



U.S. Department of Justice

Civil Division

Via E-mail

Washington, DC 20530
November 4, 2021

Mr. Austin Evers
American Oversight
1030 15th Street NW
Suite B255
Washington, DC 20005
foia@americanoversight.org

Request No. 145-FOI-17595
HDK

Dear Mr. Evers:

This is the response of the Civil Division, Department of Justice to your Freedom of Information Act request for all email communications sent by Jeffrey Clark or anyone communicating on his behalf and that contain specific key terms and all records reflecting communications between Jeffrey Clark and anyone in the White House Office or Representative Scott Perry. This Office received your request on January 27, 2021.

In accordance with our discussion with your counsel, you agreed to narrow the scope of your request to exclude all documents located in a search for records containing the key words Georgia, Pennsylvania, Michigan, and Wisconsin, or Perry provided that we review all documents returned by the search terms and process any documents related to the 2020 election. You are seeking records from November 4, 2020 through January 20, 2021.

The Civil Division located 724 pages responsive to your request. Three Hundred Fifty Nine pages are withheld in full and 365 pages are being released to you in full.

The Civil Division withheld this information in full because it is protected from disclosure under the FOIA pursuant to:

- 5 U.S.C. § 552(b)(3), which concerns matters specifically exempted from release by statute (in this instance, 39 U.S.C. § 410(c)(2) which pertains to the Postal Reorganization Act. Section 410(c)(2) permits the Postal Service to withhold “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed); and

- 5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege; and
- 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison at 202-514-2319 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the Civil Division's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIA STAR portal by creating an account on the following website: <https://foiastar.doj.gov>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,



Hirsh D. Kravitz
Senior Supervisory FOIA Counsel
Office of FOIA, Records, and E-discovery

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 02, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, STATE OF
COLORADO, STATE OF
CONNECTICUT, STATE OF ILLINOIS
STATE OF MARYLAND, STATE OF
MICHIGAN, STATE OF MINNESOTA,
STATE OF NEVADA, STATE OF NEW
MEXICO, STATE OF OREGON, STATE
OF RHODE ISLAND, STATE OF
VERMONT, COMMONWEALTH OF
VIRGINIA, and STATE OF
WISCONSIN,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States
of America; UNITED STATES OF
AMERICA; LOUIS DEJOY, in his official
capacity as Postmaster General; UNITED
STATES POSTAL SERVICE,

Defendants.

No. 1:20-CV-03127-SAB

**ORDER GRANTING, IN PART,
DEFENDANTS' MOTION TO
CLARIFY THE PRELIMINARY
INJUNCTION**

**ORDER GRANTING, IN PART, DEFENDANTS' MOTION TO
CLARIFY * 1**

DOJ-CIV-21-0142-A-000001

1 Before the Court is Defendants’ Motion to Clarify the Preliminary
2 Injunction, ECF No. 83. The motion was heard without oral argument.

3 Defendants move to clarify the Court’s preliminary injunction, asserting that
4 some aspects of the Court’s order could be interpreted to cause an overall
5 degradation in service or create obligations that cannot be fulfilled. In response,
6 Plaintiffs submitted a proposed Order on which the parties conferred. ECF No. 88-
7 1. Plaintiffs indicate Defendants do not oppose the entry of Plaintiffs’ proposed
8 order. ECF No. 88. Good cause exists to grant Defendants’ Motion to Clarify the
9 Preliminary Injunction, incorporating the language set forth in Plaintiffs’ proposed
10 order.

11 Accordingly, **IT IS HEREBY ORDERED:**

12 1. Defendants’ Motion to Clarify the Preliminary Injunction, ECF No. 83, is
13 **GRANTED** in part, and **DENIED**, in part as follows:

14 a. Defendants’ proposed clarification to Paragraph 2(a) of the
15 Preliminary Injunction Order is **granted**, in part. Paragraph 2(a) is
16 clarified to provide that the Postal Service is not required to delay a trip
17 when the impact of the delay will be an overall degradation in service,
18 *e.g.*, in order to prevent a small amount of mail from being delayed if
19 doing so would cause a larger amount of mail to be delayed, but that the
20 Postal Service shall use extra trips to minimize the effect of such delays
21 and to meet service commitments, except when not feasible. “[E]xtra
22 trips that are reasonably necessary to complete timely mail delivery [are]
23 not to be unreasonably restricted or prohibited,” as the Postal Service
24 committed to in its September 21, 2020 memorandum to employees.

25 b. Defendants’ proposed clarification to Paragraph 2(b) of the
26 Preliminary Injunction Order is **granted**, in part. Paragraph 2(b) is
27 clarified to provide that the Postal Service is required to ensure that
28 Election Mail “is generally delivered in line with First-Class Mail

**ORDER GRANTING, IN PART, DEFENDANTS’ MOTION TO
CLARIFY * 2**

1 delivery standards,” as the Postal Service committed to in its September
 2 25, 2020 memorandum to employees, but the Court is not specifying that
 3 Election Mail entered as Marketing Mail be shipped by any particular
 4 means (such as by air). To facilitate this goal, the Postal Service will, as
 5 it has promised, take “extraordinary measures” “between October 26 and
 6 November 24, to accelerate the delivery of ballots, when the Postal
 7 Service is able to identify the mailpiece as a ballot. These extraordinary
 8 measures include, but are not limited to, expedited handling, extra
 9 deliveries, and special pickups as used in past elections, to connect blank
 10 ballots entered by election officials to voters or completed ballots
 11 returned by voters entered close to or on Election Day to their intended
 12 destination (e.g., Priority Mail Express, Sunday deliveries, special
 13 deliveries, running collected ballots to Boards of Elections on Election
 14 Day, etc.).”

15 c. Defendants’ proposed clarification to Paragraph 3 of the
 16 Preliminary Injunction Order is **denied**, without prejudice, to the same
 17 arguments being raised again in the future.

18 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
 19 and forward copies to counsel.

20 **DATED** this 2nd day of October 2020.



24 *Stanley A. Bastian*

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26
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28

Stanley A. Bastian
 United States District Judge

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 17, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, STATE OF
COLORADO, STATE OF
CONNECTICUT, STATE OF ILLINOIS
STATE OF MARYLAND, STATE OF
MICHIGAN, STATE OF MINNESOTA,
STATE OF NEVADA, STATE OF NEW
MEXICO, STATE OF OREGON, STATE
OF RHODE ISLAND, STATE OF
VERMONT, COMMONWEALTH OF
VIRGINIA, and STATE OF
WISCONSIN,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States
of America; UNITED STATES OF
AMERICA; LOUIS DEJOY, in his official
capacity as Postmaster General; UNITED
STATES POSTAL SERVICE,

Defendants.

No. 1:20-CV-03127-SAB

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION * 1**

DOJ-CIV-21-0142-A-000004

1 Before the Court is Plaintiffs’ Motion for Preliminary Injunction, ECF No.
2 54. A hearing on the motion was held on September 17, 2020. Plaintiffs were
3 represented by Kristen Beneski and Noah Purcell; Defendants were represented by
4 Joseph Borson, who appeared by videoconference. The following attorneys also
5 participated by telephone: Andrew Hughes (Washington); Cristina Sepe
6 (Washington); Karl Smith (Washington); Emma Grunberg (Washington); Tera
7 Heintz (Washington); Nathan Bays (Washington); Daniel DeCecco (Colorado);
8 Danny Rheiner (Colorado); Joshua Perry (Connecticut); Jeffrey Dunlap
9 (Maryland); Angela Behrens (Minnesota); Nicholas Sydow (New Mexico);
10 Elleanor Chin (Oregon); Carol Lewis (Virginia); and Colin Roth (Wisconsin). The
11 Court also considered the briefs of amici curiae. ECF Nos. 57-1; 63-1; 66-1; and
12 78.

13 **Background Facts**

14 The case is a result of Defendant Postmaster General Louis DeJoy’s
15 institution of “transformative” changes that caused “immediate, lasting, and
16 impactful changes” in the operations and culture on the United States Postal
17 Service (“Postal Service”). These changes were set forth in a “Mandatory Stand-up
18 Talk: All Employees, July 10, 2020” document. Bullet points identified specific
19 examples of “transformative” changes that were being implemented immediately:

- 20 ✓ All operations must meet our 24-hour clock commitment
- 21 ✓ All trips will depart on time (Network, Plant and Delivery); late trips
22 are no longer authorized or accepted
- 23 ✓ Extra trips are no longer authorized or accepted
- 24 ✓ There must be proper annotation in the scanner, if a Contractor Failure
25 occurs
- 26 ✓ All PVS/HCR drives must be notified that trips depart on time
- 27 ✓ Function 3 must start on time and end on time and we must make
28 scheduled DUT
- ✓ Carriers must begin on time, leave for the street on time, and return on
time

- 1 ✓ Carriers must make the final dispatch of value; no additional
- 2 transportation will be authorized to dispatch mail to the Plant after the
- 3 intended dispatch
- 4 ✓ The right mail must go on the right truck – every time
- 5 ✓ ALL EMPLOYEES have an essential role with trips departing on time

6 The document noted that “[o]ne aspect of these changes that may be difficult

7 for employees is that—temporarily—we may see mail left behind or mail on the

8 workroom floor or docks, (in P&DCs), which is not typical.”

9 Other actions taken by DeJoy include: (1) eliminating overtime; (2)

10 decommissioning sorting machines; (3) removing mailboxes; (4) reducing

11 operating hours; and (5) changing how election mail is classified. Plaintiffs assert

12 the Postal Service has indicated that it will no longer treat election mail as First

13 Class mail regardless of the paid class of service and do so could delay the delivery

14 of the ballots by 1-5 days.

15 Plaintiffs allege these changes were made for political reasons, a few months

16 before a presidential election and in the middle of a global pandemic, with no

17 analysis on how they would affect voters or people relying on delivery of time-

18 critical items. Plaintiffs allege that while the removal of sorting machines is taking

19 place across the county, the removals would particularly affect sorting capacity in

20 states where recent presidential elections have been particularly close. Plaintiffs

21 assert the removal of the sorting machines are diminishing and will continue to

22 diminish the Postal Service’s capacity to speedily process flat mail, such as ballots.

23 If the states are required to pay the First Class rate, it will cost them tens of

24 millions of dollars.

25 In their Complaint, Plaintiffs state that reports have confirmed that delivery

26 has been delayed because of the new policy. “People have reported delay in

27 receiving time-sensitive medications, businesses that rely on the mail have reported

28 delays harming their finances, and state agencies have seen delays in delivery of

1 important documents and benefits.” ECF No. 1. Plaintiffs report that in Tennessee,
2 trucks are leaving sorting facilities for cross-country trips completely empty as a
3 result of the new policy not allowing a truck to remain even five minutes so it can
4 be loaded with mail. They allege that postal workers report that the mail is piling
5 up in their offices and that mail is backed up across the country. Plaintiffs assert
6 the effects of the mail delays are widespread, with troubling impacts on vulnerable
7 populations, small business, and political franchise. Medications and prescriptions
8 provided by the Department of Veterans Affairs are taking weeks to be delivered,
9 causing veterans to miss doses of their vital medications. Other Americans rely on
10 the Postal Service for delivery of prescriptions, as well and the delays affect the
11 delivery of their medications.

12 Plaintiffs assert the changes to the Postal Service operations threaten to
13 disrupt the successful use of mail in balloting. States are reporting increased
14 anxiety on the part of voters who have expressed concern that their mail-in ballots
15 will not be delivered on time or at all. Officials in some states are concerned that
16 voters may choose to vote in-person thereby increasing the risk of COVID-19
17 transmission at the voting centers.

18 On August 18, 2020, the day Plaintiffs filed their lawsuit, DeJoy announced
19 the suspension of some operational changes to the Postal Service, including the
20 nationwide removal of hundreds of mail processing and sorting machines, the
21 removal of mail collection boxes, and the reduction in post office retail hours. The
22 policy described above, referred to by Plaintiffs as the “Leave Mail Behind”
23 policy, however, still remains in place. Moreover, it appears that the Postal Service
24 will not treat election mail as First Class mail unless First Class postage is paid.

25 Plaintiffs assert that the delays in delivery and postmarking caused by the
26 “Leave Mail Behind” policy and the Postal Service’s decision to no longer treat
27 Election Mail as First Class mail have already disenfranchised voters and will
28 disenfranchise many more in November.

**ORDER GRANTING PLAINTIFFS’ MOTION FOR PRELIMINARY
INJUNCTION * 4**

Plaintiffs' Complaint

1
2 In their Complaint, Plaintiffs are bringing eight claims. First, they are
3 seeking a writ of mandamus under 28 U.S.C. § 1361, directing Defendants to
4 “submit a proposal . . . to the Postal Regulatory Commission requesting an
5 advisory opinion on the ‘transformative’ changes and enjoining Defendants from
6 implementing these changes pending receipt of the requested advisory opinion.”

7 Second, Plaintiffs also seek declaratory relief that declares Defendants’
8 “transformative” changes unlawful and enjoined because they are *ultra vires*.

9 Third, Plaintiffs allege that Defendants’ actions violate the States’ right to
10 prescribe “the Time, Places and Manner of holding Elections for Senators and
11 Representatives” guaranteed by Article I, Section 4, Clause 1 of the United States
12 Constitution.

13 Fourth, Plaintiffs assert Defendants’ actions violate Article II, Section I of
14 the United States Constitution and the Twelfth Amendment of the United States
15 Constitution.

16 Fifth, Plaintiffs allege Defendants violated the Tenth Amendment to the U.S.
17 Constitution because Defendants’ actions—implemented well after the States
18 established systems for voting using the Postal Service—interfere with the manner
19 chosen by the States to elect state officers and deprive the States of their
20 constitutional rights to regulate state elections and determine the manner in which
21 state officers will be chosen.

22 Sixth, Plaintiffs assert Defendants’ actions interfere with the ability of their
23 residents to timely receive and return voter registration forms and ballots and have
24 their vote counted, thereby burdening their residents’ right to vote. Plaintiffs also
25 maintain that Defendants’ actions interfere with the States’ constitutional interest
26 in choosing the method of electing national officers that respects the constitutional
27 right to vote.

28 Seventh, Plaintiffs allege Defendants’ actions violate the Fifth Amendment

**ORDER GRANTING PLAINTIFFS’ MOTION FOR PRELIMINARY
INJUNCTION * 5**

1 to the United States Constitution, which guarantees qualified voters a substantive
2 right to participate equally with other qualified voters in the electoral process.
3 Plaintiffs assert Defendants' actions burden the right of qualified voters in the
4 States to cast their ballot effectively and these actions are not supported by any
5 interest that justifies the serious burden on the right of qualified voters the equal
6 protection secured by the Fifth Amendment.

7 Eighth, Plaintiffs allege Defendants' actions violate § 504 of the
8 Rehabilitation Act because Defendants' actions impermissibly interfere with the
9 rights of the States' residents with disabilities to be free from discrimination;
10 impermissibly interfere with the rights of the States' residents with disabilities to
11 receive the benefits of and participate meaningfully in the programs and services of
12 the Postal Service; and will have a disparate impact on individuals with disabilities,
13 severely imperiling their ability to receive critical, life-saving medications through
14 the mail, participate in elections, and conduct other important, time-sensitive
15 activities.

16 **Jurisdiction**

17 Plaintiffs' Complaint is properly before this Court pursuant to 39 U.S.C. §
18 409, which provides that "[e]xcept as otherwise provided in this title, the United
19 States district courts shall have original but not exclusive jurisdiction over all
20 actions brought by or against the Postal Service." Thus, this Court has jurisdiction
21 to review Plaintiffs' claim that the Postal Service has violated § 3661(b).¹

22 _____
23 ¹ 39 U.S.C. § 3662 does not limit this Court's jurisdiction. By its terms, § 3662 is
24 discretionary, not mandatory. Section 3662 does not divest district courts of the
25 broad jurisdiction granted to them under 28 U.S.C. § 1339 over "any civil action
26 arising under any Act of Congress relating to the postal service," nor the grant of
27 "jurisdiction over all actions brought by or against the Postal Service" in 39 U.S.C.
28 § 409(a). Moreover, § 3662 encompasses claims that the Postal Service has failed

**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION * 6**

1 Under 28 U.S.C. § 1361, this Court has “original jurisdiction of any action
2 in the nature of mandamus to compel an officer or employee of the United States
3 or any agency thereof to perform a duty owed to the plaintiff.”

4 Under 28 U.S.C. 1331, this Court has original jurisdiction over all civil
5 actions arising under the Constitution and laws of the United States.

6 **Motion Standard**

7 “A preliminary injunction is a matter of equitable discretion and is ‘an
8 extraordinary remedy that may only be awarded upon a clear showing that a
9 plaintiff is entitled to such relief.’” *California v. Azar*, 911 F.3d 558, 575 (9th Cir.
10 2018) (quoting *Winter v. N.R.D.C.*, 555 U.S. 7, 22 (2008)). “A party can obtain a
11 preliminary injunction by showing that (1) it is ‘likely to succeed on the merits,’
12 (2) it is ‘likely to suffer irreparable harm in the absence of preliminary relief,’ (3)
13 ‘the balance of equities tips in [its] favor,’ and (4) ‘an injunction is in the public
14 interest.’” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)
15 (alteration in original) (quoting *Winter*, 555 U.S. at 20). The Ninth Circuit uses a
16 “sliding scale” approach in which the elements are “balanced so that a stronger
17 showing of one element may offset a weaker showing of another.” *Hernandez v.*
18 *Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quotation omitted). When the
19 government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*,
20 747 F.3d 1073, 1092 (9th Cir. 2014). This means that when the government is a
21 party, the court considers the balance of equities and the public interest together.
22 *Azar*, 911 F.3d at 575. “[B]alancing the equities is not an exact science.” *Id.*

23
24 to adhere to its rate and service standards or that those standards are inadequate.
25 That is not the case here. Instead, Plaintiffs are arguing the Postal Service’s
26 implementation of nationwide policy changes without oversight by the Postal
27 Regulatory Commission or the public was unlawful. Such claims are properly
28 brought under §§ 409 and 3661.

**ORDER GRANTING PLAINTIFFS’ MOTION FOR PRELIMINARY
INJUNCTION * 7**

1 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952)
2 (Frankfurter, J., concurring) (“Balancing the equities . . . is lawyers’ jargon for
3 choosing between conflicting public interests.”)).

4 Likelihood of success on the merits is the most important factor; if a movant
5 fails to meet this threshold inquiry, the court need not consider the other factors.
6 *Disney*, 869 F.3d at 856 (citation omitted). A plaintiff seeking preliminary relief
7 must “demonstrate that irreparable injury is likely in the absence of an injunction.”
8 *Winter*, 555 U.S. at 22. The analysis focuses on irreparability, “irrespective of the
9 magnitude of the injury.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir.
10 1999). Economic harm is not normally considered irreparable. *L.A. Mem’l*
11 *Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

12 “[I]njunctive relief should be no more burdensome to the defendant than
13 necessary to provide complete relief to the plaintiffs’ before the Court.” *L.A.*
14 *Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting
15 *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This is particularly true where
16 there is no class certification. See *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92
17 F.3d 1486, 1501 (9th Cir. 1996) (“[I]njunctive relief generally should be limited to
18 apply only to named plaintiffs where there is no class certification.”); *Meinhold v.*
19 *U.S. Dep’t of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994) (district court erred in
20 enjoining the defendant from improperly applying a regulation to all military
21 personnel (citing *Califano*, 442 U.S. at 702)).

22 That being said, there is no bar against nationwide relief in the district courts
23 or courts of appeal, even if the case was not certified as a class action, if such
24 broad relief is necessary to give prevailing parties the relief to which they are
25 entitled. *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987).

26 //

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28 //

**ORDER GRANTING PLAINTIFFS’ MOTION FOR PRELIMINARY
INJUNCTION * 8**

Analysis

1
2 Here, Plaintiffs have established a likelihood of success on the merits of
3 their claims that the United States Postal Service and the Postmaster General
4 violated 39 U.S.C. § 3661(b) and infringed on the States' constitutional authority
5 to regulate elections and the people's right to vote. Plaintiffs would suffer
6 irreparable harm absent preliminary injunctive relief, and the balance of equities
7 and the public interest weigh in favor of a preliminary injunction.

8 Although not necessarily apparent on the surface, at the heart of DeJoy's and
9 the Postal Service's actions is voter disenfranchisement. This is evident in
10 President Trump's highly partisan words and tweets, the actual impact of the
11 changes on primary elections that resulted in uncounted ballots, and recent
12 attempts and lawsuits by the Republican National Committee and President
13 Trump's campaign to stop the States' efforts to bypass the Postal Service by
14 utilizing ballot drop boxes, as well as the timing of the changes. It is easy to
15 conclude that the recent Postal Services' changes is an intentional effort on the part
16 the current Administration to disrupt and challenge the legitimacy of upcoming
17 local, state, and federal elections, especially given that 72% of the decommissioned
18 high speed mail sorting machines that were decommissioned were located in
19 counties where Hillary Clinton receive the most votes in 2016.

20 Moreover, the fact that fourteen States, members of the United States House
21 of Representatives, members of the United States Senate, and various local and
22 tribal governments have asked this Court to intervene to prevent the Postal Service
23 and others from disenfranchising citizens from participating in federal, state, and
24 local elections suggest that the Postal Service's actions are not the result of any
25 legitimate business concerns. DeJoy's actions fly in the face of Congress's intent to
26 insulate the management of the Postal Service from partisan politics and political
27 influence and acknowledgement that free and fair elections depend on a reliable
28 mail service.

**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION * 9**

1 In addition, these parties have demonstrated that the recent changes
2 implemented by DeJoy and the Postal Service have the unintended but very serious
3 consequences of interfering with other essential government functions such as
4 collecting fees and taxes, sending pension payments, and enforcing local
5 ordinances, as well as interfering with the provision of critical health care services
6 such as prescription refills, contract tracing, sexually-transmitted infection testing
7 and opioid overdose prevention.

8 Defendants take the remarkable position that nothing has changed in the
9 Postal Service's approach to election mail from past years. This is simply not true.
10 Statistics show there has been a drastic decrease in delivery rates. Most telling is
11 the picture of the banner that was hung at an Oregon Postal Service facility in early
12 September. *See* ECF No. 79. That banner includes the following phrases: "No
13 Employee has Authorization to Hold Trucks," "ALL HCR & PVS TRIPS WILL
14 DEPART ON TIME, NO EXCEPTIONS," "DO NOT HOLD A TRUCK * NO
15 MORE HOLDING TRUCKS," "Make sure every single employee in our building
16 understands * All Trips Depart on Time." *Id.* The banner reflects the "Leave Mail
17 Behind" policy that was instituted in July 2020 and is a significant change from
18 past practice. Moreover, the letters sent to the States regarding the Postal Service's
19 decision to change the past practice of handling election mail sent as Marketing
20 Mail indicate a significant change in policy and practice.

21 Here, Plaintiffs have made an extensive showing of irreparable harm that is
22 caused and will be caused by the Postal Service's "Leave Mail Behind" policy and
23 the Postal Service's refusal to ensure that election mail will be treated as First
24 Class mail to ensure timely delivery. Indeed, the Postal Service sent out mailers to
25 all voters that warned that voters should take extra steps to minimize delays that
26 presumably the Postal Service anticipates, which supports Plaintiffs' arguments
27 there would be harm in the future. Moreover, Plaintiffs have shown actual harm
28 with respect to recent primary elections. In this case, this significant and

**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION * 10**

1 irreparable harm tips the balance of the scale in such a manner that Plaintiffs need
2 not make a strong showing of substantial likelihood of success on the merits.

3 Even so, Plaintiffs have made a strong showing of substantial likelihood of
4 success on the merits. The Postal Service is required under § 3661(b) to present
5 such sweeping nationwide changes to the Postal Regulatory Commission prior to
6 implementing such changes, and the failure to do so suggests that the Postal
7 Service acted *ultra vires*. Plaintiffs have made a strong showing that the Postal
8 Service's actions have infringed on the States' constitutional rights to appoint
9 presidential electors and set the time, manner, and place of elections. Plaintiffs
10 have made a strong showing that the recent changes are the result of an effort by
11 the current Administration to use the Postal Service as a tool in partisan politics,
12 which violates the spirit and purpose of the Postal Reorganization Act and the
13 Postal Accountability and Enhancement Act.

14 Finally, Defendants' burden in complying with the Court's preliminary
15 injunction is negligible.

16 The Court finds that a nationwide injunction is appropriate in this case.
17 Indeed, if there ever were a mandate for the need of a nationwide injunction, it is
18 this case. It is easy to envision situations where the mail needs to cross state lines,
19 for example, residents who are residing out of state and want to send in an absentee
20 ballot, medications being sent from other states, as well as small businesses who
21 send their products to customers who live in other states. A nationwide injunction
22 is necessary to give Plaintiffs the relief to which they are entitled.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. Plaintiffs' Motion for Preliminary Injunction, ECF No. 54, is
25 **GRANTED.**

26 2. The USPS Defendants, and all their respective officers, agents,
27 servants, employees and attorneys, and persons in active concert or participation
28 with them are hereby **ENJOINED** from the following until the Court resolves the

**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION * 11**

1 merits of this case:

2 a. continued implementation or enforcement of policy changes
3 announced in July 2020 that have slowed mail delivery, including:

4 i. instructing mail carriers to leave mail behind for
5 processing or delivery at a later date;

6 ii. requiring mail carriers or delivery trucks to leave at set
7 times regardless of whether the mail is actually ready;

8 iii. prohibiting or unreasonably restricting return trips to
9 distribution centers, if necessary, to complete timely mail delivery; and

10 iv. taking any actions to implement or enforce the
11 operational changes outlined in the USPS's "Mandatory Stand-Up Talk: All
12 Employees" dated July 10, 2020;

13 b. deviating from the USPS's long-standing policy of treating
14 election mail in accordance with First Class Mail delivery standards,
15 regardless of the paid class;

16 c. taking any actions in violation of the commitments made in the
17 "Postmaster General Louis DeJoy Statement," dated August 18, 2020, such
18 as removal or decommissioning of any mail sorting machines, reducing
19 hours at post offices, or closing mail processing facilities; and

20 d. implementing or enforcing any "change in the nature of postal
21 services which will generally affect service on a nationwide or substantially
22 nationwide basis," absent a duly issued advisory opinion of the Postal
23 Regulatory Commission, 39 U.S.C. § 3661(b).

24 3. If any post office, distribution center, or other postal facility will be
25 unable to process election mail for the November 2020 election in accordance with
26 First Class delivery standards because of the Postal Service's recent removal and
27 decommissioning of equipment, such equipment will be replaced, reassembled, or
28 reconnected to ensure that the Postal Service can comply with its prior policy of

**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION * 12**

1 delivering election mail in accordance with First Class delivery standards, and that
2 if any post office or distribution center has requested, or in the future requests, to
3 reconnect or replace any decommissioned or removed sorting machine(s), any such
4 request must be presented to this Court within three days of this Order or within
5 three days of the date of the request, whichever is later, unless the Postal Service
6 has already approved the request. If the Postal Service has denied the request or
7 has not responded, the Court will determine whether granting the request is likely
8 necessary to ensure that election mail is processed according to First Class delivery
9 standards or otherwise to protect the constitutional right to vote, and if the Court so
10 finds, it shall order that the request be approved by the USPS Defendants.

11 4. The USPS Defendants shall notify their officers, agents,
12 representatives, servants, employees, attorneys, and all persons in active concert or
13 participation with them of the requirements herein.

14 5. The Court deems no security bond is required under Federal Rule of
15 Civil Procedure 65(c).

16 6. This injunction shall remain in effect until a final judgment is entered
17 or until further order of the Court.

18 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
19 and forward copies to counsel.

20 **DATED** this 17th day of September 2020.



24
25

A handwritten signature in blue ink that reads "Stanley A. Bastian".

26 Stanley A. Bastian
27 Chief United States District Judge
28

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

No. 20-cv-2340 (EGS)

DONALD J. TRUMP, *in his
official capacity as President
of the United States, et al.*,

Defendants.

MEMORANDUM OPINION

I. Introduction

Plaintiffs, the States of New York, Hawaii, and New Jersey; the City of New York; and the City and County of San Francisco filed this lawsuit against Defendants Donald J. Trump, in his official capacity as President of the United States; Louis DeJoy ("Mr. DeJoy"), in his official capacity as Postmaster General of the United States; and the United States Postal Service ("USPS" or "Postal Service") alleging the following claims: (1) *Ultra Vires* Agency Action—Postal Accountability and Enhancement Act; (2) *Ultra Vires* Agency Action—Postal Reorganization Act; and (3) violation of the Elections Clause of the United States Constitution. Plaintiffs seek a preliminary injunction with regard to their Postal Accountability and Enhancement Act claim. Upon consideration of the Plaintiffs' motion, the response, and

reply thereto, the applicable law, and the entire record, the Court **GRANTS** Plaintiffs' motion.

II. Background

A. Statutory and Regulatory Framework

In the Postal Reorganization Act ("PRA"), Public Law 91-375, 84 Stat. 719 (Aug. 12, 1970), Congress replaced the Post Office Department with the United States Postal Service as "an independent establishment of the executive branch of the Government of the United States, under the direction of a Board of Governors, with the Postmaster General as its chief executive officer." 39 C.F.R. § 1.1. The PRA also created an independent oversight body for the USPS, the Postal Rate Commission. 39 U.S.C. § 501. Congress passed the PRA to "[i]nsulate" the management of the USPS "from partisan politics . . . by having the Postmaster General responsible to the [Postal Rate] Commission, which represents the public interest only, for his conduct of the affairs of the Postal Service." H.R. Rep. No. 91-1104, 3660-61 (1970).

In the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006) (codified at 39 U.S.C. § 3600 et seq.), Congress replaced the Postal Rate Commission with the Postal Regulatory Commission ("PRC" or "Commission") and "strengthened its role." *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 340 (D.C. Cir. 2019).

The USPS is responsible for “develop[ing] and promot[ing] adequate and efficient postal services.” 39 U.S.C. § 3661(a). “When the Postal Service determines that there should be a change in the nature of postal services [that] will generally affect service on a nationwide or substantially nationwide basis,” it must “submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.” *Id.* § 3661(b). This provision was enacted in the PRA, and the only change made in the PAEA was to replace the original “Postal Rate Commission” with the “Postal Regulatory Commission.”

Following the submission of a proposal, “[t]he Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under [the Administrative Procedure Act] has been accorded the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.” 39 U.S.C. § 3661(c).

B. Factual Background

1. The COVID-19 Pandemic

Plaintiffs assert that the COVID-19 pandemic has increased reliance on mail delivered by the USPS. See Mem. Supp. Mot. Prelim. Inj. ("Mot."), ECF No. 12-1 at 8.¹ According to Plaintiffs, "[b]ecause COVID-19 is 'primarily spread through person-to-person contact,' Ku^[2] Decl., ECF No. 12-13] ¶ 13, state and local governments, including Plaintiffs here, have undertaken serious efforts to minimize in-person gatherings." *Id.* Plaintiffs further state that "some . . . have transformed their plans for the November 2020 election to facilitate voting by mail." *Id.* (citing Adinaro³ Decl., ECF No. 12-4 ¶ 9; Kellner⁴ Decl., ECF No. 12-12 ¶¶ 16-17; Ku Decl., ECF No. 12-13 ¶¶ 8-10; P.L. 2020, ch.72 (N.J. August 28, 2020) (providing that New Jersey's November General Election is to be conducted primarily by vote-by-mail in part to reduce the risk of community spread of COVID-19 at polling locations)). Those Plaintiffs that have

¹ When citing electronic filings throughout this Opinion, the Court cites to the ECF page number, not the page number of the filed document.

² Leighton Ku is a Professor of Public Health Policy and Management and Director of the Center for Health Policy Research at the Milken Institute School of Public Health, George Washington University.

³ David Adinaro is the Deputy Commissioner for Public Health Services for the New Jersey Department of Health.

⁴ Douglas Kellner is the Co-Chair of the New York State Board of Elections.

“mail-based election systems” in place “seek to preserve [them] during a pandemic.” *Id.* (citing Henricks⁵ Decl. ¶ 3, ECF No. 12-9; Kaohu⁶ Decl., ECF No. 12-11 ¶ 3; Takahashi⁷ Decl., ECF No. 12-19 ¶ 3.) Plaintiffs state they “have also expended time, money, and resources to educate the public about social distancing, see Adinaro Decl., ECF No. 12-4 ¶ 8, and to continue to meet their legal obligations to their residents and to administer public benefits programs by increased reliance on U.S. mail, Banks⁸ Decl., ECF No. 12-5 ¶¶ 4-7, 11, 14; Newton⁹ Decl., ECF No. 12-15 ¶ 9.” *Id.*

2. USPS Postal Policy Changes

In June and July 2020, the USPS announced and implemented four changes (collectively, “Postal Policy Changes”) to how it collects, processes and delivers mail. First, on June 17, 2020, the USPS announced that it would be removing 671 high-speed sorting machines nationwide “over the next several months.” Pls.’ Ex. 17, ECF No. 12-20 at 2-4.

Second, on July 10, 2020, the USPS announced an “operational pivot” to make “immediate, lasting, and impactful

⁵ Jon Henricks is the County Clerk for the County of Hawaii.

⁶ Kathy Kaohu is the County Clerk for the County of Maui.

⁷ Glen Takahashi is the City Clerk for the City and County of Honolulu.

⁸ Steven Banks is the Commissioner of the New York City Department of Social Services.

⁹ Jack Newton is the Director of the Public Benefits Unit as Bronx Legal Services.

changes in our operations and culture.” Pls.’ Ex. 21, ECF No. 12-24 at 2. These changes included prohibiting “late trips” and “extra trips.” *Id.* “[I]t has long been typical for postal drivers to depart for post offices or delivery points a short period *after* the prescribed time if needed to ensure that all the mail for that truck would be loaded before departure.” Coradi¹⁰ Decl., ECF No. 12-34 ¶ 13. “Extra” trips are non-scheduled delivery trips, which ensure that the agency can maintain the necessary flexibility to timely deliver mail to 160 million addresses for six days a week, *id.* ¶¶ 5, 14; and have long allowed the agency to account for daily fluctuations in mail volume, processing malfunctions or errors, and other disruptions, *id.* ¶¶ 13-4. Late trips and extra trips “are needed adjustments to adequately administer a system responsible for delivering over 470 million pieces of mail per day. They are features of the postal system, not bugs.” *Id.* ¶ 14.

The USPS knew that prohibiting these trips would result in delayed mail delivery: “One aspect of these changes that may be difficult for employees is that—temporarily—we may see mail left behind or mail on the workroom floor or docks (in P&DCs), which

¹⁰Peter Coradi has been the National Business Agent “A” for the Clerk Division, New York Region of the American Postal Workers Union since November 2001. Clerks in the Clerk Division are responsible for, among other things, mail processing, bulk mail entry, retail windows, and call centers.

is not typical.” Pls.’ Ex. 21, ECF No. 12-24 at 2. By August 13, 2020, the USPS had reduced the number of late trips by 71 percent. Pls.’ Ex. 19, ECF No. 12-22 at 2. Defendants have clarified that late or extra trips are not “banned”; however, they acknowledge that they continue “at a reduced level.” Suppl. Cintron Decl., ECF No. 39-1 ¶ 4. On September 21, 2020, USPS also issued “Operational Instructions” providing that “transportation, in the form of late or extra trips that are reasonably necessary to complete timely mail delivery, is not to be unreasonably restricted or prohibited. Managers are authorized to use their best business judgment to meet our service commitments.” See Ex. 1 to Notice Suppl. Material, ECF No. 50-1 at 4.

Third, the USPS announced another “initiative” that prohibited mail carriers in certain cities from spending time in the morning sorting mail so they could “leave for the street earlier.” Pls.’ Ex. 22, ECF No. 12-25 at 2. This meant that carriers were being ordered to not deliver mail that had arrived overnight, but rather sort it in the afternoon, meaning that it would not be delivered until the next day. *Id.* On August 24, 2020, Mr. DeJoy testified that he stopped this pilot project. See House Oversight and Reform Committee Hearing Tr. (“House Committee Hearing”), Aug. 24, 2020, Defs.’ Ex. 14, ECF No. 30-3 at 449.

Fourth, on or around July 29, 2020, the USPS General Counsel informed 46 states and the District of Columbia that if the states did not pay First Class postage on ballots sent to voters, there would be a risk that voters would not receive their ballots in time to return them by mail. See U.S. Postal Service letters to states, Wash. Post (Aug. 17, 2020), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/d1b752f9-f8c9-4c18-b548-4eb9668c672a/note/36253644-7029-4dd3-bd1c-f824054400c2>.¹¹ This was a change to the USPS policy of treating election mail and political mail mailed as marketing mail on an expedited First-Class basis. Pls.' Ex. 30, 12-33 at 12.

It is undisputed that the USPS did not seek an advisory opinion pursuant to Section 3661(b) from the PRC prior to implementing these changes.

3. USPS Postal Policy Changes Have Led to Nationwide Delays and Continue to Have a Nationwide Impact

USPS records indicate that nationally, on-time delivery of First-Class Mail began to decline in late June 2020, going from roughly 90 to 94 percent prior to the implementation of the Postal Policy changes to 82 percent in early August. Pls.' Ex. 28, ECF No. 12-31 at 11. In the August 13, 2020 email to all

¹¹The Court takes judicial notice of the letters from the USPS to 46 states and the District of Columbia. Fed. R. Evid. 201(b)(2).

USPS employees, Mr. DeJoy acknowledged that “this transformative initiative has had unintended consequences that impacted our overall service levels.” Pls.’ Ex. 19, ECF No. 12-22 at 2; see also House Committee Hearing, Defs.’ Ex. 14, ECF No. 30-3 at 455 (Mr. DeJoy testifying that mitigating late trips and extra trips “was not expected to have the impact it had for the duration of the period that it had”).

On August 18, 2020, Mr. DeJoy issued a statement that the USPS would be suspending “some longstanding operational initiatives—efforts that predate my arrival at the Postal Service—that have been raised as areas of concern as the nation prepares to hold an election in the midst of a devastating pandemic.” Pls.’ Ex. 20, ECF No. 12-23 at 2. Specifically, Mr. DeJoy stated that: (1) “[r]etail hours at Post Offices will not change”; (2) “[m]ail processing equipment and blue collection boxes will remain where they are”; (3) “[n]o mail processing facilities will be closed”; (4) “overtime has, and will continue to be, approved as needed.” *Id.*; see also House Committee Hearing, ECF No. 30-3 at 484 (Mr. DeJoy testifying that he halted the pilot program, the removal of collection boxes, reducing hours at postal retail centers, and the removal of flat and mail sorting machines).

Except for “mail processing equipment,” the suspension did not apply to the rest of the Postal Policy Changes at issue

here. See also Senate Homeland Security and Government Affairs Committee Hearing (“Senate Committee Hearing”), Aug. 21, 2020, Defs.’ Ex. 5, ECF No. 30-2 at 107 (Mr. DeJoy stating that the policy of mitigating extra trips would not be suspended); *id.* at 108 (Mr. DeJoy stating that none of the mail processors that had been removed would be brought back).

With regard to election mail, Mr. DeJoy testified before the Senate Committee that states would not have to use First-Class Mail for election mail. *Id.* at 110. However, in his testimony before the House Committee, he testified that states and election boards should follow the recommendation in letters from the USPS General Counsel to the states and the District of Columbia that election officials use First-Class Mail to mail ballots to voters. House Committee Hearing, Defs.’ Ex. 14, ECF No. 30-3 at 433; see also *id.* at 394 (Mr. DeJoy testifying that the USPS “will try to fulfill” “objectives” for “normal processing procedures plus enhanced procedures” to ensure the ballots get delivered in time).

USPS records indicate that nationally, on-time delivery of First-Class Mail as of August 22, 2020 was slightly above 85 percent. Pls.’ Ex. 28, ECF No. 12-31 at 11.

B. Procedural Background

Plaintiffs filed this lawsuit on August 25, 2020. On September 2, 2020, they filed a motion for a preliminary

injunction, which requests that the Court enjoin the defendants from enforcing the Postal Policy Changes. See Mot., ECF No. 12-1. The defendants filed their opposition on September 11, 2020. See Defs.' Opp'n Mot. Prelim. Inj. ("Defs.' Opp'n"), ECF No. 30. The Plaintiffs filed their reply brief on September 16, 2020. See Pls.' Reply ("Reply"), ECF No. 40. The motion is ripe for the Court's consideration.

III. Standard of Review

"A plaintiff seeking a preliminary injunction must establish [1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (alteration in original) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)). Where the federal government is the opposing party, the balance of equities and public interest factors merge. See *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*,

451 U.S. 390, 395 (1981). In this Circuit, the four factors have typically been evaluated on a "sliding scale," such that if "the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009).

In the wake of the Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), "the D.C. Circuit has suggested that a positive showing on all four preliminary injunction factors may be required." *Holmes v. FEC*, 71 F. Supp. 3d 178, 183 n.4 (D.D.C. 2014); see also *Sherley*, 644 F.3d at 393 ("[W]e read *Winter* at least to suggest if not to hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.") (quotation marks omitted). Nonetheless, "the Circuit has had no occasion to decide this question because it has not yet encountered a post-*Winter* case where a preliminary injunction motion survived the less rigorous sliding-scale analysis." *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 46 n.2 (D.D.C. 2014).

IV. Analysis

Plaintiffs argue that they are likely to succeed on the merits of their Section 3661 claim because the USPS "failed to submit the Postal Policy Changes to the Postal Regulatory Commission in advance for an advisory opinion as required under

39 U.S.C. § 3661(b) (and the Commission's rules), despite their significant effect on postal service nationwide," Mot., ECF No. 12-1 at 16; and that this Court has the authority to review the Postal Policy changes as *ultra vires* agency action, *id.*

Defendants respond that Plaintiffs lack Article III standing, that district courts lack subject matter jurisdiction over Section 3661 claims, and that Plaintiffs' claim does not satisfy the requirements for *ultra vires* review. Defs.' Opp'n, ECF No. 30 at 32, 35, 39.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their 39 U.S.C. § 3661(b) Claim

1. Plaintiffs Likely Have Standing To Bring This Challenge

To establish standing, "a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[i]hood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "Standing to seek . . . forward-looking injunctive relief requires [Plaintiff] to show [that it] is suffering an ongoing injury or faces immediate injury. For a future injury, that means submitting evidence showing that there is a substantial risk that the harm will recur." *Narragansett Indian Tribal Historic Preservation Office v. FERC*, 949 F.3d 8,

13 (D.C. Cir. 2020) (internal quotation marks, citations, and alterations in original omitted).

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561 (citations omitted). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Defendants contend that Plaintiffs lack standing for two reasons.¹² First, they cannot show a causal connection because they have "produce[d] no evidence that any delay in mail delivery will come from the reduction in capacity of mail processing machines," noting that the "mail processing machines are still only being utilized at a sixty-five percent rate . . . which means that there is ample extra capacity." Defs.' Opp'n, ECF No. 30 at 33. However, Plaintiffs have provided evidence that the elimination of the machines has and will continue to

¹² Defendants also argue that plaintiffs lack standing because they allege an injury by the "expedited to Street/Afternoon Sortation" initiative, which has been suspended. Defs. Opp'n, ECF No. 30 at 26. Plaintiffs respond—and the Court agrees—that defendants "may not defeat [p]laintiffs' standing by voluntarily suspending just one of several offending policies, especially where there is no prohibition on that policy's resumption." Reply, ECF No. 40 at 13.

cause delayed mail. See Coradi Decl., ECF No. 12-31 ¶ 9 (“[E]mployees report astonishing amounts of delayed mail in facilities that I have visited multiple times . . . I have never heard anything like it in my 36 years serving the U.S. Postal Service and its employees.”); *id.* ¶ 16 (“With fewer sorting machines for letter mail and flat mail, Postal employees must adapt the remaining machines to accommodate more volume or sort letter and flat mail manually.”).

Second, Defendants concede that the policy change regarding extra and late trips resulted in delayed mail in the past, but argue that “Plaintiffs cannot show that USPS’s activities are harming Plaintiffs *now and in the future*,” stating that “while there ‘was a temporary decline in meeting service standards’ in mid-July” that decline was addressed and “‘service performance is rapidly returning to early July levels.’” Defs.’ Opp’n, ECF No. 30 at 33. Defendants also argue that Plaintiffs’ complaint about election mail delays are entirely speculative, noting “the enormous efforts that USPS has put into place (and will continue or supplement through the Election) to ensure that ballots are timely delivered.” *Id.* at 34. Defendants also argue that Plaintiffs have not established that the decline was due to reducing unnecessary trips rather than staffing shortages due to COVID-19. *Id.* at 34.

However, Plaintiffs have provided evidence that reducing extra or late trips will necessarily cause delays in the delivery of mail. See Grimmer¹³ Decl., ECF No. 40-3 ¶ 10 (decrease in the number of extra or late trips will delay the delivery of letters); Goldway¹⁴ Decl., ECF No. 40-5 ¶ 31 (“It is my opinion, based on my two decades of experience reviewing Postal Service operations, that eliminating local flexibility and requiring rigid adherence to transportation scheduled would negatively impact service performance.”). Moreover, Plaintiffs have provided proof that delays, both locally and nationally, have continued. See Failure to Deliver, U.S. Senate Committee on Homeland Security and Governmental Affairs, Minority Staff Report, ECF No. 40-9 at 3 (finding that nationwide during the second week of August, “85 million more deliveries were late in a single week compared to what the late deliveries would have been that week under on-time delivery rates before the changes”); *id.* (finding that “[s]ome parts of the country saw on-time delivery drop by 15-20 percentage points in the weeks following Mr. DeJoy’s July 2020 changes”). USPS’s own data shows

¹³ Justin Grimmer, a Professor of Political Science at Stanford University, made a preliminary assessment of the impact of the policy change limiting the number of extra and late trips based on the USPS August 31, 2020 powerpoint.

¹⁴ Ruth Goldway served on the U.S. Postal Regulatory Commission from 1998 to 2015, having been appointed and reappointed by Presidents Clinton, George W. Bush, and Obama.

declines in on-time delivery of First-Class Mail continuing into August. Ex. 37, ECF No. 40-8. Moreover, in an August 13, 2020 email to all USPS employees, Mr. DeJoy acknowledged that “this transformative initiative has had unintended consequences that impacted our overall service levels.” Pls.’ Ex. 19, ECF No. 12-22 at 2. Finally, Plaintiffs have rebutted Defendants’ argument that the decline was due to reducing unnecessary trips rather than staffing shortages due to COVID-19 by pointing out that the sharp decline in on-time deliveries occurred in July and August 2020, months after COVID-19 infections began to spike in the United States in March 2020. Reply, ECF No. 40 at 11.

Accordingly, Plaintiffs have shown that there is a substantial likelihood that the on-going non-speculative harms they allege caused by mail delays are “fairly traceable” to the Postal Policy Changes. *Lujan*, 504 U.S. at 560.

2. This Court Likely Has Subject Matter Jurisdiction Over The Section 3661 Claim

Defendants contend that this Court lacks subject matter jurisdiction over “complaints regarding” Section 3661 because such complaints must first be made to the PRC and then appealed to the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”). Defs.’ Opp’n, ECF No. 30 at 35. The statutory scheme provides as follows. 39 U.S.C. § 409(a) provides that “[e]xcept as otherwise provided in this title, the

United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.” One of the exceptions to this original jurisdiction is 39 U.S.C. § 3662, which provides that “[a]ny interested person . . . who believe[s] the Postal Service is not operating in conformance with the requirements of a provision of . . . this chapter (or regulations promulgated under any of these provisions) may lodge a complaint with the Postal Regulatory Commission” Section 3662(b) requires the PRC to respond to the complaint within 90 days and that if a complaint is not timely responded to, a petition for review may be filed with the D.C. Circuit, which also has jurisdiction to review final orders or decisions of the PRC.

Plaintiffs’ complaint alleges a procedural violation—that USPS failed to comply with the requirement that “[w]hen the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory commission requesting an advisory opinion on the change.” 39 U.S.C. § 3661. Section 3661(c) requires that the opinion shall not be issued until there is opportunity for notice and comment under applicable provisions of the Administrative Procedure Act.

Defendants contend that “[c]ourts have repeatedly held that 19 U.S.C. §§ 3662 and 3663 constitute the exclusive jurisdictional remedy for complaints about postal services that fall within the statutory provisions specifically identified in section 3662.” Defs.’ Opp’n, ECF No. 30 at 36. However, Defendants have provided no mandatory authority to support their assertion that Sections 3662 and 3663 constitute the exclusive jurisdictional remedy for a claim that the USPS has failed to comply with the procedural requirements of Section 3661.

“Whether a statute is intended to preclude initial judicial review is determined by the statute’s language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 307 (1994) (internal citation omitted). The language of the statute is broad: “[a]ny interested person . . . who believe[s] the Postal Service is not operating in conformance with the requirements of a provision of . . . this chapter (or regulations promulgated under any of these provisions) may lodge a complaint with the Postal Regulatory Commission” 39 U.S.C. § 3662. This could certainly be read to mean that the failure of the USPS to comply with the procedural requirement set for in Section 3661 would be encompassed by Section 3662. Plaintiff argues that the use of the permissive “may” in Section 3662 coupled with the mandatory

phrasing "shall" in Section 3662(c) shows Congress did not intend to limit jurisdiction over Section 3661 claims. Reply, ECF No. 40 at 14. The statute consistently uses the word "may" when setting forth the procedure for filing complaints and for seeking appellate review of the PRC's determination (or failure to make a determination): any interested person "may" lodge a complaint with the PRC, and if the interested person is unsatisfied with the response or does not receive a timely response, they "may" file a petition with the D.C. Circuit. 39 U.S.C. §§ 3662(a), 3663. The use of the permissive "may" coupled with the use of the mandatory "shall" suggests that Sections 3662(a) and 3663 were not intended to be the exclusive avenue for bringing a procedural challenge to the USPS's failure to comply with Section 3661. See *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1828 (D.C. Cir. 1973) ("[T]he permissive interpretation is conclusively proven to be correct [together with the particular legislative history] by the fact that when in the same statute Congress intended a mandatory direction it used the auxiliary 'shall' not 'may'-a contrast which is generally significant"). This interpretation is strengthened because the statute expressly provides that this Court has original jurisdiction "over all actions brought by or against the Postal Service" unless "otherwise provided in [title 39]." 39 U.S.C. § 409(a).

The availability of judicial review for the USPS's failure to comply with the procedural requirements in Section 3661 is consistent with the legislative history of the PRA. In the discussion of the section of the PRA that established the "procedures for changes in postal service," the House Committee Report states the "[t]he postal service is—first, last, and always—a public service" and that the PRA "require[s] [Postal Services management] to seek out the needs and desires of its present and potential customers—the American public." H.R. Rep. No. 91-1104 at 3668. The Committee Report describes provisions in the act that "contain[] specific provisions requiring justification and review of changes in service." *Id.*; see also *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259, 263 n.6 (5th Cir. 1975) ("[T]he procedures mandated by [Section] 3661 are sufficiently elaborate to amount to a significant impediment in the path of the decision-making process of the Postal Service.").

The Court must also consider whether the claim may be reviewed because there is no other meaningful or adequate avenue for judicial review. See *Thunder Basin Coal Co.*, 510 U.S. at 307. District court jurisdiction may not be implicitly precluded based on consideration of the following factors: (1) if "a finding of preclusion could foreclose all meaningful judicial review"; (2) if the claim is "wholly collateral to a statute's

review provisions’”; and (3) if the claims are “‘outside the agency’s expertise’” to discern “whether the particular claims at issue fall outside an overarching congressional design.”¹⁵ *Jaresky v. SEC*, 803 F.3d 9, 17 (D.D.C. 2015) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489-90 (2010)). Mindful of the fact that the 90-day window for the PRC to respond to a complaint brought pursuant to Section 3661, Defendants contend that it does not matter that the PRC cannot provide immediate relief because eventual relief is sufficient as a matter of law. Defs.’ Opp’n, ECF No. 30 at 39 n.11. However, the authority upon which Defendants rely, *American Federation of Government Employees, AFL-CIO v. Trump*, 929 F.3d 748 (D.D.C. 2019), is inapposite. There, the court held that meaningful judicial review was not foreclosed because Plaintiffs were unable to obtain “‘pre-implementation’ review of executive orders or immediate relief barring all agencies from implementing the executive orders,” *id.* at 755-56, because there the parties agreed to consolidate their preliminary injunction requests with the merits, see Scheduling Order, Civil Action No. 18-1261, ECF No. 16 at 1.

With regard to the first consideration—whether Plaintiffs would be denied meaningful review—it is clear that they would.

¹⁵ Defendants’ assertion that the three factors must be met is incorrect. See *Jaresky v. SEC*, 803 F.3d at 17.

Plaintiffs have shown that the USPS implemented dramatic operational changes that have resulted in delayed mail that “have negatively affected and will continue to negatively affect Plaintiffs’ ability not only to provide necessary services to residents in need and administer their own laws and regulations, but also to protect public health by providing safe and effective means to vote by mail in the upcoming general election.” Reply, ECF No. 40 at 16. Accordingly, even if there was a “fairly discernible” intent in the statutory scheme to preclude district court jurisdiction, requiring Plaintiffs to go through the PRC process would deny them meaningful review. See *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018) (noting that “plaintiffs are denied meaningful review when they are subject to some additional and irremediable harm beyond the burdens associated with the dispute resolution process”) (internal quotation marks and citations omitted); *Krescholleck v. S. Stevedoring Co.*, 78 F.3d 868, 875 (3d Cir. 1996) (noting that the plaintiff had “alleged a sufficiently serious irreparable injury to lead us to conclude that the administrative review process is insufficient to afford him full relief”). And persuasive authority holds that this factor is the “most important.” *Berkley*, 896 F.3d at 630. Accordingly, this first factor weighs in favor of finding Congress intended district courts to have jurisdiction over claims such as this

one brought by Plaintiffs. The second consideration—whether the claim is wholly collateral to the statutory scheme—is “‘related’ to whether ‘meaningful judicial review’ is available, and the two considerations are analyzed together.” *Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump*, 929 F.3d 748, 758 (D.C. Cir. 2019) (quoting *Jarskey*, 803 F.3d at 22). The question to ask is “whether the plaintiffs ‘aimed to obtain the same relief they could seek in the agency proceeding.’” *Id.* at 758–60 (quoting *Jarskey*, 803 F.3d at 23). Here, the relief Plaintiffs seek cannot be meaningfully redressed through filing a Section 3662 complaint.

The third consideration is whether the claim is “beyond the expertise” of the PRC. Plaintiffs’ procedural claim does not require the “agency expertise” the statutory procedures contemplate. *Berkley*, 896 F.3d at 630. Accordingly, precluding district court jurisdiction here would completely deny plaintiff meaningful review given the timing of the implementation of the Postal Policy Changes.

3. Plaintiffs’ Section 3661(b) Claim Is Likely Reviewable Pursuant To The *Ultra Vires* Doctrine

While as a general matter “the Postal Service is exempt from review under the Administrative Procedure Act, . . . its actions are reviewable to determine whether it has acted in excess of its statutory authority.” *N. Air Cargo v. U.S. Postal*

Serv., 674 F.3d 852, 858 (D.C. Cir. 2012). “The scope of Non-APA review is narrow . . . [and] is available only to determine whether the agency has acted *ultra vires*—that is whether it has exceeded its statutory authority.” *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 265 (D.C. Cir. 2016) (quotation marks and citations omitted).

Defendants contend that *ultra vires* review is unavailable because: (1) Plaintiffs cannot show that USPS acted “in excess of its delegated powers and contrary to a specific prohibition” because they cannot show that USPS violated Section 3661(b); and (2) Plaintiffs have a “meaningful and adequate means of vindicating [their] statutory rights” because they can file a complaint with the PRC pursuant to Section 3662. Defs.’ Opp’n, ECF No. 30 at 40 (citing *Nat’l Air Traffic Controllers Ass’n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1258 (D.C. Cir. 2006) (internal quotation marks and citations omitted)).

The Court is persuaded that Plaintiffs claim is reviewable:

“Even where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction.” *Griffith v. FLRA*, 842 F.2d 487, 492 (D.C. Cir. 1988) (citing the leading case, *Leedom v. Kyne*, 358 U.S. 184, 188, 79 S.Ct. 180, 183-84, 3 L.Ed.2d 210 (1958) (finding judicial review proper despite statutory preclusion of judicial review, where the NLRB acted “in excess of its delegated

powers and contrary to a specific prohibition" in the NLRA)).

Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 116, 1172-73 (D.C. Cir. 2003). Plaintiffs claim here is that the USPS failed to comply with the requirement Congress set forth in Section 3661. Accordingly, Plaintiffs' claims "clearly admit of judicial review." *Id.* at 1173.

4. USPS Likely Failed To Comply With Section 3661(b)

The scope of non-APA review includes, among other things, "a straightforward question of statutory interpretation." *Nat'l Ass'n of Postal Sup'rs v. U.S. Postal Serv.*, 602 F.2d 420, 432 (D.C. Cir. 1979). In conducting this review, "[t]he judicial role is to determine the extent of the agency's delegated authority and then determine whether the agency has acted within that authority. In this as in other settings, courts owe a measure of deference to the agency's own construction of its organic statute, but the ultimate responsibility for determining the bounds of administrative discretion is judicial." *Id.* at 432-33 (internal citations omitted).

Section 3661(b) provides that "[w]hen the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such

proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.”

Persuasive authority has construed Section 3661(b) as follows:

The language of the statute . . . indicates that three factors must coexist before 3661 applies. First, there must be a ‘change.’ This implies that a quantitative determination is necessary. There must be some meaningful impact on service. Minor alterations which have a minimal effect on the general class of postal users do not fall within 3661. Second, the change must be ‘in the nature of postal services.’ This involves a qualitative examination of the manner in which postal services available to the user will be altered. Third, the change must affect service ‘on a nationwide or substantially nationwide basis.’ A broad geographical area must be involved. These three factors combine to demonstrate that Congress intended the safeguards of 3661 to apply only when changes of significance were contemplated.

Buchanan, 508 F.2d at 263.

There is no dispute that the USPS did not comply with Section 3661(b) prior to implementing the Postal Policy Changes at issue in this case. Defendants argue that the Postal Policy Changes do not implicate Section 3661(b) because: (1) there has been no “meaningful impact on service;” (2) postal services available to the user have not been altered; and (3) the changes have not affected service in a broad geographical area. Defs.’ Opp’n, ECF No. 30 at 42 (quoting and citing *Buchanan* 508 F.2d at 263). In support, Defendants argue that sorting machines are

being removed pursuant to a long-existing policy; not a change, noting that the USPS is in Phase 6 of this initiative. *Id.*

Second, there is no change with regard to election mail because it is being treated the same as it has in the past. *Id.* at 43.

Third, the ESAS pilot program, which has been suspended, was not national in scope. *Id.* Fourth, USPS has not prohibited extra or late trips, but rather has “renewed its emphasis on adhering to its published schedule.” *Id.* Defendants conclude that this latter change is “precisely the type of management direction to which [S]ection 3661 does not apply.” *Id.* Finally, Defendants contend that pursuant to past practice, the types of “nationwide changes that trigger [Section] 3661’s review are general changes to postal facility hours or service standards for mail delivery.” *Id.* at 44.

The Court is persuaded that Plaintiffs are likely to succeed on their claim that Defendants violated Section 3661(b) by failing to submit the new transportation policy to the PRC. First, the new transportation policy was a “change” because it has had a “meaningful impact on service.” *Buchanan*, 508 F.2d at 263. Plaintiffs have provided evidence showing that the reduction in extra and late trips has had a meaningful impact on service because it has resulted in nationwide delays. *See supra* at 7-8. Second, Plaintiffs have demonstrated that the reduction in sorting machines was dramatically accelerated beginning in

January 2020 as compared with the prior fiscal year. DeChambeau¹⁶ Decl., ECF No. 30-2 ¶ 21. Specifically, while 101 machines were removed in FY 2019, 711 machines were removed in FY 2020 as of August 18, 2020, resulting in a nearly 15 percent reduction in capacity. *Id.* Defendants have provided no explanation for the sudden acceleration of the removal of the sorting machines.

Plaintiffs have also demonstrated that the combination of the reduction of late trips, extra trips and reduced sorting capacity puts the timely delivery of election mail at risk. Coradi Decl., ECF No. 12-34 ¶ 17 (“If postal employees are not able to make the necessary daily adjustments via late trips, extra trips, and the full fleet of sorting machines for the 2020 election season, I am deeply concerned about whether the U.S. Postal Service will be able to deliver election mail as quickly as it has in the past. Since I began as a letter carrier in 1984, it has been standard practice to treat election mail as First Class mail with delivery times of one to three days—or better—regardless of whether it was marked as Marketing Mail, which has a delivery time of three to 10 days.”); *id.* ¶ 18 (“Given the recent U.S. Postal Service policy changes which have reduced sorting capacity and limitations on late trips and extra trips, I fear that the dedicated employees of the U.S. Postal

¹⁶ Jason Chambeau is the Headquarter Director of Processing Operations for the United States Postal Service.

Service will be prevented from making the necessary adjustment to accommodate potential influxes of election mail. Election mail includes ballots, voter registration cards, absentee voting applications, and polling place notifications. If delivery is being significantly delayed in August, which, in my experience is when mail volume is typically lower, the risk of even more dramatic delays beginning in the fall is high.”).

Plaintiffs have also demonstrated that Defendants’ position in this litigation that the Postal Policy Changes are not “changes” is not supported based on USPS’s own statements. See Email from Mr. DeJoy to All Employees, August 13, 2020, ECF No. 12-22 at 2 (“In order to transform . . . we must make a significant number of changes that will not be easy”); *id.* (“Unfortunately, this transformative initiative has had unintended consequences that impacted our overall service levels. However, recent changes are not the only contributing factors.”); *id.* at 3 (“I ask that you bear with me while we work through these changes to transform for the better”).

Second, the change was “in the nature of postal services,” 39 U.S.C. § 3661(b), because it qualitatively altered “the manner in which postal services [are] available to the user,” *Buchanan*, 508 F.2d at 263. As stated above, Plaintiffs point to evidence showing that the reduction in extra and late trips

combined with the reduction in sorting machines resulted in nationwide delays.

Third, the change affected service “on a nationwide or substantially nationwide basis,” 39 U.S.C. § 3661(b), because “[a] broad geographical area [was] involved,” *Buchanan*, 508 F.2d at 263. Plaintiffs have submitted evidence that the Postal Policy Changes have resulted in delays on a nationwide basis. *See supra* at 16-17.

While it is clear that Congress did not intend for the courts to micromanage the operations of the USPS, requiring the USPS to comply with the statutory requirement that it obtain an advisory opinion from the PRC and provide for notice and comment prior to implementing “a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis” is not micro-managing; it is requiring the USPS to act within its statutory authority. Furthermore, Congress clearly intended Section 3661 to require an opportunity for public participation and for independent review before the USPS implements service changes that will have a broad effect. The broad scope of the Postal Policy Changes demonstrates on its face that it is precisely the kind of change that is to be the subject of the public-participation and independent review safeguards provided by Section 3661.

Finally, defendants argue that because Plaintiffs have a “meaningful and adequate means of vindicating their statutory rights” by filing a complaint with the PRC and then seek judicial review in the D.C. Circuit if unsatisfied, they cannot establish *ultra vires* jurisdiction. Defs.’ Opp’n, ECF No. 30 at 41. Plaintiffs respond—and the Court agrees as explained above—that they lack a “meaningful and adequate means of vindicating their statutory rights” since “section 3662 would not afford [them] judicial review of an adverse PRC ruling within a timeframe that would allow for the meaningful vindication of their right to notice and opportunity to participate as required under 39 U.S.C. § 3661(b).” Reply, ECF No. 40 at 19.

B. Plaintiffs Face Irreparable Harm

“In this Circuit, a litigant seeking a preliminary injunction must satisfy ‘a high standard’ for irreparable injury.” *ConverDyn*, 68 F. Supp. 3d at 46 (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). The movant must demonstrate that it faces an injury that is “both certain and great; it must be actual and not theoretical,” and of a nature “of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quotation marks and emphasis omitted).

Plaintiffs argue that the Postal Policy Changes impede their ability to combat the spread of COVID-19 because the failure to timely deliver mail and other reductions in service standards results in more in-person interactions with government officials and adversely affects their "ability to provide safe alternatives to in person voting." Mot., ECF No. 12-1 at 21-22. Defendants counter that Plaintiffs have failed to meet their burden of establishing "that mail delays were necessarily the result of the challenged policies, or that future delays, if there are any, would be the result of" the Postal Policy Changes. Defs.' Opp'n, ECF No. 30 at 46-47. However, the Court has already determined that Plaintiffs have shown that there is a substantial likelihood that the on-going non-speculative harms they allege caused by mail delays are "fairly traceable" to the Postal Policy Changes. See *supra* at 14-17.

Defendants further counter that this alleged harm is to the citizens of the states and that States cannot bring *parens patriae* claims against the federal government, and that even if they could, Plaintiffs' injury is entirely speculative. Defs.' Opp'n, ECF No. 30 at 48-49. However, Plaintiffs have provided evidence that the efforts to mitigate the spread of COVID-19 is aimed at protecting the public health of their respective jurisdictions as a whole. See Adinaro Decl. ECF No. 12-4 ¶¶ 7-8 (describing the efforts of the New Jersey Department of Health

to mitigate the spread of COVID-19); Ku Decl. (describing the efforts of New York, New Jersey, and Hawaii to institute absentee or mail voting to mitigate the spread of COVID-19). Impeding these mitigation efforts results in harm to government Plaintiffs as well as the residents of the states. *New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777, 2020 WL 4347264, at *10 (S.D.N.Y. July 29, 2020) (finding that the state plaintiffs adequately demonstrated irreparable harm where the Governmental "Plaintiffs provide[d] ample evidence that the [challenged conduct] deters immigrants from seeking testing and treatment for COVID-19, which in turn impedes public efforts in the Governmental Plaintiffs jurisdictions to stem the spread of the disease."), *stayed on other grounds*, No. 20-2537, 2020 WL 5495530 (2d Cir. Sept. 11, 2020).

Defendants also argue that Plaintiffs' argument that their efforts to curb the spread of COVID-19 will be undermined by mail delays because more residents will opt to vote in person as speculative. Defs.' Opp'n, ECF No. 30 at 25. At this juncture, Plaintiffs need only demonstrate the likelihood of an increased risk of injury. *Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction."). Plaintiffs have provided ample evidence that mail delays are likely to cause more residents to

vote in person which in turn is likely to impede the spread of the virus. See Kellner Decl., ECF No. 12-12 ¶ 14 (“Due to [voters not receiving their ballots on time], additional voters went to polling places who would not have otherwise needed to, adding to significant crowds and delays at certain polling sites for in-person voting. Longer wait times at polling sites is of particular concern to election officials as this increases the risk of exposure to COVID-19, thereby threatening the health and safety of voters, voting officials, and the larger community.”); Ku Decl., ECF No. 12-13 ¶¶ 17-18 (describing empirical evidence demonstrating that “voting in crowded polling places increases the risk of infection”); *id.* ¶ 12 (describing polls indicating fewer people intend to vote by mail due to concerns about mail delays).

Finally, Defendants argue that all residents need to do is “mail their ballots a reasonable time before the election (which is approximately two months away).” Defs.’ Opp’n, ECF No. 30 at 39. However, as Plaintiffs point out, the ability of the residents of New York, Hawaii, and New Jersey to mail their ballots is not entirely within the residents’ control since ballots are not mailed to the residents two months before the election.

Plaintiffs’ harm is “both certain and great . . . actual and not theoretical” because mail delays are impeding

Plaintiffs' ability to combat the spread of a highly contagious and deadly disease and are impeding their ability to provide safe alternatives to in-person voting. As of September 27, 2020, 204,607 Americans have died from the disease and over seven million people have been infected with it. See Coronavirus Resource Center, <https://coronavirus.jhu.edu/map.html>.

Plaintiffs' harm is also "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm" because Election Day is November 3, 2020.

Because Plaintiffs have demonstrated that absent an injunction they will suffer immediate and irreparable harm to their ability to combat the spread of COVID-19 and to provide safe alternatives to in-person voting, the Court need not reach whether Plaintiffs have also demonstrated the Postal Policy Changes have resulted in direct, unrecoverable financial harms nor whether Plaintiffs have demonstrated that the Postal Policy changes disrupt Plaintiffs' administration of federal, state, and local laws and impose additional, unnecessary administrative burdens.

C. The Balance Of Equities And Public Interest Favor An Injunction

The balance-of-equities factor directs the Court to "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the

requested relief.'" *ConverDyn*, 68 F. Supp. 3d at 52 (quoting *Winter*, 555 U.S. at 24). "When the issuance of a preliminary injunction, while preventing harm to one party, causes injury to the other, this factor does not weigh in favor of granting preliminary injunctive relief." *Id.*; see also *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998). By contrast, the balance of equities may favor a preliminary injunction that serves only "'to preserve the relative positions of the parties until a trial on the merits can be held.'" *Rufer v. FEC*, 64 F. Supp. 3d 195, 205 (D.D.C. 2014) (quoting *Camenisch*, 451 U.S. at 395). "The purpose of . . . interim relief is not to conclusively determine the rights of the parties, *University of Tex. V. Camenisch*, 451 U.S. 390, 395 (1981), but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also 'conside[r] . . . the overall public interest,' *Winter*, 555 U.S. at 26." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

Defendants fail to identify any equities in their favor and do not contest the equities in the Plaintiffs' favor.

Defendants' only arguments are that they are "undertaking extensive efforts to facilitate the timely delivery of Election Mail," that the two of the four postal policies are not changes—"one has been stopped, and the fourth has been mischaracterized"—and that ensuring compliance with the

injunction “could require the Court to act as an overseer of the agency’s day-to-day activities.” Defs.’ Opp’n, ECF No. 30 at 50.

Here, the balance of the equities and the public interest favor an injunction. It is clearly in the public interest to mitigate the spread of COVID-19, to ensure safe alternatives to in-person voting, and to require that the USPS comply with the law. The equities balance in favor of Plaintiffs because the relief sought is a targeted preliminary injunction that prohibits Defendants from continuing to implement the Postal Service Policies with respect to which an advisory opinion from the PRC should have been obtained prior to implementation. Furthermore, the proposed injunction does not contemplate the Court becoming involved in overseeing the day-to-day operations of the USPS.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** the Plaintiffs' motion for a preliminary injunction. Any request to stay this decision pending appeal will be denied for substantially the same reasons as those articulated in this Opinion. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
September 27, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

No. 20-cv-2340 (EGS)

DONALD J. TRUMP, *in his
official capacity as President
of the United States, et al.*,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED the Plaintiffs' Motion for Preliminary Injunction is **GRANTED**; and it is further

ORDERED that a Preliminary Injunction is hereby entered against Defendants; and it is further

ORDERED that pursuant to the Order, Defendants are **HEREBY ENJOINED** from enforcing the Postal Policy Changes; and it is further

ORDERED that any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
September 27, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

No. 20-cv-2340 (EGS)

DONALD J. TRUMP, *in his
official capacity as President
of the United States, et al.*,

Defendants.

ORDER

On September 27, 2020, the Court preliminarily enjoined Defendants from enforcing four Postal Policy Changes that the United States Postal Service ("USPS" or "Postal Service") announced and implemented in June and July 2020: (1) the removal of high-speed sorting machines nationwide; (2) the prohibition of "'late trips' and 'extra trips'"; (3) the "Expedited to Street / Afternoon Sortation" initiative; and (4) the decision to change the "USPS policy of treating election mail and political mail marked as marketing mail on an expedited First-Class basis." Mem. Op., ECF No. 52 at 5-8; Order, ECF No. 51. On October 5, 2020, Defendants filed a Motion for Clarification regarding three aspects of the Court's Order. Mot. Clarification ("Defs.' Mot."), ECF No. 54. On October 12, 2020, Plaintiffs filed their Opposition, ECF No. 56; and on October 16, 2020,

Defendants filed their Reply, ECF No. 57. The Motion is ripe for the Court's adjudication.

First, Defendants request that "this Court clarify that its Order prospectively enjoins the Postal Service from removing mail sorting machines from service, but that it does not require the Postal Service to return disassembled machines into service (something that may not be possible)." Defs.' Mot., ECF No. 54 at 4. Plaintiffs oppose this request as inconsistent with this Court's Order and "with instructions from other courts that have likewise enjoined USPS practices in recent weeks." Pls.' Opp'n, ECF No. 56 at 3. Plaintiffs also argue that Defendants have made no showing that "it would be impossible or impractical to restore specific sorting machines to service in Plaintiffs' jurisdictions," for example, those machines that were "covered with a tarp, or otherwise roped off." *Id.* at 4 (citing Coradi Decl., ECF No. 12-34 ¶ 7). In reply, Defendants state they "agree with Plaintiffs that this Court may clarify that its requirement regarding machines applies to the extent that 'if it is determined that it is necessary to add processing capability to fulfill [USPS's] service commitments with regard to Election Mail, available processing equipment will be returned to service,' Clarifying Operational Instructions, at 3, ECF No. 50, consistent with the orders of other district courts." Defs.' Reply, ECF No. 57 (citing Order ¶ 3, ECF No. 81, *Washington v.*

Trump, No. 20-cv-3127 (SAB) (E.D. Wash. Sept. 17, 2020); Joint Stipulation to Stay Case in Light of Settlement Agreement, ECF No. 38, *Bullock v. USPS*, No. 20-cv-0079 (BMM) (D. Mont. Oct. 14, 2020)).

Second, Defendants request that the Court's order to treat Election Mail marked as Marketing Mail on an expedited First-Class basis does not require USPS to transport such mail by air. Defs.' Mot., ECF No. 54 at 5. Plaintiffs do not object to Defendants' request "[t]o the extent Defendants can comply with the Court's injunction and treat all election mail in accordance with First Class delivery speeds without relying on air transport," but argue that "there is no basis for the Court to make any categorical statement that its Order never requires delivery of election mail by air." Pls.' Opp'n, ECF No. 56 at 5-6. In reply, Defendants clarify that "the only harm to Postal Service operations comes from requiring Marketing Mail sent by election officials or related entities to voters to travel by air (which would be a significant operational change, and potentially impossible at this late date just prior to the election), because Marketing Mail is an entirely separate class of mail to which different service standards apply." Defs.' Reply, ECF No. 57 at 3. "[A]ll ballots sent by voters to their election officials are First-Class Mail, and they will travel by

air, rather than trucks, . . . so that they can complete their journey within the published service standards." *Id.*

Third, Defendants "request that this Court clarify that the Postal Service is not required to treat Political Mail in the same manner as Election Mail, i.e., 'mailed as marketing mail on an expedited First-Class basis.'" Defs.' Mot., ECF No. 54 at 9-10. Plaintiffs do not oppose this request. Pls.' Opp'n, ECF No. 56 at 7-8.

"[T]here is no Federal Rule of Civil Procedure specifically governing 'motions for clarification.'" *United States v. Philip Morris USA Inc.*, 793 F. Supp. 2d 164, 168 (D.D.C. 2011). "The general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend." *Id.* "Although such a motion cannot open the door to 're-litigat[ing] a matter that the court has considered and decided,' *Sai v. Transp. Sec. Admin.*, No. 14-cv-403, slip op. at 5 (D.D.C. Aug. 19, 2015), ECF No. 74 (citation omitted), courts in this Circuit have encouraged parties to file motions for clarification when they are uncertain about the scope of a ruling, see *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 344 (D.C. Cir. 2014); *Barnes v. Dist. of Columbia*, 289 F.R.D. 1, 12-13 (D.D.C. 2012), and entertaining such motions seems especially prudent if the parties must implement the ruling at issue at subsequent stages of the litigation." *All. of*

Artists & Recording Cos. v. Gen. Motors Co., 306 F. Supp. 3d 413, 418-19 (D.D.C. 2016).

The Court concludes that Defendants have met the threshold requirements for seeking clarification, insofar as the Court's Order is reasonably susceptible to differing interpretations.

Accordingly, the Court hereby **ORDERS** that the Court's Order, ECF No. 51, is clarified to reflect the following:

(1) if any post office, distribution center, or other postal facility will be unable to process Election Mail for the November 2020 election in accordance with First Class delivery standards because of USPS's removal and decommissioning of sorting machines from service, available processing equipment will be restored to service to ensure that USPS can comply with its prior policy of delivering Election Mail in accordance with First Class delivery standards;

(2) Defendants are not required to ship Election Mail entered as Marketing Mail by any particular means (such as by air), but must employ measures to expedite the handling of all Election Mail, which may include moving them by air when such a method is consistent with practices and policies used in past elections; and

(3) Defendants are not required to treat Political Mail, which is defined as mail sent by political candidates, political action committees, and similar organizations that engage in issue advocacy or to advocate for candidates or other things, such as initiatives, that may appear on the ballot, that is mailed as Marketing Mail on an expedited First-Class basis.

It is **FURTHER ORDERED** that Defendants are directed to file a status report by no later October 23, 2020 at 5:00 PM informing the Court of its efforts to comply with this Court's instructions here and with its previous Order, ECF No. 51.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
October 22, 2020

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|------------------------------------------|---|---------------------------------|
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| ET AL. | : | |
| | : | |
| v. | : | CIVIL ACTION NO. 20-4096 |
| | : | |
| LOUIS DeJOY | : | |
| <i>IN HIS OFFICIAL CAPACITY AS</i> | : | |
| <i>UNITED STATES POSTMASTER GENERAL,</i> | : | |
| ET AL. | : | |

MEMORANDUM

Gerald Austin McHugh, J.

September 28, 2020

This is an action brought by six states and the District of Columbia to enjoin certain changes made by the United States Postal Service in the leadup to the November 3, 2020 election. As an initial matter, it is useful to highlight that as a public agency, the Postal Service must abide by the procedures enacted by Congress when it created the modern Postal Service via the Postal Reorganization Act (“PRA”) in 1970, and again when it amended the PRA by passing the Postal Enhancement and Accountability Act (“PAEA”) in 2006. Congress required that the Postal Service seek an advisory opinion from the Postal Regulatory Commission (hereafter, “the Commission”) and that a public hearing be held prior to making significant, nationwide changes. 39 U.S.C. § 3661. This structure formally balances the Postal Service’s need to make “businesslike” decisions with its role as an agency that provides an indispensable service to the American public. *See* H.R. Rep. No. 109-66, at 42 (2005).

The Postal Service must also meet substantive requirements, including that it provide “adequate and efficient postal services,” 39 U.S.C § 403(a), and that it “give the highest

consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.” 39 U.S.C. § 101(e).

At issue in this case is whether the Postal Service violated the law and acted beyond its authority when it restricted extra and late trips by trucks and letter carriers and instituted overtime restrictions. Such changes could have profound consequences for the administration of state agencies in ordinary times. In a pandemic, states are even more reliant on the mail, especially when it comes to administering elections. This Court has been called upon to exercise jurisdiction and provide redress—namely, that the Postal Service reverse the changes it has made and abide by the statutorily-required process, which includes review and input from both the Commission and the public.

Plaintiffs and the Postal Service agree that the Postal Service undertook a major new initiative following Louis DeJoy’s installation as Postmaster General. Both sides also agree that the Postal Service did not seek an advisory opinion and that no public hearing occurred before the Postal Service implemented these changes in July 2020. Against that background, Plaintiffs have produced compelling evidence from Defendants themselves, indicating that there has been a pronounced increase in mail delays across the country since the implementation of these changes. And the Postal Service insists that it is rolling back the changes and improving performance.

Nonetheless, the Postal Service raises several procedural arguments as to why this Court may not hear this case in the first place. It further contends that even if this Court has jurisdiction, the changes do not rise to a level that requires the input of the Commission or the public.

Having examined the facts, along with the text, structure, and legislative history of the PRA and the PAEA, and having also accorded some level of deference to the Postal Service’s interpretation of the statute, I conclude that jurisdiction exists. Furthermore, as users of the mail

who rely on the Postal Service’s historic commitment to a policy of “every piece, every day,”¹ Plaintiffs have been harmed in various and meaningful ways by these changes, as discussed below.

The Postal Service is a critical agency that preceded the birth of the nation itself, one of a few agencies that the Constitution explicitly authorized. U.S. Const. art. I, § 8. Congress has described it as “a basic and fundamental service provided to the people by the Government of the United States. . . .” 39 U.S.C. § 101(a). Its ability to fulfill its mission during a presidential election taking place in the midst of a public health crisis is vital. The record in this case strongly supports the conclusion that irreparable harm will result unless its ability to operate is assured. I will therefore grant injunctive relief.

I. The Relevant Factual Background and Procedural History

In response to the COVID-19 pandemic, states have sought to facilitate mail-in voting, and a record number of voters are expected to cast mail-in ballots. In twenty-eight states, plaintiffs may apply for and cast a mail-in ballot for any reason. *See* Compl. ¶ 6, ECF No. 1. Nine states will send mail-in ballots to all eligible voters. *Id.* Voters in six other states may also request a mail-in ballot for reasons related to COVID-19. *Id.* As a result of these efforts and voters’ fears about contracting COVID-19 while voting in person, states are already seeing record numbers of requests for mail-in ballots.²

The ability of the Postal Service to deliver the Election Mail and other essential post in a timely fashion has recently been called into question. On June 15, 2020, Louis DeJoy began his tenure as the 75th Postmaster General and Chief Executive Officer. Compl. ¶ 155. Prior to his

¹ Mr. Robert Cintron, Vice President of Logistics for the Postal Service, acknowledged that for 35 years, he has heard the policy stated in various contexts: “It’s about making sure that we get every piece delivered every day, every piece on the truck every day.” Cintron Dep. Courtroom Exhibit 54 at 106: 12-16. Plaintiffs introduced Supplemental Exhibits on September 24, 2020. These exhibits have not been filed electronically.

² In North Carolina, for instance, the elections authority has received over 10.8 times the number of absentee ballot requests than it had at the same time in 2016. Compl. ¶ 7.

term, DeJoy had no experience working at the Postal Service. *Id.* Before the COVID-19 pandemic began, the Postal Service met its service standards for First-Class Mail roughly 92 percent of the time. *See* Q4 To-Date Service Performance For Market Dominant Products, Courtroom Exhibit Ex. 54-16. In April, service performance declined to 90 percent, before climbing again in May to 92 percent. *Id.* Approximately one month after Postmaster DeJoy began his tenure, service dropped precipitously and fell to 85 percent on July 11, 2020. *Id.* By August 8, 2020 service performance fell to 81.47 percent, far lower than at any other time during the pandemic. *Id.*

A. Procedural History

Prompted by fears of Postal Service delays and the administration of elections, the Commonwealth of Pennsylvania, the State of California, the State of Delaware, the District of Columbia, the State of Maine, the Commonwealth of Massachusetts, and the State of North Carolina filed a complaint for declaratory and injunctive relief on August 21, 2020 against Postmaster DeJoy, Robert Duncan, who serves as Chairman of the Postal Service Board of Governors,³ and the United States Postal Service.

Plaintiffs claim that the Postal Service has unlawfully implemented policy changes regarding transportation schedules, letter carriers, and the use of overtime. Compl. ¶ 2. Specifically, they allege that the Postal Service has been “prohibiting late or extra trips by postal workers that are often necessary to keep the mail moving forward in the mail stream; requiring carriers to adhere rigidly to start and stop times regardless of whether all mail for their route has arrived or been delivered; and limiting the use of overtime.” *Id.* at ¶ 3. Plaintiffs further argue

³ Postmaster DeJoy and Chairman Duncan are named in their official capacities.

that these policy changes caused a significant drop in service and continue to contribute to delays.

The states have further claimed that Postal Service officials “also intend to change the Postal Service’s longstanding practice of prioritizing Election Mail ahead of the November 2020 election.” Pls. Mot. Prelim. Inj. ¶ 1, ECF No. 18.

Plaintiffs include four causes of action within their Complaint:

Count I: The states contend that Defendants acted beyond their statutory authority, and in violation of section 3661 of the PRA, 39 U.S.C. § 3661, when they made national changes to postal services without submitting a proposal to the Postal Regulatory Commission. *See* Compl. ¶ 222-227. In Plaintiffs’ Motion for a Preliminary Injunction, the states also allege that Defendants’ “contemplated changes to the processing of Election Mail . . . are subject to section 3661’s procedural requirements” and that the Postal Service must issue a proposal to the Commission before making these changes. Mem. Law. Supp. Pls. Mot. Prelim. Inj. 34-35, ECF No. 18-1.

Count II: Plaintiffs also claim that Defendants’ July 2020 policy changes and their intention to abandon the practice of giving Election Mail the highest priority exceed Defendants’ authority under sections 101 and 403 of the PRA. Compl. ¶ 228-236. The Postal Service must “plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees.” 39 U.S.C § 403(a). The Postal Service must also “give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.” 39 U.S.C. § 101(e).

Count III: The states allege that the Defendants’ changes have “abruptly and unlawfully impaired the operation of the postal services and have acted to cast doubt on the Postal Service’s

ability to facilitate mail-in voting.” Compl. ¶ 244. As a consequence, Defendants have violated Plaintiffs’ rights under the Elections Clause and the Electors Clause. *Id.* at ¶ 244-246.

Count IV: Plaintiffs assert that Defendants’ actions have disenfranchised voters based on age, in violation of the 26th Amendment. *Id.* at ¶ 247-253.

On September 2, Plaintiffs filed a motion for a preliminary injunction. *See* P’s Mot. Prelim. Inj. ¶ 1. On September 4, I ordered expedited discovery. *See* Order Granting Pls. Mot. Expedite Disc., ECF No. 22. The Court was prepared to proceed with a hearing on September 22, the date proposed by the parties, but deferred the hearing to allow review of the documents produced and the deposition of two Postal Service witnesses. Testimony from the Southern District of New York was incorporated into the record here, and the parties agreed that the pending motion could be decided without live testimony. *See* ECF No. 57. I held a hearing on September 24, 2020, at which Plaintiffs introduced Supplemental Exhibits (Ex. 54–Ex. 75) and the parties presented argument. During the hearing, Plaintiffs clarified that their motion for a Preliminary Injunction is currently limited to Counts I and III.

B. Determinations of Fact⁴

By way of initial summary, the record shows that the Postal Service has implemented new initiatives to slash the number of extra and late truck trips and restrict work hours. It has also required letter carriers to abide by rigid start and stop times. Defendants strive to frame these changes as merely the further implementation of existing operating plans. *See Examining the Finances and Operations of the United States Postal Service During COVID-19 and Upcoming Elections Before the S. Committee on Homeland Security and Governmental Affairs*, 116th Cong. 10 (2020) (statement of Postmaster General and Chief Executive Office Louis

⁴ “[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.” *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

DeJoy), Courtroom Ex. 58. But the record makes clear that the agency’s sudden and rigid pivot to operating goals in the areas of truck transportation, overtime, and start and stop times for letter carriers constituted a significant change in agency practice. The evidence further establishes that these policy changes resulted in mail being left behind – until that point a “cardinal sin” among the 600,000 employees of the Postal Service. *See* Chester Cassel Decl. Ex. 47 ¶ 9, ECF No. 47-1. The declines in service that resulted from the initiatives have not been fully remedied and pose a threat to the operation of the November 2020 elections.

1. Late/Extra Truck Trips and Carrier Start/Stop Times

New Postal Service policies that were set by leadership highly discourage late or extra truck trips to move the mail, even when those trips are needed to prevent delays in delivery. After weighing the evidence, I also conclude for the purposes of this motion that USPS has also changed its policies to require letter carriers to adhere to rigid stop and start times, with few exceptions. These changes appear to have occurred on a national basis and have caused delays in the mail service.

In an August 13, 2020 internal memo, Postmaster DeJoy summarized his view that the Postal Service “must make a number of significant changes,” including “re-establish[ing] fundamental operating principles and then adher[ing] to them and run[nin]g on time.” Internal Memorandum from Postmaster General Louis DeJoy (Aug. 13, 2020) Ex. G, ECF No. 1-1. Postmaster DeJoy confirmed that he “began those efforts right away” and that, as a result, the Postal Service had an “ontime dispatch schedule” of “97.3 percent, up from 89.8 percent” and had “reduced extra trips by 71 percent.” *Id.* These statements were corroborated in an August 6th letter drafted by Postal Service Chief Operating Officer David Williams, where Williams declared that the Postal Service had taken “immediate steps” focused on “improving our

transportation efficiency,” including “working to eliminate extra and late trips.” Letter to Members of Congress from Chief Operating Officer David Williams (Aug. 6, 2020) Ex. D., ECF No. 1-1.

The initiatives regarding trucks and letter carriers were planned during a series of conference calls between Headquarters and the Area Vice Presidents (“AVPs”) who are charged with overseeing mail processing and delivery in their respective regions. With respect to the trucking initiative, Postmaster DeJoy was aware of efforts to “improve adherence to transportation schedules” and expressed support for them. *See* Cintron Dep. Courtroom Ex. 54, at 45-48.⁵

Headquarters repeatedly communicated rigid guidelines for letter carriers. On June 26, 2020, Chief Operating Officer David Williams, who reports directly to Postmaster DeJoy, presided over a conference call and PowerPoint presentation that included the AVPs. The PowerPoint declared that the Postal Service would be instituting actions to ensure that letter carriers adhere to start times and “leave on time.” *See* PowerPoint – AVP Telepresence (June 26, 2020), Courtroom Ex. 54-13. The Service estimated that the new “leave on time” requirement would save 7.1 million work hours. *Id.* On July 7, 2020, David Williams led another call with the AVPs that reiterated these messages. *See* PowerPoint – AVP Meeting (July 7, 2020), Courtroom Ex. 54-14.⁶ There, presenters again stated that letter carriers should “leave on time” and that management should “set expectations for return times” for rural letter carriers. *Id.*

⁵ On July 9, 2020, Otis Smith emailed Robert Cintron to notify him that Postmaster DeJoy “was requesting a draft of the business plan for review.” Smith directed Cintron to provide preliminary financial estimates for “elimination of extra trips and change service standards to enable use of the most efficient transportation.” Email from Robert Cintron to Otis Smith re: Preliminary Financial for Transportation Initiatives – PMG Draft report due Friday (July 20, 2020), Courtroom Ex. 54-8.

⁶ This meeting was held on a monthly basis. *See* Cintron Dep. 121. Postmaster DeJoy was certainly aware of this initiative, as he attended the July 7, 2020 call to deliver “general remarks” for 15 minutes. *See* PowerPoint – AVP Meeting (July 7, 2020), Courtroom Ex. 54-14.

Achieving these goals would require “message saturation” and for employees to have “clarity on roles, responsibilities [and] expectations.” *Id.*⁷

Williams also used the conference calls with the AVPs to push changes to trucking policies. During a July 10, 2020 conference call with the AVPs, the accompanying PowerPoint called for drastic changes to trucking transportation schedules. *See* PowerPoint – AVP Telepresence (July 10, 2020) Courtroom Ex. 54-9; Cintron Dep. 66 (establishing Williams participation). To meet “our first test,” the PowerPoint declared, the Postal Service must shift to “no extra transportation” and “no late transportation.” PowerPoint – AVP Telepresence (July 10, 2020) Courtroom Ex. 54-9. As of July 13, 2020, “all extra trips and Postal caused late trips are unauthorized contractual commitments.” *Id.* For late trips and extra trips, Area Vice Presidents would serve as the “ratifying official” and must “ratify and submit to the COO.” *Id.* If extra trips or late trips occurred the prior day, AVPs were to call the COO (Williams) “daily” to discuss next steps. *Id.* This PowerPoint would have been drafted by Williams or his staff. *See* Cintron Dep. 69.

Defendants claim that these messages represent a mere “aspiration for trying to achieve no unnecessary late trips and no unnecessary extra trips.” Cintron Dep. 143. This framing of the evidence is unconvincing. Although the July 10, 2020 PowerPoint suggests that late trips and extra trips will be permitted in rare circumstances, the specificity of its content belies Defendants’ assertions that the mandates are merely aspirational. Indeed, the PowerPoint encouraged AVPs to assume that extra trips and late trips are unauthorized absent action from the AVP as a ratifying official. The PowerPoint also suggested that AVPs who did authorize late

⁷ This document, among others produced in discovery, was marked confidential. I will not post such documents on the docket absent further consultation with counsel but will cite to them as required because of the public interest in the transparency of judicial proceedings. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 784 (3d Cir. 1994). The Court’s inherent power to do so is set forth in my published Guidelines for Counsel.

and extra trips would be held to account by the COO. The presentation appears authoritative, as it was drafted by the COO.

Given the specificity and intensity of the messages from Headquarters, it is unsurprising that some AVPs immediately undertook the rigid implementation of Headquarters' restrictions on letter carriers and truck transportation. One such effort was a July 10 "Mandatory Stand Up [sic] Talk" for "All Employees." Ex. A., ECF No. 1-1. The Stand-Up Talk ("SUT") was drafted by an AVP for the Southern Area. *See* Cintron Dep. 82.

The July 10 Stand-Up Talk was clearly influenced by the June 26, July 7, and July 10 presentations from Headquarters. The document offered "specific examples of transportation changes being implemented immediately (today)" and stated that "late trips are no longer authorized or accepted"; "all trips must depart on time"; "extra trips are no longer authorized or accepted"; "all PVS/HCR drivers must be notified that trips depart on time"; "carriers must begin on time, leave for the street on time, and return on time"; and "no additional transportation will be authorized to dispatch mail to the Plant after the intended dispatch." Stand-Up Talk, Ex. A. The AVP also noted that "one aspect of these changes that may be difficult for employees is that – temporarily – we may see mail left behind . . . which is not typical." *Id.* Employees were directed to report any mail left behind. *Id.*

Similarly, a PowerPoint entitled "PMGs expectations and plan" offered some of "[DeJoy's] expectations [that] will be implemented in short order." Ex. B, ECF No. 1-1. The author noted that "[i]f the plants run late they will keep the mail for the next day. If you get mail late and your carriers are gone and you cannot get the mail out without OT it will remain for the next day." *Id.* This document was drafted by an official out of the Northern Ohio District. *See* Tr. Prelim. Inj. Teleconference at 73, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020).

Defendants hotly dispute the reach and authority of the SUT and the PMG Expectations PowerPoint, particularly with respect to the trucking changes. Robert Cintron declared initially, under penalty of perjury, that the Stand-Up Talk “was not prepared, reviewed, or approved by Headquarters and does not represent official Postal Service guidance or direction.” Cintron Decl. 19 n. 1, ECF No. 37-1. Cintron also stated that “Headquarters did not ban all . . . extra or late trips.” *Id.* In his deposition, Cintron reiterated that extra and late trips are not banned and that the Service runs “late trips every day in the network.” Cintron Dep. 40. He maintains that the Stand-Up Talk statement that “[e]xtra trips are no longer authorized or accepted” is inaccurate. *Id.* at 83.

Angela Curtis, who serves as Vice President for Retail and Post Office Operations at Headquarters, also testified that the Stand-Up Talk and the PMGs Expectations PowerPoint were “not reviewed or approved by Headquarters” and were “distributed locally, not nationally.” Curtis Decl. 37-38 n.1, ECF No. 37-1. Moreover, she claims that “contrary to some information in these documents, Headquarters did not ban . . . all extra or late trips and did not instruct local facilities to leave . . . mail.” *Id.* at ¶ 8.

Defendants have since conceded that there is a clear connection between Headquarters and the Stand-Up Talk. In view of the involvement of Mr. Williams, the COO, it can hardly claim otherwise. In a supplemental declaration, Cintron admitted that the content of the July 10th Stand-Up Talk “draws from a July 10, 2020 teleconference, conducted with AVPs and members of Headquarters.” Cintron Supp. Decl. ¶ 3, ECF No. 46-1.⁸ It appears from the record that the

⁸ Cintron adds that, “[d]uring that teleconference, members of Headquarters made statements reflected, in part, in the July 10, 2020 SUT.” *Id.* Curtis, in another supplemental declaration, also noted that she participated in a July 10, 2020 teleconference where Headquarters members made statements that reflect the SUT in part. *See* Curtis Supp. Decl. ¶ 3, ECF No. 46-2.

Vice President for the Southern Area took Headquarters' demand for "message saturation" seriously and immediately set to work to educate employees under his purview about the changes. Furthermore, the AVP's belief that the July 10th PowerPoint's edict that "all extra trips and Postal caused late trips are unauthorized contractual commitments" meant a ban on late and extra trips is hardly unreasonable.

The messages contained within Stand-Up Talk and the PMGs Expectations PowerPoint were broadly disseminated.⁹ On July 13, 2020, Thelma Griffin, the administrative assistant to Scott Tosch, the District Manager in Louisiana, forwarded an email that stressed the Stand-Up Talk should be shared with "all employees." Email from Thelma Griffin to Louisiana ACE Users re: SUT: Pivoting for Our Future (July 14, 2020), Courtroom Ex. 54-3. She urges all of the employees within the district to "[p]rint and post on all employee bulletin boards. Keep something on file in each office to indicate completion and compliance." *Id.* On July 14, 2020, Griffin emailed again to remind employees to "continue sharing the attached SUT, until it has been shared with all employees." *Id.* On July 13, an Arizona-based representative of the National Rural Letter Carriers' Association noted that she had received a copy of the Stand-Up Talk and had questions. *See* Email from Robert Cintron to Shaun Mossman re Pivoting (July 13, 2020), Courtroom Ex. 59.¹⁰ It appears that these messages are still present in the field: on September 6, 2020, a journalist tweeted a sign that had "just went up" in a Portland, Oregon facility. *See* Tr. Prelim. Inj. Teleconference at 66, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020). The

⁹ Vance Zimmerman, the Director of Industrial Relations for the American Postal Workers Union testified that, in his experience, "stand-up talks that are entitled "Mandatory Stand-up Talk" are from National Headquarters" and are "delivered to all employees nationwide." Vance Zimmerman Decl. Ex. 46 ¶¶ 7, 8, ECF No. 18-4.

¹⁰ Management did not initially know where the Stand-Up Talk emanated from. Cintron emailed Shaun Mossman, who was revealed to have drafted the SUT to ask, "is this from the SA [Southern Area]." Email from Robert Cintron to Shaun Mossman re Pivoting (July 13, 2020), Courtroom Ex. 59.

sign stated that “All HCR and PBS trips will depart on time, no exception” and “Do not hold the truck. No more holding trucks.” *Id.*

In addition to the impact of the Stand-Up Talk and the PowerPoint presentation, there is also guidance on Postal Service trucking policy preliminarily released by Robert Cintron on July 11, 2020 (hereinafter “Cintron Guidelines”). *See* Cintron Dep. 130. Cintron has claimed that he began work on the Guidelines on July 11, 2020 in order to clarify for the AVPs that there was no ban on late or extra trips. *Id.* at 65-66. The Cintron Guidelines do not explicitly ban late or extra trips but nonetheless mirror Headquarters’ emphasis on sharply restricting approval for these trips. In the email distributing the Guidelines to the AVPs, Cintron wrote that “our focus is to eliminate unplanned extra transportation . . . we should not impact the customers we have been providing pick ups for.” Email from Robert Cintron to Area Vice Presidents re: Extra Guidance (July 14, 2020) Courtroom Ex. 54-11. He reiterated that “trips must depart on time.” *Id.* Notably, Cintron’s analytics team did not model the impact of the guidelines on the service prior to releasing them. *See* Cintron Dep. 54. Nor did they estimate what the impact of the guidance could be on the November elections. *Id.* at 62.

The combination of the Cintron Guidelines, the SUT, and the PMGs Expectations PowerPoint sharply curbed the number of late and extra trips. As Postmaster DeJoy emphasized in an August internal memo, the Postal Service on-time rates are now “97.3 percent, up from 89.8 percent” and extra trips have been reduced by “71 percent.” Internal Memorandum from Postmaster General Louis DeJoy (Aug. 13, 2020) Ex. G. In numerous instances, these efficiencies came at the cost of timely delivery of mail.¹¹

¹¹ Union officials have attested to this effect. *See* John Gibson Decl. Ex. 26 ¶ 15, ECF No. 18-4 (“Rigidly requiring trucks to leave at their scheduled time means that trucks leave without all of their mail, which exacerbates delays because a piece of mail that may have been an hour late becomes a day late or more.”); Joseph Cogan Decl. Ex. 48 ¶

Defendants’ policy with respect to rigid stop and start times for individual letter carriers is less clear. In arguing that the Stand-Up Talk and the PMGs Expectations PowerPoint do not represent actual policy, Defendants have focused primarily on the limitations upon extra or late trips for trucks. However, the SUT and the PMGs Expectations presentation both mirror Headquarters’ talking points that carriers must start on time and leave on time.

The existence of a policy constraining letter carriers is also supported by other evidence from the field. In Philadelphia, for example, “mail handlers and other postal employees were instructed that all trips, including trucks and carriers, were to leave as scheduled.” Gibson Decl. ¶ 14. National officials have also testified that they have “received reports from current U.S. Postal Service employees that they are prohibited from making late trips and extra trips even if waiting just a few minutes would ensure timely delivery to entire communities.” Coradi Decl. Ex. 49 ¶ 8, ECF No. 47-1. Postal workers have also “been instructed to leave behind mail that is ready for delivery. *Id.* Given this evidence, and no effective rebuttal from Defendants, I conclude for purposes of this motion that the Defendants at some point effectively implemented strict start and stop requirements for letter carriers.

2. Overtime Changes

The Postal Service has also set new work hour reduction targets and sought to aggressively reduce the use of overtime on a nationwide basis. Postal Service leadership has engaged in a coordinated national effort to reduce overtime usage. On August 7, 2020, Postmaster DeJoy stated that he was focused on taking “immediate steps to better adhere to our existing operating plans,” which included “not incurring unnecessary overtime or other costs.” Opening Remarks of Postmaster General Louis DeJoy at Bd. of Governor’s Meeting (Aug. 7,

13, ECF No. 47-1 (testifying that as a result of the changes, “mail that was nearly done being processed may miss the truck entirely and could sit at the facility for at least another day”).

2020) Ex. E, ECF No. 1-1. This message was also reflected in an August 6th letter to Congress, where David Williams noted that, while the Postal Service has not eliminated overtime, leadership is “reemphasizing that operational managers must ensure that overtime is earned as the result of unexpected volume or other factors pursuant to our normal overtime analysis before it is approved.” Letter to Members of Congress from Chief Operating Officer David Williams (Aug. 6, 2020) Ex. D.

Overtime was heavily discussed during the June 26, 2020 conference call between David Williams and the AVPs. *See* PowerPoint – AVP Telepresence (June 26, 2020), Courtroom Ex. 54-13. At several points, the presentation focused on a “Work Hour Reduction Target, Do It Now” initiative. *Id.* The new initiative applied to processing, delivery, and retail services. *Id.* Letter carrier supervisors would be unable to exceed 8 hours a day or forty hours a week without higher approval. *Id.* Carrier work hours would be further reduced by eliminating standby and pre-tour overtime and enforcing rigid start times. *Id.* And with respect to mail processing, leadership sought to “zero out penalty overtime”¹² and “minimize use of pre-tour OT” for employees involved in mail processing of letters and flats. *Id.* Going forward, penalty overtime would be “approved by Plant Manager only.” *Id.* The presentation also reported that changes with respect to penalty overtime would be implemented as of July 4, 2020. *Id.* Control of overtime for mail processing supervisors would be implemented in the period from July 11, 2020 to July 17, 2020. *Id.*

¹² Penalty overtime is when the Postal Service compensates a worker at twice their base rate. Employees receive time and a half for working 9 and 10 hours. After 10 hours, employees receive penalty overtime. *See* Cintron Dep. 86. The PMGs Expectations PowerPoint likely makes reference to penalty overtime when it declares that “POT will be eliminated. This is not cost effective and it will be taken away.” Ex. B, ECF No. 1-1.

These messages were repeated on the July 7, 2020 call that was also led by David Williams and included the AVPs. *See* PowerPoint – AVP Meeting (July 7, 2020), Courtroom Ex. 54-14. Leadership reiterated its call to slash work hours and included a topline message of “64 Million Work Hours” “T-86. Days” (October 1, 2020).¹³ *Id.* The accompanying PowerPoint also included directives to limit work hours for carrier and mail processing supervisors, as well as non-supervisory letter carrier personnel. *Id.* Angela Curtis, who then served as Acting Vice President for Eastern Area Operations, presented on new, reduced overtime targets regarding the manual distribution of mail to carrier routes. *Id.* Curtis also noted that overtime would be limited with respect to retail and customer service. *Id.* The overtime utilization rate for clerks would be cut from 16 percent to 12 percent and pre-tour overtime would be eliminated. *Id.* The July 10, 2020 call with the AVPs and Williams also incorporated the “64M Work Hours” and “T-83 Days” message. *See* PowerPoint – AVP Telepresence (July 10, 2020) Courtroom Ex. 54-9.

Postal Service leadership strongly disputes the existence of a new national overtime policy. Angela Curtis has testified that the current policy allows management to utilize overtime hours as needed to deliver the mail on time. Curtis Decl. ¶¶ 13, 14. She insists that this practice has not changed since Postmaster DeJoy took office. *Id.* Supervision of overtime, she contends, is handled by front-line workers in the field who may freely approve or deny overtime requests. *Id.* at ¶ 14. Curtis also stresses that Headquarters has never issued an instruction that bans or formally caps overtime. *Id.* at ¶ 22; *see also* Colin Decl. ¶ 3, Ex. 37-2.

Curtis’ assertion that there is no change on overtime policy conflicts with Plaintiffs’ declarations. Union officials have testified that “overtime was significantly restricted at certain facilities” in Philadelphia that are represented by Local 308. Gibson Decl. ¶ 14. Although

¹³ October 1, 2020 is the end of the fiscal year for USPS. *See* Cintron Dep. 105.

overtime allowances have increased in Philadelphia since the dramatic reductions in late July and early August, restrictions remain in place. *Id.* at ¶ 16. One Philadelphia branch manager further reported that the overtime restrictions came from the Postmaster General. *Id.* And in Pittsburgh, management instituted a blanket one-week ban on overtime. *See* Kelly Dickey Decl. Ex. 50 ¶ 22, ECF No. 47-1. Management has since lifted its ban but overtime continues to be limited at the facilities represented by Local 322 of the National Postal Mail Handlers Union. *Id.* at ¶ 23. Employees in San Antonio have also alleged that overtime restrictions are in place. *See* Tr. Prelim. Inj. Teleconference at 23, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020).

The PMGs Expectations PowerPoint, which came out of the Northern Ohio district¹⁴ also discusses overtime restrictions. The document states that “[o]vertime will be eliminated . . . we are paying too much in OT and it is not cost effective and will soon be taken off the table.” Ex. B, ECF No. 1-1. The presentation also declares that “[i]f . . . you cannot get the mail out without OT it will remain for the next day.” *Id.* As with the transportation schedules, Postal Service leadership has denied that this PowerPoint represents agency policy. Cintron Decl. ¶ 25.

Ms. Curtis, in support of her claim that there are no overtime restrictions, notes that “prior to June 15, 2020, the Postal Service was incurring overtime at a rate of approximately 13 percent of total work hours nationwide, and since that time the rate has remained approximately 13 percent.” Curtis Decl. ¶ 23 The Service has also claimed that the “[l]owest levels of availability were in July 11 due to localized COVID impact and increased usage of annual leave.” Prokity Decl. ¶ 5, ECF No. 37-2. The testimony regarding the impacts of COVID-19 is supported by the reports of union officials in the field. *See* Dickey Decl ¶ 17 (noting that

¹⁴ *See* Tr. Prelim. Inj. Teleconference at 73, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020).

COVID-19 has exacerbated the need for overtime); Gibson Decl. ¶ 16 (stating that more overtime has been needed for COVID).

There are some obvious inconsistencies in Defendants' account. It is clear that there have been repeated messages from Headquarters regarding its "Work Hour Reduction" initiative. The agency blames its decline in service on the large number of COVID-absences but acknowledges that the overtime rates have remained the same. Logically, however, one would expect overtime to increase with a greater number of absences because a smaller number of employees must perform more work.

The comments regarding overtime from Postmaster DeJoy and Mr. Williams, when viewed in combination with Headquarters' presentation of "Work Hour Reduction Targets" to AVPs and the actions at the facility level in Ohio (as represented by the PMGs Expectations document) and Pennsylvania, strongly suggest that however Defendants seek to characterize official policy, for practical purposes, leadership has encouraged restrictions on overtime in a way that has affected timely delivery of mail.

3. Status of the Transportation and Overtime Policies

The contested policies remain in place. Postmaster DeJoy's August 18, 2020 statement did not suspend transportation changes, and the Cintron Guidelines are still in effect. Cintron Dep. 144. DeJoy has stated that, "effective Oct. 1, we will engage standby resources in all areas of our operations, including transportation, to satisfy any unforeseen demand." Statement of Postmaster General Louis DeJoy (August 18, 2020) Ex. H, ECF No. 1-1. However, it is unclear if Postmaster DeJoy's statement on standby capacity rescinded the former policies. His statement may also apply solely to election mail.

The Postal Service has also not changed its overtime policy in response to public outcry over service; as Postmaster DeJoy reiterated on August 18, 2020, “overtime has, and will continue to be, approved as needed.” *Id.* While this statement serves as additional evidence of the fact that a flat ban is not in place, it does not eliminate the possibility that the agency has instituted new work hours reductions targets and restrictions on overtime.

4. Changes in the Treatment of Election Mail Sent as Marketing Mail

The Postal Service has historically prioritized the processing of Election Mail, defined as “any mailpiece that an authorized election official creates for voters participating in the election process and includes ballots and voter registration materials.” *Office of the Inspector General, Audit Report: Processing Readiness of Election and Political Mail During the 2020 General Elections* (Aug. 31, 2020) Ex. 19 at 1, ECF No. 18-5. Ballots returned by voters to election officials must be sent, at a minimum, as First-Class Mail. *Id.* Current Postal Service officials have reiterated this requirement. Glass Decl. ¶ 4, ECF No. 37-2.

The question in this case is whether the Postal Service is altering its treatment of Election Mail that is sent from election authorities to voters. States may send their election mail as either First-Class mail, which routinely takes 2-5 days to be delivered, or Marketing Mail, which takes 3-10 days to be delivered. *See Office of the Inspector General, Audit Report: Processing Readiness of Election and Political Mail During the 2020 General Elections* (Aug. 31, 2020) Ex. 19 at 1. At this stage, the record in this case does not suggest that the Postal Service intends to deviate from its customary procedures with respect to the processing of Election Mail sent as Marketing Mail.

The Service does not appear to have a formal policy of upgrading Election Mail sent as Marketing Mail to First-Class Mail. *See* Glass Decl. ¶ 18. This conclusion is supported by a 2016

letter sent to election officials which encourages Boards of Election to “use First-Class Mail postage rather than Standard or Non-Profit postage rates when paying for the delivery of outbound absentee or vote by mail ballots.” Glass Decl. 55. The 2016 letter further emphasized that “[t]he Postal Service is committed to processing and delivering Official Election mail within our stated delivery standards. Most First-Class Mail deliveries are made within 2-5 days. Standard Mail deliveries are made within 3-10 days.” *Id.* at 56.

Although Defendants do not have a formal policy of automatically upgrading this class of mail, the Postal Service custom of “advancing” means that Election Mail entered as Marketing Mail usually has a similar delivery speed to First-Class Mail. *See* Glass Decl. ¶ 21. “Advancing” means that when there is excess First-Class processing capacity at a plant, Election Mail entered as Marketing Mail will be processed before all other mail. *Id.*

The evidence regarding specific changes in the Postal Service’s handling of election mail is inconclusive. What is not reasonably in dispute is that the delays that have occurred as a result of the initiatives described above clearly pose a threat to the delivery of Election Mail to and from the voters. As Robert Glass admitted in his deposition, “service performance of Election Mail decreased similar to the decreases we saw in other mail.” Glass Dep. 65-66 Courtroom Ex. 55. And Judge Marrero of the Southern District of New York posed the question starkly to Mr. Cintron in the evidentiary hearing in *Jones v. United States Postal Service*: “Q: Is it possible that in the course of implementing this policy of loading trucks and having them go out on time, that some of the mail that does not get in the trucks and having them go out on time, that some of the mail that does not get in the truck and leave on time could include some election mail? A: It’s possible.” *See* Tr. Prelim. Inj. Teleconference at 67, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020).

5. Impacts of Changes

As an initial matter, it is somewhat concerning that the Postal Service has been inconsistent even as to the standard for First-Class Mail. The official website for the Service describes First-Class Mail as being delivered in “1-3 business days.” *First-Class Mail*, <https://www.usps.com/ship/first-class-mail.htm> (last visited Sept. 27, 2020). In letters sent to election officials, the Postal Service represented that most first-class mail “is delivered [in] 2-5 days.” Letters to Plaintiff States from General Counsel Thomas Marshall Ex. I, ECF No. 1-1. Approximately one month later, a letter was sent to Mail Service Providers stating that “First-Class Mail is delivered in 3 to 5 days.” Letter from Steven W. Monteith Acting Chief Customer and Marketing Officer and Executive Vice President, USPS, to Mail Service Providers (Aug. 26, 2020) Ex. 15 at 8, ECF No. 18-4. In an August 31, 2020 audit report, the USPS Office of Inspector General made clear that one-day delivery is not being accomplished, as First-Class Mail service currently takes 2-3 days within the continental United States. *See Office of the Inspector General, Audit Report: Processing Readiness of Election and Political Mail During the 2020 General Elections* (Aug. 31, 2020) Ex. 19 at 9 n. 13.

As conceded by Postmaster DeJoy,¹⁵ the initiative, which included changes to trucking, overtime, and letter carrier schedules, caused a decline in service. During the week of July 4, 2020 to July 11, 2020, there was a five-point decline in service standards. *See* Q4 To-Date Service Performance For Market Dominant Products, Courtroom Exhibit Ex. 54-16. Mr. Cintron issued his preliminary guidance on July 11, 2020 and performance declined further, to 82.22 percent. *Id.* The lowest point occurred on August 8, 2020, at 81.47 percent. *Id.* Mr. Cintron

¹⁵ On August 13, Postmaster DeJoy touted “substantial improvements” but acknowledged that “this transformative initiative has had unintended consequences that impacted our overall service levels.” Internal Memorandum from Postmaster General Louis DeJoy (Aug. 13, 2020) Ex. G.

maintains that the dip in service could have been attributed to other factors like COVID-19 and “other initiatives that were going on at the same time,” which included “other operating plan initiatives.” Cintron Dep. 146, 149. But at no other point during the pandemic has service fallen in the manner it did in July and August.

Furthermore, although Defendants have claimed that “service performance is rapidly returning to early July levels,” Cintron Decl. ¶ 27, Congressional briefing materials indicate that meaningful delays were still present at the end of August. *See Congressional Briefing: Transportation and Service Performance Updates* (Aug. 31, 2020) Ex. 16, ECF No. 18-4. As of September 5, 2020, the latest data in the record, First-Class mail service was at 88.74 percent, which is still lower than pre-July levels. *See Q4 To-Date Service Performance For Market Dominant Products*, Courtroom Exhibit Ex. 54-16.

The affidavits of current and former Postal Service employees persuasively explain why heavy restrictions on late or extra trips would impact service. John Gibson, President of Local 303 of the National Postal Mail Handler’s Union, details that “[r]igidly requiring trucks to leave at their scheduled time means that trucks leave without all of their mail, which exacerbates delays because a piece of mail that may have been an hour late because a day late or more.” Gibson Decl. ¶ 15. Similarly, Chester Cassel, who worked for the Postal Service for 51 years, underscores that, in his experience as a transportation manager, “it was often necessary to hold trucks for a few minutes at the plant or at the station to make sure that all the day’s mail was loaded on board.” Cassel Decl. ¶ 26. These extra or late trips prevent the “cardinal sin” among Postal Service employees – leaving mail behind. *Id.* at ¶ 9. And the nationwide scope of the restrictions was conceded by the Postmaster in his testimony before the House of Representatives, in which he acknowledged that the changes were in place in “every state a truck

moves in.” See *Protecting the Timely Delivery of Mail, Medicine, and Mail-In Ballots Before the H. Committee on Oversight and Reform*, 116th Cong. 228 (2020) (statement of Postmaster General and Chief Executive Office Louis DeJoy), ECF No. 37-4.

Admittedly, increased operating efficiencies at the Postal Service that result in cost savings are in the public interest. But, consistent with updated reporting from June 2020, testimony before the House of Representatives demonstrated that the Service will remain financially viable through August of 2021. *Id.* at 95. It is therefore curious, at a minimum, that a major initiative would be implemented, in the middle of a public health crisis, four months before a national election where mail-in voting is expected to increase dramatically. Depending on how one views the range of conclusions that can be drawn from the evidence, it might even be considered reckless. Regardless, for the reasons set forth below, it is unlawful.

Plaintiffs go further and argue that the changes are malign in their intent. They draw that inference based upon President Trump’s continued public statements attacking the Postal Service and attacking mail-in voting, coupled with Postmaster DeJoy’s substantial contributions both to the Republican Party and to President Trump. At this stage in the case and with minimal formal discovery, any such conclusion is premature. I do note, however, that I am troubled by, and draw negative inferences from, what appears to be a strategic effort by Defendants to limit the Court’s understanding of the significant degree to which some top officials of the Postal Service were directly involved in the operational changes that went into effect in July. My concern on that score weighs strongly in favor of injunctive relief, to assure that the necessary steps are taken to cure these critical deficits.

II. The Controlling Procedural Standard

A plaintiff that seeks a preliminary injunction must “establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The first two factors are the most critical; the Third Circuit has stated that plaintiffs “must meet the threshold for the first two most critical factors... and if the gateway factors are met, a court then considers the remaining two factors, possibility of harm to others and the public interest.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). The Supreme Court has further emphasized that the “purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Benisek v. Lamone*, 138 S.Ct. 1942, 1945 (2018) (citing *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

III. Subject-Matter Jurisdiction

Congress enacted the PRA in 1970. In doing so, it created the modern Postal Service, and defined its susceptibility to private suit. It gave the Postal Service the power to “sue and be sued in its official name.” 39 U.S.C. § 401. Congress also conferred upon federal district courts the power to hear cases by or against the Postal Service, saying “[e]xcept as provided in this section, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.” 39 U.S.C. § 409(a). Separately, 28 U.S.C. § 1339 states that “[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.”

The PRA’s overarching policy concern is to provide “basic and fundamental service . . . to the people.” 39 U.S.C. § 101(a). Pursuant to that end, the Postal Service is obligated to “develop

and promote adequate and efficient postal services.” 39 U.S.C. § 3661(a). When deciding to make “change[s] in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis,” the Postal Service must first “submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.” 39 U.S.C. § 3661(b). Users of the mail then have an opportunity to participate in a public hearing subject to Administrative Procedure Act (“APA”) rules before the PRC issues an advisory opinion. 39 U.S.C. § 3661(c).

The Commission has an additional role with respect to 39 U.S.C. § 3661. For example, the PRA invests the Commission with original jurisdiction over “*Rate and Service Complaints*.” Thus, while the PRA gave district courts broad jurisdiction over Postal Service matters, Congress did not give district courts exclusive jurisdiction over its disputes. 39 U.S.C. § 3662(a).

Section 3662(a), titled “*Rate and Service Complaints*,” provides:

Any interested person (including an officer of the Postal Regulatory Commission representing the interests of the general public) who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

The question before me is whether this Court may exercise jurisdiction, under 28 U.S.C. § 1339 and the PRA’s general statutory grant of § 409(a), over Plaintiffs’ claim that the Defendants acted unlawfully when they failed to consult with the Commission and participate in a public hearing before making “change[s] in the nature of postal services which will generally affect service on a nationwide . . . basis.” 39 U.S.C. § 3661(b).

The Postal Service argues the Commission’s authority is exclusive and that this Court lacks authority to review its action. Its position is not without some irony. It is accused of bypassing the Commission and thereby acting beyond its authority, and, in turn, defends itself by stating that it

is the Plaintiffs who must resort to the Commission in order to obtain relief. *See* Defs. Resp. in Opp'n to Pls. Mot. Prelim. Inj. 25-30, ECF No. 37. These circumstances arise partially because of the dual roles of the Commission with regard to Chapter 36 of the PRA. First, it hears “Rate and Service Complaints” from “interested part[ies]” per section 3662(b). Second, *before* the Postal Service may make “change[s] in the nature of postal services which will generally affect service on a nationwide . . . basis,” 39 U.S.C. § 3661(b), it holds public hearings and issues advisory opinions. 39 U.S.C. § 3661(c). The issue is nuanced and complex, but in the final analysis I am persuaded that this Court has jurisdiction.

By way of initial summary, before proceeding through the analysis, it bears repeating that 28 U.S.C. § 1339 provides that “[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.”¹⁶ More importantly, section 409(a) of the PRA constitutes an additional jurisdictional grant that explicitly states non-reviewability is the exception—not the rule. With regard to section 409(a), the Third Circuit has stated that “we cannot imagine how Congress could grant jurisdiction more plainly.” *Licata v. U.S. Postal Serv.*, 33 F.3d 259, 261 (3d Cir. 1994).

Moreover, the Court has not found, nor have the Defendants cited, any case in which a court denied jurisdiction over a claim that the Postal Services acted outside of its authority with regard to the process required under section 3661(b). In contrast, the Third Circuit has addressed claims that the Postal Service acted outside its authority when it bypassed the Commission, where the PRA explicitly calls for Commission input. It exercised jurisdiction, even though according to

¹⁶ It should be noted that the Supreme Court attaches less significance to grants of general jurisdiction such as 28 U.S.C. § 1331 when the governing statute provides for judicial review in a particular court, *see e.g., Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), but the combination of three statutory sources—28 U.S.C. § 1331, 28 U.S.C. § 1339, and 39 U.S.C. § 409(a) carries some weight.

Defendants’ rationale here, Plaintiffs would have been obligated to bring those claims exclusively to the Commission. *See United Parcel Serv., Inc. v. U.S. Postal Serv.*, 604 F.2d 1370, 1381 (3d Cir. 1979) *cert. denied*, 446 U.S. 957 (1980).¹⁷ Similarly, the Sixth Circuit has exercised jurisdiction per 28 U.S.C. § 1339 and section 409(a) over *ultra vires* claims against the Postal Service with regard to the promulgation of regulations. *See Combined Commc'ns Corp. v. U.S. Postal Serv.*, 891 F.2d 1221, 1227-28 (6th Cir. 1989). Moreover, when confronted with the precise legal issue this court is called upon to decide—a claim relating to the failure of the Postal Service to undertake the process mandated under section 3661(b) in making nationwide changes to service—both the Fifth Circuit and a district court have exercised jurisdiction under section 409(a). *See Buchanan v. U.S. Postal Serv.*, 375 F. Supp. 1014, 1017 (N.D. Ala. 1974), *aff'd in part, vacated in part*, 508 F.2d 259 (5th Cir. 1975) (affirming district court order enjoining changes in service); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, No. CIV.A.06 726 CKK, 2007 WL 2007578, at *7 (D.D.C. July 6, 2007). My ultimate conclusion is that jurisdiction exists for the reasons set forth more fully below.

A. Standard of Review

In this inquiry I am guided by a trio of Supreme Court cases. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). They provide the framework to determine

¹⁷ The Plaintiffs in *United Parcel Serv., Inc.* argued that the Postal Services acted outside its authority in bypassing the Commission when engaging in a temporary ratemaking experiment *vis a vis* former section 3622, which required that any change in a rate of postage be recommended by the Postal Rate Commission. 39 U.S.C. § 3622 (1970), *amended by* 39 U.S.C. § 3622 (1998); *United Parcel Serv., Inc.*, 604 F.2d at 1374. The previous version of section 3662 allowed “[i]nterested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title . . . to lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe.” 39 U.S.C. § 3662 (1970), *amended by* 39 U.S.C. § 3622 (2006). The Commission, in its discretion, would hold hearings on such complaint and issue a recommended decision. *Id.* Then, “[a] decision of the Governors to approve, allow under protest, or modify the recommended decision of the Postal Rate Commission” could be appealed to any court of appeals of the United States. *Id.*

when judicial review is appropriate if a statute also provides for administrative review and the right to appeal the administrative decision to a circuit court. In the most recent case, *Elgin*, the Supreme Court instructs that where the circuit court is capable of providing meaningful review, the “appropriate inquiry is . . . whether it is ‘fairly discernible’ from the [statute] . . . that Congress intended [litigants] . . . to proceed exclusively through the statutory review scheme.” 567 U.S. at 9-10 (alteration in original) (internal citations omitted). “To determine whether it is ‘fairly discernible’ that Congress precluded district court jurisdiction over petitioners’ claims, we examine the . . . [statute’s] text, structure, and purpose.” 567 U.S. at 10 (alteration in original) (internal citations omitted).

The Third Circuit has recently utilized *Elgin*’s approach in determining the appropriateness of judicial review of agency action. *See E.O.H.C. v. Sec’y U. S. Dep’t of Homeland Sec.*, 950 F.3d 177, 188 (3d Cir. 2020); *see also Guerra v. Consol. Rail Corp.*, 936 F.3d 124, 135 (3d Cir. 2019); *cf. Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 195 (3d Cir. 2018) (noting that it would utilize the approach outlined in *Thunder Basin* had it not already decided the jurisdictional question through the explicit language of the statutory text).

B. Discussion

I begin with the analysis under the framework set forth in *Elgin*: where the circuit court is capable of providing meaningful review, the “appropriate inquiry is . . . whether it is ‘fairly discernible’ from the [statute] . . . that Congress intended [litigants] . . . to proceed exclusively through the statutory review scheme.” 567 U.S. at 9-10 (alteration in original). Assuming the Plaintiffs’ claims could at some later point ultimately be addressed by the D.C. Circuit under 39 U.S.C. § 3663¹⁸ following administrative review by the Commission, I must determine whether

¹⁸ 39 U.S.C. § 3663 provides: “A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes

Congress' intent to preclude district court jurisdiction is "fairly discernible in the statutory scheme." *Id.* This requires an examination of the statute's text, structure, and purpose. *Id.*; *see E.O.H.C.*, 950 F.3d at 188; *see also Guerra*, 936 F.3d at 135.

If an intent to preclude judicial review is not discerned, the language of the statute authorizing review has force and effect. *See Buchanan v. U.S. Postal Serv.*, 375 F. Supp. 1014, 1017 (N.D. Ala. 1974), *aff'd in part, vacated in part*, 508 F.2d 259 (5th Cir. 1975) (affirming district court order enjoining changes in service); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, No. CIV.A.06 726 CKK, 2007 WL 2007578, at *7 (D.D.C. July 6, 2007) (exercising jurisdiction where USPS allegedly acted beyond its authority *vis a vis* section 3661(b)); *see also United Parcel Serv.*, 604 F.2d 1370, 1381 (3d Cir. 1979) (exercising jurisdiction where USPS allegedly acted beyond its authority in ratemaking context, despite the availability of resort to the Commission); *Commc'ns Corp.*, 891 F.2d 1221, 1228 (6th Cir. 1989) (exercising jurisdiction per section 409(a) over *ultra vires* claims against the Postal Service with regard to the promulgation of regulations.)

The most relevant sections for this analysis are sections 3661, 3662(a), and 409(a), along with 28 U.S.C. § 1339. Section 3661, titled "*Postal Services*," provides:

- (a) The Postal Service shall develop and promote adequate and efficient postal services
- (b) When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such

final, institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia." However I note that the Third Circuit recently held in the context of the INA that "claims that cannot be effectively handled by the administrative review process," such as "where review and relief may come too late" deprive the claimant of meaningful review. *E.O.H.C.*, 950 F.3d at 186 (internal citations omitted); *see also Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868, 875 (3d Cir. 1996) ("It follows that . . . [plaintiff] has alleged a sufficiently serious irreparable injury to lead us to conclude that the administrative review process is insufficient to afford him full relief.") (alteration in original).

proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.

(c) The Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.

Next, section 3662(a), titled “*Rate and Service Complaints*,” provides:

Any interested person (including an officer of the Postal Regulatory Commission representing the interests of the general public) who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

28 U.S.C. § 1339 states:

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

Finally, section 409(a) provides:

Except as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.

In analyzing the text, given the Third Circuit’s statement in *Licata*, 33 F.3d at 261, I start from the premise that section 409(a) consists of a general grant of jurisdiction over all actions brought against the Postal Service. Yet section 409(a) counsels that exceptions to that rule exist, given its opening phrase, “[e]xcept as otherwise provided in this title” 39 U.S.C. § 409(a).

In order to determine whether section 3662, as it relates to section 3661(b), constitutes the exception, thus divesting district courts’ jurisdiction over claims relating to section 3661(b), I examine the text of section 3662. Section 3662 is entitled “*Rate and Service Complaints*.” The explicit text of section 3662 provides that “any interested person . . . may lodge a complaint with

the Postal Regulatory Commission” (emphasis added) when that person believes the Postal Service is not operating in conformance with Chapter 36 and a number of other sections (which predominantly deal with rates and service).¹⁹ Chapter 36 includes section 3661.

At the outset, the term “may” suggests that resort to the Commission is permissive. The principal case on which Defendants rely, *Lemay*, makes this very point: “[c]ertainly, as a general rule of statutory construction, ‘may’ is permissive, whereas ‘shall’ is mandatory. *LeMay v. U.S. Postal Serv.*, 450 F.3d 797, 799 (8th Cir. 2006) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). In that regard, the Third Circuit has emphasized that courts should assume words mean what they appear to say: “[i]f the Act’s meaning is plain from its text, our task is complete, unless the result falls into the narrow category of cases where the plain meaning of the statute is ‘demonstrably at odds with the intentions of its drafters.’” *Air Courier Conference of Am./Int’l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1217–18 (3d Cir. 1992) (internal citations omitted). I note as well the Supreme Court’s recent and forceful comment on extra-textual analysis: “[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.” *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

Yet, as numerous courts have observed, the legislative history of the PRA reveals a Congressional desire “to minimize external intrusions on the Postal Service’s managerial independence.” *LeMay*, 450 F.3d at 800 (citing *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259, 262 (5th Cir.1975)). In crafting the PRA, “Congress intended to afford postal management the ‘unfettered authority and freedom that has been denied for years to maintain and operate an

¹⁹ These sections include: 39 U.S.C. § 101(d) (rates); 39 U.S.C. § 401(2) (rules and regulations) (services, rates, fees, and classifications); 39 U.S.C. § 404a (rules and regulations); 39 U.S.C.A. § 601 (services).

efficient service.’” *Lemay*, 450 F.3d at 800 (citing Sen. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970)).

Thus, despite the explicit presumption in favor of judicial review under both 28 U.S.C. § 1339 and section 409(a) of the PRA, as well as the general rule of statutory construction suggesting that “may” is permissive, some courts reviewing “claims regarding postal rates and services,” *Lemay*, 450 F.3d at 799, have looked beyond the text and concluded that the legislative history reveals Congress intended to divest jurisdiction from the district courts.²⁰ Defendants point to a number of such cases. *Id.*; see also *Foster v. Pitney Bowes Corp.*, 549 F. App’x 982 (Fed. Cir. 2013); *Bovard v. U.S. Post Office*, 47 F.3d 1178 (10th Cir. 1995); *Pep-Wku, LLC v. USPS*, No. 20-cv-0009-GNS, 2020 WL 2090514, at *3 (W.D. Ky. Apr. 30, 2020); *McDermott v. Potter*, No. C09-0776RSL, 2009 WL 2971585, at *3 (W.D. Wash. Sept. 11, 2009), *aff’d sub nom. McDermott v. Donahue*, 408 F. App’x 51 (9th Cir. 2011); *Rodriguez v. Hemit*, No. C16-778 RAJ, 2018 WL 3618260, at *2 (W.D. Wash. July 30, 2018); *Striley v. United States Postal Serv.*, No. 16-CV-07233-HRL, 2017 WL 513166, at *3 (N.D. Cal. Feb. 8, 2017); *Murphy v. United States Postal Serv.*, No. C 14-02156 SI, 2014 WL 4437731, at *3 (N.D. Cal. Sept. 9, 2014); *Powell v. United States Postal Serv.*, No. CV 15-12913-FDS, 2016 WL 409672, at *1 –2 (D. Mass. Feb. 2, 2016).

But each of the cases cited by the Defendants involved run-of-the-mill allegations of unsatisfactory service or issues far afield from those contemplated in section 3661(b). See, e.g., *Lemay*, 450 F.3d at 798 (complaint that Postal Service’s heightened Priority Mail charges did not correspond with enhanced services); *Foster v. Pitney Bowes Corp.*, 549 F. App’x at 984 (complaint arising under PRA section 404(a) that the Postal Service stole plaintiff’s ideas contained in patent application); *Bovard*, 47 F.3d at 1178 (complaint that USPS unreasonably discriminated against

²⁰ As discussed below, I find the legislative history discussed by *Lemay* and other courts as limited to garden variety claims about postal service.

Plaintiff by switching mail service from ordinary to afternoon delivery); *Pep-Wku, LLC*, 2020 WL 2090514, at *1 (W.D. Ky. Apr. 30, 2020) (complaint by owners of multi-unit apartment complexes that USPS failed to sort mail before delivering it to their apartment complexes, thereby forcing them to do the sorting themselves); *McDermott v. Potter*, 2009 WL 2971585, at *1 (W.D. Wash. Sept. 11, 2009), (complaint about closure of local postal facility); *Hemit*, No. C16-778 RAJ, 2018 WL 3618260, at *1 (W.D. Wash. July 30, 2018) (complaint about bad attitude of mail carrier); *Striley*, 2017 WL 513166, at *1 (N.D. Cal. Feb. 8, 2017) (complaint that USPS unlawfully increased the rates for Plaintiff’s post office box, crammed Plaintiff’s box full of advertising materials, and failed to deliver an article of mail), *Murphy*, 2014 WL 4437731, at *1 (N.D. Cal. Sept. 9, 2014) (complaint about denial of Plaintiff’s postal services at a local United States post office); *Powell*, 2016 WL 409672, at *1 (D. Mass. Feb. 2, 2016) (complaint that local post office refused to deliver mail to the Plaintiff).²¹

Although these lawsuits were largely filed by *pro se* plaintiffs who were likely without the legal background to ground their claims in a specific statutory provision, the overwhelming majority of the claims at issue are precisely captured by section 3661(a), which requires the Postal Service to provide adequate and efficient service to the public. None involved a claim that the USPS circumvented the process required when making a “change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis.” 39 U.S.C. § 3661(b). The nature of the dispute in *Lemay*—a “common dispute over . . . services”—controlled the Eighth Circuit’s conclusion that the legislative history weighed against exercising jurisdiction.

²¹ Other district court cases not cited by the parties are consistent. *Azzolina v. U.S. Postal Serv.*, 602 F. Supp. 859 (D.N.J.1985) (complaint challenged USPS selection of post office site in his township); *Tedesco v. U.S. Postal Serv.*, 553 F. Supp. 1387 (W.D.Pa.1983) (Plaintiffs sought to have post office established in their township and brought action against Postal Service based on allegations of breach of duty to provide prompt, reliable, and efficient service.) They fit the same mold.

450 F.3d at 801. Its opinion makes that clear in the following summary of its holding: “After correctly perceiving the matter was a common dispute over rates and services, the district court rightly determined Congress had placed authority over such matters in the Postal Rate Commission, at which point the district court was divested of its jurisdiction.” *Id.*

Unlike the claims in the cases cited by Defendants, which dealt with the adequacy and efficiency of service under section 3661(a), Plaintiffs’ core challenge is that the Postal Service acted outside of its authority in making changes without consulting first with the Commission in violation of section 3661(b), a wholly separate provision. *See* Pls. Reply Supp. Mot. Prelim. Inj. 7, ECF No. 47. They argue that while it may not be unreasonable to infer that Congress intended to foreclose judicial review of claims arising under section 3661(a), which can most properly be characterized as localized service-related disputes, *id.* at 7, Congress certainly did not have the same intention *vis a vis* claims relating to section 3661(b). That section focuses on the *process* to which the Postal Service must adhere before making a “change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis.” 39 U.S.C. § 3661(b). Likewise, the Commission has emphasized that “the twin hallmarks of section 3661(b) are advance public disclosure of Postal Service plans that will affect service on a nationwide basis, in the form of a request for an advisory opinion from the Commission, and an opportunity for public comment on those plans.” Commission Report Concerning Complaint on First-Class Mail Standards Service, Docket No. N2001-3, at 2 (April 17, 2006).

So I return again to the text, structure, and legislative history of the PRA with regard to section 3662 and its relation to section 3661(b) — the specific provisions that are before this court — bearing in mind that reviewability is embedded in the relevant statutes. 28 U.S.C. § 1339; 39 U.S.C. § 409(a). In reviewing the relevant text of sections 3662 and 3661, I note once more that

Congress elected to use the term “may” when it described the right of “any interested user” to file a complaint with the Commission. 39 U.S.C. § 3662(a). At the outset, this plain text suggests that resort to the Commission is permissive. *LeMay*, 450 F.3d at 799 (citing *Anderson*, 329 U.S. at 485 (1947)). To interpret it otherwise requires countervailing evidence from the overall structure and legislative history of the PRA. *Id.*; see *Bostock*, 140 S. Ct. at 1737.

Turning to the structure of the PRA and its legislative history, certainly Congress intended to reduce outside interference with several facets of Postal Service operations. As discussed above, other courts have not unreasonably concluded that “common disputes over . . . services” were meant exclusively for the Commission. *Lemay*, 450 F.3d at 801. But section 3661(b)—the provision Plaintiffs claim that Defendants have violated—clearly falls outside the scope of such common disputes. Indeed, Congress instituted section 3661(b) because it expected that these changes were uncommon and would require stakeholder input. See *Buchanan*, 508 F.2d at 262 (5th Cir. 1975) (“The language of the statute, the legislative history, and the existence of alternative remedies indicate that Congress intended 3661 to apply to only a specified class of decisions. Postal management was left with broad decision-making power, subject to 3661 requirements for specified decisions”). That section requires not only that the Postal Service consult with the Commission before making changes that fall within its purview, 39 U.S.C. § 3661(b), but also that a public hearing be held in accordance with APA procedures. 39 U.S.C. § 3661(c). I find this provision significant, as the Postal Service, for the most part, is not otherwise subject to APA review. 39 U.S.C. § 410; *Nat'l Easter Seal Soc. for Crippled Children & Adults v. U.S. Postal Serv.*, 656 F.2d 754, 767 (D.C. Cir. 1981) (“Congress provided that the procedural requirements of the APA apply in certain, limited circumstances for example, when major changes with a nationwide impact are contemplated . . .”).

Moreover, the only court presented with section 3661(b) claims as they relate to section 3662 has emphasized the distinction between “common disputes over . . . services” on the one hand, *LeMay*, 450 F.3d at 801, and claims about nationwide changes relating to section 3661(b) on the other. *Buchanan*, 508 F.2d 259, 262 (5th Cir.1975) (exercising jurisdiction where the Postal Service allegedly acted beyond its authority *vis a vis* 3661(b)). In *Buchanan*, the Fifth Circuit found that the PRA offered a “harmonious scheme,” whereby those seeking to challenge whether the Postal Service improperly bypassed the Commission could do so in federal district court, whereas those with service-related complaints akin to section 3661(a) could file complaints with the Commission. 508 F.2d at 264. In reaching this conclusion, the court found that “[t]here is much in the legislative history of the Act to indicate that Congress intended to increase the ability of the Postal Service management to make the decisions necessary to the efficient and effective operation of the postal system,” but also evident is the “goal of providing to the American people a public service which is sensitive and responsive to their needs.”²² 508 F.2d at 262; *see Am. Postal Workers Union, AFL-CIO*, 2007 WL 2007578, at *7 (D.D.C. July 6, 2007).

Nothing in the legislative history of subsequent amendments suggests an intention to legislatively overrule *Buchanan*. *See, e.g.*, S. Rep. No. 108-318, at 48 (2004); H.R. Rep. No. 109-66, at 52 (2005). In describing section 3662, the House and Senate Committee reports are nearly identical. They focus almost entirely on the Commission’s expanded enforcement powers to address rate and service issues promptly and effectively. The House Committee Report states that the changes to section 3662 “strengthen the authority of the Postal Regulatory Commission to act

²² This reading is consistent with the opening section of Title 39 entitled “*Postal Policies*,” which begins with the following provision: “The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people.” 39 U.S.C. § 101(a).

on complaints,” H.R. Rep. 109-66, at 52, and explains that it will be required to address complaints within 90 days of receipt. *Id.* It notes that the Commission can now levy fines against the Postal Service for certain violations. *Id.* Clearly the thrust of the report is on enforcement powers and not the scope of the Commission’s authority or its preclusive impact on judicial remedies. Indeed, the House Committee cites only one way that the changes would enlarge the scope of the authority of the Commission. *Id.* With the revisions in place, the Commission could now order the Postal Service to adjust rates or suspend product rates or classification. *Id.*

Similarly, the Senate Committee Report in a section entitled “Rate and Service Complaints,” summarily states that the new changes provide the Regulatory Commission with enhanced authority to respond to complaints of pricing, service, or other actions by the Postal Service in violation of law.” S. Rep. No. 108-318 at 48. The Committee Report then notes a number of ways in which the Commission’s enforcement powers had expanded under the revised language. First, the changes required prompt attention by the Committee within 90 days of receiving complaints. *Id.* Second, the Commission could now levy fines against the Postal Service. *Id.* Again, the Senate Report discusses one area in which the actual scope of the Commission’s authority would be enlarged: under the new changes, the Commission could order the Postal Service to adjust rates if they are set below attributed costs, which was authority that the Rate Commission had lacked under the original version of the PRA. *Id.* Thus, although explaining changes in enforcement powers and the scope of the Commission’s authority, neither the House nor the Senate Reports mentioned changes with regard to claims relating to section 3661(b), nor any intention to displace judicial review.²³

²³ Neither party has brought anything to the court’s attention to contradict this reading of the legislative history.

The Act's legislative history simply does not convince me that Congress intended courts to diverge from the plain meaning of the text. And, I must be mindful of the Third Circuit's admonition in *Air Courier*, which was analyzing PRA provisions regarding ratemaking, not "to use ambiguous legislative history to contradict a clear statute's text." *Air Courier Conference of Am./Int'l Comm.*, 959 F.2d at 1223. *See also Bostock*, 140 S. Ct. at 1737.

In fact, shortly after the current version of section 3662 was enacted, a district court explicitly *rejected* the argument that it lacked jurisdiction over a complaint regarding the USPS's alleged non-compliance with section 3661(b). *Am. Postal Workers Union, AFL-CIO*, 2007 WL 2007578, at *7 (D.D.C. July 6, 2007). As the court explained, "[p]laintiff's Complaint seeks a declaration that it is unlawful for USPS to proceed with modification to its mail processing operations . . . because USPS failed to submit [the proposed modifications] to the PRC for an advisory opinion within a reasonable time prior to the implementation of . . . [the modifications]." *Id.* "Plaintiff's Complaint appears to be properly brought before this Court pursuant to 39 U.S.C. § 409, which provides that 'the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against [USPS]'" *Id.* Additionally with regard to section 3662, the D.C. Circuit has noted that the PRA's "scheme . . . is inherently claim-dependent, and the relevant statutory language even suggests an aim on the part of Congress to allow complainants a role in framing their claims (and choosing their forum)." *Anatol Zukerman & Charles Krause Reporting, LLC v. U.S. Postal Serv.*, 220 F. Supp. 3d 27, 34 (D.D.C. 2016).

Likewise, the Third Circuit has exercised jurisdiction in ratemaking cases involving allegations that the Postal Service improperly bypassed the Commission, where resort to the Commission was also available under section 3662. *United Parcel Serv.*, 604 F.2d at 1381 (holding that Postal Service acted outside its authority in bypassing the PRC before engaging in a temporary

ratemaking experiment). These rulings are not inconsistent with the reasoning of *Lemay*, which found that section 3662 constitutes “a *specific* grant of authority over a *defined* category of postal rate/postal service concerns.” 450 F.3d at 800 (emphasis added). That the Third Circuit has exercised jurisdiction over claims otherwise susceptible of administrative review by the Commission per section 3662 supports a conclusion that section 3662 *does not* divest district courts of jurisdiction under 28 U.S.C. § 1339 and section 409(a), where plaintiffs claim that the Postal Service acted outside of its authority in bypassing the Commission. *United Parcel Serv., Inc.*, 604 F.2d at 1381.

In light of the text, structure, and legislative history, and informed by decisions from the Third and Fifth Circuits, I do not find it “fairly discernible” that Congress intended to preclude district courts from hearing claims related to section 3661(b), which contemplates changes of national significance, simply because resort to the Commission is available.²⁴ I echo the Third Circuit in noting that, “as a policy matter, ‘it would be passing strange for an ultra vires agency action to be . . . insulated from judicial review.’” *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 820 F.3d 592, 600 (3d Cir. 2016) (quoting *Teamsters Local Union No. 455 v. N.L.R.B.*, 765 F.3d 1198, 1201 (10th Cir. 2014)).²⁵ Otherwise, as Plaintiffs suggest, “the Postal Service could, for example, choose to stop delivering mail received from select zip codes the week before an election . . . and the States could do nothing about it.” *Pl. Resp.* at 16, ECF No. 47.

²⁴ If Congress had indeed intended to preclude review over such claims, it could have changed the language of section 3661(b) from the permissive “may” to “must” or “shall” when it adopted the PAEA in December 2006. Indeed, when the PAEA was adopted, Congress used the term “shall” in the very same section. 39 U.S.C. § 3661(c). This coupling further suggests that “may” in section 3662(a) means what it says.

²⁵ It should be further borne in mind that “[t]he law is settled that if a federal officer does or attempts to do acts which are in excess of his authority or under authority not validly conferred, equity has jurisdiction to restrain him.” *Zirin v. McGinnes*, 282 F.2d 113, 115 (3d Cir. 1960) *citing* *State of Colorado v. Toll*, 268 U.S. 228 (1925); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); and *Harper v. Jones*, 195 F.2d 705 (10th Cir. 1952), *cert. denied*, 344 U.S. 821 (1952).

To further illustrate why judicial review is warranted here, it is useful to return to *Thunder Basin*. 510 U.S. 200. There, the Supreme Court considered the question of jurisdiction in the context of the Mine Act, wherein Congress did not provide explicit guidance on whether judicial review was precluded by the statute’s administrative scheme, and a plaintiff was seeking injunctive relief in the court. *Id.* at 202-06. The nature of the mine operator’s claim against the Mine Safety and Health Administration (MSHA) was that certain regulations the MSHA had promulgated violated its rights under the National Labor Relations Act. *Id.* at 205. The mine operator sought to enjoin penalties to which it was subject for failure to comply with those regulations, prior to enforcement by Secretary of the Department of Labor.²⁶ *Id.* It had filed the motion for a preliminary injunction in federal district court, despite the fact that the statutory scheme allowed mining operators thirty days to challenge citations via the Federal Mine Safety and Health Review Commission (MSHRC), whose determinations were reviewable by courts of appeals. *Id.* at 208.

To ascertain whether it was “fairly discernible” that Congress intended to preclude judicial review of such claims, the Court reviewed the text, structure, and legislative history of the Mine Act. *Id.* at 206-12. Ultimately it concluded that “the Mine Act’s comprehensive enforcement structure, combined with the legislative history’s clear concern with channeling and streamlining the enforcement process, establishes a ‘fairly discernible’ intent to preclude district court review . . .” *Id.* at 216 (internal citations omitted). It thus held that the MSHRC had exclusive jurisdiction over such claims. *Id.*

²⁶ Section 814 of the Mining Act provides that the Secretary may issue a citation if he “believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter.” 30 U.S.C. § 814.

The Court found it persuasive that the structure of the Mine Act expressly authorized district court jurisdiction in only two provisions, both of which empowered the Secretary of the Department of Labor to enjoin violations, and neither of which afforded mine operators a corresponding right. *Id.* at 209. Moreover “[t]he Act’s comprehensive review process” did “not distinguish between preenforcement and postenforcement challenges” *Id.* at 208-09. And the Court stressed the “detailed structure for reviewing violations of ‘any mandatory health or safety standard, rule, order, or regulation promulgated’ under the Act.” *Id.* at 207 (internal citations omitted).

The Court also found that the legislative history of the statute weighed against exercising jurisdiction over the claims of mine operators. *Id.* at 209-10. At the time of the Mining Act’s passage, worker accidents were common, and Congress expressed concern that mine operators would be able to re-litigate civil-penalty assessments in federal district court once the administrative review process was complete, thereby “seriously hamper[ing] the collection of civil penalties.” *Id.* at 210. Thus, Congress expressly eliminated mine operators’ rights to challenge a final penalty assessment *de novo* in district court. *Id.*

The case before us differs meaningfully from *Thunder Basin* in several key respects. First and foremost, unlike the limited jurisdictional grants in the Mine Act, both 28 U.S.C. § 1339 and section 409(a) of the PRA explicitly grant jurisdiction in cases involving the Postal Service, with section 409(a) explicitly granting jurisdiction in cases *against* the Postal Service. *Licata*, 33 F.3d at 261-62. That explicit grant is subject only to exceptions within the statute.²⁷ 39 U.S.C. § 409(a). In contrast, the Mine Act *did not* include a grant of general jurisdiction to district courts in suits

²⁷ I reiterate that the combination of three statutory sources—28 U.S.C. § 1331, 28 U.S.C. § 1339, and 39 U.S.C. § 409(a) carries some weight.

against the MSHA or the Secretary of Labor. *Thunder Basin*, 510 U.S. at 209. To the contrary, the Mine Act authorized jurisdiction in only two distinct areas, both of which empowered the Secretary of Labor to utilize district courts to augment its enforcement powers against regulated entities. *Id.*

Second, the Mine Act’s review process did not discuss pre-enforcement challenges; it told mine operators exactly when they had a right to weigh in on the process, and that was *after* the Secretary of Labor issued citations. *Id.* at 208-09. Here, the distinction in the PRA between pre-implementation and post-implementation of certain Postal Service actions is fundamental. Indeed, Plaintiffs’ claims relate precisely to that distinction. Per sections 3661(b) and 3661(c), the PRA reserves for both the Commission and the public the right to provide input *before* the Postal Service makes nationwide changes affecting the nature of the postal services, a right which Plaintiffs allege was denied when USPS skirted the statutorily mandated process.²⁸

Finally, an interpretation allowing judicial review in *Thunder Basin* would have thwarted the goals of the statute. *Id.* at 209-10. Congress’s purpose in passing the Mine Act was to empower the Secretary of Labor to penalize mine operators violating health and safety standards accordingly, without being hampered at the collection stage. *Id.* at 210. *De novo* resort to a district court by mine operators would have complicated collection efforts, thus undermining the legislation’s purpose. But the instant matter is different. Allowing the public to resort to federal district court when the Postal Service violates the *public’s statutorily mandated right* to a hearing before nationwide changes are made under section 3661 only supports the PRA’s overarching

²⁸ Again, the Commission has pointed out that “[t]he twin hallmarks of section 3661(b) are advance public disclosure of Postal Service plans that will affect service on a nationwide basis, in the form of a request for an advisory opinion from the Commission, and an opportunity for public comment on those plans.” Commission Report Docket No. N2001-3, at 2.

policy, which is to provide a “basic and fundamental service . . . to the people.” 39 U.S.C. § 101. The availability of judicial review in such limited instances only serves to support that policy.

Thus, applying the Supreme Court’s test in the context of the PRA, it is entirely sensible to conclude that section 3662 precludes review of “common disputes over . . . services,” *id.*, given that these complaints comprise the core language of, and guiding principle behind, section 3662. But as to claims relating to section 3661(b), the controlling test supports the availability of judicial review. *See Buchanan*, 508 F.2d at 262 (5th Cir. 1975); *United Parcel Serv.*, 604 F.2d at 1381 (holding that Postal Service acted outside its authority in bypassing the PRC before engaging in a temporary ratemaking experiment); *Am. Postal Workers Union, AFL-CIO*, 2007 WL 2007578, at *7 (D.D.C. July 6, 2007) (explicitly *rejecting* the argument that it lacked jurisdiction under 409(a) regarding a complaint *vis a vis* USPS’s alleged non-compliance with section 3661(b)); *see also Anatol Zukerman*, 220 F. Supp. 3d at 34 (the PRA’s “scheme . . . is inherently claim-dependent, and the relevant statutory language even suggests an aim on the part of Congress to allow complainants a role in framing their claims (and choosing their forum)”).

In summary, Congressional intent to preclude district courts from hearing claims relating to section 3661(b) is not fairly discernible from the text, structure, and legislative history of the PRA.²⁹ The Defendants have not overcome the statutory language authorizing judicial review per

²⁹ If I had been unpersuaded by Plaintiffs’ argument that Congressional intent to preclude review is not fairly discernible in the text, structure, and legislative history of the PRA, I could also have considered “‘three additional factors’” to override the presumption of the unavailability of judicial review. *Elgin*, 567 U.S. at 15 (citing *Free Enter. Fund*, 561 U.S. at 489). Under these additional exceptions, which are not applied according to any “strict mathematical formula,” *Arch Coal v. Acosta*, 888 F.3d 493, 500 (D.C. Cir. 2019), courts may find that Congress did not intend to limit jurisdiction where: ‘a finding of preclusion could foreclose all meaningful judicial review’; if the suit is ‘wholly collateral to a statute’s review provisions’; and if the claims are ‘outside the agency’s expertise.’ *Elgin*, 567 U.S. at 15 (internal citations omitted).

Nevertheless, having been persuaded that Congressional intent to preclude review is not fairly discernible, I need not consider those factors under *Elgin*, which instructs that where the circuit court is capable of providing meaningful review, the “appropriate inquiry is . . . whether it is ‘fairly discernible’ from the [statute] . . . that Congress intended [litigants] . . . to proceed exclusively through the statutory review scheme.” 567 U.S. at 9-10 (alteration in original) (internal citations omitted).

28 U.S.C. § 1339 and 39 U.S.C. § 409(a). I will exercise therefore exercise jurisdiction over Plaintiffs’ Count I claims.

At argument, Defendants made clear that they were not arguing that the Plaintiffs had failed to exhaust administrative remedies, but rather that the availability of judicial review later in the process deprives this Court of jurisdiction. But some of the controlling principles of exhaustion have relevance here if only by way of analogy. If a nonjudicial remedy is “clearly shown to be inadequate to prevent irreparable injury” in extraordinary circumstances, the court may grant an exception under administrative exhaustion doctrine. *Republic Indus., Inc. v. Cent. Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 293–94 (3d Cir. 1982); see *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 249 (3d Cir. 2002) (“[a] plaintiff is excused from exhausting administrative procedures under ERISA if it would be futile to do so.”).

As will be discussed below, the Plaintiffs have demonstrated irreparable harm. Moreover, they have shown that—with regard to the demonstrable harms related to their status as users of the mail *vis a vis* the upcoming election—resort to the Commission even within days of the changes USPS made on or around July 10, 2020 would have been futile, given that the Commission has 90 days simply to respond as to whether it will hear a complaint. 39 U.S.C. § 3662(b)(1). If the Commission had decided to dismiss the case, it could have waited until mid-October to do so. *Id.* Defendants would have been left to appeal to the D.C. Circuit just days before the election. Similarly under section 3662(b)(1) the Commission could have simply waited until mid-October to decide to hear the case, at which time it would have been too late. There is no doubt the Plaintiffs have acted reasonably and in due diligence in seeking immediate judicial review.

As to Count II, subject matter jurisdiction exists under 28 U.S.C. § 1339 and 39 U.S.C. § 409(a), which provides that: “[e]xcept as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.” The Third Circuit has held that section 409(a) provides an independent basis for subject matter jurisdiction. *See Licata*, 33 F.3d at 262; *see also Anselma Crossing, L.P. v. U.S. Postal Serv.*, 637 F.3d 238, 241 (3d Cir. 2011).³⁰

As to Count III, subject matter jurisdiction exists under 28 U.S.C. § 1331 and Article III, Section 2 of the United States Constitution.

IV. Standing

Article III of the Constitution limits federal courts' jurisdiction to certain “Cases” and “Controversies.” The law of Article III standing, in turn, “serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). At its core, “the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). “Standing has constitutional and prudential components, both of which must be satisfied before a litigant may seek redress in the federal courts.” *UPS Worldwide Forwarding, Inc. v. U.S. Postal Serv.*, 66 F.3d 621, 625 (3d Cir. 1995).³¹

Constitutional standing to seek injunctive relief requires a plaintiff to show (1) “that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; (2) the threat must be actual and imminent, not conjectural or hypothetical; (3) it must be fairly traceable to the

³⁰ Plaintiffs have not formally moved for preliminary relief under Count II. It should be noted, however, that none of the exceptions that Defendants assert deprive this Court of jurisdiction apply to the claims asserted under Count II. And as discussed below, the same evidence that provides a basis for relief under Count I would apply with equal force to the core elements of Count II.

³¹ Because Defendants do not challenge Plaintiffs’ prudential standing, I do not address it here.

challenged action of the defendant; and (4) it must be likely that a favorable judicial decision will prevent or redress the injury.” *Free Speech Coalition, Inc. vs. Att’y Gen. of the U. S.*, 825 F.3d 149,165 (3d Cir. 2016) (internal punctuation omitted) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Plaintiffs seeking injunctive relief must also demonstrate a likelihood of future harm. *See McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 225 (3d Cir. 2012). Moreover, a plaintiff must also “demonstrate standing for each claim he seeks to press.” *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359 (3d Cir. 2015).

Plaintiffs must make a “clear showing” that they have standing. Because standing requirements “are not pleading requirements, but are necessary elements of a plaintiff’s case, mere allegations will not support standing at the preliminary injunction stage.” *Doe v. National Bd. of Medical Examiners*, 199 F.3d 146, 152 (3d Cir. 1999). Moreover, as a preliminary injunction “may only be awarded upon a clear showing that the plaintiff is entitled to such relief,” these Plaintiffs must make a “clear showing” that they have standing. *See Winter*, 555 U.S. at 22; *see also Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (applying a “clear showing” standard in evaluating Article III standing at the preliminary injunction stage).

Moreover, as a general rule, in an injunctive case, courts need not address the standing of each plaintiff if it concludes that one plaintiff has standing. *See Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 481 n.14 (3d Cir. 2016) (citing *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 826 n.1 (2002)).

A. Pennsylvania Has Standing to Challenge Procedural Violations of the PRA

Plaintiffs allege that, in early July, “the Postal Service abruptly instituted a ‘transformative initiative’ that changed how mail was processed, transported, and delivered.” Mem. Law. Supp. Pls. Mot. Prelim. Inj. 33. These changes included restrictions on overtime, requirements that

carriers adhere rigidly to start and stop times regardless of whether all mail for their route has arrived or been delivered, and limits on late or extra trips by postal workers. *Id.* The Postal Service, Plaintiffs claim, was required to request an advisory opinion from the Postal Regulatory Commission prior to instituting the July changes. *Id.*

Plaintiffs further claim that the Postal Service has acted without the requisite procedural safeguards (the submission of the proposed changes to the Postal Regulatory Commission) and are suing to enforce their procedural rights. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992) (describing the “procedural” requirements for a hearing prior to a license denial or the issuance of an environmental impact statement before the construction of a new government facility). To the extent that the Defendants believe that the Postal Service was not required to submit its proposed changes to the Commission, this is an issue of the merits rather than of standing.

Where plaintiffs seek to enforce procedural rights, they must first establish that the procedures “are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.” *Id.* at 573 n.8; *Earth Island Inst.*, 555 U.S. at 496–497 (noting that an injury may arise when individuals are denied their right to comment due to “unlawful abridged procedures,” so long as their concrete interests are threatened). Once a plaintiff establishes that his concrete interest is particularly threatened by the procedural violation, the “plaintiffs must ‘demonstrate a causal relationship between the final agency action and the alleged injuries,’” which permits the court to “assume[] the causal relationship between the procedural defect and the final agency action.” *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014); *see also Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 247 n.4 (3d Cir. 2011) (noting that plaintiffs had

standing where the agency implemented a policy, in violation of plaintiffs’ notice and comment rights, that could delay issuance of notices to proceed to plaintiffs).

1. Defendants’ Alleged Procedural Violations Threaten Pennsylvania’s Concrete Interests

Pennsylvania has experienced a particularized, concrete harm to its interest in timely service as a user of the mail.³² “A concrete injury must be *de facto*; that is, it must actually exist.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016) (internal punctuation omitted). Plaintiffs must set forth facts that show a risk of harm particular to them. *See Kamal v. J. Crew Group, Inc.*, 918 F.3d 102, 116 (3d Cir. 2019). The Commonwealth’s Department of General Services has provided a list of instances where delays have interrupted the processing of incoming revenue, travel reimbursements, and other agency priorities. *See Beverly Hudson Decl. Ex. 28 3–4*, ECF No. 18-4. The Office of the General Counsel in the Pennsylvania Criminal Unit has also experienced mail delays that have made it more difficult to carry out their duty to issue warrants. *See Carissa M. Mager Decl. Ex. 34 ¶¶ 8, 9*, ECF No. 18-4. Recent USPS delays have also hindered the Department of Labor’s efforts to schedule hearings and adjudicate benefits. *See Robert V. O’Brien Decl. Ex. 39 ¶ 19–29*, ECF No. 18-4.

This evidence underscores that Pennsylvania is not asserting a procedural right “*in vacuo*.” *Earth Island Inst.*, 555 U.S. at 496. Had the Commonwealth been able to participate in the commenting process prescribed under section 3661, it would have the opportunity to assert its

³² Because only one plaintiff must have standing in equitable relief cases, I do not address the standing of the other state Plaintiffs in detail, although California, Delaware, and North Carolina have also offered evidence of harms to their state agencies. Mail delays have also impaired the ability of the California Department of Consumer Affairs to process licenses, which has forced the agency to deploy additional staff resources. *See Kimberly Kirchmeyer Decl. Ex. 32 ¶ 16-20*, ECF No. 18-4. In addition, Delaware has listed instances, beginning in July, where state residents did not receive essential items provided by the Delaware Department of Health and Social Services, on account of mail delays. *See Gabriela Kejner Decl. Ex. 31 ¶ 14*, ECF No. 18-4. And finally, North Carolina’s Division of Motor Vehicles has received hundreds of complaints about mail delays around driver’s license suspensions and hearing deadlines. *D. Jordan Whichard IV Decl. Ex. 45 ¶ 8*, ECF No. 18-4.

agencies’ need for timely service. Pennsylvania, accordingly, has a concrete and particularized interest in the resolution of this controversy.³³

2. The Delays Harming Pennsylvania Are Traceable to Defendants’ Alleged Violations

Plaintiffs must also demonstrate that the injuries to their interests are “fairly traceable” to the agency action that was instituted with insufficient procedures. This requirement preserves concreteness and particularity in procedural standing cases; as the D.C. Circuit has persuasively explained, it ensures that courts do not “foster a procedural right in the air or a right that is distinct from any concrete injury.” *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996) (internal citations omitted). In this matter, Pennsylvania has made a clear showing that the mail delays are “fairly traceable” to the Postal Service’s transportation and overtime changes.

On August 13, Postmaster DeJoy touted improvements in the on-time dispatch schedule, which resulted on-time rates of “97.3 percent, up from 89.9 percent.” Internal Memorandum from Postmaster General Louis DeJoy (Aug. 13, 2020) Ex. G. At the same time, DeJoy also noted that the Postal Service had “reduced extra trips by 71 percent — a tremendous achievement.” *Id.* But DeJoy conceded that “this transformative initiative has had unintended consequences that impacted our overall service levels.” *Id.* DeJoy’s conclusion that the transportation changes impacted service is also supported by statistical evidence and employee testimony. Service precipitously declined in July, when the changes were implemented, *see* USPS Serv. Performance Measurement Ex. 11, ECF No. 18-3, and delays impacted services in the Eastern Area (which includes Pennsylvania), *see* Eastern Area AIM Meeting – Service Update Ex. 6, ECF No. 18-3, and the Pacific Area (which includes California). *See* Pacific Area AIM Meeting Presentation Ex.

³³ The fact that the delays are “widely shared” does not minimize Pennsylvania’s interest in the litigation. *See Massachusetts v. EPA*, 549 U.S. 497, 522 (2007).

12, ECF No. 18-3. Post office employees in the Pacific and Eastern areas have also alleged that the change to transportation mail has delayed processing in their respective regions. *See* Cogan Decl. Ex. 48 ¶ 13 (Oregon); Kelly Dickey Decl. Ex. 50 ¶ 25 (Pittsburgh); John Gibson Decl. Ex. 26 ¶ 15 (Philadelphia).

The delays in Pennsylvania are also linked to the changes in overtime policy. As described previously, the record strongly suggests that USPS leadership has undertaken a national policy to alter overtime policies. *See* PowerPoint – AVP Telepresence (June 26, 2020), Courtroom Ex. 54-13 (describing a national “Work Hour Reduction Target, Do It Now” initiative). Pennsylvania has not been spared the impact of this decision. Union officials have testified that “overtime was significantly restricted at certain facilities” in Philadelphia that are represented by Local 308 of the National Postal Mail Handler’s Union. Gibson Decl. ¶ 14. Although overtime allowances have increased in Philadelphia since the dramatic reductions in late July and early August, restrictions remain in place. *Id.* at ¶ 16. One Philadelphia branch manager further reported that the overtime restrictions came from the Postmaster General. *Id.* And in Pittsburgh, management instituted a one-week ban on overtime. Dickey Decl. ¶ 22. Management has since lifted its ban but overtime continues to be limited at the facilities represented by Local 322 of the National Postal Mail Handlers Union. *Id.* at ¶ 23.

Defendants have argued that the Plaintiffs must also show that that the prior delays were “primarily caused by the USPS policy changes, rather than COVID-related circumstances (e.g., staffing shortages).” Defs. Resp. in Opp’n to Pls. Mot. Prelim. Inj. 32. But this view misstates the law on causation.³⁴ In *Massachusetts v. EPA*, the agency maintained that its alleged procedural

³⁴ Even if Defendants were correct, Plaintiffs could still make a strong showing that the delays were primarily caused by USPS policy changes. In a September 16, 2020 hearing, Robert Cintron observed that the COVID-related impacts started to occur in February/March. *See* Tr. Prelim. Inj. Teleconference at 59, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020). However, as of the week of August 29th, first-class mail service was at 88%, which was

violation – a refusal to undertake rulemaking to address greenhouse gas emissions – contributed so “insignificantly to petitioners’ injuries that the Agency cannot be haled into federal court to answer for them.” 549 U.S. 497, 523 (2007). The Court disagreed; Massachusetts had standing because the agency’s refusal to regulate such omissions *contributed* to the state’s injury, even though the actions of third parties also had a large impact. *Id.* at 523-24. As in *Massachusetts*, halting the Defendants’ policies would meaningfully contribute to addressing Pennsylvania’s injuries.

3. Pennsylvania Will Experience Ongoing Injuries

The Commonwealth of Pennsylvania has also met its burden with respect to the “actual and imminent” standard. In equitable relief cases, the Third Circuit has required plaintiffs to show that they are “likely to suffer future injury” from the defendant's conduct.” *McNair*, 672 F.3d at 223. Defendants argue that Plaintiffs cannot make such a demonstration, as “service performance is rapidly returning to early July levels.”³⁵ Defs. Resp. in Opp’n to Pls. Mot. Prelim. Inj. 32. This statement was contradicted by Robert Cintron’s testimony during the September 16, 2020 *Jones v. USPS* hearing. Robert Cintron first admitted, on cross-examination, that service performance of First-Class mail had improved by only .28 percent in the most recent data. *See* Tr. Prelim. Inj. Teleconference at 62, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020). Cintron also agreed that “[c]urrently, first-class mail products are somewhere between five and six percent below

the lowest performance yet within the COVID-19 pandemic. *Id.* at 59-60. The Postal Service has stated that the lowest rates of availability due to COVID-19 and vacation absences occurred in mid-July. *See* Prokity Decl.¶ 5. The ongoing nature of the delays strongly suggests that another causal factor besides COVID-19 is at work.

³⁵ This factor is less critical in our standing analysis because Pennsylvania is asserting a procedural injury. As the Supreme Court made clear in *Lujan v. Defenders of Wildlife*, “the normal standards for redressability and immediacy” are lessened in cases where the plaintiff has been “accorded a procedural right to protect his concrete interests.” 504 U.S. at 572 n.7. Pennsylvania’s interest against mail disruption will remain concrete throughout; compare *Earth Island Inst.*, 555 U.S. at 497 (Plaintiffs asserted a procedural right *in vacuo* with respect to a building project that was already the subject of litigation and settlement).

established service standards.” *Id.* at 53. At 88.74% for First-Class Mail, *see* Q4 To-Date Service Performance For Market Dominant Products, Courtroom Exhibit Ex. 54-16, service has not yet rebounded to the lowest point in the COVID-19 era. *Id.*

Pennsylvania’s claim that they are likely to suffer future injury is further bolstered by evidence that the contested policies have persisted and will continue delays across the state. The August 18, 2020 DeJoy statement notably did not mention a suspension of changes to the transportation policy and stated only that overtime would be “approved as needed.” Statement of Postmaster General Louis DeJoy (August 18, 2020) Ex. H, ECF No. 1-1. But among the Pennsylvania facilities represented by Local 322, overtime was terminated for one week and continues to be limited. *See* Dickey Decl. ¶¶ 22, 23. Management at these facilities continues to order that trucks adhere to a strict transportation standard, even if it means that some mail will be left behind. *Id.* at ¶ 24. Representatives of Pennsylvania-based Local 303 have also claimed that the rigid transportation requirements and overtime restrictions have persisted, although overtime usage has increased. *See* Gibson Decl. ¶¶ 15, 16. The record strongly shows that the injuries sustained by Pennsylvania will persist into the future, as the state will continue to be denied their right to comment on the policy changes that threaten their concrete interests as users of the mail.

4. Pennsylvania’s Injuries Can Be Redressed by Injunctive Relief

Plaintiffs are also able to meet the light burden of redressability that arises in procedural rights standing cases. The Supreme Court has maintained that “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Earth Island Inst.*, 555 U.S. at 496 (noting that procedural rights claims “can loosen the strictures of the redressability prong of our standing inquiry”). Here, a favorable judicial ruling would resolve plaintiffs’ procedural injury, as the

plaintiffs would be able to comment on the proposed changes prior to their implementation. Plaintiffs do not need to show that a resolution in the procedural injury would ultimately result in USPS adopting a different policy. *See Defenders of Wildlife*, 504 U.S. at 572 n. 7.

B. California Has Standing to Challenge USPS' Alleged Constitutional Violations

Standing involves an examination of whether a “particular plaintiff is entitled to an adjudication of the particular claims asserted.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). “As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

In *Oregon v. Mitchell*, the Supreme Court reiterated that states retain power to “regulate elections” under the Elections Clause in the absence of a Congressional enactment or Constitutional limit. 400 U.S. 112, 121 (1970). There, the Court entertained an action by the State of Oregon to enforce its interests under the Elections Clause against Congressional aggrandizement. The Court ultimately held that Congress had “invaded an area preserved to the states” when it attempted to lower the voting age in state and local elections. *Id.* at 130.³⁶ Similarly, in *South Carolina v. Katzenbach*, the Court permitted South Carolina and the states to pursue claims that the Voting Rights Act “encroach[ed] on an area reserved to the States by the Constitution.” 383 U.S. 301, 323 (1966).

Plaintiffs in this action similarly seek to halt federal encroachment on their constitutional power to determine the “Times, Places, and Manner” of federal elections and appoint electors. *See* U.S. Const. art. I, § 4, cl. 1; U.S. Const. art. II § 1, cl. 2. The states allege that USPS interference,

³⁶ The Court also noted that “no question has been raised concerning the standing of the parties or the jurisdiction of this Court.” *Oregon v. Mitchell*, 400 U.S. 112, 117 n. 1 (1970).

in the form of delays and incorrect mailers to voters, have “jeopardize[d] the manner in which the States have chosen to let voters vote” under the Elections Clause. Mem. Law. Supp. Pls. Mot. Prelim. Inj. 47.

California³⁷ has offered sufficient evidence to show that its claimed injury – the Postal Service’s interference with the state’s constitutional power to conduct elections and set rules for mail-in ballots – is concrete, particularized, and fairly traceable to Defendants. The agency’s intrusions have taken two forms: delays³⁸ that call into the efficacy of California’s mail voting system into question and incorrect mailers to California voters.

USPS data from the Pacific region (the latest available in the record) establishes that services for First-Class mail declined precipitously in July and remained below usual standards at the start of August. *See* Pacific Area AIM Meeting Presentation Ex. 12. Declines have persisted nationally and have impacted Election Mail. *See* Tr. Prelim. Inj. Teleconference at 53, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020) (“[c]urrently, first-class mail products are somewhere between five and six percent below established service standards.”); Robert Glass Dep. 65, Courtroom Exhibit 55 (observing that delays have already occurred with respect to Election Mail). Declarations from California officials have established that service delays have occurred in California and are persistent. *See, e.g.*, Kirchmeyer Decl. ¶ 18. And California’s Secretary of State has testified that USPS sent out incorrect mailers about how voters can vote by mail in California’s elections. *See* Alex Padilla Supp. Decl. Ex. 53 ¶ 6, ECF No. 47-1. As a result of USPS delays and policy changes, California’s Secretary of State experienced a “drastic spike in inquiries” that

³⁷ Again, I analyze standing for California because only one plaintiff is required to have standing in equitable relief cases. Declarations from officials in Maine and Washington, D.C. also describe financial expenditures by the states to protect their residents’ ability to vote by mail, in light of persistent USPS delays. *See* Matthew Dunlap Decl. Ex. 23 ¶19, ECF No. 18-4 (ME); Alice P. Miller Decl. Ex. 37 ¶13, ECF No. 18-4 (D.C.)

³⁸ Because I have established that the delays are traceable to USPS policy changes, I do not repeat this analysis here.

required them to divert resources. Alex Padilla Dec. Ex. 40 ¶¶ 27, 28, ECF No. 18-4. California also received a surge of questions regarding the incorrect mailers. *See* Alex Padilla Supp. Decl. ¶ 4.

Taken together, this evidence establishes that USPS’ actions have shaken voters’ confidence in California’s mail-in voting system and continue to pose a credible threat to the state’s ability to administer its election. Whether the harm is cognizable under the Electors Clause or the Elections Clause is a different inquiry.

California can also meet standards for redressability. As established previously, an injunction would remedy the delays that are the result of the July 2020 policies. Moreover, this Court is empowered to enjoin USPS from mailing false postcards. These remedies would resolve California’s constitutional injury.

V. Likelihood of Success on the Merits

With respect to this requirement, a movant for a preliminary injunction “must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not”). *Holland v. Rosen*, 895 F.3d 272, 286 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 440, 202 L. Ed. 2d 319 (2018) (citing *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017); *see also Singer Management Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (stating that a “likelihood” of success “does not mean more likely than not”).

The Plaintiffs allege that the Postal Service was required by 39 U.S.C. § 3661(b) to ask the Postal Commission for an advisory opinion regarding their changes to policies for late and extra trips (“Transportation Policy”) and for overtime work (“Overtime Policy”). Compl. ¶ 224-226. Section 3661(b) of the Postal Reorganization Act (PRA) states:

When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially

nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.

39 U.S.C. § 3661(b).

Plaintiffs further claim that by not submitting a proposal to the Commission before the changes in the Transportation Policy and Overtime Policy took effect, Defendants acted beyond their statutory authority and the changes are *ultra vires*. Compl. ¶ 227. Defendants argue that they were not required to seek an advisory opinion under section 3661(b) because the changes implemented do not constitute changes in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis. Defs. Resp. in Opp'n to Pls. Mot. Prelim. Inj. 32.

Both Defendants and Plaintiffs agree that the question of whether the Postal Service needs to go to the Commission for an advisory opinion is properly addressed under the framework of *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259 (5th Cir. 1974). In *Buchanan*, a proposed class of postal users sought to enjoin changes being implemented by the Postal Service, alleging that the Service was required to go through the section 3661 process beforehand. *Buchanan*, 508 F.2d at 261. The court enjoined implementation of two of the three changes involved and ordered the Postal Service to seek an advisory opinion from the Commission. *Id.* at 267. The PRA had been enacted just four years prior, and the circuit court (as had the district court below) thoroughly examined the legislative history and purposes of § 3661. *Id.* at 263-64; *Buchanan v. U.S. Postal Serv.*, 375 F. Supp. 1014, 1017-18 (N.D. Ala. 1974).

The court wrote that there are “two basic policies” at the core of the PRA that “pull in different directions”: “the goal of vesting in management the freedom to make decisions without external constrains” and “the goal of providing to the American people a public service which is

sensitive and responsive to their needs.” *Buchanan*, 508 F.2d at 262. The court found that these policies could be harmonized by reading section 3661 such that “management is given the freedom to manage without unnecessary limitations and the public is given an opportunity to present their views on decisions of the Postal Service which affect them.” *Id.* at 262; *see also Buchanan*, 375 F. Supp. at 1017-18 (noting that although “it is clear that Congress intended generally to give the Postal Service broad powers and wide discretion in its operations” it is “equally as clear . . . Congress intended to retain for the public a right to be heard so that the Postal Service would be responsive to the public and the public would have assurance that any major changes in postal service. . . would conform to the basic policies established in the [PRA].)”³⁹ When the Postal Service implements “change[s] in the nature of postal service which will generally affect service on a nationwide or substantially nationwide basis” without going through the procedures prescribed by section 3661, the general public is “denied a very fundamental right -- the opportunity for a hearing on the proposed change.” *Buchanan*, 375 F. Supp. at 1019.

Under *Buchanan*, there are three factors that must exist before a proposed change is required to go through the Commission in compliance with section 3661:

First, there must be a “change.” This implies that a quantitative determination is necessary. There must be some meaningful impact on service. Minor alterations which have a minimal effect on the general class of postal users do not fall within § 3661. Second, the change must be “in the nature of postal services.” This involves a qualitative examination of the manner in which postal services available to the user will be altered. Third, the change must affect service “on a nationwide or substantially nationwide basis.” A broad geographical area must be involved.

Buchanan, 508 F.2d at 262-63.

As discussed in Section III, I have found that subject matter jurisdiction exists under 39 U.S.C. § 409, as buttressed by 28 U.S.C. § 1339 and 28 U.S.C. § 1331 to consider this claim.

³⁹ The text of section 3661(b) examined in *Buchanan* remains unchanged today. *See Buchanan*, 375 F. Supp. at 1018; 39 U.S.C. § 3661(b).

Because the Administrative Procedure Act does not apply to the Postal Service for claims like this one, *see Mittleman v. Postal Regul. Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014), I analyze this claim under a theory of nonstatutory review.

“Nonstatutory review” enables a federal court to use its equity powers to enjoin violations of law by governmental officials. This form of review is primarily used if a plaintiff “is unable to bring his case predicated on either a specific or a general statutory review provision.” *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996); *see also Zirin v. McGinnes*, 282 F.2d 113, 115 (3d Cir. 1960); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 600 (3d Cir. 2016) (ruling that party did not forfeit claim of ultra vires agency action because such claims should not be insulated from judicial review); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981). Where nonstatutory review is available, it is quite narrow. *Mittleman*, 757 F.3d at 25. It is available only to determine whether the agency has acted “*ultra vires*”—that is, whether it has “exceeded its statutory authority.” *Id.*

Ultra vires review has been utilized by various courts to analyze actions of the Postal Service. In *Aid Ass’n for Lutherans*, the D.C. Circuit reviewed a District Court decision, holding that the Postal Service had acted *ultra vires* in promulgating certain regulations. 321 F.3d 1166, 1174 (D.C. Cir. 2004). The court found that the agency acted *ultra vires* because it “lacked authority under the statute effectively to regulate out of the market nonprofits’ use of the reduced postage rates for insurance-related purpose.” *Id.* at 1178; *see also id.* at 1172 (“Judicial review is favored when an agency is charged with acting beyond its authority.”) Similarly, in *Combined Commc’ns Corp.*, the Sixth Circuit upheld a district court’s decision that the Postal Service had acted *ultra vires* in promulgating certain regulations, after finding jurisdiction under 28 U.S.C. § 1339 and 39 U.S.C. § 409. 891 F.2d at 1227-28. The Third Circuit has likewise analyzed *ultra vires* claims against the

Postal Service where plaintiffs alleged that the Service exceeded its authority by implementing certain policies without following the procedure prescribed by the PRA. *See Air Courier Conf. of America/ Int'l Comm.*, 959 F.2d at 1215; *United Parcel Serv., Inc.*, 604 F.2d at 1372.⁴⁰

A. Scope of Review

Before analyzing the *Buchanan* factors, I am mindful of the deference owed to agency interpretations of its governing statute.

At the outset, I must identify exactly what the interpretation is that was offered by the agency, as that will guide the analysis as to the deference owed that interpretation. *See United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). I may only consider the interpretation offered at the time of the agency action, and not *post hoc* justification offered during litigation. *See Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1909 (2020) (holding that courts must rely only on “contemporaneous explanations for agency action” and that “[p]ermitt[ing] agencies to invoke belated justifications, on the other hand, can upset ‘the orderly functioning of the process of review.’”) (quoting *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943)); *see also Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 151 (3d Cir. 2004) (“[W]e may affirm the agency's decision only on grounds on which the agency actually relied, and not on the basis of alternative rationales or justifications put forward by counsel on appeal.”) (quoting *Chenery*).

As discussed in Section I.B, there were changes to the Postal Service’s transportation policies in July 2020. Mr. Cintron states that he has been leading an “initiative” regarding extra

⁴⁰ Defendants have suggested that this Court’s nonstatutory review must proceed under *Leedom v. Kyne*, 358 U.S. 184 (1958). In interpreting *Leedom*, the D.C. Circuit has looked to whether the agency’s error is “patently a misconstruction of the Act,” or “when the agency has disregarded a specific and unambiguous statutory directive,” or “when the agency has violated some specific command of the statute.” *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487, 497 (D.C. Cir. 1988). However, I do not rely on the more restrictive language of *Leedom* because I do not find that Congress has generally precluded review on this class of claims where jurisdiction already exists within the statute itself. *See Air Courier*, 959 F.2d 1213, 1215 (3d Cir. 1992); *United Parcel Serv., Inc.*, 604 F.2d 1370, 1372 (3d Cir. 1979); *see also Combined*, 891 F.2d at 1227-28.

and late truck trips, which began in name two years ago, but received “renewed focus” this July. Changes in overtime policy also began in July 2020.

The Postal Service has not presented documents issued at the beginning of Mr. Cintron’s “initiative” from two years ago. And as to documents published contemporaneously with the changes in July of this year, the Postal Service disputes that either the Stand-Up Talk or the PMG Expectations PowerPoint represent agency policy. That question is not dispositive for this analysis, however, since neither document references section 3661. The policy guidelines issued by Mr. Cintron in July 2020 likewise do not reference section 3661 and do not discuss why the new policy would or would not be covered by the procedural safeguards of that section. The only contemporaneous document in the record seems to be the letter from the Postal Service’s General Counsel, Thomas Marshall, to members of Congress on July 22, 2020. *See* Marshall Letter, Ex C at 13-15, ECF No. 1-1. In this letter, Mr. Marshall writes that “we are aware of our legal obligations to request an advisory opinion before implementing ‘a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis’ under 39 U.S.C. § 3661(b)” but that “[n]one of the operational efforts discussed here constitute such a change.” *Id.* at 15.

1. The Marshall Letter Is Not Owed *Chevron* Deference.

I now turn to the level of deference owed to Mr. Marshall’s determination that the operational changes do not constitute a change within the ambit of section 3661(b). As I must at the beginning of any deference inquiry, I begin by asking whether Congress “has directly spoken to the precise question at issue” through unambiguous statutory language. *See Hagans v. Commissioner of Social Sec.*, 694 F.3d 287, 294 (3d Cir. 2012) (citing *Chevron U.S.A., Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). If so, then no further inquiry is needed. *Id.*

Here, the statute mandates procedure through the Commission when a change affects “the nature of postal services” and that change “will generally affect service on a nationwide or substantially nationwide basis.” 39 U.S.C. § 3661(b). These terms are ambiguous and are susceptible to multiple interpretations, as the Commission itself has acknowledged. *See, e.g.* Order No. 1307, Order Partially Denying Motion of [USPS] to Dismiss Complaint and Notice of Formal Proceedings, Docket No. C2001-1, at 13 n. 12 (Mar. 20, 2001) (“There is no bright line for determining when a reduction in collection and mail processing service is a change in the nature of a postal service.”). I therefore proceed to step two of *Chevron*. *See Chevron*, 467 U.S. at 843.

Chevron review of an agency’s interpretation of ambiguous statutory language is appropriate where “Congress delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation claiming deference was promulgated in the exercise of that authority.” *Mead Corp.*, 553 U.S. at 226-27. Congress has delegated authority to the Postal Service to make rules carrying the force of law. *See* 39 U.S.C. § 401(2) (authorizing the Postal Service “to adopt, amend, and repeal . . . rules and regulations . . . as may be necessary in the execution of its functions. . .”) Interpretations by the Postal Service promulgated in the exercise of this rulemaking authority can thus be entitled to *Chevron* deference. *See, e.g., Aid Ass’n for Lutherans*, 321 F.3d at 1174 (holding that *Chevron* review was appropriate where USPS had promulgated regulations pursuant to notice and comment rulemaking). In *Air Courier*, the Third Circuit granted *Chevron* deference to the Postal Service’s international rate-setting. *Air Courier*, 959 F.2d at 1215. The PRA delegated to the Postal Service the authority to set rates carrying the force of law, and the rate-setting in this context was an exercise of that authority. *Id.* at 1225.

The internal policies addressed by Mr. Cintron’s initiative (or its “renewed focus”), and the concurrent interpretation of section 3661 provided by Mr. Marshall were not exercises of the Postal Service’s delegation and do not carry the force of law. The summary explanation provided in the letter is not owed *Chevron* deference. The Third Circuit has consistently held that “interpretations such as those in opinion letters— like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law- do not warrant *Chevron*-style deference.” *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246, 252 (3d Cir. 2005) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)); *see also Hayes v. Harvey*, 903 F.3d 32, 45-46 (3rd Cir. 2018) (en banc) (noting in dicta that HUD guidance documents do not warrant deference under *Chevron* because they lack the force of law); *Mercy Catholic Medical Center v. Thompson*, 380 F. 3d 142, 145-55 (3rd Circ. 2004) (holding that agency interpretive guidelines are not entitled to *Chevron* deference and noting that “[t]o grant Chevron deference to informal agency interpretations would unduly validate the results of an informal process.”) (quoting *Madison v. Res. For Human Dev., Inc.*, 233 F.3d 175, 186 (3d Cir. 2000)).

Where agency interpretations are cursory and lack detailed explanation, as is the case here, the Third Circuit has also held that these interpretations are not entitled to *Chevron* deference. *See Packard*, 418 F.3d at 251-52 (holding that “the informal and cursory” reasoning of the agency derived from one paragraph in an interagency letter was not entitled to *Chevron* deference); *Hagans*, 694 F.3d at 302 (noting that “[t]he SSA devotes only one paragraph to its interpretation of the statute and does not explain how or why it reached its interpretation, a factor which weighs against deference.”).⁴¹

⁴¹ Although many Third Circuit decisions focus on whether an agency interpretation has the “force of law,” *see, e.g. Hayes*, 903 F.3d at 45-46, some agency interpretations that do not have the force of law may at times still be entitled to *Chevron* deference. *See Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (holding that the agency’s longstanding interpretation is not “automatically deprive[d]. . . of the judicial deference otherwise its due” solely because the “the

2. The Marshall Letter should be examined under the *Skidmore* framework

Instead, the agency’s interpretation of the PRA should be reviewed pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Hagans*, 694 F.3d at 294-95. Under *Skidmore* review, a court considers an agency judgment “based on ‘the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’” 323 U.S. at 140.

The Third Circuit has “adopted *Mead*’s conceptualization of the *Skidmore* framework as a ‘sliding-scale’ test in which the level of weight afforded to an interpretation varies depending on [the] analysis of the enumerated factors.” *Sec’y U.S. Dep’t of Labor v. American Future Systems Inc.*, 873 F.3d 420, 428 (3d Cir. 2017) (citing *Hagans*, 694 F. Supp. at 304, citing *Mead*, 553 U.S. at 228). Those factors include whether the interpretation was: “(1) [i]ssued contemporaneously with the statute; (2) [c]onsistent with other agency pronouncements; (3) [r]easonable given the language and purposes of the statute; (4) [w]ithin the expertise of the relevant agency; (5) [p]art of a longstanding and unchanging policy.” *Id.* “[M]any of the same circumstances. . . relevant for determining whether to apply *Chevron* deference are also useful for deciding the level of deference due under *Skidmore*.” *Hagans*, 694 F.3d at 304-05.

Agency previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking.”) (citing *Chevron*, 467 U.S. at 843). Rather, depending on “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time,” *Chevron* may still “provide[] the appropriate lens through which to view the legality of the Agency interpretation.” *Id.* at 222. Nevertheless, like the informal ruling at issue in *Hagans*, the two sentences of the Marshall letter still would not be entitled to *Chevron* deference even without an exclusive focus on whether the letter had the force of law. *See Hagans*, 694 F.3d at 303 (“It is not entirely clear from the Supreme Court’s precedent whether the lack of the ‘force of law’ is always fatal to the application of *Chevron*, but in any event, the lack of legal effect of this ruling, combined with the absence of formal notice-and-comment rulemaking and the failure of the [agency] to describe its reasoning, cannot be counterbalanced by the [agency]’s institutional desire for uniformity and ease of administration.”)

Applying these factors, I find that a relatively low level of deference is warranted. Under the first factor, Mr. Marshall's interpretation was not issued contemporaneously with the statute. Under the second factor, Mr. Marshall's interpretation is not consistent with other contemporaneous agency pronouncements. Postmaster DeJoy referred to the policies instituted in July as "significant changes," and as a "transformative initiative." Internal Memorandum from Postmaster General Louis DeJoy (Aug. 13, 2020) Ex. G. And with respect to late and extra trips, Mr. DeJoy further stated that the Postal Service had "reduced extra trips by 71 percent" and that the change had affected on-time rates by eight percent. *Id.* Postmaster DeJoy also noted that "this transformative initiative has had unintended consequences that impacted our overall service levels." *Id.* Postal Service briefing documents provided to Congress likewise refer to the transportation policy as an "initiative." *Congressional Briefing: Transportation and Service Performance Updates* (Aug. 31, 2020) Ex. 16. Overall, Mr. Marshall's interpretation is not consistent with other agency pronouncements.

The third factor is whether Mr. Marshall's interpretation is reasonable given the language of the statute. To trigger the Commission process under section 3661(b), there must be a "change in the nature of postal services." 39 U.S.C. § 3661(b). The PRA defines "postal services" to be "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto." 39 U.S.C. § 101(5). Postal service standards must "preserve regular and effective access to postal services in all communities, including those in rural areas or where post offices are not self-sustaining" and must "reasonably assure Postal Service customers [of] delivery reliability, speed and frequency consistent with reasonable rates and best business practices." 39 U.S.C. § 3691(b)(1)(B), (C); *see also* Goldway

Decl. Ex. 52 ¶ 12, ECF No. 47-1 (describing “service standards” as “the official timeliness goal for delivering mail after receiving it from the customer.”)

Defendants urge me to give broad deference to the past interpretations of section 3661(b) offered by the Commission, and I do so. *See* Section V.B.3, *infra*. The Commission’s description of the language of the statute is thus useful in analyzing this third factor. In one of the first advisory opinions issued by the Postal Regulatory Commission (then called the Postal Rate Commission), the PRC details the history of section 3661(b), and the competing interests of allowing the USPS managerial freedom while still trying to ensure public accountability. *See* Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services, Docket No. N75-1, at 15-17 (Apr. 22, 1976). The Commission wrote that “[t]he procedural requirements of § 3661 obviously impinge upon the managerial decision-making processes of the Postal Service” but that “the imperative that adequate and efficient postal services to be provided to the public dictates a significant and viable scope of operation for § 3661.” *Id.* at 16. Ultimately, the Commission held that section 3661 encompasses changes in the “type, quality, terms, or conditions” of service, and that a change falls within the ambit of section 3661 if “it has as a reasonably foreseeable consequence a significant change in the availability of basic postal services to the representative postal consumer.” *Id.* at 9; *see also id.* at 21 (“It is the experience of the individual postal consumer, the recipient of the complex of services provided by the Postal Service and the intended beneficiary of the policies incorporated by § 3661, that must be assayed in determining whether an action or program involves a change in the nature of postal services.”).

Here, Plaintiffs have put forward substantial evidence to show that postal customers experienced significant changes in the availability of basic postal services. *See* Section IV.A.2, *supra*; Section V.B, *infra*. They have also proffered evidence showing that these service impacts

were a reasonably foreseeable consequence of the changes. *See* Stand-Up Talk (stating that “we may see mail left behind” as a result of the changes); Gibson Decl. ¶ 15 (“Rigidly requiring trucks to leave at their scheduled time means that trucks leave without all of their mail, which exacerbates delays because a piece of mail that may have been an hour late becomes a day late or more.”); Cogan Decl. ¶ 13 (testifying that as a result of the changes, “mail that was nearly done being processed may miss the truck entirely and could sit at the facility for at least another day.”); Coradi Decl. ¶ 8 (testifying that as a result of the transportation policy, employees “are prohibited from making late trips and extra trips even if waiting just a few minutes would ensure timely delivery to entire communities.”).

Plaintiffs also submitted a declaration from Ruth Goldway, who served on the Commission for seventeen years and was Chairwoman for six years. Goldway Decl. ¶ 1-2. Ms. Goldway represents that “[i]t is my opinion, based on my two decades of experience reviewing Postal Service operations, that eliminating local flexibility and requiring rigid adherence to transportation schedules would negatively impact service performance.” *Id.* at ¶ 31. She further represents that “[e]ven if the Postal Service did not know that its changes were likely to impact service standards, it should still have reported to the Commission once it became clear that the changes were preventing the Postal Service from meeting its existing service standards.” *Id.* at ¶ 36. Given the language of the statute, as interpreted by the Commission, it is unreasonable to argue that the policy changes contemplated and implemented could not have significant changes as a reasonably foreseeable consequence.

The fourth factor is whether the interpretation is within the expertise of the relevant agency. The Postal Service clearly does have some expertise in evaluating programs under § 3661. But this expertise is shared with the Postal Commission. *See, e.g., Air Courier*, 959 F.2d at 1223 (“Our

holding. . . in favor of the Postal Service is strengthened by the long-standing interpretation both the Postal Service and the Commission have given the statute. “) The Postal Service has previously sought out the expertise of the Commission as to exactly this question—whether a proposed change affects the nature of postal service on a substantially nationwide basis and triggers the procedures of the subsection. *See* Advisory Opinion on Elimination of Saturday Delivery, Docket No. N2010-1, at 1 (Mar. 24 2011) (“[T]he public proceeding that supports the Commission’s conclusions is an example of how the Postal Service and the Commission can cooperatively use their complementary authority to develop policy and improve the process in an open and transparent manner.”); *see also* Advisory Opinion on Service Changes Associated with Standard Mail Load Leveling, Docket No. N2014-1 (Mar. 26, 2014) at 8 (noting that “[w]ith an advisory opinion, the Commission. . . provides an opinion based on its expertise.”); Goldway Decl. ¶ 23 (“The Commission also provides the Postal Service with valuable analysis and guidance on how to best accomplish its goals of increased efficiency and cost-savings without impeding mail service and public access”).

Because interpretations of section 3661(b) are shared between the Postal Service and the Commission, and because these interpretations often conflict, *see* section V.A.3, *infra*, this factor likewise does not warrant deference to the Postal Service’s interpretation alone in this instance. *Compare National Ass’n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 825-26 (1983) (deferring to the Commission’s interpretation of a statute instead of the Postal Service’s interpretation), *with Air Courier*, 959 F.2d at 1224 (noting that “the Commission agrees with the Postal Service” as to the interpretation in question and deferring to that interpretation).

Finally, under the fifth factor, this interpretation is not part of a long and unchanging policy. *See, e.g.*, Gibson Decl. ¶ 14 (testifying to implementation of changes in July 2020 that differed

from previous policy and practice); Cogan Decl. ¶ 7 (same); Coradi Decl. ¶¶ 5-9 (same); Dickey Decl. ¶¶ 19-26 (same). Under Third Circuit precedent, the agency’s summary interpretation, devoid of reasoning, is owed very low deference under *Skidmore*. See *Packard*, 418 F.3d at 253 (holding in the context of an “informal and cursory” letter that “*Skidmore* deference is available only based on an agency interpretation’s power to persuade . . . [t]he materials at issue here simply provide no reasoning or analysis that a court could properly find persuasive.”) After analyzing the five factors above, I conclude that the agency’s interpretation through the Marshall letter is owed a low level of deference. *Mead*, 553 U.S. at 228.

3. Past Practice of the Commission

The Defendants also argue that past practice of the Commission and the Postal Service “should be given the deference ordinarily accorded any interpretation of a statute by the agency.” Defs. Resp. in Opp’n to Pls. Mot. Prelim. Inj. 33 (citing *United Farm Workers of Am., AFL-CIO v. Chao*, 227 F. Supp. 2d 102,107 n.11 (D.D.C. 2002)). According to Defendants, the Commission’s past practice makes clear that the changes in this case do not rise to the level of changes affecting the nature of postal service on a substantially nationwide basis. *Id.* at 33-34.

I agree that the past practice of the Commission and the Postal Service is critical, and that statutory interpretations of the Commission are owed the highest degree of deference. *Cf. U.S. Postal Serv. v. Postal Regul. Comm’n*, 640 F.3d 1263, 1266 (D.C. Cir. 2011) (holding that the Commission’s interpretation of 39 U.S.C. § 3622 is entitled to *Chevron* deference); *U.S. Postal Serv. v. Postal Regul. Comm’n*, 599 F.3d 705, 710 (D.C. Cir. 2010) (deferring to Commission’s interpretation of 39 U.S.C. § 404(e)(3)).

The past practice of the Commission, however, does not accord with Defendants’ description of how the Commission has interpreted section 3661(b). To the contrary, the

Commission's interpretation of section 3661(b) and the types of changes it has held to fall within that section's ambit would seem to reach the changes contemplated by this action.

True, some advisory opinions concern "general changes to postal facility hours or service standards for mail delivery." Advisory Opinion Docket No. N2014-1 at 1, 10 (involving a proposal to change the service standard from 3 days to 4 days); Advisory Opinion on Mail Processing Network Rationalization Service Changes, Docket No. N2012-1, at 1 (Sept. 28, 2012) (involving changes to service standard that "would ultimately eliminate all overnight delivery service for single-piece First-Class Mail, and delay much of current First-Class Mail 2-day delivery to 3-day delivery.").

But the Commission has also issued advisory opinions on smaller matters and has interpreted section 3661(b) to encompass a larger variety of changes than Defendants imply. In 2006, for example, the Commission issued an opinion on the Postal Service's proposal "to enhance efficiency in the postal system's network of mail processing facilities through the use of modern computerized simulation and optimization models." Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services, Docket No. N2006-1, at 15 (Dec. 12, 2006). Notably, the Commission found that the proposal triggered section 3661(b) because "implementation of [the] proposal is likely to cause at least a small degradation in the current level of service provided to First-Class Mail on a nationwide basis." *Id.* at 9. In that same case, the Postal Service estimated that "[i]n terms of volume, the net reduction in overnight [First Class Single-Piece Letters] would be 1.55 percent." *Id.* at 74. The Commission found that the proposed change qualified as a "change to the nature of postal services" under section 3661(b). *Id.* at 9. The Commission issued an opinion under section 3661, even though the proposed change's "overall effects on the postal service [could not] be known in advance" and even though the Postal Service "explicitly disclaim[ed] any

intention to change currently-established service standards as part of its proposal.” *Id.* at 13; 15. In one of its first advisory opinions, the Commission likewise wrote that “[T]he effect of a contemplated program, rather than the Service’s specific intent in adopting it, controls in establishing whether that program accomplishes a change in the nature of postal services.” Advisory Opinion Docket No. N75-1, at 20.

The Commission has also issued advisory opinions under section 3661(b) even where the Postal Service has not made the “threshold” determination that a proposed change affects the nature of postal service, and where the Postal Service has thus contested the Commission’s jurisdiction. *See* Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, Docket No. N2009-1, at 11 (3/10/10) (rejecting the Postal Service’s jurisdictional challenge, analyzing the proposed changes under the *Buchanan* framework, and finding that “the Postal Service’s Initiative falls under the ambit of 39 U.S.C. § 3661.”). The Commission has described section 3661(b) in expansive terms, noting the importance of its safeguards for protecting the public and in ensuring that the Postal Service fulfills its statutory obligations. The Commission has noted that section 3661(b) is a “statutory tool provided by Congress for gathering. . . public input” and that:

Obtaining the views of Postal Service customers is vitally important where the Postal Service's monopoly First-Class Mail product is concerned. The privilege of a governmentally established monopoly status includes the responsibility to hear and consider the needs of the constituency that must function under the constraints of that monopoly. Actions that are, or are perceived to be unilateral in nature may disenfranchise users to the ultimate detriment of the monopoly product.

Commission Report: Complaint on Sunday and Holiday Collections, Docket No. C2001-1 at 2 (Nov 5, 2002).

It is precisely because the Postal Service cannot always properly independently make the threshold determination of section 3661(b) that the Commission has maintained it is important for the Postal Service to seek out the expertise of the Commission. *See, e.g.*, Goldway Decl. ¶ 21 (describing how in reviewing a certain proposal, the Commission found “that the cost savings [stated by the Postal Service] were overstated by more than \$1 billion, would cause up to \$0.6 billion in net revenue losses, and would cause almost 25 percent of all First-Class and Priority mail to be delayed for two days” and that “the Postal Service had failed to assess the impact its proposal would have on people living and working in rural or remote locations.”).

In sum, the past practice of the Commission, which is owed a high degree of deference, shows that the Commission interprets section 3661(b) more expansively than suggested by the Defendants. And, as set forth below, this ultimately weighs strongly against Defendants in an assessment of the merits.

B. Analysis of *Buchanan* Requirements

I now return to the *Buchanan* requirements, giving a low level of deference to Mr. Marshall’s statement in the July 22 letter, and a very high degree of deference to the Commission’s past practice in interpreting section 3661 and these factors. In order for changes to fall within the ambit of section 3661(b), three requirements must be met. *Buchanan*, 508 F.2d at 262-63. Importantly, in the context of a preliminary injunction, “it is not necessary [for a court] to decide that the challenged changes are in fact embraced in Section 3661.” *Buchanan*, 375 F. Supp. at 1022. Rather, a court must find “that most likely they are and therefore that there is substantial likelihood that plaintiffs will prevail on the merits.” *Id.*

The first requirement under *Buchanan* is that “there must be a ‘change.’ This implies that a quantitative determination is necessary. There must be some meaningful impact on service.

Minor alterations which have a minimal effect on the general class of postal users do not fall within § 3661.” *Buchanan*, 508 F.2d at 262. Defendants argue that the July operational changes are not changes within the ambit of section 3661 because they do not represent new policy, but rather a “renewed focus” to comply with existing policies. Plaintiffs counter that the evidence thus far, including declarations from Mr. Cintron and public statements from Postmaster DeJoy and Chief Operating Officer David Williams, show evidence of a change and a meaningful impact on service.

The agency’s description of its own change is not determinative; rather, courts may look at facts in the record to determine whether there has been a “meaningful impact on service.” *See id.* at 265 (noting that “the Postal Service says[] there is no change in the nature of postal services since [the program] changes nothing and only provides information” but that “[t]estimony indicating the existence of two programs supports plaintiffs’ position.”). The Commission has likewise held that “the effect of a contemplated program, rather than the Service’s specific intent in adopting it, controls” as to whether there has been a “change.” Advisory Opinion Docket No. N75-1, at 20. “Therefore, the Service’s claim that [a program] is designed to maintain existing overall levels of postal service, and will produce no aggregate change in the service it provided, is not controlling.” *Id.* And even proposals described by the Postal Service as a “renewed focus” of “longstanding policy” have previously merited review by the Commission under section 3661. *See* Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, Docket No. N2009-1, at 8 (Mar. 10, 2010) (noting that the Postal Service sought an advisory opinion before implementing changes “that may result from a focused, systemwide application of its longstanding discontinuance review process.”).

As discussed above, Defendants' attempt to characterize the initiative as a simple continuance of existing policies, rather than a change, is belied by the agency's own pronouncements and substantial evidence in the record. Postmaster DeJoy stated that the Postal Service "must make a number of significant changes," and that he "began those efforts right away." Internal Memorandum from Postmaster General Louis DeJoy (Aug. 13, 2020) Ex. G. The Stand-Up Talk referred to "transportation changes being implemented immediately (today)." See Stand-Up Talk Ex A. A banner put up recently in Oregon read "Do not hold the truck. No more holding trucks" and "All HCR and PBS trips will depart on time, no exception." See Tr. Prelim. Inj. Teleconference at 66, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020). Guidance by Mr. Cintron effectively sets national transportation policy and narrows the criteria for approving late or extra trips. See Email from Robert Cintron to Area Vice Presidents re: Extra Guidance (July 14, 2020) Courtroom Ex. 54-11 (stating that "our focus is to eliminate unplanned extra transportation" and that "trips must depart on time."). The Cintron Guidance was distributed to area executives. *Id.*; Cintron Decl. ¶245. Ruth Goldway, the former Chairwoman of the Commission, noted that, in her opinion, the changes in transportation and overtime policies should have been submitted to the Commission. Goldway Decl. ¶ 35. Ms. Goldway also wrote that "[e]ven if the Postal Service did not know that its changes were likely to impact service standards, it should still have reported to the Commission once it became clear that the changes were preventing the Postal Service from meeting its existing service standards." *Id.* ¶ 36.

The "quantitative determination" demanded by *Buchanan* is also evidenced in the agency's own documents. Mr. DeJoy stated that the Postal Service now had an "ontime dispatch schedule" of "97.3 percent, up from 89.8 percent" and had "reduced extra trips by 71 percent." Internal Memorandum (Aug. 13, 2020) Ex. G. Mr. DeJoy also stated that "[u]nfortunately, this

transformative initiative has had unintended consequences that impacted our overall service levels.” *Id.* Evidence shows sharp decreases in mail service across the country beginning in mid-July, after the issuance of the Stand Up Talk and Mr. Cintron’s policy guidance. *See* Eastern Area AIM Meeting- Service Update (Aug. 4, 2020) Ex. 6; Service Performance Measurement, PMG Briefing Ex. 11; Pacific Area Performance Briefing; Congressional Briefing (Aug. 31, 2020) Ex. 12; Q4 To-Date Service Performance For Market Dominant Products, Courtroom Exhibit 54-17.

The second *Buchanan* requirement is that “the change must be ‘in the nature of postal services.’ This involves a qualitative examination of the manner in which postal services available to the user will be altered.” 508 F.2d at 262-63. Defendants argue that if the new initiatives qualify as a change, then any managerial initiative would have to go through the process. Plaintiffs respond that not all managerial decisions would be implicated by their reading of section 3661(b), but only those that affect the nature of postal services.

The Commission has stated that in determining whether an initiative involves a change in the nature of postal services “[i]t is the *experience of the individual postal consumer*, the recipient of the complex of services provided by the Postal Service and *the intended beneficiary of the policies* incorporated by § 3661, that must be assayed.” Advisory Opinion Docket No. N75-1, at 21. (Emphasis added).

Plaintiffs have shown that individual postal customers have experienced an alteration in the availability of postal services as a result of the changes. *See, e.g.*, Jeffrey Erlbaum Decl. Ex. 24, ECF No. 18-4 (testifying to impact of delays on his business); Clayton Haas Decl. Ex. 27, ECF No. 18-4 (describing how delays have harmed the California Department of Conservation); Beverly Hudson Decl. Ex. 28 (testifying to problems caused by delays for the Pennsylvania Department of General Service and providing a chart of these delays); Linda Jara Decl. Ex. 29,

ECF No. 18-4 (describing how delays have impacted her access to medication); Jennifer Jones Decl. Ex. 30, ECF No. 18-4 (describing how USPS delays killed the chickens she ordered through the mail); Gabriella Kejner Decl. Ex. 31 (detailing instances where Delaware residents did not receive essential items provided by the Delaware Department of Health and Social Services in a timely fashion due to postal delays); Kimberly Kirchmeyer Decl. Ex 32 (describing how mail delays have impaired the California Department of Consumer Affairs' ability to carry out its mission and have impaired the ability of the agency to process licenses); Steward Knox Decl. Ex. 33, ECF No. 18-4 (describing how delays have impacted receipt of notices that the California Labor and Workforce Development Agency has sent); Clarissa Mager Decl. Ex 34 (describing the public safety risks caused by mailing delays related to the Pennsylvania Criminal Unit of the Office of the General Counsel); Naomi Mayer Decl. Ex. 36, ECF No. 18-4 (testifying that she has been personally impacted by Postal Service delays); Christina Ann Naccarato-OTOole Decl. Ex 38 (testifying that she and her family have been harmed by USPS delays); Robert O'Brien Decl. Ex. 39 (describing how recent USPS delays have impaired the ability of the Pennsylvania Department of Labor to timely adjudicate and pay benefits, schedule and hold hearings, and respond to matters in litigation); Jean Pallares Decl. Ex. 41, ECF No. 18-4 (describing how patients who receive prescriptions through the mailing program from the Los Angeles County Department of Health Services have been impacted by delays); Melinda Utal Decl. Ex. 43, ECF No. 18-4 (describing how her business has been impacted by delays); Jill Weber Decl. Ex 44, ECF No. 18-4 (describing changes in her mail delivery); *see also* Sections IV.A.2 and IV.A.3, *supra*.

The third requirement to invoke section 3661(b) is that “the change must affect service ‘on a nationwide or substantially nationwide basis.’ A broad geographical area must be involved.” *Buchanan*, 508 F.2d at 263.

In analyzing this requirement, the Commission previously upheld a decision by an ALJ that the change had a nationwide impact “because the breadth of its impact” was “evidenced by its hierarchical dissemination from Postal Service headquarters and its implementation at multiple locations in different areas throughout the country.” Advisory Opinion Docket No. N75-1, at 26. The Commission further noted that “[i]f a significant number of postal customers experience the requisite change in service in their local areas, and these local areas cover a ‘broad geographical area’ then the change is substantially nationwide “regardless of whether the local changes produce an aggregate change in the level of postal services provided by the Postal service.” *Id.* at 29. The Commission cautioned that this reasoning “should not be read to imply that this Commission will assert jurisdiction over ‘scattered local changes’ in postal services which are not the products of an identifiable decision or program of the Postal Service.” *Id.* Rather, jurisdiction under section 3661(b) “is predicated upon the assumption that change in the nature of postal services, however widespread or significant, must be the results of a ‘determination’ of the Postal Services in the form of a discrete managerial decision or program.” *Id.* at 29-30.

Where courts have denied relief, it has been on the basis that the postal service changes challenged were limited in geographical area and thus not covered by section 3661(b). *See, e.g., Bradley v. U.S. Postal Serv.*, 554 F.2d 186, 187-88 (5th Cir. 1977) (per curiam) (holding that a change did not “invoke the safeguards of section 3661” because it only affected residents of one county and thus was not “a nationwide change.”); *Ludewig v. Wolff*, 492 F. Supp. 1048, 1059 (S.D. Tx. 1980) (holding that “the renumbering of mailboxes in one rural route in Three Rivers, Texas” did not invoke the section 3661 procedures under the “nationwide impact” requirement of the subsection); *Wilson v. U.S. Postal Serv.*, 441 F. Supp. 803, 808 (C.D. Cal. 1977) (“In this instance, the transfer of mail processing functions merely affects the western region of Los Angeles County.

That is a far cry from affecting postal services on even a substantially nationwide basis.”); *NAACP v. U.S. Postal Serv.*, 398 F. Supp. 562, 564 (N.D. Ga. 1975) (holding that the relocation of the main branch of the Atlanta Postal Service “does not involve a broad geographic region.”)

Defendants seem to concede that these changes are occurring at a nationwide level; indeed, they could not plausibly argue otherwise. The changes in this case come from headquarters. *See* Cintron Decl ¶ 245; PowerPoint – AVP Telepresence (June 26, 2020), Courtroom Ex. 54-13; PowerPoint – AVP Meeting (July 7, 2020), Courtroom Ex. 54-14; PowerPoint – AVP Telepresence (July 10, 2020) Courtroom Ex. 54-9; Cintron Dep. 66. The changes have been implemented at postal offices around the country, as shown by declarations from union leaders, *see* Gibson Decl. Ex. 26; Dickey Decl. Ex. 50; Coradi Decl. Ex. 49; Cogan Decl. Ex. 48, led to a Stand Up Talk being distributed around the country from the Southern Area, to a banner being hung in Oregon, and to a PowerPoint apparently being crafted in Northern Ohio and widely distributed. The effects of the centralized changes have been felt by customers in, at least six states and the District of Columbia, as described above and in Section IV, *supra*.

In order to grant a preliminary injunction, the Plaintiffs must show a “reasonable probability” of success on the merits that Defendants were required to seek an advisory opinion from the Commission under section 3661(b) and acted ultra vires by failing to do so. *Reilly*, 858 F.3d at 176; *see also Buchanan*, 375 F. Supp. at 1022 (holding that a court need only find that “most likely” the changes in question are embraced by section 3661(b)). Under any standard of deference, I conclude that the Plaintiffs have made this showing.⁴²

⁴² See Section VIII, *infra*, for a brief discussion on the merits of Count III.

VI. Irreparable Harm

To show irreparable harm, “a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.” *Ramsay v. National Board of Medical Examiners*, 968 F.3d 251, 262 (3d Cir. 2020) (citing *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994)). Economic loss does not constitute irreparable harm. *Acierno*, 40 F.3d at 653. Moreover, “the injury created by a failure to issue the requested injunction must ‘be of a peculiar nature, so that compensation in money cannot atone for it.’” *Id.* Irreparable harm is evaluated according to a “more likely than not” standard. *Reilly*, 858 F.3d at 180.

Here, Plaintiffs have shown previous and ongoing harm being suffered by agencies and individuals as a result of these allegedly illegal changes. *See* Sections IV.A.2 and IV.A.3, *supra*. The harms highlighted are more than economic, and are “of a peculiar nature, so that compensation in money cannot atone” for them. For example, the Deputy Secretary for Administration at the Department of General Services in Pennsylvania attested that the agency has received a number of complaints from suppliers concerning payments that have been mailed and were never received. *See* Hudson Decl. Ex. 28 at 4-5. The Postal Service’s delays have inflicted a reputational injury, a fact that operates in favor of a preliminary injunction. *See Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 211 (3d Cir. 2014), *holding modified* by *Reilly*, 858 F.3d at 173 (“Potential damage to reputation constitutes irreparable injury for the purpose of granting a preliminary injunction in a trademark case.”) (citing to *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 196 (3d Cir. 1990)); *see also S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 378 (3d Cir.1992) (noting that “[g]rounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill.”).

Plaintiffs must show that it is likely that they will suffer irreparable harm. *See Winter*, 555 U.S. at 22 (“Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction.”). Plaintiffs have made that showing. Multiple agencies have shown that postal delays interfered with their basic ability to administer their programs. *See, e.g.*, Haas Decl. Ex. 27 (testifying to how delays in equipment delivery and delays in hearing notices have harmed the California Department of Conservation); Kejner Decl. Ex. 31 (testifying to how the delays in mail have prevented proper administration of programs by multiple agencies within the Delaware Department of Health and Social Services); Kirchmeyer Decl., Ex. 32 (testifying to how mail delays have harmed the basic functioning and processing of the California Department of Consumer Affairs); Knox Decl. Ex. 33 (testifying to how delays have affected the ability to issue decisions and delays in hearings for agencies within the California Labor and Workforce Development Agency); Mager Decl. Ex. 34 (testifying to public safety risks caused by delays in mailings to and from the Office of the General Counsel in Pennsylvania); O’Brien Decl. Ex. 39 (testifying to how mailing delays for hearing notices and decisions have harmed the Pennsylvania Department of Labor and Industry); Pallares Decl. Ex. 41 (testifying to how the Los Angeles County Department of Health Services has been harmed in its ability administer its prescription mailing program due to mailing delays); Whichard Decl. Ex. 45 (testifying to how mailing delays have harmed the ability of the Office of the Governor for North Carolina to administer various programs).

Given the ongoing reductions in service standards, even after Postmaster DeJoy announced a halt of various changes, *see* Courtroom Exhibit 54-16, Plaintiffs have shown it is more likely than not that they will continue to suffer these harms without a preliminary injunction. *See also* Section IV.A.3, *supra*. This resonates with particular concern as to Election

Mail, because the defendants have testified that Election Mail was delayed during primaries in July and August could be impacted in the future by the operational changes. *See* Glass Dep. 50-51, 65-66, Courtroom Ex 55 (stating that “[t]here was a reduction in our service level. It did take longer for pieces to go from sender to receiver” that included election mail in primary elections conducted in July and August 2020); *see* Tr. Prelim. Inj. Teleconference at 66, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020) (conceding that election mail could be left behind as a result of changes in the transportation policy).

VII. Balance of Equities and Public Interest.

Having established likelihood of success on the merits and irreparable harm, which the Third Circuit has stated are the most critical, I now turn to the Balance of Equities and the Public Interest. *See Reilly*, 858 F.3d at 179 (describing the first two factors as “critical” and as “gateway factors.”) Plaintiffs must show that “the balance of the equities tips in [their] favor, and an injunction is in the public interest.” *Winter*, 555 U.S. at 20. Where the Government is a party, the last two factors in the preliminary injunction analysis merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

When assessing the balance of equities, the Third Circuit will consider how the district court “balanc[ed] the parties’ relative harms; that is, the potential injury to the plaintiff[] without this injunction versus the potential injury to the defendant with it in place.” *Ramsay v. National Board of Medical Examiners*, 968 F.3d 251, 263 (3d Cir. 2020). In this matter, the balance of the equities tilts in Plaintiffs’ favor. Although the USPS has an interest in efficiency, as discussed above, this interest does not outweigh its responsibility to adhere to the PRA and its responsibilities to the public. The agency has already pledged to halt a number of different policy initiatives until the election, effectively conceding that the public interest requires such action. *See* Statement of

Postmaster General Louis DeJoy (August 18, 2020) Ex. H. Moreover, the purpose of a preliminary injunction is to preserve the relative positions of the parties. *Benisek*, 128 S. Ct. at 1945. Enjoining the enforcement of the July 2020 policies puts the Postal Service in the same posture that it has been in for its recent history. I find that enjoining the imposition of USPS policies would halt disruption in the mail service and preserves the status quo that existed before the policies were implemented. I find that the interest of the public and particularly the risk of irreparable harm tilts the equities in the plaintiffs' favor in this instance. Finally, to the extent that Defendants contend that they are already taking steps to remedy the admitted deficits in the timely delivery of mail, they can hardly be burdened by a court order requiring them to address those deficits.

For the foregoing reasons, I find that Plaintiffs have met their burden and that a preliminary injunction should be entered as to Count I.⁴³

VIII. Disposition of Count III

Because Plaintiffs' motion for a preliminary injunction with respect to their procedural claims under the PRA will be granted, there is no need to reach Plaintiffs' claims under the Elections Clause and the Electors Clause. I decline to do so under the reasoning articulated by Justice Brandeis in his famed *Ashwander* concurrence:

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

⁴³ Plaintiffs have not moved for relief under Count II, which alleges that the changes implemented by the Postal Service violate sections 101(e), 403(a) and 403(b) of the PRA. Pl. Compl. at ¶ 228-236. As noted in note 29 *supra*, there is a separate jurisdictional basis for these claims. Section 101(e) of the PRA requires that in determining all policies for postal services, the Postal Service "shall give the highest consideration to the requirement for the most expeditious. . . delivery of important letter mail." 39 U.S.C. § 101(e). Section 403(a) requires the Postal Service to "develop, plan, promote, and provide adequate and efficient postal services." 39 U.S.C. § 403(a). Section 403(b) requires the Postal Service to "maintain an efficient system of collection, sorting, and delivery of the mail nationwide." 39 U.S.C. § 403(b). Much of the same evidence advanced in support of Count I would appear to establish a probability of success on the merits as to Count II.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).
See also Harmon v. Brucker, 355 U.S. 579, 581 (1958).

Justice Brandeis’ principle has been endorsed by the Third Circuit. *See Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 249 n.13 (3d Cir. 2005); *New Jersey Payphone Ass’n, Inc. v. Town of West New York*, 299 F.3d 235, 249 (3d Cir. 2002) (Alito, J., concurring).

Plaintiffs bring claims under the Elections Clause and the Electors Clause seeking to halt what they view as unprecedented executive interference in their election administration. The states fear that the persistent declines in USPS service under Postmaster DeJoy will delay Election Mail, thereby impairing voters’ ability to safely participate in a critical election contest. I share Plaintiffs’ concern, as USPS service has not rebounded to pre-July levels. But, as Plaintiffs admit, their constitutional arguments are novel and would require me to craft a new constitutional standard in deciding the merits of their claims.

Because equitable relief under Count I also addresses the delays that threaten states’ mail-in voting systems, under the prevailing guidance from the Court of Appeals, I will dispose of Plaintiffs’ motion for a preliminary injunction on the narrowest possible ground – the procedural violation of the PRA.

IX. Remedy

The nature of this action necessarily requires a nationwide injunction, for which there is well-settled authority. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932) (holding district court’s order “binding upon the respondent, not simply within the District of Massachusetts, but throughout the United States”); *McLendon v. Cont’l Can Co.*, 908 F.2d 1171, 1182 (3d Cir. 1990) (holding “[f]ull relief required a nationwide injunction”). Thus, ordinarily, when a court finds agency regulations to be unlawful under the APA, it vacates those

rules entirely—the scope of the remedy fits the violation. *See, e.g., Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 834 (E.D. Pa. 2019), *aff'd sub nom. Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019), *cert. granted sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 918, (2020), and *cert. granted sub nom. Trump v. Pennsylvania*, 140 S. Ct. 918 (2020), and *rev'd and remanded sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).⁴⁴

Yet “[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.” *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). In that exercise, courts must give appropriate consideration to the imperative “that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Therefore, in certain circumstances—even in cases involving APA procedures with nationwide effect—it is possible to craft an injunction more limited in scope. *See Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985) (holding regulation invalid, but determining district court did not have “the authority to issue an injunction aimed at controlling [Agency's] behavior in every . . . case in the country”).

Although the APA is not at issue here, for the purposes of providing complete relief to the Plaintiffs, I find the instant case highly analogous to that in which a federal agency violates procedures mandated by the APA in issuing regulations. As discussed *supra*, the Plaintiffs have suffered a procedural injury by nature of the deprivation of the right to a public hearing per section

⁴⁴ Although the holding of *Pennsylvania v. Trump* was ultimately reversed on the merits, the district court’s decision to issue a nationwide injunction was both affirmed by the Third Circuit in *Pennsylvania v. President United States*, 930 F.3d 543, 575-76 (3d Cir. 2019), and approved in dicta by the Supreme Court in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2412 n.5 (2020). Thus I find it illustrative for this purpose.

3661 of the PRA. This has resulted in numerous concrete harms to the States themselves, including but not limited to the impaired functioning of critical state agencies. There are any number of examples of how continued mail delays outside of Plaintiff states would continue to subject Plaintiff states to those same harms.

Plaintiffs have demonstrated that mail delays both disrupt their ability to administer programs that impact the health and safety of their citizens, and subject them to reputational harms involving contractual partners. For example, Pennsylvania state agencies involved in ongoing business relationships have sent checks to suppliers that are late or never received; meanwhile incoming checks have arrived weeks late.⁴⁵ Hudson Decl. at 2, 4. Where contractual partners are out of state, it is difficult to imagine that the proper functioning of state agencies, which rely heavily on the effectiveness of the Postal Service, could be fully restored without nationwide relief. It is similarly challenging to conceive of a way to address ongoing reputational harms that result from out-of-state contractual partners receiving checks late without affording the Plaintiffs nationwide relief.

Plaintiffs' administrative agencies have been disrupted in other meaningful ways, including their ability to ensure the safety of their citizens.⁴⁶ An Administrative Officer in the Office of General Counsel in the Criminal Unit in Pennsylvania ("OCG Criminal Unit"), who receives and processes extradition requests from other states, reports mail delays and notes the related safety concerns. Mager Decl. Ex. 34, at ¶ 4-9, ECF 18. She explains that "[i]n most states

⁴⁵ Beverly Hudson, Deputy Secretary for Administration at Department of General Services ("DGS") explains how delays regarding incoming and outgoing mail are impacting her office, which oversees "processing of in-bound and outgoing mail on behalf of the Commonwealth." Hudson Decl. at ¶ 4.

⁴⁶ *See, e.g.*, Penn. Const., art. I, § 2 titled "Political Powers": "All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness."

there is a 90-day deadline for a Governor’s Warrant to be issued in an asylum state . . . If the Governor’s Warrant is not issued by the 90-day deadline a fugitive can be released from jail regardless of the crimes with which they have been charged.”⁴⁷ *Id.* at ¶ 6. Thus, if I issue an injunction with regard only to Plaintiff states, the Commonwealth remains exposed to high-level risks because of mail delays beyond its borders.

Moreover, Plaintiffs’ administration of the upcoming election has been and will continue to be frustrated as a result of mail delays. For example, Maine’s Secretary of State, which is responsible for administering state and federal elections, has had to respond to reports of delays in a host of ways: “encouraging voters to return absentee ballots as soon as possible after they are received,” answering “from voters who say that they do not trust the USPS to deliver their mail in absentee ballots on time,” working with “municipal officials to secure funding to partially offset the cost of the installation of secure drop boxes,” and activating an on-line website “where voters will be able to track their absentee ballot.” Dunlop Decl. at ¶¶ 2, 17-20.

By Defendants’ own admission, it is reasonable to conclude that Plaintiff states will have to continue to devote time and resources to addressing these problems even if mail delays in their own states are corrected. According to Robert Justin Glass, Director of the Postal Service’s Election Mail Operations:

[T]he Postal Service has to also be aware that we reach a general national audience, especially one where you're gonna have voters that are currently receiving mail in a state that is not the state in which they're gonna be voting. So you have to take into account that somebody could be living or currently be receiving mail in Pennsylvania, but voting for an election, you know, based in the State of Florida, and there could be completely different sets of laws.

⁴⁷ See Pa.C.S.A. § 9136; 42 Pa. C.S.A. § 9138; *Com. ex re. Knowles v. Lester*, 321 A.2d 637 (Pa. 1974) (affirming grant of writ of habeas corpus on ground that petitioner had been detained for more than 90 days following his arrest without being presented before court as required by Pennsylvania’s Uniform Criminal Extradition Act). The Court explained that the 90-day timeline was meant to allow the governor of the state demanding the fugitive’s presence to “forward a requisition to the asylum state.” *Lester*, 321 A.2d at 639.

Glass Dep. 118:18-24, 119:1-5.

Ultimately it would be highly impractical to craft a remedy specific to the Plaintiff states based on the Postal Service's operating structure. First, the Postal Service's retail and delivery operations are separated into four geographical areas (Atlantic, Southern, Central, and Western Pacific); mail processing operations are divided into two additional areas (Eastern and Western). Powerpoint AVP Telepresence (June 26, 2020), Courtroom Ex. 54-13.⁴⁸ That the Postal Service, by its own admission, cannot account for the way communications around late and extra trips have been interpreted in the field and around the country supports the conclusion that the Postal Service's internal operating structure would be a barrier to ensuring that anything but a nationwide injunction could be effectively implemented. Tr. Prelim. Inj. Teleconference at 64-77, *Jones v. USPS*, No. 20-6516 (S.D.N.Y. Sept. 16, 2020)..

Three other district courts have issued national injunctions within the past ten days. *Washington v. Trump*, No. 1:20-CV-03127-SAB, 2020 WL 5568557 (E.D. Wa. Sep. 17, 2020); *Jones v. U. S. Postal Serv.*, No. 20 Civ. 6516 (VM), 2020 WL 5627002 (S.D.N.Y. Sep. 21, 2020); *State of New York v. Trump* (ECF 20-cv-2340) (D.D.C. Sep. 27, 2020). It is therefore particularly important "to ensure that nationwide relief . . . would not improperly interfere with the litigation of similar issues in other judicial districts." *Califano*, 442 U.S. at 702 (1979). Under the comity doctrine, I have attempted to ensure that the remedy here does not directly conflict. Indeed, this preliminary injunction explicitly incorporates the Order entered by agreement of the parties in *Jones*. See *California v. U.S. Dep't Health & Human Serv.*, 941 F.3d 410, 421 (9th Cir. 2019) ("to our knowledge, no court has adopted the view that an injunction imposed by one district court against a defendant deprives every other federal court of subject matter jurisdiction over a dispute

⁴⁸ This document was labeled as "confidential."

in which a plaintiff seeks similar equitable relief against the same defendant.”). Although the issue of election mail was not presented here as fully as it was in *Jones v. U. S. Postal Serv*, a case brought largely by voters, I am fully incorporating Judge Marrero’s Order because the problems created by Defendants’ changes in operating procedures affect election mail at every stage of the process, both mailings to voters by states and ballots returned to states. It is necessary to include those aspects of Judge Marrero’s Order in order to afford complete relief here.

Again, when “agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” *Nat’l Min. Ass’n*, 145 F.3d at 1409. In considering the alternatives, it is clear that the “ordinary result” must apply under these circumstances. *Id.*; see *Pennsylvania v. President United States*, 930 F.3d at 575 (affirming district court’s decision to apply nationwide injunction). In order to afford the Plaintiffs “complete relief,” *Califano*, 442 U.S. at 702, a nationwide injunction is needed.

An appropriate Order follows.

/s/ Gerald Austin McHugh
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| COMMONWEALTH OF PENNSYLVANIA, | : | |
| ET AL. | : | |
| | : | |
| v. | : | CIVIL ACTION NO. 20-4096 |
| | : | |
| LOUIS DeJOY | : | |
| <i>IN HIS OFFICIAL CAPACITY AS</i> | : | |
| <i>UNITED STATES POSTMASTER GENERAL,</i> | : | |
| ET AL. | : | |

ORDER

This 28th day of September, 2020, for the reasons stated in the accompanying memorandum opinion, it is hereby **ORDERED** that Plaintiffs’ Motion for a Preliminary Injunction (ECF No. 18) is **GRANTED IN PART**, as follows:

1. This Court adopts the order entered by the United States District Court for the Southern District of New York in *Jones v. United States Postal Service*, No. 20 Civ. 6516 (S.D.N.Y. Sept. 25, 2020) (Marerro, J.) and makes it an Order of this Court.
2. To the extent that Judge Marerro’s Order imposed reporting requirements, in complying with the Order, Defendants shall simultaneously file the same reports with this Court.
3. Defendants shall comply with the “Clarifying Operational Instructions” issued September 21, 2020, Courtroom Exhibit 57, adopted in response to the Order entered by *Washington v. Trump*, No. 1:20-CV-03127-SAB, 2020 WL 5568557 (E.D. Wa. Sep. 17, 2020) (Bastian, J.), and not deviate from those instructions except as authorized by Judge Bastian.
4. Additionally, Defendants, and all their respective officers, agents, servants, employees and attorneys, and persons in active concert or participation with them are hereby **ENJOINED** from the following:
 - a. continued implementation or enforcement of operational changes announced in July 2020 reflected in the July 10, 2020 “Mandatory Stand-Up Talk: All Employees,” and the “PMGs Expectations” PowerPoint unless and until the Postal Service presents such changes to the Postal Regulatory Commission and obtains an advisory opinion after a public hearing is held pursuant to 39 U.S.C. 3661(b) and 39 U.S.C. 3661(c).
 - b. continued implementation or enforcement of the Guidelines regarding transportation sent by Robert Cintron to Area Vice Presidents and other agency representatives on

July 11, 2020 and July 14, 2020, unless and until the Postal Service presents such changes to the Postal Regulatory Commission and obtains an advisory opinion after a public hearing is held pursuant to 39 U.S.C. 3661(b) and 39 U.S.C. 3661(c).

- c. continued implementation or enforcement of any and all organizational efforts, initiatives, “operational pivots,” new efforts to “better adhere to existing operating plans” or priority shifts with regard to changes in late and extra truck trips and carrier start and stop times that began during the time period of June 15, 2020 until September 16, 2020, unless and until the Postal Service presents such changes to the Postal Regulatory Commission and obtains an advisory opinion after a public hearing is held pursuant to 39 U.S.C. 3661(b) and 39 U.S.C. 3661(c);
- d. continued implementation or enforcement of any and all organizational efforts, initiatives, “operational pivots,” or priority shifts with regard to work hours reduction targets, penalty overtime, pre-tour overtime, new manager approval requirements for work hours and overtime, and other overtime requests and approvals that began during the time period of June 15, 2020 until September 16, 2020, unless and until the Postal Service presents such changes to the Postal Regulatory Commission and obtains an advisory opinion after a public hearing is held pursuant to 39 U.S.C. 3661(b) and 39 U.S.C. 3661(c);

5. On October 9, October 16, October 23, and October 30, the Postal Service shall make timely submissions to this Court regarding:

- a. The rate that the Postal Service incurred overtime, starting October 2, 2020, as a percentage of total work hours nationwide and as a percentage of total work hours within the two regional processing operations areas and four retail and delivery operations areas;
- b. The number of late and extra trips taken by Network & Local PVS & HCR, starting October 2, 2020.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
ET AL. :

v. :

CIVIL ACTION NO. 20-4096

LOUIS DeJOY :
IN HIS OFFICIAL CAPACITY AS :
UNITED STATES POSTMASTER GENERAL, :
ET AL. :

MEMORANDUM

McHUGH, J.

October 9, 2020

Defendants have moved for Clarification and/or Reconsideration (ECF 66) of this Court’s Order of September 28, 2020, granting in part Plaintiffs’ Motion for a Preliminary Injunction (ECF 63). Specifically, Defendants contend that some aspects of the Court’s order, notably ¶ 1, ¶ 4b, ¶ 4c, and ¶ 4d, might be interpreted in a way that could spur confusion and lead to an overall degradation in service. *See* Defs. Mot. for Clarification and/or Recons. at 2.

As Defendants requested, a telephonic hearing took place on October 6, 2020, followed by a number of hearings on October 8, 2020 and October 9, 2020, in an attempt to guide and facilitate further discussion by the parties. The parties conferred and were able to reach agreement on some, but not all, issues.

“[S]o long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so.” *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973). Moreover, under Federal Rule of Civil Procedure 54(b), “any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of

judgment adjudicating all the claims and all the parties' rights and liabilities." Given the fast-approaching November 3, 2020 election and the Postal Service's concern that the immediate implementation of certain provisions of this Court's September 28, 2020 Order might cause unnecessary confusion around Postal Service operations, good cause exists to clarify the way in which those provisions shall be implemented in the immediate future. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (noting that courts "should pay particular regard to the public consequences in employing the extraordinary remedy of the injunction.").

As an initial matter, I note that I have taken care to co-ordinate my orders with the orders entered by other judges. To that end, I have now specifically incorporated two subsequent orders from the Southern District of New York. Conversely, because I have now approved specific instructions for implementation of my order, in order to avoid potential ambiguity or confusion, I am vacating the previous reference to the Eastern District of Washington in paragraph 3 of the September 28, 2020 Order.

The Order of Clarification issued today incorporates most of the language on which the parties have mutually agreed, together with additional language I am persuaded is warranted both to meet Defendants' operational needs and provide specific guidance with respect to compliance with my order.

/s/Gerald Austin McHugh
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|------------------------------------------|---|---------------------------------|
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| ET AL. | : | |
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| v. | : | CIVIL ACTION NO. 20-4096 |
| | : | |
| LOUIS DeJOY | : | |
| <i>IN HIS OFFICIAL CAPACITY AS</i> | : | |
| <i>UNITED STATES POSTMASTER GENERAL,</i> | : | |
| ET AL. | : | |

ORDER GRANTING, IN PART, DEFENDANTS’ MOTION TO CLARIFY

This 9th day of October, 2020, it is hereby **ORDERED** that Defendants’ Motion for Clarification/Reconsideration, (ECF No. 66) is **GRANTED IN PART**, as follows:

1. The supplemental orders of September 25, 2020 and September 29, 2020, entered by the United States District Court for the Southern District of New York in *Jones v. United States Postal Service*, No. 20 Civ. 6516 (S.D.N.Y. Sept. 29, 2020) are adopted and deemed incorporated within this Court’s orders.
2. Paragraph 3 of this Court’s Order of September 28, 2020 (ECF No. 63), making reference to the action pending in the Eastern District of Washington is hereby **VACATED** and superseded by the specific provisions of this Order.
3. Paragraph 4 of this Court’s order of September 28, 2020 (ECF No. 63) is hereby **CLARIFIED** as follows:

For the purposes of paragraphs 4b and 4c of this Court’s Order, Defendants shall be deemed in compliance if they commit to and enforce the following:

- Transportation, in the form of late and extra trips is authorized and shall be used where reasonably necessary to meet service standards and service performance targets. While the Postal Service is not required to delay a trip when that delay will cause an overall degradation in service (e.g., a truck should not be delayed to ensure timely delivery of a small amount of mail when doing so would cause a larger amount of mail to be delayed) the Postal Service shall use extra trips to minimize the effect of such delays and to meet service commitments, except when not feasible. Managers shall use their best business judgment to meet service commitments and to not leave mail behind.

- Extra transportation resources are authorized and shall be used to ensure that Election Mail reaches its intended destination in a timely manner. This includes, but is not limited to, extra trips from all points of processing and delivery (e.g., retail units and plants), as necessary to connect Election Mail to its intended destination or the next stage in Postal Service processing. Late and extra trips that would facilitate the on-time delivery of Election Mail are authorized and encouraged—the Postal Service is committed to using such trips to deliver Election Mail on time.
- Extra delivery and collection trips are authorized and shall be used to ensure, to the best of the Postal Service’s ability, that completed ballots entered on Election Day reach the appropriate election official by the state’s designated deadline. This includes, but is not limited to, early collections the week before Election Day to ensure all collected ballots are processed timely, and delivery of ballots found in collections on Election Day to election boards within states requiring ballots to be returned by a designated time on Election Day.
- The Postal Service shall make all reasonable efforts to ensure that all mail, including Election Mail, committed for a particular day is delivered that day. All requirements regarding carrier start and stop times should be consistent with the Postal Service’s handbooks and manuals, all of which predate June 15, 2020.

Defendants will ensure that all USPS employees, via their supervisors and managers, are notified of the provisions of this Order and the Postal Service’s commitment to and enforcement of them. To the extent that they conflict, the provisions of this Order shall supersede any prior guidance, including Guidelines regarding transportation sent by Robert Cintron to Area Vice Presidents and other agency representatives on July 11, 2020 and July 14, 2020.

For the purposes of paragraph 4.d., Defendants shall be deemed in compliance with the Order (ECF No. 63) if they commit to and enforce the following:

- The Postal Service will approve overtime, including penalty overtime, for the purpose of meeting service standards and service performance targets.
- Overtime, including penalty overtime, is authorized and shall be used to support all additional resources necessary to ensure that Election Mail is prioritized and delivered on time.

Defendants will ensure that all USPS employees, via their supervisors and managers, are notified of these provisions and the Postal Service’s commitment to and enforcement of them. These provisions shall supersede any prior guidance, to the extent they conflict.

4. By October 16, 2020, Defendants shall provide Plaintiffs and this Court with an affidavit detailing their efforts to notify all USPS employees, via their supervisors and managers, of these provisions and the Postal Service's commitment to and enforcement of them.
5. The Court hereby schedules a telephonic status hearing for **December 3, 2020**, at 1:30 p.m. to review the operational effect of Defendants' ongoing implementation of the Court's Order of September 28, 2020 (ECF No. 63).

/s/Gerald Austin McHugh
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VOTE FORWARD; AMY BOLAN; AARON
CARREL; DANTE FLORES-DEMARCHI;
PAUL HUNTER; SEBASTIAN IMMONEN;
KATHRYN MONTGOMERY; SEAN
MORRISON; INDERBIR SINGH DATTA;
MARTHA THOMPSON; LINDA
ROBERSON; GARY YOUNG; VOCES
UNIDAS DE LAS MONTAÑAS;
COLORADO ORGANIZATION FOR
LATINA OPPORTUNITY AND
REPRODUCTIVE RIGHTS; PADRES &
JÓVENES UNIDOS;

Plaintiffs,

v.

LOUIS DEJOY, in his official
capacity as the Postmaster
General; and the UNITED STATES
POSTAL SERVICE,

Defendants.

Civ. Action No. 20-2405 (EGS)

MEMORANDUM OPINION

Plaintiffs—eleven voter-eligible individuals and four organizations dedicated to seeking greater civic engagement in the November 2020 election—bring this lawsuit against Defendants Louis DeJoy (“Mr. DeJoy”), in his official capacity as Postmaster General of the United States, and the United States Postal Service (“USPS”), alleging that a new USPS policy implemented in July 2020 violates Plaintiffs’ constitutional right to vote and constitutes *ultra vires* agency action. See

Pls.' Am. Compl., ECF No. 15.¹ Plaintiffs seek a preliminary injunction with regard to their constitutional claim.

Upon consideration of the Plaintiffs' motion, the response, the reply thereto, the applicable law, and the entire record, the Court **GRANTS** Plaintiffs' motion.

I. Background

A. Factual Background

1. The COVID-19 Pandemic

Plaintiffs assert that the COVID-19 pandemic has increased reliance on mail delivered by the USPS. Pls.' Mem. Law Supp. Mot. Prelim. Inj. ("Pls.' Mot."), ECF No. 16-1 at 7. According to Plaintiffs, several states have adjusted their election procedures to allow for all eligible voters to vote by mail-in ballot in the November 2020 election: 43 states and the District of Columbia will permit all eligible voters to vote by mail, and 28 states will require that the ballots be received, rather than postmarked, by Election Day. *Id.* at 7-8 (citing news reports). In total, the adjustments made by many states in response to the COVID-19 pandemic will result in approximately 83% of all eligible voters having the opportunity to vote in this method. *Id.* (citing news reports). It is anticipated that

¹ When citing electronic filings throughout this Opinion, the Court cites to the ECF page number, not the page number of the filed document.

at least 80 million mail-in ballots will be submitted for the November election. See Hersh Decl., ECF No. 16-15 ¶ 14.

2. USPS Policy Changes

On July 10, 2020, USPS announced an “operational pivot” to make “immediate, lasting, and impactful changes in our operations and culture.” Ex. 4 to Pls.’ Mot., ECF No. 16-6 at 2. As most relevant here, the document stated that (1) “[a]ll trips will depart on time (Network, Plant and Delivery); late trips are no longer authorized or accepted”; (2) “[e]xtra trips are no longer authorized or accepted”; (3) “[c]arriers must begin on time, leave for the street on time, and return on time”; and (4) “no additional transportation will be authorized to dispatch mail to the Plant after the intended dispatch” (collectively, the “Late/Extra Trips Policy”). *Id.* The USPS knew that prohibiting these trips would result in delayed mail delivery: “One aspect of these changes that may be difficult for employees is that—temporarily—we may see mail left behind or mail in the workroom floor or docks . . . , which is not typical.” *Id.* However, the document noted expectations that “operations will begin to run more efficiently and that delayed mail volumes will soon shrink significantly.” *Id.* at 3. These changes were also confirmed in a USPS PowerPoint presentation, which explained that if “the [USPS processing] plants run late they will keep the mail for the next day. If [delivery units] get mail late and

your carriers are gone and you cannot get the mail out without [overtime] it will remain for the next day.” Ex. 5, ECF No. 16-7 at 5-6. Since the USPS policy took effect, USPS has eliminated an average of 32,900 extra or late trips per week, Grimmer Decl., ECF No. 16-11 ¶¶ 10-11, or a 75% drop in the number of both types of trips, Pls.’ Reply, ECF No. 24 at 11.

Due to the policy changes expressly prohibiting late trips and extra trips, the ability to deliver mail in an efficient manner can be inhibited at three different points in the delivery chain. First, mail handlers deliver mail from the local post office to a USPS processing plant; if the mail arrives at the post office after the handler has already left for the processing plant, the mail may wait at the post office until the next day. Pls.’ Mot., ECF No. 16-1 at 12-13. Second, once the mail arrives at the processing plant, if it is not processed prior to the mail handler’s scheduled departure time from the plant to the relevant delivery unit, it again may remain at the plant until the next day. *Id.* at 13. Third, once the letter has made it to the delivery unit, it still must arrive prior to the mail carrier’s trip to the final intended destination; if it arrives after the mail carrier has left for her delivery route, the letter may be delayed one day. *Id.* at 13. Thus, the USPS policy changes may potentially delay certain mail items for up to three days more than typical prior to the policy changes.

The USPS policy changes stand in contrast with prior practices that allowed postal workers to conduct late trips or extra trips “to delay or supplement their scheduled deliveries to ensure that they have collected and transported all outstanding mail at any given facility.” Pls.’ Mot., ECF No. 16-1 at 10 (citing Ex. 3 to Pls.’ Mot., ECF No. 16-5).

Defendants have clarified that late or extra trips are not “banned”; however, they acknowledge that they continue “at a reduced level.” Suppl. Cintron Decl., ECF No. 21-3 ¶ 4. On September 21, 2020, USPS also issued “Operational Instructions” providing that “transportation, in the form of late or extra trips that are reasonably necessary to complete timely mail delivery, is not to be unreasonably restricted or prohibited. Managers are authorized to use their best business judgment to meet our service commitments.” See Ex. 1 to Notice Suppl. Material, ECF No. 30-1 at 4.

3. USPS Postal Policy Changes Have Led To Nationwide Delays And Continue To Have A Nationwide Impact

USPS records indicate that nationally, on-time delivery of First-Class Mail began to decline following implementation of the USPS policy changes. On-time services scores are the “measure of the frequency with which USPS is able to deliver mail in the timeframe defined by its service standards.” Pls.’ Reply, ECF No. 24 at 11; see also Suppl. Grimmer Decl., ECF No.

24-2 ¶¶ 5, 7. During the pre-policy period, from January 4, 2020 to July 4, 2020, the average USPS service score was 91.6% nationally; however, the August 29, 2020 service score was 3.56 percentage points lower than the pre-policy average. Suppl. Grimmer Decl., ECF No. 24-2 ¶ 5; see also *id.* (noting that the August 29 service score was 2.96 percentage points lower than the three-week period prior to the USPS policy implementation). The overall decline in service scores is consistent across all but one region in the United States, though the service scores vary. For example, while the USPS "Capital Metro" area has a service score that has declined 6.3 percentage points since implementation of the USPS policy, the service score in the "Southern" area has declined by only approximately two percentage points. See *id.* ¶ 7. Moreover, services scores in 91% of USPS districts around the United States are lower as compared to the pre-policy average from January 4, 2020 to July 4, 2020. *Id.* ¶¶ 8-9.

Defendant Mr. DeJoy has recognized that USPS made only "one change" in early July 2020, and that change regarded his request that "the team . . . run the transportation on time and mitigate extra trips." Ex. 6 to Pls.' Mot., ECF No. 16-8 at 4. In the August 13, 2020 letter to all USPS employees, Mr. DeJoy also acknowledged delivery delays were "unintended consequences" of the USPS policy changes. See Pls.' Mot., ECF No. 16-1 at 16

(citing USPS, *Path Forward: PMG Addresses Restructuring* (Aug. 13, 2020), <https://rb.gy/y6tbre>). Furthermore, in testimony before the House Committee on Oversight and Reform on August 24, 2020, Mr. DeJoy again recognized that the USPS policy changes were causing delivery delays and that it “expose[d] a need to realign some of [USPS’s] processing and scheduling that caused mail to miss the scheduled transportation.” See Ex. 8 to Pls.’ Mot., ECF No. 16-10 at 10. Mr. DeJoy stated that because “production schedules within the plants were not aligned with the transportation schedules going out,” “about 10% of the mail was not aligned.” See Ex. 6 to Pls.’ Mot., ECF No. 16-8 at 7.

B. Procedural History

Plaintiffs filed this lawsuit on August 28, 2020. See Compl., ECF No. 1. On September 8, 2020, Plaintiffs filed an amended complaint against Defendants, see Am. Compl., ECF No. 15, and subsequently filed a motion for preliminary injunction requesting that the Court enjoin Defendants and their agents from implementing the USPS policy changes, see Pls.’ Mot. Prelim. Inj., ECF No. 16. Defendants filed their opposition on September 15, 2020. See Defs.’ Resp. Pls.’ Mot. Prelim. Inj. (“Defs.’ Opp’n”), ECF No. 21. Plaintiffs filed their reply brief on September 20, 2020. See Pls.’ Reply Supp. Mot. Prelim. Inj. (“Pls.’ Reply”), ECF No. 24. The motion is ripe for the Court’s consideration.

II. Legal Standard

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (alteration in original) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)). Where the federal government is the opposing party, the balance of equities and public interest factors merge. See *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In this Circuit, the four factors have typically been evaluated on a "sliding scale," such that if "the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009).

In the wake of the Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), "the D.C. Circuit has suggested that a positive showing on all four preliminary injunction factors may be required." *Holmes v. FEC*, 71 F. Supp. 3d 178, 183 n.4 (D.D.C. 2014); see also *Sherley*, 644 F.3d at 393 ("[W]e read *Winter* at least to suggest if not to hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction." (citation and quotation marks omitted)). Nonetheless, "the Circuit has had no occasion to decide this question because it has not yet encountered a post-*Winter* case where a preliminary injunction motion survived the less rigorous sliding-scale analysis." *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 46 n.2 (D.D.C. 2014).

III. Analysis

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Constitutional Claim

1. Plaintiffs Likely Have Standing To Bring This Challenge

As a threshold matter, Defendants argue that Plaintiffs cannot establish that they are likely to succeed on the merits because Plaintiffs lack standing in this case. Defs.' Mot., ECF No. 21 at 31.

To establish standing, "a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a

'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "These requirements apply whether an organization asserts standing to sue, either on its own behalf, or on behalf of its members." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). "Standing to seek . . . forward-looking injunctive relief requires [Plaintiff] to show that it is suffering an ongoing injury or faces an immediate threat of injury. For a future injury, that means submitting evidence showing that there is a substantial risk that the harm will recur." *Narragansett Indian Tribal Historic Pres. Office v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020) (internal quotation marks, citations, and alterations in original omitted). However, only one plaintiff needs standing in order for a claim to go forward. See *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 9 (D.C. Cir. 2017) (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)).

Defendants argue that neither the "Organization Plaintiffs"—Vote Forward, Voces Unidas de las Montañas, COLOR, and Padres & Jóvenes Unidos—nor the individual Plaintiffs can establish that they have suffered an injury-in-fact. Defs.' Mot., ECF No. 21 at 31. Defendants do not allege that Plaintiffs

have not established causation or redressability for the purposes of standing.

First, regarding organizational standing, the D.C. Circuit recently articulated the test for determining whether an organization satisfies the “irreparable harm” prong:

An organization is harmed if the “actions taken by [the defendant] have ‘perceptibly impaired’ the [organization’s] programs.” *Fair Emp’t Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L.Ed.2d 214 (1982)); see also *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (explaining that the initial question is whether “a defendant’s conduct has made the organization’s activities more difficult”). If so, the organization must then also show that the defendant’s actions “directly conflict with the organization’s mission.” *Nat’l Treasury Emps. Union*, 101 F.3d at 1430. The second step is required to ensure that organizations cannot engage in activities simply to create an injury. *Id.*

League of Women Voters v. Newby, 838 F.3d 1, 8 (D.C. Cir. 2016).

Citing Plaintiff Vote Forward as an example, Plaintiffs argue that Defendants’ policy changes have impaired Vote Forward’s programs by causing it to “redirect [its] limited resources, which includes both [its] labor and [its] funds, to address challenges caused by Defendants’ Policy that were unforeseen.” Pls.’ Mot., ECF No. 16-1 at 41. According to Plaintiffs, as part of Vote Forward’s mission to “empower grassroots volunteers to help register voters from traditionally

underrepresented communities and encourage them to vote," see Forman Decl., ECF No. 16-24 ¶ 2, Vote Forward "has built an online platform through which volunteers throughout the country are connected with and encouraged to mail hand-written letters to fellow citizens imploring them to vote," Pls.' Reply, ECF No. 24 at 26 (citing Forman Decl., ECF No. 16-24 ¶¶ 4-5). While Vote Forward had previously planned to mail the get-out-the-vote letters on October 27, in line with its "data" suggesting that letters mailed closer to Election Day are more successful, Vote Forward has had to move up its mailing date as a direct result of the USPS policy changes, threatening to "diminish the success of the campaign." Pls.' Reply, ECF No. 24 at 26 (citing Forman Decl., ECF No. 16-24 ¶¶ 6, 8). As a result, Plaintiffs allege that Vote Forward has had to divert resources "to respond to an influx of inquiries [from] volunteers regarding USPS's mailing delays and to assess whether sending out [get-out-the-vote] letters earlier than planned would negatively impact the effectiveness of Vote Forward's letter-writing campaign." Pls.' Mot., ECF No. 16-1 at 42. In addition, Vote Forward has had to "expend[] multiple weeks of effort" to launch two new programs as a result of the USPS policy changes: one that "aims to quantify the mailing delays associated with Defendant's policies," and another that "seeks to ascertain the differential impact on voter turnout if [get-out-the-vote] letters are sent

one week versus three weeks prior to an election," "at a total cost of approximately \$50,000." *Id.*; Forman Decl., ECF No. 16-24 ¶¶ 9-11. Thus, Defendants' actions have "made the organization's activities more difficult," *Newby*, 838 F.3d at 8 (quoting *Nat'l Treasury Emps. Union*, 101 F.3d at 1430), as a result of the "direct conflict between the defendant's conduct and the organization's mission," *Abigail All. v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (citation omitted).

Contrary to Defendants' assertion, Plaintiffs' decision to "use[] its resources to counteract" such injury is not self-inflicted solely because it is voluntary. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quoting *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015)); see also *Equal Rights Ctr. v. Post Props.*, 633 F.3d 1136, 1139 (D.C. Cir. 2011) (explaining that an injury is not a "self-inflicted . . . budgetary choice[]" merely by having been made willfully or voluntarily (quoting *Fair Emp't Council of Greater Wash., Inc.*, 28 F.3d at 1276). Rather, as long as the organization expends resources "to counteract the effects of the defendant['s]" challenged conduct, that diversion can suffice for Article III purposes. *Id.* at 1140. As stated above, Plaintiff Vote Forward has demonstrated that its expenditures—"such as the time and monetary expenses associated with Vote Forward's new programs to test the time it will take to deliver letters and to gauge the

effectiveness of a get-out-the-vote campaign weeks, rather than mere days, before Election Day”—were undertaken to directly counteract the harms caused by Defendants’ actions. Pls.’ Reply, ECF No. 24 at 28. In addition, although Defendants argue that Plaintiffs such as Vote Forward could not suffer an injury because they “educate and assist potential voters as part of their standard activities,” Defs.’ Opp’n, ECF No. 21 at 32, the fact that Defendants’ actions undermined Vote Forward’s ability to conduct its usual activities is sufficient to constitute a “drain on the organization’s resources,” not “simply a setback to the organization’s abstract social interests.” *Nat’l Ass’n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (quoting *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)); see also *Havens*, 455 U.S. at 379 (finding sufficient for organizational standing purposes that plaintiff alleged it had “been frustrated by defendants’ racial steering practices in its efforts to assist equal access to housing through counseling and other referral services” and “had to devote significant resources to identify and counteract the defendant’s [sic] racially discriminatory steering practices” (alteration in original)).

The Court also concludes that Plaintiffs have shown traceability and redressability. Regarding traceability, Plaintiffs have demonstrated that the implementation of the USPS

policy changes in July coincided with a significant decline in USPS on-time service scores, and Defendants have acknowledged that the only change USPS made in early July was in regard to the policy regarding transportation and extra trips. Pls.’

Reply, ECF No. 24 at 12 (citing Ex. 6, ECF No. 16-8).

Defendants, however, argue that Plaintiffs cannot establish that their injuries are solely the result of the USPS policy changes because of the “simultaneous impact” of the COVID-19 pandemic.

Defs.’ Mot., ECF No. 21 at 43-44. Defendants suggest instead that staffing shortages due to the pandemic caused the decline in USPS on-time service scores. *Id.* The Court is not persuaded.

As Plaintiffs point out, USPS data “show no relationship between declines in on-time service scores and the time periods in which USPS allegedly experienced staffing shortages.” Pls.’ Reply, ECF No. 24 at 13. In fact, in comparison with prior months, the average service scores actually increased in March at the moment when Defendants allege staffing shortages were worsening. *Id.*

(citing Grimmer Decl., ECF No. 24-2 ¶ 13; Prokity Decl., ECF No. 21-2 ¶ 5). Furthermore, “declines in service scores continued *after* the claimed staffing problems had abated.” *Id.* (citing Prokity Decl., ECF No. 21-2 ¶ 10). Based on the data figures, the Court finds that Plaintiffs’ claimed injuries are likely the result of the USPS policy changes and may be remedied by declaratory or injunctive relief.

Accordingly, Plaintiff Vote Forward has established a substantial likelihood of standing. Because the Court is satisfied that Vote Forward has standing, the Court need not address whether the other Plaintiffs also have standing in order to proceed.

2. The Applicable Legal Standard

Prior to considering the merits, the parties disagree as to which legal standard should govern Plaintiffs' claim that the USPS policy changes impose an unconstitutional burden on the right to vote under the First and Fifth Amendments. Plaintiffs argue that the Court should apply the *Anderson-Burdick* framework, derived from *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992), in this matter. Pls.' Mot., ECF No. 16-1 at 26. Under *Anderson*, *Burdick*, and their progeny, the United States Supreme Court has recognized that "[e]lection laws will invariably impose some burden upon individual voters," and that not all laws burdening the right to vote are subject to strict scrutiny." *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 682 F.3d 72, 73-74 (D.C. Cir. 2012) (alteration in original) (quoting *Burdick*, 504 U.S. at 433-34). Instead, courts "must first consider the character and magnitude of the asserted injury" to the plaintiffs' right to vote against "the precise interests put forward by the [government] as justifications for the burden

imposed[,]” including “the legitimacy and strength of each of those interests” and “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789. The level of scrutiny a court should apply depends on the burden. When a voter’s rights are “subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). But when a voter’s rights are subjected only to “reasonable, nondiscriminatory restrictions,” “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (internal quotation marks omitted). If the restriction falls somewhere between those two poles, then the court uses a flexible analysis, “where the more severe the burden, the more compelling the [government’s] interest must be.” *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018).

Defendants, for their part, argue that the *Anderson-Burdick* framework does not apply here because that standard only concerns the constitutionality of state election laws—not “a non-election law that may have an attenuated, indirect effect on the electoral process” or the “everyday actions” of federal agencies. Defs.’ Opp’n, ECF No. 21 at 36-37. In Defendants’ view, “[a]pplying the *Anderson-Burdick* balancing test to any policy that has some impact on the electoral process would

produce odd results,” including “that any deficiency in USPS service could give rise to a constitutional voting rights claim.” *Id.* at 37. Defendants argue that because the *Anderson-Burdick* framework does not apply, Plaintiffs’ claim must fail because Plaintiffs have not alleged stand-alone claims under either the First or Fifth Amendments, which encompass distinct requirements as compared to a claim alleged under *Anderson-Burdick*. *Id.* at 38.

Defendants further argue that even if the Court considers the USPS policy to constitute an “election law,” the *Anderson-Burdick* framework still would not apply. *Id.* Rather, the Court would apply the rational basis test under *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). In *McDonald*, the Supreme Court held that an Illinois statute that denied certain inmates mail-in ballots did not impose an unconstitutional burden on their right to vote. *Id.* at 807. Rather, the statute only restricted their asserted right to receive an absentee ballot, and they were therefore not “absolutely prohibited from voting by the State.” *Id.* at 808 & n.7. The Supreme Court noted that “the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths . . . or provide guarded transportation to the polls.” *Id.* at 808 n.6. The Court further noted that a more rigid standard is proper only when the

policy or practice at issue categorically “den[ies] [plaintiffs] the exercise of the franchise . . . preclud[ing] [them] from voting.” *Id.* at 807-08. Accordingly, the Supreme Court upheld the statute under rational basis review. *Id.* at 811. Defendants argue that *McDonald* is controlling because “Plaintiffs are claiming that USPS policies may deprive them of the ability to cast votes through mail-in ballots” and Plaintiffs’ “position is not materially different from the county jail inmates . . . who were physically restricted from the polls.” Defs.’ Opp’n, ECF No. 21 at 39.

The Court finds that *McDonald* is inapposite. First, Defendants mischaracterize Plaintiffs’ claim in this case. Plaintiffs do not broadly challenge the USPS policy changes as denying them the right to receive mail-in ballots, as was at issue in *McDonald*. Rather, Plaintiffs allege that Defendants’ policy changes undermine the integrity of the November 2020 election by causing delays in the delivery of mail-in ballots, resulting in the risk that hundreds of thousands of voters will be disenfranchised. Second, “[t]he Supreme Court has expressly restricted [*McDonald*’s] applicability to cases in which there is no evidence showing that the challenged restriction will prohibit the plaintiff from voting.” *Jones v. U.S. Postal Serv.*, No. 20-cv-6516 (VM), 2020 WL 5627002, at *15 (S.D.N.Y. Sept. 21, 2020). For example, in *Hill v. Stone*, the Supreme Court

explained that, in *McDonald*, “there was nothing in the record to indicate that the challenged Illinois statute had any impact” on the right to vote, but that the case had acknowledged that “[a]ny classification actually restraining the fundamental right to vote . . . would be subject to close scrutiny.” *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1974) (citing *McDonald*, 394 U.S. at 807–09). In other words, “[e]ssentially the Court’s disposition of the claims in *McDonald* rested on failure of proof.” *O’Brien v. Skinner*, 414 U.S. 524, 529 (1974). Because Plaintiffs have provided evidence that the USPS policy will inhibit many voters’ ballots from being counted in the November 2020 election, *McDonald*’s rational basis test is inappropriate.

Whether the Court should consider Plaintiffs’ claim under the *Anderson-Burdick* framework is not so straightforwardly dismissed, however. The Court first notes that Defendants’ claim that the policy changes implemented by USPS only inadvertently or indirectly affect voting rights is unpersuasive, particularly in a year in which the global COVID-19 pandemic has forced many individuals to decide either to vote by mail-in-ballot or to not vote at all. See *Jones*, 2020 WL 5627002, at *14 (“The Court . . . disagrees with the Government that this case does not implicate ‘the counting of votes.’ To hold otherwise would be to ignore the facts at hand: a large number of voters will be exercising their right to vote in the November 2020 election by

placing their ballots in the mail. There is simply no reason for the Court to ignore the severe reality that the country is in the middle of a deadly pandemic”). For the November 2020 election, 43 states and the District of Columbia will permit all eligible voters to vote by mail-in ballot, and 28 of those states will require that the ballots be received by Election Day. Pls.’ Mot., ECF No. 16-1 at 7-8 (citing news reports). Furthermore, a “conservative” estimate predicts that 80 million ballots will be submitted by mail. See Hersh Decl., ECF No. 16-15 ¶ 14. In other words, for tens of millions of voters this year, the postal service “is literally the method by which the election is conducted.” Pls.’ Reply, ECF No. 24 at 16. The USPS policy thus directly impacts and controls the ability of millions of citizens to have their vote counted. Defendants themselves do not dispute their unique role within the electoral process and their “longstanding commitment to the timely delivery of Election Mail.” Defs.’ Opp’n, ECF No. 21 at 13. Even beyond delivering mail-in ballots, USPS conducts “extensive outreach to state and local election officials to support effective use of postal services to facilitate the distribution and return of ballots”; gives an “Election Mail Kit” to “approximately 11,500 state and local election officials”; and has established a separate “bipartisan Election Mail Committee to actively oversee USPS’s support of Election Mail for the

Election.” *Id.* at 12-13. This relationship between the USPS and the electoral process suggests a strong connection with the protection of voters’ rights.

And although the Court acknowledges that the majority of cases apply the *Anderson-Burdick* test within the confines of a state election law, this aligns with the fact that “our country has a highly decentralized system of election administration, in which states and localities are primarily responsible for regulating and managing elections.” *Jones*, 2020 WL 5627002, at *14 (citations omitted). Defendants correctly note, for example, that both *Anderson* and *Burdick* themselves concerned the constitutionality of state-level election laws and indicated that the balancing test applies when a court is considering a challenge to such laws. However, the Court is not persuaded that either case, or the cases that have followed, have so restricted application of the balancing framework to only that specific context. For example, courts within this Circuit have relied upon the *Anderson-Burdick* framework in analyzing “state” practices that allegedly burden parties’ ability to cast their votes effectively under both the Fifth Amendment and the Fourteenth Amendment. *See, e.g., Libertarian Party*, 682 F.3d at 74 (analyzing under *Burdick* plaintiffs’ First and Fifth Amendment claims that the District “consistent with its regulations, never reported which individuals were penciled in

by voters choosing the write-in option or how many votes any such individual accrued"); *Turner v. D.C. Bd. of Elections & Ethics*, 77 F. Supp. 2d 25, 30, 33 (D.D.C. 1999) (RWR) (analyzing the constitutionality of Congress's 1998 District of Columbia Appropriations Act under *Burdick*, among other standards, where the Act barred the D.C. Board of Elections and Ethics from counting, releasing, and certifying the results of a referendum). *But see LaRouche v. Fowler*, 152 F.3d 974, 994 (D.C. Cir. 1998) (finding that the *Burdick* test was inappropriate in a challenge against the Democratic National Committee's internal rules because the test "was not designed for a case in which the First Amendment weighs on both sides of the balance"). Courts have also applied the *Anderson-Burdick* balancing test in the context of non-election laws. For example, in *Monserate v. New York State Senate*, 599 F.3d 148 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit addressed a First Amendment challenge to the New York Senate's decision to expel a senator who had been accused of domestic violence. *Id.* at 152-53. The Second Circuit found that the *Anderson-Burdick* line of cases was not limited to the pre-vote election law context, stating that the Supreme Court had "minimized the extent to which voting rights are distinguishable from ballot access cases" because "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Id.* at

155 (internal citations and quotation marks omitted). Accordingly, the Second Circuit applied the *Anderson-Burdick* test in analyzing whether the senator's expulsion burdened constitutional rights related to voting and political association. *Id.*; see also *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 622-23 (8th Cir. 1997) (analyzing a board resolution prohibiting a newly elected ambulance board member from voting on certain matters because her husband worked for the ambulance district under the *Anderson-Burdick* framework); *Hussey v. City of Portland*, 64 F.3d 1260, 1262, 1264 (9th Cir. 1995) (applying the *Anderson-Burdick* framework in evaluating the constitutionality of an "ordinance requiring non-residents to consent to annexation as a condition of receiving a subsidy, or reduction in hook-up costs, for mandated sewer connections," finding that consents were the "constitutional equivalent" of voting).

Here, regardless of the intent behind the changes, the USPS policy "will invariably impose some burden upon individual voters" and their constitutional rights in an election year. *Libertarian Party*, 682 F.3d at 73-74. The USPS directly affects how Election Mail is handled and the speed with which Election Mail arrives at its intended destination. While the USPS serves many other functions, its role in handling ballots compels the conclusion that USPS plays an active role in ensuring that

elections are conducted in a "fair and honest" manner, "rather than chaos." *Burdick*, 504 U.S. at 433 (citation omitted). Furthermore, the Court is not convinced that the *Anderson-Burdick* framework is limited to only state government and not federal government actions. To so find would effectively exclude, for example, any federal legislation impacting elections in the District of Columbia pursuant to Congress's plenary power over the District. See U.S. Const. art. I § 8; *Palmore v. United States*, 411 U.S. 389, 397 (1973). In addition, this case does not present the same concerns as the D.C. Circuit noted in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), where the court noted that applying *Anderson-Burdick* to the rules of a non-state political party was inappropriate because "the presence of First Amendment interests on both sides of the equation makes inapplicable the test applied to electoral restrictions where the First Amendment weighs on only one side." *Id.* at 995.

Accordingly, the Court finds that Plaintiffs have established that the *Anderson-Burdick* framework likely applies to Plaintiffs' claim.

3. Plaintiffs Have Shown That They Are Likely To Succeed On The Merits Of Their Constitutional Claim

Plaintiffs argue that the USPS policy changes "impose[] undue burdens on Plaintiffs' and other voters' rights to vote in

violation of the First and Fifth Amendments." Pls.' Mot., ECF No. 16-1 at 10. The Court agrees that, under the *Anderson-Burdick* framework, Plaintiffs have shown that they are likely to succeed on the merits of their claim.

As explained above, under the *Anderson-Burdick* framework, the Court must determine whether "the character and magnitude of the asserted injury to the rights protected by the First and [Fifth] Amendments that the plaintiff seeks to vindicate" outweighs "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into account "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 433-34. Next, the court evaluates how much deference to afford to the government's interests. If voting rights are "subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). But when a voter's rights are subjected only to "reasonable, nondiscriminatory restrictions," then courts apply a rational basis review. *Id.* (internal quotation marks omitted).

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick*, 504 U.S. at 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). "Obviously included within the

right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots *and have them counted*" *United States v. Classic*, 313 U.S. 299, 315 (1941) (emphasis added). Thus, where a policy creates a situation where "[a] large number of ballots will be invalidated, and consequently, not counted based on circumstances entirely out of the voters' control," the "burden [on the right to vote] is exceptionally severe." *Gallagher v. N.Y. State Bd. of Elections*, No. 20-cv-5504, 2020 WL 4496849, at *16 (S.D.N.Y. Aug. 3, 2020); *see also Doe v. Walker*, 746 F. Supp. 2d 667, 679-80 (D. Md. 2010) ("By imposing a deadline which does not allow sufficient time for absent uniformed services and overseas voters to receive, fill out, and return their absentee ballots, the state imposes a severe burden on absent uniformed services and overseas voters' fundamental right to vote.").

Here, the Court finds that the "character and magnitude" of Plaintiffs' asserted injury to the right to vote is significant. Plaintiffs have provided sufficient evidence suggesting that Defendants' policy has caused and will continue to cause inconsistency and delays in the delivery of mail across the United States, placing at particular risk voters residing in one of the 28 states that require mail ballots to be received, not just post-marked, by Election Day. For example, Plaintiffs

explain that if a voter residing in one of those 28 states mails in her ballot on the Saturday before Election Day, a one-day delay “significant[ly] increases the risk of the ballot being rejected as untimely,” and a two-day delay “would make disenfranchisement a certainty.” Pls.’ Mot., ECF No. 16-1 at 30. Furthermore, Plaintiffs simply cannot predict when their ballots will arrive at their intended destination. When they will arrive, and whether they will arrive in time to be counted, instead depends upon “arbitrary factors, such as the particular USPS branch that handles their ballots.” *Jones*, 2020 WL 5627002, at *16; see also Supp. Grimmer Decl., ECF No 24-2 ¶¶ 5, 7 (listing “on-time” service scores varying across USPS areas in the United States). Indeed, USPS itself has acknowledged the threat of voter disenfranchisement that may result from delivery delays caused by Defendants’ policy, warning in a July 29, 2020 letter to 46 states and the District of Columbia that USPS “cannot guarantee all ballots cast by mail for the November election will arrive in time to be counted.” See Pls.’ Mot., ECF No. 16-1 at 15. Thus, in a year in which it is estimated that 80 million citizens are anticipated to submit their votes via USPS, and between 3.7% and 9.3% of those are estimated to mail ballots on the Saturday before Election Day, the potential for voter disenfranchisement is immense. See Hersh Decl., ECF No. 16-15 ¶¶ 14, 21-23; see also Pls.’ Mot., ECF No. 16-1 at 7 (citing

Juliette Love, Matt Stevens, & Lazaro Gamio, *Where Americans Can Vote by Mail in the 2020 Election*, N.Y. Times (last updated Aug. 14, 2020), <https://rb.gy/fwss81>)).

Furthermore, while content neutral, Defendants' policy changes place an especially severe burden on those who have no other reasonable choice than to vote by mail, such as those who may be at a high risk of developing a severe case of COVID-19 should they become exposed to the virus at the polling place, and those who are not physically able to travel to the polls due to disability. See Pls.' Mot., ECF No. 16-1 at 31. For these individuals, mail-in voting is either the only choice or the only safe choice they have. Defendants, however, suggest that these individuals and others can avoid such injuries if they only choose to vote earlier. Defendants argue that there is no severe burden on Plaintiffs because any disenfranchisement would be due to "'their own failure to take [the] timely steps' necessary." Defs.' Opp'n, ECF No. 21 at 40 (alteration in original) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)). In Defendants' view, USPS "cannot be required by the Constitution to ensure that a voter's ballot arrive in the timeframe set by her state if that voter mails the ballot the day before the state's deadline." *Id.* This argument fails. In suggesting that voters should cast their ballots earlier than required, Defendants ignore Plaintiffs' "essential" interest in

making “informed choices among candidates for office.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346-47 (1995). As the Supreme Court has recognized, “[i]n election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time.” *Anderson*, 460 U.S. at 790. Many individuals, including Plaintiffs in this case, rely on the efficient delivery of their mail-in ballots so that they make take the time available to consider the issues and candidates in an election. See, e.g., Datta Decl., ECF No. 16-23 ¶¶ 3-5. Accordingly, any argument that Plaintiffs inflict injury on themselves by not voting earlier does not significantly lessen their harms in this situation. In any event, Plaintiffs’ arguments are in regard to voters who decide to send in their ballots three days in advance of Election Day, not one day.

Defendants also argue that the Plaintiffs’ claim must fail because there is no constitutional right to vote by mail and states are not required to offer mail-in voting. Defs.’ Opp’n, ECF No. 21 at 35. Defendants contend that “[i]f a State can prohibit mail-in voting . . . then USPS policies which may indirectly limit when a ballot must be mailed cannot be constitutionally suspect.” *Id.* However, Defendants miss the point. Plaintiffs here are not alleging that Defendants are denying them a right to vote by mail. Rather, Plaintiffs are

alleging that the Defendants' policy changes undermine the integrity of the November 2020 election by causing delays in the delivery of mail-in ballots, resulting in thousands of votes not being counted. As the Supreme Court has explained, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (quoting *Harper*, 383 U.S. at 665). And that is precisely the issue. For example, if one of the individual Plaintiffs submits her ballot, but it does not make it to her local election office in time because of delays caused by the USPS policy, "her 'right to full and effective participation in the political processes of h[er] [Nation]'s legislative bodies' is impaired relative to that of both in-state and out-of-state voters with access to USPS branches functioning effectively." *Jones*, 2020 WL 5627002, at *21 (alteration in original) (quoting *Reynolds v. Sims*, 377 U.S. 506, 565 (1964)).

Defendants contend that the USPS policy changes do not impose a "severe" burden on voters because "USPS has not instituted a ban on late trips or extra trips," only a call for a "renewed focus on schedules." Defs.' Opp'n, ECF No. 21 at 40. Defendants argue that there is "little indication" that policy changes will cause delays in view of the "resources USPS is committing to Election Mail, and USPS's assurance that it has

the capacity to process the expected volume of Election Mail.” *Id.* However, even if Defendants did not institute a full “ban” on late or extra trips, Defendants have not rebutted the statistics that Plaintiffs have put forward indicating that the nearly 75% drop in the number of late and extra trips has resulted in “a material cut in USPS’s capacity to timely deliver mail.” See Cintron Decl., ECF No. 21-1 ¶¶ 23-25; Pls.’ Reply, ECF No. 24 at 11; see also Grimmer Decl., ECF No. 16-11 ¶ 9 (stating that USPS cuts amounted to an average of 32,900 fewer trips per week). Although Defendants suggest that the drop in USPS’s “on-time” deliveries were partly caused by staffing shortages from COVID-19, the Court is persuaded by Plaintiffs’ analysis of USPS data showing “no relationship between declines in on-time service scores and the time periods in which USPS allegedly experienced staffing shortages.” Pls.’ Reply, ECF No. 24 at 13. Furthermore, as USPS has “itself forecast[ed] the injuries” previously, it is “disingenuous” for USPS to claim that there is “little indication” of delays in delivery of mail-in ballots. See *Jones*, 2020 WL 5627002, at *12 (citation omitted). The Court finds that such burdens on voters’ right to have their ballots counted suggests that a high level of scrutiny is required.

Against such injuries, Defendants assert that the policy changes are “intended to increase efficiency” and “minimize

unnecessary costs.” Defs.’ Opp’n, ECF No. 21 at 41. Defendants contend that these “general regulatory interests” survive the *Anderson-Burdick* inquiry under a rational basis review. *Id.* (quoting *Libertarian Party*, 682 F.3d at 77). In Defendant’s view, the fact that the USPS policy changes were actually inefficient in the short term or that cost savings may be minimal does not mean that they were any less legitimate. *Id.* Defendants argue that “the proffered justifications for the USPS policy at issue are sufficient to justify the indirect, minimal burden it may impose on voters.” *Id.* Plaintiffs dispute that Defendants’ justifications are sufficient to justify the burden imposed on voters. Plaintiffs argue that the USPS policy changes were in fact *inefficient* and that the mail delivery slow-downs were expected because the policy’s purpose was to “undermine the ability of the Postal Service to fulfill its statutory duty to provide ‘prompt, reliable, and efficient services to patrons in all areas.’” Pls.’ Mot., ECF No. 16-1 at 32-33 (quoting 39 U.S.C. § 101(a)). Plaintiffs also contend that Defendants’ cost savings rationale is insufficient because (1) case precedent establishes that the government may not burden fundamental rights in its quest to save costs; (2) the cost savings are minimal over the period leading up to Election Day; and (3) Defendant Mr. DeJoy has confirmed that the USPS’s financial position is sound. *Id.* at 33-35.

Defendants are correct that the government generally need not justify itself with "elaborate, empirical verification" of its interests in a rational basis review. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). However, the Court finds that the bar is higher here. Given the severity of Plaintiffs' harms, the Court must instead determine whether Plaintiffs' injuries are outweighed by Defendants' justifications under at least an intermediate level of scrutiny, if not strict scrutiny. The Court finds that Defendants do not meet either.

The Court respects that the federal government, and USPS in particular, have legitimate interests in maintaining efficient programs and in saving money; however, these interests do not justify the resulting harms Plaintiffs face. As stated above, the burden the USPS policy changes place on Plaintiffs' constitutional right to vote and have their vote counted is significant. At risk is disenfranchisement in the November election of potentially hundreds of thousands of individuals. These harms justify a high level of scrutiny, yet Defendants only generally assert that "compliance with pre-set schedules is intended to increase efficiency" and minimize "administrative costs." Defs.' Opp'n, ECF No. 21 at 41 (quoting *Libertarian Party*, 682 F.3d at 77). Defendants' reasons for administrative cost savings are insufficient: as the Supreme Court has

explained, the “vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.” *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963). Furthermore, Defendants have failed to provide any reasons regarding why implementation of the USPS policy changes were necessary during a nationwide election season in the middle of a pandemic, particularly in view of Defendants’ express acknowledgement that they anticipated “mail left behind or mail on the workroom floor or docks.” Ex. 4, ECF No. 16-6 at 2. And despite Defendants’ assertions to the contrary, as of the end of August, USPS service scores remain lower than the pre-policy average. See Suppl. Grimmer Decl., ECF No. 24-3 ¶ 5.

Accordingly, the Court finds that Plaintiffs are likely to succeed on their constitutional claim.

B. Plaintiffs Face Irreparable Harm

“The failure to demonstrate irreparable harm is ‘grounds for refusing to issue a preliminary injunction, even if the other three factors . . . merit such relief.’” *Nat’l Mining Ass’n v. Jackson*, 768 F. Supp. 2d 34, 50 (D.D.C. 2011) (RBW) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). “In this Circuit, a litigant seeking a preliminary injunction must satisfy ‘a high standard’ for irreparable injury.” *ConverDyn*, 68 F. Supp. 3d at 46 (quoting

Chaplaincy of Full Gospel Churches, 454 F.3d at 297). The movant must demonstrate that it faces an injury that is “both certain and great; it must be actual and not theoretical,” and of a nature “of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quotation marks and emphasis omitted). Furthermore, similar to the test for organizational standing, an organization faced irreparable harm where (1) the “actions taken by [the defendant] have ‘perceptibly impaired’ the [organization’s] programs,” *League of Women Voters*, 838 F.3d at 8 (alteration in original) (quoting *Fair Emp’t Council of Greater Wash.*, 28 F.3d at 1276), and (2) “the defendant’s actions ‘directly conflict with the organization’s mission,” *id.* (quoting *Nat’l Treasury Emps. Union*, 101 F.3d at 1430).

The Court finds that both the individual Plaintiffs and the Organization Plaintiffs face irreparable harm absent a preliminary injunction.

1. The Individual Plaintiffs Face Irreparable Harm

The individual Plaintiffs argue that the USPS policies puts their vote at risk of not being counted if they choose to send in their ballot on a day that is close to Election Day. Prior to the implementation of the USPS policy, the individual Plaintiffs would have been able to reasonably expect that a ballot placed

in the mail on October 31, the Saturday prior to Election Day, would have arrived at its intended destination by November 3, based on the 1 to 3 day First Class Mail delivery standard. Pls.' Mot., ECF No. 16-1 at 37. Now, however, even with just a one-day delivery delay caused by the USPS policy changes, there is a significant risk that a voter's ballot will not be counted. *Id.*

In response, Defendants argue that the individual Plaintiffs' preference to wait to send in their ballots until closer to Election Day because they want to avoid regretting their decision or because they want to "wait until they have all the information they need" is insufficient and too speculative to establish an irreparable harm. Defs.' Opp'n, ECF No. 21 at 42 (alterations omitted). In other words, "'if their plight can be characterized as disenfranchisement at all, it was not caused by' USPS but rather 'their own failure to take [the] timely steps' necessary." *Id.* (alteration in original) (quoting *Rosario*, 410 U.S. at 758). Furthermore, Defendants assert that "in light of service improvements and ongoing efforts to timely delivery [sic] Election Mail," Plaintiffs cannot show that their ballots would not be received in time. *Id.* at 42-43.

The Court finds that the individual Plaintiffs have sufficiently shown they will likely suffer irreparable harm absent a preliminary injunction. As described above, Plaintiffs

have provided ample evidence showing that, due to delays in the delivery of mail, there is a substantial risk that Plaintiffs will suffer an undue burden on their constitutional right to vote. See *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.”); *Cardona v. Oakland Unified Sch. Dist., Cal.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (explaining abridgement “or dilution of a right so fundamental as the right to vote constitutes irreparable injury”). There is “no do-over and no redress” once the election has passed. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Defendants’ suggestion that Plaintiffs need only vote earlier than planned also does not remedy the harms Plaintiffs would face in being forced to make a decision on how to vote before they have all of the information they require. *Cf. McIntyre*, 514 U.S. at 346-47 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”). Finally, regarding Defendants’ assertion that Plaintiffs have failed to show the likelihood of delivery delays, as Plaintiffs have pointed out, Defendants’ own data suggests that USPS’s service scores have not bounced back since the implementation of the policy changes,

and Defendants have provided no other information suggesting that that will change prior to Election Day. See Pls.' Reply, ECF No. 24 at 10-13; see also Grimmer Decl., ECF No. 16-11; Suppl. Grimmer Decl., ECF No. 24-2.

The individual Plaintiffs have thus asserted irreparable harm.

2. The Organization Plaintiffs Face Irreparable Harm

The Organization Plaintiffs argue that they have also demonstrated that irreparable harm is clear and immediate because the USPS policy has "caused Plaintiffs to redirect their limited resources, which includes both their labor and their funds, to address challenges caused by Defendants' Policy that were unforeseen." Pls.' Mot., ECF No. 16-1 at 41. In response, Defendants argue that any claimed injury to the Organization Plaintiffs' resources are insufficient because they have not established that mail delays were solely a result of the USPS policy as opposed to COVID-19. Defs.' Opp'n, ECF No. 21 at 43. Defendants assert that COVID-19 caused significant staffing shortages beginning in March 2020, and, although the shortages began to recover in June, "the availability for July again began to decrease, with availability falling to its lowest levels in the week of July 11, 2020." *Id.* (citing Prokity Decl., ECF No. 21-2 ¶¶ 4-5). Thus, given these "simultaneous" impacts, Plaintiffs cannot claim that the USPS policy was the sole cause

of their injury. *Id.* at 43-44. Defendants also contend that any future harms are not “certain and great.” *Id.* at 44 (quoting *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Human Servs.*, No. 20-cv-1630 (JEB), 2020 WL 5232076, at *38 (D.D.C. Sept. 2, 2020)).

Here, the Organization Plaintiffs have shown a likelihood of suffering irreparable harm. “As the D.C. Circuit has confirmed, ‘[o]bstacles’ that ‘unquestionably make it more difficult for [an organization] to accomplish [its] primary mission . . . provide injury for purposes both of standing and irreparable harm.’” *Whitman-Walker Clinic, Inc.*, 2020 WL 5232076, at *38 (alterations in original) (quoting *League of Women Voters*, 838 F.3d at 9). As described, the USPS policy changes have likely impaired and will likely continue to impair Plaintiff Vote Forward’s ability to provide its services, undermining its mission. Plaintiff Voces Unidas has asserted similar harms to its programs: to counteract the harms caused by the USPS policy changes, Voces Unidas—an organization “dedicated to increasing civic engagement of the Latino population in three rural Colorado counties” through get-out-the-vote campaigns—estimates it will need to spend between \$50,000 to \$80,000 beyond its original budget through hiring “additional canvassers to intensify the campaign earlier than previously anticipated and to pay for additional advertising and dissemination of

information to the communities it serves." Pls.' Mot., ECF No. 16-1 at 42-43 (citing *Voces Unidas Decl*, ECF No. 16-25); *cf. Food & Water Watch, Inc.*, 808 F.3d at 920 (explaining that an organization suffers an injury where it "expend[s] resources to educate its members and others" and those "operational costs [go] beyond those normally expended"). Furthermore, the Court has already determined that Plaintiffs' harms were the result of the implementation of the USPS policy changes, not staffing shortages, and, as stated above, "that harm is irreparable" because after the November election passes, "there can be no do over and no redress." *League of Women Voters*, 838 F.3d at 9 (quoting *League of Women Voters of N.C.*, 769 F.3d at 247).

C. The Balance of Equities and Public Interest Favor an Injunction

The balance-of-equities factor directs the Court to "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief." *ConverDyn*, 68 F. Supp. 3d at 52 (quoting *Winter*, 555 U.S. at 24). "When the issuance of a preliminary injunction, while preventing harm to one party, causes injury to the other, this factor does not weigh in favor of granting preliminary injunctive relief." *Id.*; see also *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998). By contrast, the balance of equities may favor a preliminary injunction that serves only "to preserve the relative positions of the parties until a trial on the merits can be held." *Rufer v. FEC*,

64 F. Supp. 3d 195, 206 (D.D.C. 2014) (CRC) (quoting *Camenisch*, 451 U.S. at 395). “The purpose of . . . interim relief is not to conclusively determine the rights of the parties, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also ‘conside[r] . . . the overall public interest,’ *Winter*, [555 U.S.] at 26.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (second alteration in original).

Plaintiffs contend that the balance of the equities and the public interest favor a preliminary injunction because it is in the public interest to prevent constitutional violations and to allow eligible citizens to vote. Pls.’ Mot., ECF No. 16-1 at 43-44. Defendants do not contest the equities in Plaintiffs’ favor. Rather, Defendants argue that the public interest and the balance of the equities disfavor granting relief because (1) “USPS is currently undertaking extensive efforts to facilitate the timely delivery of Election Mail”; (2) “the Individual Plaintiffs have an opportunity to avoid any harm by mailing in their ballots without delay”; (3) the July 10 “Stand-Up Talk” “does not represent official USPS policy”; and (4) granting relief “could require the Court to act as an overseer of the agency’s day-to-day activities. Defs.’ Opp’n, ECF No. 21 at 44-45.

Here, the balance of the equities and the public interest favor an injunction. "By definition, '[t]he public interest . . . favors permitting as many qualified voters to vote as possible.'" *League of Women Voters of N.C.*, 769 F.3d at 247-48 (quoting *Husted*, 697 F.3d at 437). It is also clearly in the public interest to require that USPS implement policies that do not infringe upon constitutional rights. *League of Women Voters*, 838 F.3d at 12 ("There is generally no public interest in the perpetuation of unlawful agency action."). Nor does the proposed injunction contemplate that the Court would become involved in overseeing the day-to-day operations of the USPS. And while it may be true that the "Stand-Up Talk" itself may not be an official policy, Defendants do not contest that they have implemented changes regarding transportation and extra trips, and the Court has the authority to adjust the requested relief as appropriate. See *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992) ("It is well established . . . that a federal district court has wide discretion to fashion appropriate injunctive relief").

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** the Plaintiffs' motion for a preliminary injunction. Any request to stay this decision pending appeal will be denied for substantially the

same reasons as those articulated in this Opinion. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

**Signed: Emmet G. Sullivan
United States District Judge
September 28, 2020**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VOTE FORWARD, et al.,
Plaintiffs,

v.

No. 20-cv-2405 (EGS)

LOUIS DEJOY, *in his official
capacity as the Postmaster
General, et al.*,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED the Plaintiffs' Motion for Preliminary Injunction is **GRANTED**; and it is further

ORDERED that a Preliminary Injunction is hereby entered against Defendants; and it is further

ORDERED that pursuant to the Order, Defendants are **HEREBY ENJOINED** from enforcing the Late/Extra Trips Policy; and it is further

ORDERED that any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
September 28, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TERESA RICHARDSON; CHRISTOPHER
CARROLL; GINA ARFI; and AIDA
ZYGAS,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
capacity as President of the
United States; LOUIS DEJOY, in
his official capacity as
Postmaster General of the
United States; and UNITED
STATES POSTAL SERVICE,

Defendants.

Civ. Action No. 20-2262 (EGS)

MEMORANDUM OPINION

Plaintiffs—four voter-eligible individuals from Texas, Pennsylvania, New York, and Wisconsin—bring this lawsuit against Defendants President Donald J. Trump (“President Trump”), in his official capacity as President of the United States; Louis DeJoy (“Mr. DeJoy”), in his official capacity as Postmaster General of the United States; and the United States Postal Service (“USPS”) alleging (1) violation of the constitutional right to vote; (2) civil conspiracy to violate the right to vote; and (3) *ultra*

vires agency action. Am. Compl., ECF No. 49.¹ Plaintiffs seek a preliminary injunction with regard to each of their claims.

Upon consideration of the Plaintiffs' motion, the response, and reply thereto, the applicable law, and the entire record, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion.

I. Background

A. Factual Background

1. The COVID-19 Pandemic

The COVID-19 pandemic has increased reliance on mail delivered by the USPS. See Hersh Decl., ECF No. 57-6 ¶ 10. Several states have adjusted their election procedures to allow for all eligible voters to vote by mail-in ballot in the November 2020 election. For example, nine states and the District of Columbia will automatically send voters ballots this year, and another nine states will automatically send voters an application to request an absentee ballot. *Id.* ¶ 12. In addition, "some 77% of Americans live in jurisdictions in which anyone can request a mail ballot (without an excuse) or are mailed applications to vote by mail or are mailed actual ballots to cast votes by mail." *Id.* ¶ 14. In total, the adjustments made by many states in response to the COVID-19 pandemic will result

¹ When citing electronic filings throughout this Opinion, the Court cites to the ECF page number, not the page number of the filed document.

in approximately 80 million mail-in ballots being submitted for the November election. *See id.*

2. USPS Postal Policy Changes

In June and July 2020, the USPS announced and implemented a series of changes (collectively, "Postal Policy Changes") to how it collects, processes, and delivers mail.

First, in a "leaked PowerPoint" titled "PMGs expectations and plan," USPS announced that penalty overtime "will be eliminated" and "[o]vertime will be eliminated" because "we are paying too much in [overtime] and it is not cost effective" ("Overtime Policy"). Am. Compl., ECF No. 49 ¶ 48 (citing *Leaked USPS PowerPoint Indicates PMG DeJoy Focus on Getting Operating Costs Under Control*, Alliance of Nonprofit Mailers (July 14, 2020), nonprofitmailers.org/leaked-usps-powerpoint-indicates-pmg-dejoy-focus-on-getting-operating-costs-under-control/ [hereinafter "USPS PowerPoint"]²). In testimony before the House Oversight and Reform Committee on August 24, 2020, Mr. DeJoy stated that he "did not direct the elimination or any cutback in overtime." *See* Ex. 14 to Defs.' Response Pls.' Mot. Prelim. Inj. ("Defs.' Opp'n"), ECF No. 55-4 at 305.

² Because the USPS PowerPoint is cited and quoted within the Amended Complaint, ECF No. 49, the Court deems the document incorporated by reference in the complaint. *See Boster v. Reliance Standard Life Ins.*, 959 F. Supp. 2d 9, 29 (D.D.C. 2013) (ABJ).

Second, on June 17, 2020, the USPS announced that it would be removing high-speed sorting machines nationwide over the course of several months. Am. Compl., ECF No. 49 ¶¶ 50-51 (citing Letter from Rickey R. Dean, Manager of Contract Admin., Am. Postal Workers Union, to Mark Diamondstein, Pres., Am. Postal Workers Union (June 17, 2020), https://www.21cpw.com/wp-content/uploads/2020/06/mail-processing-equipment-reduction_6-17-2020.pdf³); see also Ex. A to Reply Further Supp. Pls.' Mot. Prelim. Inj. ("Pls.' Reply"), ECF No. 57-2. Defendants state that the further removal of equipment has been suspended until after the November 2020 election. Defs.' Opp'n, ECF No. 55 at 23-24.

Third, on July 10, 2020, the USPS announced several "transportation changes," including changes prohibiting "late trips" and "extra trips" ("Late/Extra Trips Policy"). Am. Compl., ECF No. 49 ¶ 52 (citing Jory Heckman, *USPS Warns Staff of Temporary Mail Delays As It Cuts 'Soaring' Delivery Costs*, Fed. News Network (July 15, 2020), <https://federalnewsnetwork.com/management/2020/07/usps-warns-staff-of-temporarymail-delays-as-it-cuts-soaring-delivery-costs>⁴). The USPS knew that prohibiting these trips would result

³ The Court considers this document as incorporated by reference in the Amended Complaint. See *supra* n.2.

⁴ The Court takes judicial notice of the existence of the news article. See *Washington Post v. Robinson*, 935 F.2d 282, 291

in delayed mail delivery: “[One] aspect of these changes that may be difficult for employees is that—temporarily—we may see mail left behind or mail on the workroom floor or docks (in P&DCs)” *Id.* ¶ 53. By August 13, 2020, the USPS had reduced the number of extra trips by 71 percent. Pls.’ Reply, ECF No. 57 at 8 (citing *Path Forward: PMG Addresses Restructuring*, USPS LINK (Aug. 13, 2020), <https://link.usps.com/2020/08/13/path-forward-2>⁵). Defendants have clarified that late or extra trips are not “banned”; however, they acknowledge that they continue “at a reduced level.” Cintron Decl., ECF No. 55-3 ¶ 4. On September 21, 2020, USPS also issued “Operational Instructions” providing that “transportation, in the form of late or extra trips that are reasonably necessary to complete timely mail delivery, is not to be unreasonably restricted or prohibited. Managers are authorized to use their best business judgment to meet our service commitments.” See Ex. A to Notice Suppl. Material, ECF No. 62-1 at 4.

(D.C. Cir. 1991) (“[A] court may take judicial notice of the existence of newspaper articles in the Washington, D.C., area that publicized” certain facts); *Agee v. Muskie*, 629 F.2d 80, 81 n.1, 90 (D.C. Cir. 1980) (taking judicial notice of facts generally known as a result of newspaper articles).

⁵ The Court takes judicial notice of this document. See *Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (taking judicial notice of document posted on the District of Columbia’s Retirement Board website).

Fourth, on July 16, 2020, the USPS announced another “initiative” that prohibited mail carriers in certain cities from spending time in the morning sorting mail so they could “leave for the street earlier.” Mem. Points Authorities Supp. Pls.’ Appl. Prelim. Inj. (“Pls.’ Mot.”), ECF No. 15 at 22. The National Association of Letter Carriers thereafter expressed concern that “USPS chose to test [the initiative] unilaterally” without their participation and because it did not seem to “conform” with specific USPS handbook provisions regarding certain types of mail. See Am. Compl., ECF No. 49 ¶¶ 54-55 (citing *USPS Announces New ESAS Delivery Initiative Test*, Nat’l Ass’n of Letter Carriers (July 21, 2020), <https://www.nalc.org/news/nalc-updates/usps-announces-new-esas-delivery-initiative-test>⁶). A subsequent USPS internal memo clarified that the initiative meant that “[c]ity carriers will not sort any mail during the morning operation,” but will instead sort delivery in the afternoon “[u]pon return from street delivery.” *Id.* ¶ 56 (citing Memorandum from USPS (July 2020), <http://www.nalc3825.com/SUT.ESAS.July.2020.pdf>⁷).

Defendants state that this program has been “suspended at the Postmaster General’s Direction.” Defs.’ Opp’n, ECF No. 55 at 28.

⁶ The Court considers this document as incorporated by reference in the Amended Complaint. See *supra* n.2.

⁷ The Court considers this document as incorporated by reference in the Amended Complaint. See *supra* n.2.

Fifth, on August 7, 2020, Mr. DeJoy “released a reorganization memo reflecting that twenty-three postal executives, including several with decades of experience, were reassigned or displaced.” Am. Compl., ECF No. 49 ¶ 59 (citing Jacob Bogage, *Postal Service Overhauls Leadership as Democrats Press for Investigation of Mail Delays*, Wash. Post (Aug. 7, 2020), <https://www.washingtonpost.com/business/2020/08/07/postal-service-investigationdejoy>⁸). In addition, USPS announced it had implemented a “management hiring freeze and will be requesting future Voluntary Early Retirement Authority from the Office of Personnel Management for employees not represented by a collective bargaining agreement.” *Id.* ¶ 60 (citing Press Release, *Postmaster General Louis DeJoy Modifies Organizational Structure to Support USPS Mission* (Aug. 7, 2020), <https://about.usps.com/newsroom/national-releases/2020/0807-pmg-modifiesorganizational-structure.htm>⁹). Defendants have stated that “[f]or a period of time beginning in August 2020, there has been a management hiring freeze for all non-bargaining unit

⁸ The Court takes judicial notice of the existence of the news article. See *supra* n.4.

⁹ The Court takes judicial notice of the USPS press release because it is a federal agency document available from a reliable source. See *Democracy Forward Found. v. White House Off. of Am. Innovation*, 356 F. Supp. 3d 61, 68 n.4 (D.D.C. 2019) (CKK).

employees. However, that hiring freeze has had no impact on craft employees. Indeed, [USPS] has hired thousands of new employees to help address staff shortages caused by the pandemic.” Curtis. Decl., ECF No. 55-1 ¶ 25.

Sixth, in August 2020, USPS also began removing mailboxes in New York, Pennsylvania, Oregon, and Montana. Pls.’ Mot., ECF No. 15 at 22. Defendants state that the removal of mailboxes has been suspended until after the November 2020 election. Defs.’ Opp’n, ECF No. 55 at 23-24.

Seventh, on or around July 29, 2020, the USPS General Counsel informed 46 states and the District of Columbia that if the states did not pay First Class postage on ballots sent to voters, there would be a risk that voters would not receive their ballots in time to return them by mail. See Pls.’ Reply, ECF No. 57 at 12; see also Goldway Decl., ECF No. 57-7 ¶¶ 4-6. This was a change to the USPS practice of treating “Election Mail”¹⁰ and political mail mailed as marketing mail on an expedited First-Class basis. Pls.’ Reply, ECF No. 57 at 12; see also Goldway Decl., ECF No. 57-7 ¶¶ 5-7.

¹⁰ USPS defines “Election Mail” as “any item mailed to or from authorized election officials that enables citizens to participate in the voting process. This includes ballots, voter registration forms, ballot applications, polling place notifications, and similar materials. This mail qualifies as Election Mail both when it is sent to voters from election officials at the state and local levels and when it is returned by voters to those officials.” Glass Decl., ECF No. 55-2 ¶ 3.

3. USPS Postal Policy Changes Have Led To Nationwide Delays And Continue To Have A Nationwide Impact

"[O]n-time mail delivery fell abruptly following . . . [Mr.] DeJoy's July 2020 directives ordering operational changes in mail service and delivery. By the second week of August 2020, on-time delivery of First-Class Mail nationwide had fallen nearly 10 percentage points compared to the week preceding the change." Pls.' Reply, ECF No. 57 at 9-10 (quoting Senator Gary Peters, U.S. Senate Comm. on Homeland Sec. & Gov't Affairs, *Failure to Deliver: Harm Caused by U.S. Postmaster General DeJoy's Changes to Postal Service Mail Delivery* 3 (Sept. 16, 2020), https://www.hsgac.senate.gov/imo/media/doc/200916_FullReport_PetersPostalInvestigation.pdf [hereinafter "Senate Report"]¹¹); see also Senate Report at 1 ("[T]hese changes significantly slowed mail delivery across the entire country and, as Senator Peters wrote to Postmaster General DeJoy and detailed in an interim report, 'compromised service for veterans, small businesses, rural communities, seniors, and millions of Americans who rely on the mail for medicines, essential goods, voting, correspondence, and for their livelihoods.'"). In an August 13, 2020 email to all USPS employees, Mr. DeJoy

¹¹ The Court takes judicial notice of the Senate report. See *Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 313 n.30 (D.D.C. 2018) (RC).

acknowledged that “this transformative initiative has had unintended consequences that impacted our overall service levels.” *Path Forward: PMG Addresses Restructuring*, USPS LINK (Aug. 13, 2020), <https://link.usps.com/2020/08/13/path-forward-2>.

On August 18, 2020, Mr. DeJoy issued a statement that the USPS would be suspending “some longstanding operational initiatives—efforts that predate my arrival at the Postal Service—that have been raised as areas of concern as the nation prepares to hold an election in the midst of a devastating pandemic.” Am. Compl., ECF No. 49 ¶ 63 (quoting Press Release, USPS, Postmaster General Louis DeJoy Statement (Aug. 18, 2020), <https://about.usps.com/newsroom/national-releases/2020/0818-postmaster-general-louis-dejoy-statement.htm>¹²). Specifically, Mr. DeJoy stated that: (1) “[r]etail hours at Post Offices will not change”; (2) “[m]ail processing equipment and blue collection boxes will remain where they are”; (3) “[n]o mail processing facilities will be closed”; (4) “overtime has, and will continue to be, approved as needed.” Press Release, USPS, Postmaster General Louis DeJoy Statement (Aug. 18, 2020), <https://about.usps.com>

¹² The Court takes judicial notice of the USPS press release because it is a federal agency document available from a reliable source. See *supra* n.9.

/newsroom/national-releases/2020/0818-postmaster-general-louis-dejoy-statement.htm.

Defendants state that “[t]he only exception to [Mr. DeJoy’s] directive to maintain the status quo through Election Day pertains to the ongoing effort to improve compliance with existing schedules throughout USPS’s transportation and processing networks.” Defs.’ Opp’n, ECF No. 55 at 22. However, USPS has announced that employees “are not to reconnect/reinstall machines that have been previously disconnected without prior approval from HQ Maintenance.” Am. Compl., ECF No. 49 ¶ 64 (quoting Aaron Gordon, *USPS Headquarters Tells Managers Not to Reconnect Mail Sorting Machines, Emails Show*, Vice News (Aug. 20, 2020), https://www.vice.com/en_us/article/xg8k4d/usps-emails-tell-managers-not-to-reinstall-mail-sorting-machines-postmaster-general-dejoy¹³); see also *id.* ¶¶ 96, 111-12. In addition, USPS announced it does not plan to reinstall the mailboxes removed after June 16, 2020. Am. Compl., ECF No. 49 ¶ 119.

4. Plaintiffs’ Factual Allegations

Plaintiffs seek “injunctive relief to protect [their] right to vote by ensuring that the United States Postal Service delivers absentee and mail-in ballots in a timely fashion to

¹³ The Court takes judicial notice of the existence of the news article. See *supra* n.4.

them and then, delivers their executed ballots to election officials in time to be counted.” See Am. Compl., ECF No. 49 ¶ 10. Each of the Plaintiffs allege that they applied for, but never received, an absentee or mail-in ballot during the 2020 primary elections due to the “several steps calculated to slow down – and to undermine – the [USPS’s] ability to deliver the mail, all in the name of cost-cutting but at the expense of the right of citizens to vote.” Am. Compl., ECF No. 49 ¶¶ 10-11, 16. Plaintiffs allege that these delays will continue into November, leaving them “with the choice of compromising their right to vote by not voting at all or risking their health.” *Id.* ¶¶ 19, 176.

Because they never received their ballots through the mail, each Plaintiff was forced to either vote in-person, risking contracting COVID-19 or infecting at-risk individuals with whom they live, or not vote at all. *Id.* ¶¶ 11-12. For example, Plaintiff Teresa Richardson resides in Texas and applied for an absentee ballot, based on “disability,” for the July primary election in her state. Ms. Richardson suffers from “debilitating arthritis that has resulted in two hip replacements, a shoulder replacement, and an expected knee replacement” and is a “high risk for COVID-19” because she is currently undergoing “prophylactic treatment resulting from a breast cancer diagnosis.” Richardson Decl., ECF No. 15-2 ¶¶ 4-7. Ms.

Richardson applied for an absentee ballot on or around April 24, 2020, but she never received the ballot. *Id.* ¶¶ 10-12. She decided to vote in person on July 14, 2020. *Id.* In Texas, applications to vote by mail must be received 11 days before Election Day; all ballots submitted by mail must be postmarked by Election Day and be received by the day after Election Day. See *FAQ*, Off. of the Tex. Sec'y of State (last visited Oct. 8, 2020), <https://www.votetexas.gov/faq/index.html>.

Plaintiff Christopher Carroll is a registered voter in Pennsylvania and requested a ballot for the June 2020 primary election in his state. Carroll Decl., ECF No. 15-3 ¶¶ 1, 3-5. He never received his ballot, so he was unable to vote because he was out of the state on the date of the election. *Id.* ¶ 5. In Pennsylvania, applications to vote by mail must be received 7 days before Election Day; all ballots submitted by mail must be postmarked by Election Day and be received within 3 days after Election Day. See *Voting by Mail-in or Absentee Ballot*, Commonwealth of Pa. (last visited Oct. 8, 2020), <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>.

Plaintiff Gina Arfi is a registered voter in New York and requested an absentee ballot for the primary election "based on temporary illness or physical disability." Arfi Decl., ECF No. 15-4 ¶¶ 1, 3. Ms. Arfi never received her ballot; she decided

not to vote because, as she lives with her 85-year-old grandmother, she was concerned about exposing herself and her grandmother to COVID-19. *Id.* ¶ 5. In New York, applications to vote by mail must be received 7 days before Election Day; all ballots submitted by mail must be postmarked by Election Day and be received within 7 days after Election Day. *See Absentee Voting*, N.Y. State Bd. of Elections (last visited Oct. 8, 2020), <https://www.elections.ny.gov/votingabsentee.html>.

Finally, Plaintiff Aida Zygas is registered to vote in Wisconsin and requested an absentee ballot for the August 2020 elections in her state because she did not think she would be in the state on the day of the election. Zygas Decl., ECF No. 15-5 ¶¶ 1, 3. She did not receive a ballot; however, she returned to Wisconsin in time for the election and decided to vote in person. *Id.* ¶ 4. In Wisconsin, applications to vote by mail must be received 5 days before Election Day. All ballots submitted by mail must be postmarked by Election Day and be received within 6 days after Election Day. *See Overview of Absentee Voting Rules*, Wis. Elections Comm'n (last visited Oct. 8, 2020), https://elections.wi.gov/sites/default/files/publication/137/absentee_overview_1_27_16_pdf_14821.pdf.

B. Procedural History

Plaintiffs filed this lawsuit on August 17, 2020. *See generally* Compl., ECF No. 1. On August 20, 2020, Plaintiffs

filed a motion for preliminary injunction requesting that the Court direct Defendants to:

(1) return postal operations and restore postal service to that in place on January 1, 2020; (2) replace or restore the removed the high-speed sorting machines and mailboxes that have been taken out of service and put them back into operation; (3) restore overtime pay and lift the hiring freeze so that USPS can hire additional employees when and where necessary to ensure the timely processing and delivery of mail-in ballots; (4) make all late mail deliveries instead of letting mail be delayed or go undelivered; (5) restore seasoned employees to their former positions, including the employees who were reassigned or displaced in the recent USPS reorganization; and (6) refrain from any and all other conduct that is intended to interfere and/or interferes with Plaintiffs' fundamental right to vote in United States elections, including but not limited to the 2020 presidential election.

Pls.' Appl. Prelim. Inj., ECF No. 14. Plaintiffs also request that the Court appoint a special master to oversee Defendants' compliance with any injunction. Pls.' Mot., ECF No. 15 at 28. On September 11, 2020, Plaintiffs filed an amended complaint against Defendants, replacing its claim that Defendants' conduct violated the Administrative Procedure Act with a claim that the USPS policy changes represent *ultra vires* agency action.¹⁴ Am.

¹⁴ Although Plaintiffs filed their amended complaint after filing their motion for preliminary injunction and before Defendants filed their opposition, the Court finds it appropriate to refer to the factual allegations in the amended complaint. See *Takiguchi v. MRI Int'l, Inc.*, 611 F. App'x 919, 921 (9th Cir. 2015) (dismissing the argument that the "district court

Compl., ECF No. 49. Defendants filed their opposition to Plaintiffs' motion for preliminary injunction on September 15, 2020. Defs.' Opp'n, ECF No. 55. Plaintiffs filed their reply brief on September 20, 2020. Pls.' Reply, ECF No. 57. The motion is ripe for the Court's consideration.

II. Legal Standard

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (alteration in original) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)). Where the federal government is the opposing party, the balance of equities and public interest factors

improperly considered evidence that the plaintiffs submitted with their preliminary injunction reply brief and allegations pleaded for the first time in the Third Amended Complaint, which was filed after all of the preliminary injunction briefing," because "even if it were error to do so, it would be harmless, see *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992), because the mere allegations of a complaint will never suffice to establish the prerequisites for obtaining a preliminary injunction, see *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)"); *Vantage Mobility Int'l LLC v. Kersey Mobility LLC*, No. 19-cv-04684, 2020 WL 411188, at *1 (D. Ariz. Jan. 24, 2020) ("Although VMI filed the First Amended Complaint ('FAC') after the Preliminary Injunction Application, the Court will resolve the Application by considering the FAC as the operative pleading").

merge. See *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In this Circuit, the four factors have typically been evaluated on a “sliding scale,” such that if “the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009).

In the wake of the Supreme Court’s decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), “the D.C. Circuit has suggested that a positive showing on all four preliminary injunction factors may be required.” *Holmes v. FEC*, 71 F. Supp. 3d 178, 183 n.4 (D.D.C. 2014); see also *Sherley*, 644 F.3d at 393 (“[W]e read *Winter* at least to suggest if not to hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.” (citation and quotation marks omitted)). Nonetheless, “the Circuit has had no occasion to decide this question because it has not yet

encountered a post-*Winter* case where a preliminary injunction motion survived the less rigorous sliding-scale analysis.”

ConverDyn v. Moniz, 68 F. Supp. 3d 34, 46 n.2 (D.D.C. 2014).

III. Analysis

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Claim

Plaintiffs claim that they have shown a likelihood of success on the merits of all three of their claims: (1) violation of the right to vote and the right to equal protection;¹⁵ (2) civil conspiracy; and (3) *ultra vires* agency action. Because the Court finds that Plaintiffs have shown they will likely succeed on their claim that Defendants’ policy changes violated their fundamental right to vote, the Court need not evaluate Plaintiffs’ two other claims at this time.

1. Plaintiffs Likely Have Standing

As a threshold matter, Defendants argue that Plaintiffs have failed to establish that they have standing to bring their claim. Defs.’ Opp’n, ECF No. 55 at 30.

To establish standing, “a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between

¹⁵ Plaintiffs bring their equal protection claim under the Fourteenth Amendment. Am. Compl., ECF No. 49 at 49. Because Defendants are subject to the Fifth Amendment to the United States Constitution but not to the Fourteenth, the Court construes the complaint as one bringing a claim under the Fifth Amendment.

the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "Standing to seek . . . forward-looking injunctive relief requires [Plaintiff] to show that it is suffering an ongoing injury or faces an immediate threat of injury. For a future injury, that means submitting evidence showing that there is a substantial risk that the harm will recur." *Narragansett Indian Tribal Historic Pres. Off. v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020) (internal quotation marks, citations, and alterations in original omitted).

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561 (citations omitted). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Defendants contend that Plaintiffs have not established that any future injury is "certainly impending," Defs.' Opp'n, ECF No. 55 at 31 (quoting *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)), arguing that the fact "[t]hat Plaintiffs may have

failed to receive their absentee ballots for the primary elections does nothing to establish a real and immediate threat that they will again fail to receive their absentee ballots for the November 2020 general election," *id.* (alterations and quotation marks omitted) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). Defendants contend that "Plaintiffs have put forth no evidence (or allegation) supporting Plaintiffs' inference that they failed to receive their absentee ballots for the primary elections due to any purported recent changes to USPS policies." Defs.' Opp'n, ECF No. 55 at 31. Because Plaintiffs cannot rule out "several alternative explanations" for why Plaintiffs never received their absentee ballots in time for the primary elections, Defendants argue that this "undermines" Plaintiffs' future injury allegation and theory of redressability. *Id.*

The Court disagrees. Plaintiffs exclusively seek prospective injunctive relief. Am. Compl., ECF No. 49 ¶ 10 ("This is a suit for injunctive relief to protect the Plaintiffs' right to vote by ensuring that the United States Postal Service delivers absentee and mail-in ballots in a timely fashion to them and then, delivers their executed ballots to election officials in time to be counted."). Under D.C. Circuit precedent, "the proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm," which in this

case would be disenfranchisement in the November 2020 election, “as the concrete and particularized injury and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently ‘imminent’ for standing purposes.” *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017) (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015)). Here, Plaintiffs provided evidence that changes in USPS policy caused and will continue to cause delays in the delivery of mail. See Grimmer Decl., ECF No. 57-4 ¶ 10 (decrease in the number of extra or late trips will delay the delivery of letters); Tr., *Jones v. U.S. Postal Serv.*, No. 20-cv-6516 (S.D.N.Y. Sept. 16, 2020), Ex. D to Pls.’ Reply, ECF No. 57-5 at 24-25 (mail processing clerk at the San Antonio Main Post Office testified under oath that the plant was experiencing a “two to three day[]” delay and expected the delay to continue into November because (1) “they’re shifting people around into positions of no expertise”; (2) “they’re hiring brand new employees with no official training to know how to expedite the mail properly and running the right sort programs”; and (3) “they’re cutting back on overtime”).

Plaintiffs have cited evidence that delays in mail service, both locally and nationally, correlate with the timing of the USPS policy changes in July and have continued at least into the month of August. See Pls.’ Reply, ECF No. 57 at 9-10 (“By the

second week of August 2020, on-time delivery of First-Class Mail nationwide had fallen nearly 10 percentage points compared to the week preceding the changes.” (quoting Senate Report at 3)); Senate Report at 3 (finding that “[s]ome parts of the country saw on-time delivery drop by 15-20 percentage points in the weeks following Mr. DeJoy’s July 2020 changes”). In addition, USPS’s own data shows declines in on-time delivery of First-Class Mail continuing into August. Grimmer Decl., ECF No. 57-4 at 24-25. The Court thus finds that Plaintiffs have shown they face a “‘substantial risk’ of future injury,” *Attias*, 865 F.3d at 627, that is “fairly traceable” to the USPS policy changes, *Lujan*, 504 U.S. at 560.

Defendants also claim that even if the USPS policy changes did cause the primary ballots to never arrive, that still does “not support an inference that these delays will affect Plaintiffs in particular again” because Plaintiffs have not alleged that the mail delays “affect all voters across-the-board . . . [or that they] are uniquely susceptible to these delays.” Defs.’ Opp’n, ECF No. 55 at 32. Defendants argue that “Plaintiffs’ allegations also fail to account for the fact that the delays that affected USPS in July are being remedied, . . . or the tremendous amount of resources that USPS has pledged to support the upcoming election.” *Id.* However, as stated above, there is sufficient evidence to show that Defendants’ policy

changes continue to have nationwide effects on the timely delivery of mail. See Senate Report at 3 (finding that nationwide during the second week of August, “85 million more deliveries were late in a single week compared to what the late deliveries would have been that week under on-time delivery rates before the changes”); Grimmer Decl., ECF No. 57-4 at 24-25.

For all of these reasons, the Court finds that Plaintiffs’ have standing.

2. The Applicable Legal Standard

Prior to considering the likelihood of success on the merits, the parties disagree on which legal standard should govern Plaintiffs’ claim that the USPS policy changes infringe upon their constitutional right to vote.

Plaintiffs argue that “[d]elaying mail-in ballots places an unconstitutional burden on Plaintiffs’ right to vote and merits strict scrutiny.” Pls.’ Reply, ECF No. 57 at 22. In Plaintiffs’ view, “[l]aws that govern the handling of ballots are reasonably understood as directly regulating the election, whether the ballot is handled by a poll worker or a mail handler or letter carrier.” *Id.* at 21. Defendants, on the other hand, argue that because the USPS policy changes only indirectly affect Plaintiffs, the rational basis test should apply. Defs.’ Mot., ECF No. 55 at 33. Defendants contend that the cases Plaintiffs

cite in favor of applying strict scrutiny are inapplicable because the cases are factually distinguishable or only concern state election laws that directly regulate the electoral process. *Id.* But even if the Court considers this case analogous to the line of cases involving “election laws,” Defendants contend that the Court would still apply the rational basis test under *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969).

In *McDonald*, the Supreme Court held that an Illinois statute that denied certain inmates mail-in ballots did not impose an unconstitutional burden on their right to vote. *Id.* at 807. Rather, the statute only restricted their asserted right to receive an absentee ballot, and they were therefore not “absolutely prohibited from voting by the State.” *Id.* at 808 & n.7. The Supreme Court noted that “the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths . . . or provide guarded transportation to the polls.” *Id.* at 808 n.6. The Court further noted that a more rigid standard is proper only when the policy or practice at issue categorically “den[ies] [plaintiffs] the exercise of the franchise . . . preclud[ing] [them] from voting.” *Id.* at 807-08. Accordingly, the Supreme Court upheld the statute under rational basis review. *Id.* at 811. Defendants argue that *McDonald* is controlling because “Plaintiffs are

claiming that USPS policies may deprive them of the ability to cast votes through mail-in ballots” and Plaintiffs’ “position is not materially different from the county jail inmates in *McDonald* who were physically restricted from the polls.” Defs.’ Opp’n, ECF No. 55 at 34-35.

Although Plaintiffs concede that they are not wholly prohibited from voting, as they may choose to vote in person if they do not receive a mail-in ballot in time, the Court finds that *McDonald* is inapplicable here. First, Defendants mischaracterize Plaintiffs’ claim in this case. Plaintiffs do not broadly challenge the USPS policy changes as denying them the right to receive mail-in ballots, as was at issue in *McDonald*. There is no dispute that Plaintiffs are eligible to vote by mail under their respective state laws. Rather, the question here is whether USPS may implement a policy that may arbitrarily prevent a large swath of voters, eligible to receive a mail-in ballot, from receiving their ballots in the first place. Second, as the Supreme Court noted in a concurring opinion, *McDonald* involved a “relatively trivial inconvenience encountered by a voter unable to vote by absentee ballot when other means of exercising the right to vote [were] available.” *O’Brien v. Skinner*, 414 U.S. 524, 532 (1974) (Marshall, J., concurring) (noting that the record in *McDonald* was “barren of any indication” that the State would not provide alternative

avenues to vote). Here, however, the Court concludes that in-person voting in the midst of the ongoing COVID-19 pandemic is more than a mere "trivial inconvenience." Because COVID-19 spreads mainly from person-to-person, see *Frequently Asked Questions*, Centers for Disease Control and Prevention (last updated Sept. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>, all voters, including Plaintiffs, place themselves at risk of contracting a potentially terminal infection should they choose to vote in person as a result of failing to receive their mail-in ballots in time. In such circumstances, which were absent in *McDonald*, the Court finds there is a burden on individuals' ability to effectuate their right to vote. Accordingly, *McDonald's* rational basis test is inappropriate.

The Court also declines to apply strict scrutiny to the claim automatically, as Plaintiffs suggest. Rather, the Court finds that the *Anderson-Burdick* framework, derived from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), likely applies here. Under the *Anderson-Burdick* line of cases, courts have recognized that "[e]lection laws will invariably impose some burden upon individual voters,' and that not all laws burdening the right to vote are subject to strict scrutiny." *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 682 F.3d 72, 73-74 (D.C. Cir. 2012) (alteration in

original) (quoting *Burdick*, 504 U.S. at 433-34). Instead, courts “must first consider the character and magnitude of the asserted injury” to the plaintiffs’ right to vote against “the precise interests put forward by the [government] as justifications for the burden imposed[,]” including “the legitimacy and strength of each of those interests” and “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789. The level of scrutiny a court should apply depends on the burden. When a voter’s rights are “subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). But when a voter’s rights are subjected only to “reasonable, nondiscriminatory restrictions,” “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (internal quotation marks omitted). If the restriction falls somewhere between those two poles, then the court uses a flexible analysis, “where the more severe the burden, the more compelling the [government’s] interest must be.” *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018).

Courts have applied this framework in the context of non-election laws that have an effect on voters’ rights or political candidates’ rights. For example, in *Monserate v. New York State*

Senate, 599 F.3d 148 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit addressed a First Amendment challenge to the New York Senate's decision to expel a senator who had been accused of domestic violence. *Id.* at 152-53. The Second Circuit found that the *Anderson-Burdick* line of cases was not limited to the pre-vote election law context, stating that the Supreme Court had "minimized the extent to which voting rights are distinguishable from ballot access cases" because "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Id.* at 155 (internal citations and quotation marks omitted). Accordingly, the Second Circuit applied the *Anderson-Burdick* test in analyzing whether the senator's expulsion burdened constitutional rights related to voting and political association. *Id.*; see also *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 622-23 (8th Cir. 1997) (analyzing a board resolution prohibiting a newly elected ambulance board member from voting on certain matters because her husband worked for the ambulance district under the *Anderson-Burdick* framework); *Hussey v. City of Portland*, 64 F.3d 1260, 1262, 1264 (9th Cir. 1995) (applying the *Anderson-Burdick* framework in evaluating the constitutionality of an "ordinance requiring non-residents to consent to annexation as a condition of receiving a subsidy, or reduction in hook-up costs, for mandated sewer connections," finding that consents were the

“constitutional equivalent” of voting). In addition, courts within this Circuit have relied upon the *Anderson-Burdick* framework in analyzing “state” practices that allegedly burden parties’ ability to cast their votes effectively under both the Fifth Amendment and the Fourteenth Amendment. *See, e.g., Libertarian Party*, 682 F.3d at 74 (analyzing under *Burdick* plaintiffs’ First and Fifth Amendment claims that the District, “consistent with its regulations, never reported which individuals were penciled in by voters choosing the write-in option or how many votes any such individual accrued”); *Turner v. D.C. Bd. of Elections & Ethics*, 77 F. Supp. 2d 25, 30, 33 (D.D.C. 1999) (RWR) (analyzing the constitutionality of Congress’s 1998 District of Columbia Appropriations Act under *Burdick*, among other standards, where the Act barred the D.C. Board of Elections and Ethics from counting, releasing, and certifying the results of a referendum). *But see LaRouche v. Fowler*, 152 F.3d 974, 994 (D.C. Cir. 1998) (finding that the *Burdick* test was inappropriate in a challenge against the Democratic National Committee’s internal rules because the test “was not designed for a case in which the First Amendment weighs on both sides of the balance”).

Here, regardless of the intent behind the changes, the USPS policy “will invariably impose some burden upon individual voters” and their constitutional rights in an election year.

Libertarian Party, 682 F.3d at 73-74. The USPS directly affects how Election Mail is handled and the speed with which Election Mail arrives at its intended destination. While the USPS serves many other functions, its role in handling ballots compels the conclusion that USPS plays an active role in ensuring that elections are conducted in a "fair and honest" manner, "rather than chaos." *Burdick*, 504 U.S. at 433 (citation omitted). Furthermore, the Court is not convinced that the *Anderson-Burdick* framework is limited to only state government and not federal government actions. To so find would effectively exclude, for example, any federal legislation impacting elections in the District of Columbia pursuant to Congress's plenary power over the District. See U.S. Const. art. I § 8; *Palmore v. United States*, 411 U.S. 389, 397 (1973). In addition, this case does not present the same concerns as the D.C. Circuit noted in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), where the court noted that applying *Anderson-Burdick* to the rules of a non-state political party was inappropriate because "the presence of First Amendment interests on both sides of the equation makes inapplicable the test applied to electoral restrictions where the First Amendment weighs on only one side." *Id.* at 995.

Although Defendants argue that failing to apply the rational basis test to "non-election policies that may have some

indirect impact on the electoral process would produce odd results," including that "any deficiency in USPS service could give rise to a constitutional voting rights claim," Defs.' Opp'n, ECF No. 55 at 33-34, the Court disagrees. The Court first notes that Defendants' claim that the policy changes implemented by USPS only inadvertently or indirectly affect voting rights is unpersuasive, particularly in a year in which the global COVID-19 pandemic has forced many individuals to decide either to vote by mail-in ballot or to not vote at all. *See Jones v. U.S. Postal Serv.*, No. 20-cv-6516, 2020 WL 5627002, at *14 (S.D.N.Y. Sept. 21, 2020) ("The Court . . . disagrees with the Government that this case does not implicate 'the counting of votes.' To hold otherwise would be to ignore the facts at hand: a large number of voters will be exercising their right to vote in the November 2020 election by placing their ballots in the mail. There is simply no reason for the Court to ignore the severe reality that the country is in the middle of a deadly pandemic . . ."). For the upcoming election in November, it is estimated that 80 million ballots will be submitted by mail. *See Hersh Decl.*, ECF No. 57-6 ¶ 14. The USPS policy thus directly impacts and controls the ability of millions of citizens to have their vote counted. Defendants themselves do not dispute their unique role within the electoral process and their "longstanding commitment to the timely delivery of Election Mail." Defs.'

Opp'n, ECF No. 55 at 13. Even beyond delivering mail-in ballots, USPS conducts "extensive outreach to state and local election officials to support effective use of postal services to facilitate the distribution and return of ballots"; gives an "Election Mail Kit" to "approximately 11,500 state and local election officials"; and has established a separate "bipartisan Election Mail Committee to actively oversee USPS's support of Election Mail for the Election." *Id.* at 12-13. This relationship between the USPS and the electoral process suggests a strong connection with the protection of voters' rights. In addition, a finding that the *Anderson-Burdick* framework applies does not necessarily mean that "any deficiency in USPS service could give rise to a constitutional voting rights claim." *Id.* at 33. This case does not allege that inadvertent, run-of-the-mill delays in the postal service will infringe on their right to vote in the November 2020 election. Instead, Plaintiffs are alleging that a series of deliberate nationwide changes in postal service procedures has caused a widespread slow-down in mail delivery times, that the changes directly affect their ability to vote, and that Defendants are aware that the policy changes affect the timely delivery of mail, including Election Mail. See Pls.' Reply, ECF No. 57 at 7-10.

Accordingly, the Court finds that the *Anderson-Burdick* framework likely applies to Plaintiffs' claim.

3. Plaintiffs Have Shown That They Are Likely To Succeed On The Merits Of Their Constitutional Claim

Plaintiffs argue that the USPS policy changes infringe upon their constitutional right to vote and violate the Equal Protection Clause. The Court agrees that, under the *Anderson-Burdick* framework, Plaintiffs have shown that they are likely to succeed on the merits of their claim.

As explained above, under the *Anderson-Burdick* framework, the Court must determine whether “the character and magnitude of the asserted injury to the rights protected by the First and [Fifth] Amendments that the plaintiff seeks to vindicate” outweighs “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into account “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Burdick*, 504 U.S. at 433-34. Next, the court evaluates how much deference to afford to the government’s interests. If voting rights are “subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Id.* at 434 (internal quotation marks omitted). But when a voter’s rights are subjected only to “reasonable, nondiscriminatory restrictions,” then courts apply a rational basis review. *Id.* (internal quotation marks omitted).

“It is beyond cavil that ‘voting is of the most fundamental

significance under our constitutional structure.'" *Burdick*, 504 U.S. at 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)); see also *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted" *United States v. Classic*, 313 U.S. 299, 315 (1941). The right to vote "includes the right to have one's vote counted on equal terms with others," *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008), and applies to the "initial allocation of the franchise" as well as to "the manner of its exercise," *id.* at 477 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). Thus, where a policy creates a situation where "[a] large number of ballots will be invalidated, and consequently, not counted based on circumstances entirely out of the voters' control," the "burden [on the right to vote] is exceptionally severe." *Gallagher v. N.Y. State Bd. of Elections*, No. 20-cv-5504, 2020 WL 4496849, at *16 (S.D.N.Y. Aug. 3, 2020); see also *Doe v. Walker*, 746 F. Supp. 2d 667, 679-80 (D. Md. 2010) ("By imposing a deadline which does not allow sufficient time for absent uniformed services and overseas voters to receive, fill out, and return their absentee ballots, the state imposes a

severe burden on absent uniformed services and overseas voters' fundamental right to vote.").

Here, the Court finds that the "character and magnitude" of Plaintiffs' asserted injury to the right to vote is significant. Although Defendants call Plaintiffs' harm "speculative," Defs.' Opp'n, ECF No. 55 at 35, Plaintiffs have provided sufficient evidence suggesting that Defendants' policy regarding extra and late trips has caused and will continue to cause inconsistency and arbitrary delays in the delivery of mail across the United States, placing at risk Plaintiffs' ability to receive their mail-in ballots in time or have them arrive at their local election office in time. See Senate Report at 3 (stating that "[b]y the second week of August 2020, on-time delivery of First-Class Mail nationwide had fallen nearly 10 percentage points compared to the week preceding the [USPS policy changes]"); Grimmer Decl., ECF No. 57-4 at 24-25 (indicating that USPS data shows that on-time delivery of First-Class Mail had not bounced back to the average experienced prior to July). For example, Plaintiffs explain that "[e]ven in states where ballots need only be postmarked by Election Day, delays of two to three days are likely to disenfranchise a large portion of the electorate," Pls.' Reply, ECF No. 57 at 11, because those ballots still have to arrive at the election office in time to be counted, see, e.g., *Voting by Mail-in or Absentee Ballot*, Commonwealth of Pa.

(last visited Oct. 8, 2020), <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> (explaining that, in Pennsylvania, ballots postmarked by Election Day must be received within three days after Election Day). Furthermore, Plaintiffs simply cannot predict when their ballots will arrive at their intended destination. When they will arrive, and whether they will arrive in time to be counted, instead depends upon “arbitrary factors, such as the particular USPS branch that handles their ballots.” *Jones*, 2020 WL 5627002, at *16. Indeed, USPS itself has acknowledged the threat of voter disenfranchisement, warning in a July 29, 2020 letter to 46 states and the District of Columbia that USPS “cannot guarantee that all ballots cast by mail for the 2020 presidential election will arrive in time to be counted.” Am. Compl., ECF No. 49 ¶ 181; *see also* Pls.’ Reply, ECF No. 57 at 10 (citing a July 29, 2020 letter from the USPS General Counsel). Thus, in a year in which it is estimated that 80 million citizens are anticipated to submit their votes via USPS, and between 3.7% and 9.3% of those are estimated to mail ballots on the Saturday before Election Day, the potential for voter disenfranchisement is immense. *See* Hersh Decl., ECF No. 57-6 ¶¶ 14, 21-23.

Furthermore, Defendants’ policy changes place an especially severe burden on the Plaintiffs who have no other reasonable choice than to vote by mail, such as those who may be

at a high risk of developing a severe case of COVID-19 should they become exposed to the virus at the polling place, who live with individuals at a high risk of severe COVID-19 symptoms, and who are not physically able to travel to the polls because they are out of the state. See Pls.' Mot., ECF No. 15 at 11-13. For these individuals, mail-in voting is either the only choice or the only safe choice they have for themselves and their loved ones. Although Defendants point out that Plaintiffs may still vote in person, the Court nonetheless finds that when nationwide policy changes prevent an eligible voter from receiving the mail-in ballot to which she is entitled, and as a result she must choose between either disenfranchisement or risking contracting a potentially terminal disease herself and infecting at-risk persons with whom she lives, the right to vote is heavily burdened.

Defendants argue that the Plaintiffs' claim must fail because there is no constitutional right to vote by mail and states are not required to offer mail-in voting. Defs.' Opp'n, ECF No. 55 at 32-33. Defendants contend that "[i]f a State can prohibit mail-in voting . . . then USPS policies which may indirectly limit when a ballot must be mailed cannot be constitutionally suspect." *Id.* Defendants miss the point. Plaintiffs here are not alleging that Defendants are denying them a right to vote by mail. Rather, Plaintiffs are alleging

that the Defendants' policy changes undermine the integrity of the November 2020 election by causing delays in the delivery of election mail, risking disenfranchisement of thousands of voters. Defendants, however, claim that the arbitrariness of the delays actually cuts in their favor. *Id.* at 35-36. Defendants point out that the USPS policy changes "do not expressly (or necessarily) deny anyone a mail-in ballot" and that "[t]o the extent there are mail delays, or certain mail goes undelivered, there is no allegation that USPS has determined in advance the class of persons to be affected." *Id.* But whether there is purposeful or intentional discrimination is irrelevant to the Court's analysis here. See *Bush*, 531 U.S. at 104-05 (finding an Equal Protection Clause violation without making a finding of discriminatory intent). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.*; see also *Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (noting that "arbitrary and capricious action" can violate the Fourteenth Amendment (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962))). For example, if one of the Plaintiffs submits her ballot, but it does not make it to her local election office in time because of delays caused by the USPS policy, "her 'right to full and effective participation in the political processes of h[er] [Nation]'s legislative bodies' is

impaired relative to that of both in-state and out-of-state voters with access to USPS branches functioning effectively.” *Jones*, 2020 WL 5627002, at *21 (alteration in original) (quoting *Reynolds*, 377 U.S. at 565); see also *Brunner*, 548 F.3d at 478 (stating that the allegation, among others, that “[p]rovisional ballots were not distributed to appropriate voters, causing voters to be denied the right to vote if true, could support a troubling picture of a system so devoid of standards and procedures as to violate” the Constitution).

Against such injuries, Defendants assert that the policy changes are intended “to increase efficiency” and “minimize unnecessary costs.” Defs.’ Opp’n, ECF No. 55 at 36. Defendants contend that these general “regulatory” interests survive rational basis review, *id.* (quoting *Libertarian Party*, 682 F.3d at 77), and that the Court may not find such interests are irrational because it “disagrees with the policy choice,” *id.* (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–14 (1993)). Plaintiffs, on the other hand, dispute that Defendants’ justifications are sufficient to justify the burden imposed on voters. Plaintiffs argue that the USPS policy changes were in fact inefficient and increased unnecessary costs. Pls.’ Reply, ECF No. 57 at 22–23. Furthermore, Plaintiffs contend that “USPS has no constitutional mandate to cut costs” and that “[v]iolating an important constitutional right in order to

achieve a goal not within its mandate . . . is obviously not legitimate or rational prioritization." *Id.* at 23.

Defendants are correct that "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns, Inc.*, 508 U.S. at 313. However, the Court finds that the bar is higher here. Given the severity of Plaintiffs' harms, the Court must instead determine whether Plaintiffs' injuries are outweighed by Defendants' justifications under at least an intermediate level of scrutiny, if not strict scrutiny. The Court finds that Defendants do not meet either.

The Court respects that the federal government, and USPS in particular, have legitimate interests in maintaining efficient programs and in saving money; however, these interests do not justify the resulting harms Plaintiffs face. As stated above, the burden the USPS policy changes place on Plaintiffs' constitutional right to vote and have their vote counted is significant. At risk is disenfranchisement in the November election of potentially hundreds of thousands of individuals. These harms justify a high level of scrutiny, yet Defendants only generally assert that "USPS did renew its focus on

compliance with pre-set schedules in order to increase efficiency, and minimize unnecessary costs.” Defs.’ Opp’n, ECF No. 55 at 36. Defendants’ reasons for administrative cost savings are insufficient: as the Supreme Court has explained, the “vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.” *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963). Furthermore, Defendants have failed to provide any reasons regarding why implementation of the USPS policy changes were necessary during a nationwide election season in the middle of a pandemic, particularly in view of Defendants’ express acknowledgement that they anticipated “mail left behind or mail on the workroom floor or docks.” Mandatory Stand-Up Talk: All Employees (July 10, 2020), <https://federalnewsnetwork.com/wp-content/uploads/2020/07/071020-stand-up-talk.pdf>.¹⁶ And despite Defendants’ assertions to the contrary, as of the end of August, USPS service scores remained lower than the pre-policy average. See Grimmer Decl., ECF No. 57-4 at 24-25; Pls.’ Reply, ECF No. 57 at 9-10 (“By the second week of August 2020, on-time delivery of First-Class Mail nationwide had fallen nearly 10 percentage points compared to the week preceding the changes.” (quoting Senate Report at 3)).

¹⁶ The Court takes judicial notice of the USPS document regarding transportation changes. Fed. R. Evid. 201(b)(2).

Accordingly, the Court finds that Plaintiffs are likely to succeed on their constitutional claim.

B. Plaintiffs Face Irreparable Harm

"In this Circuit, a litigant seeking a preliminary injunction must satisfy 'a high standard' for irreparable injury." *ConverDyn*, 68 F. Supp. 3d at 46 (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). The movant must demonstrate that it faces an injury that is "both certain and great; it must be actual and not theoretical," and of a nature "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quotation marks and emphasis omitted).

Plaintiffs argue that, because the USPS policy changes infringe upon Plaintiffs' constitutional right to vote, including in the November 2020 election, that alone is sufficient to show irreparable injury for the purposes of seeking equitable relief. Pls.' Mot., ECF No. 15 at 25. Plaintiffs further argue that President Trump has "incentivized" voters to "remain away from the polls" in the November 2020 election by "making statements suggesting that mail-in voting is rife with fraud." *Id.* at 25-26 (quoting *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868, at *3 (U.S. July 16, 2020) (Sotomayor, J., dissenting)). Defendants, in opposition, contend that

Plaintiffs' contention that USPS policies have denied them the right to vote is "insufficient and too speculative" to establish an irreparable injury. Defs.' Opp'n, ECF No. 55 at 40. Moreover, Defendants argue that Plaintiffs have not identified any actions that may "incentivize" them not to vote. *Id.* Nor have Plaintiffs established that any future harms are likely to recur given that "USPS has taken a number of steps that have resulted in service performance improving." *Id.* at 41.

The Court finds that Plaintiffs have sufficiently shown they will likely suffer irreparable harm absent a preliminary injunction. At this juncture, Plaintiffs need only demonstrate the likelihood of an increased risk of injury. *Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction."). And, as described above, Plaintiffs have provided evidence showing that, due to delays in the delivery of mail, there is a substantial risk that Plaintiffs will suffer an undue burden on their constitutional right to vote. See *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."); *Cardona v. Oakland Unified Sch. Dist., Cal.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (explaining abridgement "or dilution of a right so fundamental as the right to vote constitutes irreparable

injury"). There is "no do-over and no redress" once the election has passed. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). The Court further finds Plaintiffs would face irreparable harm in being forced to make a decision on how to vote before they have all of the information they require. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). Finally, regarding Defendants' assertion that Plaintiffs have failed to show the likelihood of delivery delays, USPS data suggests that on-time delivery for First Class Mail has not bounced back since the implementation of the policy changes, and Defendants have provided no other information suggesting that that will change prior to Election Day. See Grimmer Decl., ECF No. 57-4 at 24-25; Pls.' Reply, ECF No. 57 at 9-10.

The Court finds that the Plaintiffs have sufficiently shown they will likely suffer irreparable harm absent a preliminary injunction due to the restriction on the fundamental right to vote.

C. The Balance of Equities and Public Interest Favor an Injunction

The balance-of-equities factor directs the Court to “balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.” *ConverDyn*, 68 F. Supp. 3d at 52 (quoting *Winter*, 555 U.S. at 24). “When the issuance of a preliminary injunction, while preventing harm to one party, causes injury to the other, this factor does not weigh in favor of granting preliminary injunctive relief.” *Id.*; see also *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998). By contrast, the balance of equities may favor a preliminary injunction that serves only “to preserve the relative positions of the parties until a trial on the merits can be held.” *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014) (CRC) (quoting *Camenisch*, 451 U.S. at 395). “The purpose of . . . interim relief is not to conclusively determine the rights of the parties, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also ‘conside[r] . . . the overall public interest,’ *Winter*, [555 U.S.] at 26.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (second alteration in original).

Plaintiffs contend that the balance of the equities and the

public interest favor a preliminary injunction because it is in the public interest to prevent constitutional violations and to allow eligible citizens the ability to exercise their right to vote. Pls.' Mot., ECF No. 15 at 26-27. Defendants do not contest the equities in Plaintiffs' favor. Rather, Defendants argue that the public interest and the balance of the equities disfavor granting relief because (1) "USPS is currently undertaking extensive efforts to facilitate the timely delivery of Election Mail"; (2) "[t]here is no dispute that USPS has the capacity . . . to handle the anticipated surge in Election Mail"; (3) "Plaintiffs have an opportunity to avoid any harm by mailing in their ballots without delay"; and (4) granting relief "could require the Court to act as an overseer of the agency's day-to-day activities." Defs.' Opp'n, ECF No. 55 at 41-42.

Here, the balance of the equities and the public interest favor an injunction. "By definition, '[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *League of Women Voters of N.C.*, 769 F.3d at 247-48 (quoting *Husted*, 697 F.3d at 437). It is also clearly in the public interest to require that USPS implement policies that do not infringe upon constitutional rights. *Newby*, 838 F.3d at 12 ("There is generally no public interest in the perpetuation of unlawful agency action.").

D. Request For Preliminary Injunction

Plaintiffs' motion for preliminary injunction requests the following relief:

(1) return postal operations and restore postal service to that in place on January 1, 2020; (2) replace or restore the removed the high-speed sorting machines and mailboxes that have been taken out of service and put them back into operation; (3) restore overtime pay and lift the hiring freeze so that USPS can hire additional employees when and where necessary to ensure the timely processing and delivery of mail-in ballots; (4) make all late mail deliveries instead of letting mail be delayed or go undelivered; (5) restore seasoned employees to their former positions, including the employees who were reassigned or displaced in the recent USPS reorganization; and (6) refrain from any and all other conduct that is intended to interfere and/or interferes with Plaintiffs' fundamental right to vote in United States elections, including but not limited to the 2020 presidential election.

Pls.' Appl. Prelim. Inj., ECF No. 14. To the extent the Court deems that certain aspects of the proposed preliminary injunction are inappropriate, the Court has the authority to adjust the requested relief as it deems fit. *See Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992) ("It is well established . . . that a federal district court has wide discretion to fashion appropriate injunctive relief"). Although Plaintiffs have alleged that they are at risk of potential disenfranchisement in the November election due to the entirety of the June and July USPS Postal Policy Changes, the

Court finds that Plaintiffs have provided supporting evidence regarding only some of those policy changes.

The Court shall grant Plaintiffs' request to "restore overtime pay" and to "make all late mail deliveries instead of letting mail be delayed or go undelivered." As described above, the Court finds that Plaintiffs have established that, without a preliminary injunction, Plaintiffs are likely to suffer harms based upon this specific conduct.

However, the Court declines to issue a preliminary injunction to "return postal service to that in place on January 1, 2020." Plaintiffs have alleged that USPS policy changes implemented in June and July 2020 have led to significant delays in the on-time delivery of mail, and the Court therefore sees no reason to order USPS to return its operations to the status quo a full six months prior to those changes. In addition, the Court finds that Plaintiffs have submitted little to no evidence connecting the removal of high-speed sorting machines and mailboxes to any resulting delays in mail service. Plaintiffs also have not provided sufficient evidence to warrant a Court order regarding their request to "restore seasoned employees to their former positions" and "lift the hiring freeze." Finally, the Court denies Plaintiffs' request with regard to Defendants "refrain[ing] from any and all other conduct that is intended to interfere and/or interferes with Plaintiffs' fundamental right

to vote in United States elections, including but not limited to the 2020 presidential election” as overly broad and lacking the specificity required by Federal Rule of Civil Procedure 65. See Fed. R. Civ. P. 65(d) (providing that “[e]very order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail . . . the act or acts restrained or required”).

The Court also finds it inappropriate to appoint a special master to supervise implementation of this Court’s Order. While Plaintiffs cite to *National Organization for Reform of Marijuana Laws v. Mullen*, 112 F.R.D. 120 (N.D. Cal. 1996) [hereinafter “*NORML*”], in support of their position, the case is readily distinguishable. In *NORML*, the court had already issued a preliminary injunction, and the plaintiffs had subsequently alleged “numerous instances of violations” of that injunction. 112 F.R.D. at 121. The court found that because “[s]uch evidence of noncompliance with an injunction that first issued nearly a year earlier portends continuing violations, especially when viewed in light of the fast-paced and wide-ranging character of CAMP surveillance and raid activities, the difficult legal issues involved, and the numerous affirmative measures that the Court has ordered defendants to undertake” the “circumstances constitute an ‘exceptional condition’ and call for the appointment of a Special Master.” *Id.* Here, in contrast, there

is no history of Defendants failing to comply with Court orders, no difficult legal issues involved, and relatively few measures for Defendants to take. Because reference to a master shall be the exception and not the rule, Fed. R. Civ. P. 53(a), the Court finds that implementation of its Order is not so complex as to constitute such exceptional circumstances.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the Plaintiffs' motion for a preliminary injunction. Any request to stay this decision pending appeal will be denied for substantially the same reasons as those articulated in this Opinion. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
October 8, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TERESA RICHARDSON, *et al.*,

Plaintiffs,

v.

No. 20-cv-2262 (EGS)

DONALD J. TRUMP, *in his
official capacity as President
of the United States, et al.*,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED the Plaintiffs' Motion for Preliminary Injunction is **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED that a Preliminary Injunction is hereby entered against Defendants; and it is further

ORDERED that pursuant to the Order, Defendants are **HEREBY ENJOINED** from enforcing the Late/Extra Trips Policy; and it is further

ORDERED that pursuant to the Order, Defendants **SHALL** authorize all overtime necessary to ensure the timely delivery of Election Mail; and it is further

ORDERED that any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
October 8, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,

Plaintiff,

v.

No. 20-cv-2295 (EGS)

UNITED STATES POSTAL SERVICE,
et al.,

Defendants.

MEMORANDUM OPINION

I. Introduction

Plaintiff, the National Association for the Advancement of Colored People ("NAACP") filed this lawsuit against Defendants the United States Postal Service ("USPS" or "Postal Service") and Louis DeJoy ("Mr. DeJoy"), in his official capacity as Postmaster General of the United States, alleging the following claims: (1) Non-statutory review of unlawful agency action for failure to follow the procedures required by 39 U.S.C. § 3661; (2) Non-statutory review of unlawful agency action that is arbitrary, capricious, and not in accordance with 39 U.S.C. § 101(e); (3) Mandamus to enforce 29 U.S.C. § 3991; and (4) Mandamus to enforce 39 U.S.C. § 101(e). Plaintiff seeks a preliminary injunction with regard to their first and second claims. Upon consideration of Plaintiff's motion, the response,

and reply thereto, the applicable law, and the entire record, the Court **GRANTS** Plaintiff's motion.

II. Background

A. Statutory and Regulatory Framework

In the Postal Reorganization Act ("PRA"), Public Law 91-375, 84 Stat. 719 (Aug. 12, 1970), Congress replaced the Post Office Department with the Postal Service as "an independent establishment of the executive branch of the Government of the United States, under the direction of a Board of Governors, with the Postmaster General as its chief executive officer." 39 C.F.R. § 1.1. The PRA establishes that the policy of the USPS includes the mandate to "provide prompt, reliable, and efficient services to patrons in all areas and . . . render postal services to all communities." 39 U.S.C. § 101. The PRA also created an independent oversight body for the USPS, the Postal Rate Commission. 39 U.S.C. § 501. Congress passed the PRA to "[i]nsulate" the management of the USPS "from partisan politics . . . by having the Postmaster General responsible to the [Postal Rate] Commission, which represents the public interest only, for his conduct of the affairs of the Postal Service." H.R. Rep. No. 91-1104, 3660-61 (1970).

In the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006) (codified at 39 U.S.C. § 3600 et seq.), Congress replaced the Postal Rate

Commission with the Postal Regulatory Commission (“PRC” or “Commission”) and “strengthened its role.” *Carlson v. Postal Regul. Comm’n*, 938 F.3d 337, 340 (D.C. Cir. 2019).

The USPS is responsible for “develop[ing] and promot[ing] adequate and efficient postal services.” 39 U.S.C. § 3661(a). “When the Postal Service determines that there should be a change in the nature of postal services [that] will generally affect service on a nationwide or substantially nationwide basis,” it must “submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.” *Id.* § 3661(b).

Following the submission of a proposal, “[t]he Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under [the Administrative Procedure Act] has been accorded the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.” 39 U.S.C. § 3661(c).

B. Factual Background

1. The COVID-19 Pandemic and Its Impact on Voting in the 2020 Election.¹

On March 11, 2020, the World Health Organization ("WHO") declared a global pandemic as a result of the spread of COVID-19. See Dr. Tedros Adhanom, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. On March 13, 2020, President Donald J. Trump declared a national emergency as a result of the outbreak. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

The virus that causes COVID-19 is highly contagious, is believed to spread mostly from person-to-person when people are in within six feet of each other, and may be spread by people who are not showing symptoms of the virus. See Centers for Disease Control, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself and Others* (last updated Sep. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting->

¹ The Court takes judicial notice of documents and information on official government websites. Fed. R. Evid. 201(b)(2); see also *Western Watershed Project v. Bernhardt*, 2020 WL 3402379, * 3 n.4 (D.D.C. June 19, 2020). The Court takes judicial notice of certain information at the World Health Organization website, the Johns Hopkins University website, and the Mayo Clinic website which is "not subject to reasonable dispute" because they are "sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2).

sick/prevention.html. Symptoms range from mild to severe. See Mayo Clinic, *Coronavirus Disease 2019 (COVID-19), Symptoms and Causes* (updated Sep. 11, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>. Older people and people with existing chronic medical conditions have a higher risk of serious illness from COVID-19. *Id.* Such chronic medical conditions include “serious heart disease . . . , cancer, chronic obstructive pulmonary disease, type 2 diabetes, severe obesity, chronic kidney disease, sickle cell disease, and weakened immune system from solid organ transplants.” *Id.* COVID-19 can result in severe medical complications including “pneumonia and trouble breathing, organ failure in more than one organ, heart problems, acute respiratory distress syndrome, blood clots, acute kidney injury, and additional viral and bacterial infections.” *Id.* A disproportionate number of black people have been infected and killed by the disease. The COVID Tracking Project, *The COVID Racial Data Tracker*, <https://covidtracking.com/race>.

As of October 10, 2020, just over one million people worldwide, and 214,004 Americans have died from COVID-19. See Johns Hopkins University, Coronavirus Resource Center, <https://coronavirus.jhu.edu/map.html>. Also as of October 6, 2020, over 37 million people worldwide have been infected, with

the United States having more infections than any other country, with just over seven and a half million infections. *Id.*

In light of the COVID-19 pandemic, the Centers for Disease Control and Prevention ("CDC") has provided guidance to voters and election polling locations to prevent the spread of the disease, including recommending "a wide variety of voting options . . . such as alternative voting options that minimize contact." See CDC, *Coronavirus Disease 2019 (COVID-19): Considerations for Election Polling Locations and Voters, Interim Guidance to Prevent Spread of Coronavirus Disease 2019 (COVID-19)* (last updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>. Consistent with this guidance, states have enacted temporary changes for the 2020 election including expanding the ability to vote by mail. Nat'l Conference of State Legislatures, *COVID-19 and Elections*, (last updated Oct. 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx>.

2. USPS Implements Changes that Lead to Nationwide Mail Delays

The key changes that Plaintiff challenges are the prohibition on "late trips" and "extra trips" (collectively

"Transportation Policy Changes")² announced on July 10, 2020.³ Reply, ECF No. 25 at 9.⁴ Defendants have since clarified that late or extra trips are not "banned"; however, they acknowledge that they continue "at a reduced level" that began in July 2020. Suppl. Cintron Decl., ECF No. 24-3 ¶ 4. By August 13, 2020, the USPS had reduced the number of late trips by 71 percent. Email from Mr. DeJoy to All Employees ("August 13, 2020 Email"), Aug. 13, 2020, ECF No. 25-1. Mr. DeJoy acknowledged that the "transformative initiative has had unintended consequences that impacted our overall service levels." *Id.* at 2. On September 21, 2020, USPS issued "Operational Instructions" providing that "transportation, in the form of late or extra trips that are reasonably necessary to complete timely mail delivery, is not to be unreasonably restricted or prohibited. Managers are authorized to use their best business judgment to meet our service commitments." Ex. 1 to Notice Suppl. Material, ECF No. 29-1 at 4.

² "Late trips" and "extra trips" have been employed by the USPS to "complete timely mail delivery." Ex. 1 to Notice Suppl. Material, ECF No. 29-1 at 4.

³ Plaintiff originally challenged changes in addition to the Transportation Policy Changes, see Mem. in Supp. of Mot. for Prelim. Inj. ("Mot."), ECF No. 8-1 at 22-23; but clarified that they challenge the Transportation Policy Changes, see Reply, ECF No. 25 at 9.

⁴ When citing electronic filings throughout this Opinion, the Court cites to the ECF page number, not the page number of the filed document.

It is undisputed that the USPS did not seek an advisory opinion pursuant to 39 U.S.C. § 3661(b) from the PRC prior to implementing these changes.

C. Procedural Background

Plaintiff filed this lawsuit on August 20, 2020. On September 1, 2020, Plaintiff filed a motion for a preliminary injunction, which requests that the Court enjoin Defendants from enforcing certain USPS policies and practices. See Mem. in Supp. of Mot. for Prelim. Inj. ("Mot."), ECF No. 8-1. Defendants filed their opposition on September 11, 2020. See Defs.' Opp'n Mot. Prelim. Inj. ("Defs.' Opp'n"), ECF No. 21. Plaintiff filed its reply brief on September 16, 2020. See Pls.' Reply ("Reply"), ECF No. 25. The motion is ripe for the Court's consideration.

III. Standard of Review

"A plaintiff seeking a preliminary injunction must establish [1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (alteration in original) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)). Where the federal government is the opposing party, the balance of equities and public interest factors merge. See *Nken v. Holder*, 556 U.S. 418, 435 (2009). A

preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In this Circuit, the four factors have typically been evaluated on a “sliding scale,” such that if “the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009).

In the wake of the Supreme Court’s decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), “the D.C. Circuit has suggested that a positive showing on all four preliminary injunction factors may be required.” *Holmes v. FEC*, 71 F. Supp. 3d 178, 183 n.4 (D.D.C. 2014); see also *Sherley*, 644 F.3d at 393 (“[W]e read *Winter* at least to suggest if not to hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.”) (quotation marks omitted). Nonetheless, “the Circuit has had no occasion to decide this question because it has not yet encountered a post-*Winter* case where a preliminary injunction motion survived the

less rigorous sliding-scale analysis.” *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 46 n.2 (D.D.C. 2014).

IV. Analysis

Plaintiff argues that it is likely to succeed on the merits of its Section 3661(b) claim because “Congress has mandated that before implementing changes that have a nationwide impact on mail delivery, the Postal Service must provide an opportunity for public comment and seek an advisory opinion from the [PRC].” Mot., ECF No. 8-1 at 13. Plaintiff further argues that in rushing to make the Transportation Policy Changes, “Defendants failed to consider key statutory objectives about reliable mail service and the need to give the highest consideration to delivery [of] important mail, including ballots and checks . . . and failed to consider the adverse impact on timely delivery of medications” which they contend is inconsistent with the mandate set forth in Section 101. *Id.*

Defendants respond that Plaintiff lacks Article III standing, that district courts lack subject matter jurisdiction over Section 3661 claims, that the *ultra vires* doctrine does not provide for judicial review here, and that Plaintiff’s claim that defendants’ failure to comply with Section 101(e) was arbitrary and capricious cannot be brought. Defs.’ Opp’n, ECF No. 21 at 33-38, 39-43, 43-49, 49-51.

A. Plaintiff Is Likely To Succeed On The Merits Of Its 39 U.S.C. § 3661(b) Claim

1. Plaintiff Likely Has Standing to Bring this Challenge

To establish standing, “a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likel[i]hood’ that the injury ‘will be redressed by a favorable decision.’” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). “These requirements apply whether an organization asserts standing to sue, either on its own behalf, or on behalf of its members.” *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). “Standing to seek . . . forward-looking injunctive relief requires [Plaintiff] to show [that it] is suffering an ongoing injury or faces immediate injury. For a future injury, that means submitting evidence showing that there is a substantial risk that the harm will recur.” *Narragansett Indian Tribal Historic Pres. Office v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020) (internal quotation marks, citations, and alterations in original omitted).

“The party invoking federal jurisdiction bears the burden of establishing these elements.” *Lujan*, 504 U.S. at 561

(citations omitted). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Defendants argue that Plaintiff fails to demonstrate injury to its members or to itself as an organization. "First, the fact that one of the Plaintiff's members [Mr. Earl Graham, a disabled veteran] allegedly has been harmed by delayed mail in the past does not entitle Plaintiff to standing now, at least when it is seeking forward-looking injunctive relief" because Defendants have provided "evidence that mail delays have been mitigated" and so "there is no basis to conclude that this purported injury is likely to recur." Defs.' Opp'n, ECF No. 21 at 34-35 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 107-108, 1983). However, Mr. Graham has described persisting mail delays. Decl. of Earl Graham,⁵ ECF No. 8-3 ¶ 6 ("Before this summer, my mail-order medications would arrive generally a few days after my doctor approved any prescription. Since mid-July, however, my medications have taken much longer to arrive, including sometimes arriving one week or longer after my doctor has

⁵ Earl Graham is a member of the NAACP.

approved prescriptions.”); Second Decl. of Earl Graham, ECF No. 25-2 ¶ 2 (“The delays I discussed have continued since I submitted by August 28, 2020 declaration.”); ¶ 3 (“A week [after an August 25, 2020 teleconference appointment with a Veterans Affairs doctor] the medicine approved by my doctor during my August 25, 2020, teleconference appointment still had not arrived. Without the medication, I began experiencing serious pain.”); ¶¶ 5-6 (explaining that he was eligible to be sent medication through express mail due to the seriousness of the pain he was experiencing and that he received the medication sent via express mail within two days); ¶ 6 (“By the time the delayed medication arrived, it had been almost two weeks since my August 25, 2020 teleconference appointment.”). As Plaintiff has provided evidence of continuing mail delays, Defendants’ reliance on *City of L.A.* for the proposition that the alleged injury is unlikely to recur is misplaced. In that case, the Supreme Court observed that “five months had elapsed between [the traffic stop resulting in a chokehold] and the filing of the complaint, yet there was no allegation of further unfortunate encounters between [Mr.] Lyons and the police.” *City of Los Angeles*, 461 U.S. at 108. Here, Plaintiff has provided evidence demonstrating that mail delays persist.

As part of this argument, Defendants contend that the Complaint does not allege what exactly caused the mail delays.

Defs.' Opp'n, ECF No. 21 at 34-35. However, Defendants' own evidence demonstrates that Mr. DeJoy has acknowledged that the Transportation Policy Changes caused mail delays. See Ex. 5, Tr. of Senate Homeland Security and Governmental Affairs Comm. Hr'g on USPS Operations During COVID-19 and the Elections, Aug. 21, 2020, ECF No. 21-1 at 104 (Mr. DeJoy stating that the reduction in late trips resulted in mail delays); *Id.* at 309, (Mr. DeJoy stating that "[w]e are very concerned with the deterioration and service and are working very diligently."); *Id.* at 323 (Mr. DeJoy stating that "[o]ur recovery process is taking too long. This should have been resolved in a couple of—in a few days and it's-it's not."); *Id.* at 350 (Mr. DeJoy stating that "I think there is a lot of different issues going on within the country that are—impact mail delay, including the actions that we took with regard to transportation."); August 13, 2020 Email, ECF No. 25-1 at 4 ("Unfortunately, this transformative initiative has had unintended consequences that impacted our overall service levels.")

Second, Defendants argue that Plaintiff's members' concerns about future mail delays impacting their ability to vote fails to establish standing because future injury must be "certainly impending." Defs.' Opp'n, ECF No. 21 at 35 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2010)). Defendants contend that "the Postal Service has numerous policies and practices

designed to ensure that ballots will be timely delivered before the election,” that it is within Plaintiff’s members’ control to timely mail their ballots, and so their injury is speculative. *Id.* However, Defendants are incorrect to assert that standing to obtain injunctive relief requires the injury to be “certainly impending.” Rather, “[s]tanding to seek . . . forward-looking injunctive relief requires [Plaintiff] to show [that it] is suffering an ongoing injury or faces immediate injury. For a future injury, that means submitting evidence showing that there is a substantial risk that the harm will recur.” *Narragansett Indian Tribal Historic Pres. Office*, 949 F.3d at 13 (internal quotation marks, citations, and alterations in original omitted). Accordingly, as explained above, Plaintiff has demonstrated that its members face a “substantial risk that the harm will recur” and has demonstrated injury to its members.

Third, Defendants contend that Plaintiff alleges issue advocacy harm, which is insufficient to establish organizational standing. Defs.’ Opp’n, ECF No. 21 at 35–37. Plaintiff responds that it has provided evidence demonstrating that because of the impact of the mail delays, it is “diverting resources away from its ordinary voter registration activities, voter protection activities, and education activities designed to promote voter turnout” which pursuant to *League of Women Voters v. Newby*, 838

F.3d 1 (D.C. Cir. 2016), constitutes irreparable injury. Reply, ECF No. 25 at 30.

The Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") recently articulated the test for determining whether an organization satisfies the "irreparable harm" prong:

An organization is harmed if the "actions taken by [the defendant] have 'perceptibly impaired' the [organization's] programs." *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)); see also *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (explaining that the initial question is whether "a defendant's conduct has made the organization's activities more difficult"). If so, the organization must then also show that the defendant's actions "directly conflict with the organization's mission." *Nat'l Treasury Emps. Union*, 101 F.3d at 1430. The second step is required to ensure that organizations cannot engage in activities simply to create an injury. *Id.*

League of Women Voters, 838 F.3d at 8. "Irreparable harm" is a higher burden than that necessary to establish Article III standing. *Nat. Res. Def. Council, Inc. v. EPA*, 383 F. Supp. 3d 1, 11 (D.D.C. 2019) ("an identifiable trifle is enough for standing'") (quoting *United States v. Students Challenging Reg'y Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)).

Plaintiff has provided evidence demonstrating that it "has established a civic engagement program, which is designed to encourage citizens to be fully engaged in the democratic

process, and to raise awareness for political, educational, social and economic equality for communities of color in the electoral and legislative process. . . [T]he program seeks to increase turnout among Black voters in federal, state, and local elections.” Decl. of Carmen Watkins,⁶ ECF No. 8-2 ¶¶ 2, 6. Plaintiff has also demonstrated that Defendants’ actions have “made the organization’s activities more difficult,” *League of Women Voters*, 838 F.3d at 8 (citation omitted); because Plaintiff has explained that needing to address the impact of the mail delays is causing it to “divert[] resources from the regular activities of the NAACP’s civil engagement program,” which includes “registering voters, contacting registered voters to ensure that they have accurate voting information and encouraging them to vote, organizing events to get out the vote, and conducting voter protection activities during early voting.” *Id.* ¶ 11.

Next, Plaintiff must show that “the defendant’s actions ‘directly conflict with the organization’s mission’” in order “to ensure that organizations cannot engage in activities simply to create an injury.” *League of Women Voters*, 838 F.3d at 8. Plaintiff’s civic engagement program is clearly part of its mission “to ensure the political, educational, social, and

⁶ Carmen Watkins is the Interim Vice President of Field Operations for the NAACP.

economic equality of all persons and to eliminate race-based discrimination.” Watkins Decl., ECF No. 8-2 ¶ 2. And as stated above, the civic engagement program includes “registering voters, contacting registered voters to ensure that they have accurate voting information and encouraging them to vote, organizing events to get out the vote, and conducting voter protection activities during early voting.” *Id.* ¶ 11.

Accordingly, Plaintiff has provided evidence demonstrating that to Defendants’ actions “directly conflict with [its] mission” because it has needed to divert resources from the civic engagement program to instead “organize transportation for voters to drop off their absentee ballots” in various states. *Id.* ¶¶ 8, 9, 10, 12.

Defendants fail to distinguish *League of Women Voters* in their opposition brief and the authorities they point to support Plaintiff’s ability to satisfy “irreparable harm,” a higher burden than that necessary to establish Article III standing. Plaintiff has provided evidence that due to mail delays caused by Defendants’ action, they have needed in the past and will need in the future to divert resources from their civic engagement program to organize transportation to ensure that votes are counted. This constitutes a “drain on the organization’s resources”; not simply a “setback to the organization’s abstract social interests.” *Nat’l Ass’n of Home*

Builders v. EPA, 667 F.3d 6, 11 (D.C. Cir. 2011) (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)). Similarly, Plaintiff's provision of services through its civic engagement program demonstrates that it does not engage solely in "pure issue-advocacy." *Ctr. for Law & Educ v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005). Rather, Plaintiff's activities are more akin to those of Housing Opportunities Made Equal ("HOME"), which the Supreme Court held had standing in *Havens Realty Corp. v. Coleman*. In so holding, the Supreme Court stated:

If, as broadly alleged, petitioner's steering practices have perceptibly impaired HOME's ability to providing counseling and referral services for low-and moderate-income home seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.

455 U.S. at 379. Similarly, here Plaintiff has provided evidence demonstrating how mail delays are causing it to divert resources from its usual civic engagement activities, which is distinguishable from the situation in *Int'l Acad. Of Oral Medicine & Toxicology v. FDA*, 195 F. Supp. 3d 243 (D.D.C. 2016), where the Plaintiff failed to explain how the agency action "forced it to divert or modify its activities in any meaningful way from its standard programmatic efforts." *Id.* at 259.

For all of these reasons, Plaintiff has provided evidence “showing that there is a substantial risk that the harm will recur.” *Narragansett Indian Tribal Historic Pres. Office*, 949 F.3d at 13.

Finally, Defendants argue that “Plaintiff cannot establish causation or redressability because it seeks to enjoin changes that have not occurred.” Defs.’ Opp’n, ECF No. 38. Specifically, Defendants argue that “the only specific change that was actually implemented was additional guidance on complying with long-established transportation schedules by departing on time and thus mitigating extra trips.” *Id.* This, however, is precisely what Plaintiff challenges. Reply, ECF No. 25 at 9, 19-21.

For all of these reasons, Plaintiff has demonstrated that it likely has standing to bring its claims on behalf of its members and itself as an organization.

2. This Court Likely Has Subject Matter Jurisdiction Over The Section 3661 Claim

Defendants contend that this court lacks subject matter jurisdiction over “complaints regarding” Section 3661 because such complaints must first be made to the PRC and then to the D.C. Circuit. Defs.’ Opp’n, ECF No. 21 at 39. The statutory scheme provides as follows. 39 U.S.C. § 409(a) provides that “[e]xcept as otherwise provided in this title, the United States

district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.” One of the exceptions to this original jurisdiction is set forth in 39 U.S.C. § 3662, which provides that “[a]ny interested person . . . who believe[s] the Postal Service is not operating in conformance with the requirements of a provision of . . . this chapter (or regulations promulgated under any of these provisions) may lodge a complaint with the [PRC] . . .” Section 3662(b) requires the PRC to respond to the complaint within 90 days and provides that if a complaint is not timely responded to, a petition for review may be filed with the D.C. Circuit, which also has jurisdiction to review final orders or decisions of the PRC.

Plaintiff’s complaint alleges a procedural violation—that the USPS failed to comply with the requirement that “[w]hen the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory commission requesting an advisory opinion on the change.” 39 U.S.C. § 3661.

Defendants contend that “[c]ourts have repeatedly held that 39 U.S.C. §§ 3662 and 3663 constitute the exclusive jurisdictional remedy for complaints about postal services that

fall within the statutory provisions specifically identified in [S]ection 3662.” Defs.’ Opp’n, ECF No. 21 at 40. However, defendants have provided no mandatory authority to support their assertion that Sections 3662 and 3663 constitute the exclusive jurisdictional remedy for a claim that the USPS has failed to comply with the procedural requirements set forth in Section 3661. Indeed, Plaintiff points out that none of the cases cited by defendants “concerns a failure to follow the procedural requirements of [S]ection 3661” but rather “considered a complaint about Postal Service prices and the manner in which the Postal Service provides delivery services.” Reply, ECF No. 25 at 12.

“Whether a statute is intended to preclude initial judicial review is determined by the statute’s language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 307 (1994) (internal citation omitted). The language of the statute is broad: “[a]ny interested person . . . who believe[s] the Postal Service is not operating in conformance with the requirements of a provision of . . . this chapter (or regulations promulgated under any of these provisions) may lodge a complaint with the Postal Regulatory Commission . . .” 39 U.S.C. § 3662. This could certainly be read to mean that the failure of the USPS to comply with the

procedural requirement set forth in Section 3661 would be encompassed by Section 3662. Plaintiff argues that the use of the permissive "may" in Section 3662 coupled with the mandatory phrasing "shall" in Section 3662(c) shows Congress did not intend to limit jurisdiction over Section 3661 claims. See Reply, ECF No. 25 at 10. The statute consistently uses the word "may" when setting forth the procedure for filing complaints and for seeking appellate review of the PRC's determination (or failure to make a determination): any interested person "may" lodge a complaint with the PRC, and if the interested person is unsatisfied with the response or does not receive a timely response, they "may" file a petition with the D.C. Circuit. 39 U.S.C. §§ 3662(a), 3663. The use of the permissive "may" coupled with the use of the mandatory "shall" suggests that Sections 3662(a) and 3663 were not intended to be the exclusive avenue for bringing a procedural challenge to the USPS's failure to comply with Section 3661. See *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1828 (D.C. Cir. 1973) ("[T]he permissive interpretation is conclusively proven to be correct [together with the particular legislative history] by the fact that when in the same statute Congress intended a mandatory direction it used the auxiliary 'shall' not 'may'-a contrast which is generally significant"). This interpretation is strengthened because the statute expressly provides that this

Court has original jurisdiction "over all actions brought by or against the Postal Service" unless "otherwise provided in [title 39]." 39 U.S.C. § 409(a).

The availability of judicial review for the USPS's failure to comply with Section 3661 is consistent with the legislative history of the PRA. In the discussion of the section of the PRA that established the "procedures for changes in postal service," the House Committee Report states that "[t]he postal service is—first, last, and always—a public service" and that the PRA "require[s] [Postal Services management] to seek out the needs and desires of its present and potential customers—the American public." H.R. Rep. No. 91-1104 at 3668. The Committee Report describes provisions in the act that "contain[] specific provisions requiring justification and review of changes in service." *Id.*; see *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259, 263 n.6 (5th Cir. 1975) ("[T]he procedures mandated by 3661 are sufficiently elaborate to amount to a significant impediment in the path of the decision-making process of the Postal Service.").

The Court must also consider whether the claim may be reviewed because there is no other meaningful or adequate avenue for judicial review. See *Thunder Basin Coal Co.*, 510 U.S. at 307. District court jurisdiction may not be implicitly precluded based on consideration of the following factors: (1) if "a

finding of preclusion could foreclose all meaningful judicial review’”; (2) if the claim is “‘wholly collateral to a statute’s review provisions’”; and (3) if the claims are “‘outside the agency’s expertise’” to discern “whether the particular claims at issue fall outside an overarching congressional design.”⁷ *Jaresky v. SEC*, 803 F.3d 9, 17 (D.D.C. 2015) (quoting *Free Enter. Fund v. Pub. Company Acct. Oversight Board*, 561 U.S. 477, 489-90 (2010)). Mindful of the fact that there is a 90-day window for the PRC to respond to a complaint brought pursuant to Section 3661, Defendants contend that it does not matter that the PRC cannot provide immediate relief because eventual relief is sufficient as a matter of law. Defs.’ Opp’n, ECF No. 21 at 43 n.11. However, the authority upon which Defendants rely is inapposite. In *American Federation of Government Employees, AFL-CIO v. Trump*, 929 F.3d 748 (D.D.C. 2019), the court held that meaningful judicial review was not foreclosed because Plaintiffs were unable to obtain “pre-implementation review of executive orders or immediate relief barring all agencies from implementing the executive orders,” *Id.* at 755 (internal quotation marks omitted); because there the parties agreed to consolidate their preliminary injunction requests with the

⁷ Defendants’ assertion that the three factors must be met is incorrect. See *Jaresky v. SEC*, 803 F.3d 9, 17 (D.D.C. 2015).

merits, see Scheduling Order, Civil Action No. 18-1261, ECF No. 16 at 1.

With regard to the first consideration—whether Plaintiff would be denied meaningful review—it is clear that it would. There is no dispute that the USPS did not comply with Section 3661 in implementing the Transportation Policy Changes, and Plaintiff has provided evidence demonstrating that the changes have resulted in mail delays which cause Plaintiff's members and Plaintiff as an organization harm. See *supra* IV.A.1. Accordingly, even if there was a “fairly discernible” intent in the statutory scheme to preclude district court jurisdiction, requiring Plaintiff to go through the PRC process would deny it meaningful review. See *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018) (noting that “plaintiffs are denied meaningful review when they are subject to some additional and irremediable harm beyond the burdens associated with the dispute resolution process” (internal quotation marks and citations omitted)); *Krescholleck v. S. Stevedoring Co.*, 78 F.3d 868, 875 (3d Cir. 1996) (noting that the plaintiff had “alleged a sufficiently serious irreparable injury to lead us to conclude that the administrative review process is insufficient to afford him full relief”). And persuasive authority holds that this factor is the “most important.” *Berkley*, 896 F.3d at 630. Accordingly, this first factor weighs in favor of finding

Congress intended district courts to have jurisdiction over claims such as the one brought by Plaintiff. The second consideration—whether the claim is wholly collateral to the statutory scheme—is “‘related’ to whether ‘meaningful judicial review’ is available, and the two considerations are analyzed together.” *Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump*, 929 F.3d 748, 758 (D.C. Cir. 2019) (quoting *Jarskey*, 803 F.3d at 22.) The question to ask is “whether the plaintiffs ‘aimed to obtain the same relief they could seek in the agency proceeding.’” *Id.* at 758–60 (quoting *Jarskey*, 803 F.3d at 23). Here, the relief Plaintiff seeks cannot be meaningfully redressed through filing a Section 3662 complaint.

The third consideration is whether the claim is “beyond the expertise” of the PRC. Plaintiff’s claim is that the USPS failed to comply with the procedural requirement set forth in Section 3661. This procedural claim does not require the “agency expertise” the statutory procedures contemplate. *Berkley*, 896 F.3d at 630. Accordingly, precluding district court jurisdiction here would completely deny Plaintiff meaningful review given the timing of the implementation of the Transportation Policy Changes.

For all these reasons, the Court likely has subject matter jurisdiction over Plaintiff’s Section 3661(b) claim. See *Commonwealth of Pennsylvania v. DeJoy*, Civil Action No. 20-4096,

2020 WL 5763553, *22 (E.D. Pa. Sept. 29, 2020) (stating that “Congressional intent to preclude district courts from hearing claims relating to [S]ection 3661(b) is not fairly discernible from the text, structure, and legislative history of the PRA.”).

3. Plaintiff’s Section 3661(b) Claim Is Likely Reviewable Pursuant To The *Ultra Vires* Doctrine

While as a general matter “the Postal Service is exempt from review under the Administrative Procedure Act, . . . its actions are reviewable to determine whether it has acted in excess of its statutory authority.” *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 858 (D.C. Cir. 2012). “The scope of Non-APA review is narrow . . . [and] is available only to determine whether the agency has acted *ultra vires*—that is whether it has exceeded its statutory authority.” *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 265 (D.C. Cir. 2016) (quotation marks and citations omitted).

Defendants contend that *ultra vires* review is unavailable because: (1) Plaintiff cannot show that USPS acted “in excess of its delegated powers and contrary to a specific prohibition” because they cannot show that USPS violated Section 3661(b); and (2) Plaintiff has a “meaningful and adequate means of vindicating [their] statutory rights” because they can file a complaint with the PRC pursuant to Section 3662. Defs.’ Opp’n, ECF No. 21 at 44 (citing *Nat’l Air Traffic Controllers Ass’n*

AFL-CIO v. Fed. Serv. Impasses Panel, 437 F.3d 1256, 1258 (D.C. Cir. 2006) (internal quotation marks and citations omitted)).

The Court is persuaded that Plaintiff's claim is reviewable:

"Even where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction." *Griffith v. FLRA*, 842 F.2d 487, 492 (D.C. Cir. 1988) (citing the leading case, *Leedom v. Kyne*, 358 U.S. 184, 188, 79 S.Ct. 180, 183-84, 3 L. Ed. 2d 210 (1958) (finding judicial review proper despite statutory preclusion of judicial review, where the NLRB acted "in excess of its delegated powers and contrary to a specific prohibition" in the NLRA)).

Aid Ass'n for Lutherans v. U.S. Postal Service, 321 F.3d 116, 1172-73 (D.C. Cir. 2003). Plaintiff's claim here is that the USPS failed to comply with the requirement Congress set forth in Section 3661. Accordingly, Plaintiff's claim "clearly admit[s] of judicial review." *Id.* at 1173.

4. USPS Likely Failed to Comply with Section 3661(b)

The scope of non-APA review includes, among other things, "a straightforward question of statutory interpretation." *Nat'l Ass'n of Postal Sup'rs v. U.S. Postal Serv.*, 602 F.2d 420, 432 (D.C. Cir. 1979). In conducting this review, "[t]he judicial role is to determine the extent of the agency's delegated authority and then determine whether the agency has acted within

that authority. In this as in other settings, courts owe a measure of deference to the agency's own construction of its organic statute, but the ultimate responsibility for determining the bounds of administrative discretion is judicial." *Id.* at 432-33 (internal citations omitted).

Section 3661(b) provides that "[w]hen the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change."

Persuasive authority has construed Section 3661(b) as follows:

The language of the statute . . . indicates that three factors must coexist before 3661 applies. First, there must be a 'change.' This implies that a quantitative determination is necessary. There must be some meaningful impact on service. Minor alterations which have a minimal effect on the general class of postal users do not fall within 3661. Second, the change must be 'in the nature of postal services.' This involves a qualitative examination of the manner in which postal services available to the user will be altered. Third, the change must affect service 'on a nationwide or substantially nationwide basis.' A broad geographical area must be involved. These three factors combine to demonstrate that Congress intended the safeguards of 3661 to apply only when changes of significance were contemplated.

Buchanan v. U.S. Postal Service, 508 F.2d 259, 263 (5th Cir. 1975).

There is no dispute that the USPS did not comply with Section 3661(b) prior to implementing the Transportation Policy Changes. Defendants argue that the Transportation Policy Changes do not implicate Section 3661(b) because: (1) there has been no “meaningful impact on service;” (2) postal services available to the user have not been altered; and (3) the changes have not affected service in a broad geographical area. Defs.’ Opp’n, ECF No. 21 at 46 (quoting and citing *Buchanan* 508 F.2d at 263). In support, Defendants argue that “[t]he only notable change USPS has made has been to renew its emphasis on adhering to its published schedule, including developing written guidance clarifying the circumstances under which extra truck trips were acceptable, in order to mitigate the number of unplanned and unnecessary trips” which is not a “change” that is contemplated in Section 3661. *Id.* at 46-47. Defendants contend that this “is not a new policy but rather has a renewed focus on ensuring the Postal Service complies with its *existing policies*, and that it operates as efficiently as possible.” *Id.* Defendants conclude that this is “precisely the type of management direction to which [S]ection 3661 does not apply.” *Id.* at 47.

The Court is persuaded that Plaintiff is likely to succeed on its claim that Defendants violated Section 3661(b) by failing to submit the Transportation Policy Changes to the PRC. First, it was a "change" because it has had a "meaningful impact on service." *Buchanan*, 508 F.2d at 263. Plaintiff points to evidence showing that the reduction in extra and late trips has resulted in changes to service standards nationwide because it has resulted in nationwide delays. *See supra* at 6-7, 13-14; *see also* August 13, 2020 Email, ECF No. 25-1 at 4 ("We have also reduced extra trips by 71 percent - a tremendous achievement.") Furthermore, Plaintiff has demonstrated that Defendants' position that the Transportation Policy Changes do not constitute a "change" is not supported by the USPS's own statements. *See id.* at 3-4 ("In order to transform . . . we must make a significant number of changes that will not be easy . . ."); *Id.* at 4 ("Unfortunately, this transformative initiative has had unintended consequences that impacted out overall service levels. However, recent changes are not the only contributing factors."); *Id.* ("I ask that you bear with me while we work through these changes to transform for the better . . .").

Second, the changes were "in the nature of postal services," 39 U.S.C. § 3661(b) because they qualitatively altered "the manner in which postal services [are] available to the user," *Buchanan*, 508 F.2d at 263. As stated above, Plaintiff

points to evidence showing that the reduction in extra and late trips resulted in nationwide delays.

Third, the changes affected service “on a nationwide or substantially nationwide basis,” 39 U.S.C. § 3661(b) because “[a] broad geographical area [was] involved,” *Buchanan*, 508 F.2d at 263. Defendants’ own evidence demonstrates that service was affected on a nation-wide basis. See Defs.’ Ex. 14, ECF No. 21-1 at 452-53 (Mr. DeJoy stating that the reduction in late and extra trips occurred in “[e]very state a truck moves in”).

Defendants contend that pursuant to past practice, the types of “nationwide changes that trigger 3661’s review are general changes to postal facility hours or service standards for mail delivery”; and not the type of operational change at issue here. *Id.* at 47-49. However, based on the analysis above, the significant reduction in late and extra trips has resulted in a change to service standards.

While it is clear that Congress did not intend for the courts to micromanage the operations of the USPS, requiring the USPS to comply with the statutory requirement that it obtain an advisory opinion from the PRC and provide for notice and comment prior to implementing “a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis” is not micro-managing; it is requiring the USPS to act within its statutory authority.

Furthermore, Congress clearly intended Section 3661 to require an opportunity for public participation and for independent review before the USPS implements service changes that will have a broad effect. The broad scope of the Transportation Policy Changes demonstrates on its face that it is precisely the kind of change that is to be the subject of the public-participation and independent review safeguards provided by Section 3661.

Finally, Defendants argue that because Plaintiff has a “meaningful and adequate means of vindicating their statutory rights” by filing a complaint with the PRC and then seek judicial review in the D.C. Circuit if unsatisfied, they cannot establish *ultra vires* jurisdiction. Defs.’ Opp’n, ECF No. 21 at 44. Plaintiff responds—and the Court agrees—that the PRC complaint process, even if it is available for their procedural challenge, would not redress its injury due to the timeframes involved. Reply, ECF No. 25 at 18. Because the Court finds that Plaintiff has shown it will likely succeed on its claim that Defendants’ Transportation Policy Changes likely violated 39 U.S.C. § 3661(b), the Court need not evaluate Plaintiff’s claim that Defendants acted arbitrarily, capriciously, and contrary to the mandate of Section 101(e) at this time.

C. Plaintiff Faces Irreparable Harm

“In this Circuit, a litigant seeking a preliminary injunction must satisfy ‘a high standard’ for irreparable injury.” *ConverDyn*, 68 F. Supp. 3d at 46 (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). The movant must demonstrate that it faces an injury that is “both certain and great; it must be actual and not theoretical,” and of a nature “of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quotation marks and emphasis omitted). Furthermore, an organization faces irreparable harm where (1) the “actions taken by [the defendant] have ‘perceptibly impaired’ the [organization’s] programs,” *League of Women Voters v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (quoting *Fair Emp’t Council of Greater Wash.*, 28 F.3d at 1276), and (2) “the defendant’s actions ‘directly conflict with the organization’s mission,” *id.* (quoting *Nat’l Treasury Emps. Union*, 101 F.3d at 1430).

With regard to the irreparable harm to its members, Plaintiff argues and submits evidence demonstrating that the “changes that USPS implemented without following the required [S]ection 3661 process have caused delays that harm, and will continue to harm, NAACP members.” Mot., ECF No. 8-1 at 38. Defendants counter first, that there is no procedural injury

because "Plaintiff cannot state a claim under [S]ection 3661 and thus cannot have suffered any procedural injury as a result of any violation of that statute." Defs.' Opp'n, ECF No. 21 at 52. However, the Court has determined that Defendants likely violated Section 3661(b). See *supra* Section IV.A.4. And a failure to comply with Section 3661(b) is sufficient to show irreparable harm. See *Buchanan*, 375 F. Supp. 1014, 1022 (N.D. Ga. 1974) ("The denial of . . . a [Section 3661] hearing, should one be required, is sufficient irreparable injury to support interlocutory injunctive relief, for it is clear that no hearing will be conducted and that the changes will continue unless enjoined.") *aff'd in relevant part*, 508 F.2d at 266 (stating that the district court "was correct in its determinations that plaintiffs had properly established that there was a substantial threat of irreparable injury"). Second, Defendants counter that "Plaintiff has not identified that its members are likely to suffer any injuries in terms of the potential future delay of their ballots" in light of the USPS's service improvements, noting that all Mr. Graham has to do is "mail[] his ballot a reasonable time before the election (which is approximately two months away)." Defs.' Opp'n, ECF No. 21 at 52. However, Mr. Graham's ability to return his ballot on time is not wholly within his control as the mailing of ballots is a matter of state law. See *supra* Section II.B.1 Furthermore, Plaintiff has

demonstrated that mail delays have persisted. *See generally* Second Decl. of Earl Graham, ECF No. 25-2.

With regard to irreparable harm to Plaintiff as an organization, Plaintiff argues and submits evidence demonstrating that “the delays caused by the Postal Service’s changes have harmed, and continue to harm, the NAACP itself by frustrating its mission and requiring it to divert resources to counteract the effect of USPS’s action.” Mot., ECF No. 8-1 at 39-40. Defendants counter that Plaintiff’s claimed injury to its resources fails because “Plaintiff has not established that mail delays were necessarily the result of the challenged policies, or that future delays, if there are any, would be the result of these Postal Service operational changes,” Defs.’ Opp’n, ECF No. 21; and that in view of the steps USPS has taken to improve service performance, Plaintiff cannot show that “future harm is imminent or likely to recur,” *id.* at 53. However, the Court has already determined that Plaintiff as an organization has demonstrated irreparable harm. *See supra* at 15-20.

Accordingly, both Plaintiff’s members and Plaintiff as an organization face irreparable harm absent a preliminary injunction.

D. The Balance Of Equities And Public Interest Favor An Injunction

The balance-of-equities factor directs the Court to “balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.” *ConverDyn*, 68 F. Supp. 3d at 52 (quoting *Winter*, 555 U.S. at 24). “When the issuance of a preliminary injunction, while preventing harm to one party, causes injury to the other, this factor does not weigh in favor of granting preliminary injunctive relief.” *Id.*; see also *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998). By contrast, the balance of equities may favor a preliminary injunction that serves only “to preserve the relative positions of the parties until a trial on the merits can be held.” 64 F. Supp. 3d 195, 205 (D.D.C. 2014) (quoting *Camenisch*, 451 U.S. at 395). “The purpose of . . . interim relief is not to conclusively determine the rights of the parties, *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also ‘conside[r] . . . the overall public interest,’ *Winter*, 555 U.S. at 26.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

Plaintiff argues that, as it explained in its argument that it has standing to bring its claims, without an injunction, "the NAACP and its members will suffer serious and immediate harms that could not be sufficiently remedied later . . . [and that] the Postal Service would not be harmed by an order requiring it to follow the law, and the public interest is served when administrative agencies comply with their statutory obligations," noting that "[t]his point applies fully to procedural obligations imposed by statute." Mot., ECF No. 8-1 at 41-42. Plaintiff also notes that "the public would not be harmed (to the contrary) by the restoration of reliable postal service, providing the timely delivery of medicines and checks and other important mail." *Id.* at 42.

Defendants fail to respond to Plaintiff's arguments, responding only that they are "undertaking extensive efforts to facilitate the timely delivery of Election Mail" and that "Plaintiff's member voters have an opportunity to avoid any harm by mailing in their ballots without delay." Defs.' Opp'n, ECF No. 21 at 54. Defendants also contend that ensuring "full compliance could [inappropriately] require the Court to act as an overseer of the agency's day-to-day activities." *Id.*

The balance of the equities and the public interest favor an injunction. First, Defendants identify no harms to themselves whereas Plaintiff has demonstrated serious, immediate, and

recurring harms to its members and to itself as an organization. Defendants' suggestion that an injunction could require the Court to oversee the USPS's "day-to-day activities" is without merit given that the Court will issue a targeted preliminary injunction enjoining the USPS from implementing the Transportation Policy Changes. Second, "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters*, 838 F.3d at 12 (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)).

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for a preliminary injunction. Any request to stay this decision pending appeal will be denied for substantially the same reasons as those articulated in this Opinion. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
October 10, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,
et al.,

Defendants.

No. 20-cv-2295 (EGS)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Preliminary Injunction is **GRANTED**; and it is further

ORDERED that a Preliminary Injunction is hereby entered against Defendants; and it is further

ORDERED that pursuant to the Order, Defendants are **HEREBY ENJOINED** from enforcing the Transportation Policy Changes; and it is further

ORDERED that any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
October 10, 2020

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

LOUIE GOHMERT, TYLER BOWYER, NANCY
COTTLE, JAKE HOFFMAN, ANTHONY KERN,
JAMES R. LAMON, SAM MOORHEAD, ROBERT
MONTGOMERY, LORAIN PELLEGRINO, GREG
SAFSTEN, KELLI WARD and MICHAEL WARD,

Plaintiffs,

v.

THE HONORABLE MICHAEL R. PENCE, VICE
PRESIDENT OF THE UNITED STATES, in his
official capacity,

Defendant.

Civil Action No. 6:20-cv-00660-JDK

(Election Matter)

**PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR
EXPEDITED DECLARATORY JUDGMENT AND EMERGENCY
INJUNCTIVE RELIEF**

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INTRODUCTION

Plaintiffs, U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward, respectfully file this reply in support of their Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief (“Motion”). Neither the opposition filed by the Defendant Vice President nor the supplemental arguments filed by amici curiae briefs or would-be intervenors rebut the clear constitutional violations in Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), Plaintiffs’ right to petition this Court for review of those violations, or this Court’s jurisdiction to enter the requested relief. Before addressing the substantive and procedural arguments, Plaintiffs first reiterate what their cause is about and what it is not about.

In 1787, James Madison explained that we live in a democratic republic, not a pure democracy. That choice of government was designed by the framers of the Constitution, a visionary work that has guided this country since its inception. The system of choosing a president by the Electoral College, and not popular vote, was the product of deep thought and conviction. It is the law of the land.

On January 6th, a joint session of Congress will convene to formally elect the President. The defendant, Vice-President Pence, will preside. Under the Constitution, he has the authority to conduct that proceeding as he sees fit. He may count elector votes certified by a state’s executive, or he can prefer a competing slate of duly qualified electors. He may ignore all electors from a certain state. That is the power bestowed upon him by the Constitution.

For over a century, the counting of elector votes and proclaiming the winner was a formality to which the prying eye of the media and those outside the halls of the government paid

no attention. But not this time. Plaintiff Representative Gohmert, along with 140 of his Republican House colleagues have announced that they will object to the counting of state certified electors pledged to former Vice-President Biden¹ because of the mounting and convincing evidence of voter fraud in key swing states whose combined electoral count change the election results. Ex. B.

The Court is now asked to rule on a pressing and critical question: which set of rules does Vice-President Pence follow when confronted by these objections? The rules set by the Constitution, or those in a simple statute, 3 USC 15, last updated in 1948 by a session of Congress long ago ended. Plaintiffs are not asking this Court to choose a winner of the presidential contest. Nor are Plaintiffs asking the Court to rule on whether there was pervasive fraud in the swing states that are subject to objection. Those are matters left to the January 6th joint session of Congress. The issue before this Court hinges on an obvious and elementary concept – that a federal statute cannot conflict or abrogate the United States Constitution.

In their submissions, Defendant and amici never reach this issue. Instead, they hide behind procedural arguments such as standing, laches and other “gatekeeping” defenses that, as set forth below, are easily disposed above. They argue that the January 6th joint session is no more than a perfunctory coronation. A ceremony where the Vice-President is relegated to the mundane task of opening envelopes filled with electoral votes certified by state governors. They say that the Vice President, the glorified envelope-opener in chief, has no authority to preside over anything else or to decide anything of substance or to even count the votes in those weighty envelopes. He is only the envelope-opener.

¹ Senator Josh Hawley has also pledged to object to the Biden electors in the contested states. Ex. A.

This relief sought is supported by a clear historical perspective of the role of the Vice President in the electoral process. Below, we set forth a brief study of the background to the Vice President’s weighty and prudential powers afforded under the Constitution – the foundation of American democracy -- which unequivocally entrusts to him all the prerogatives and rights to determine what electoral votes to count or to disregard that are attendant to his role as President of the Senate. We further explain how 3 USC 15 is unconstitutional and why it is of no force or effect whatsoever. Finally, we discuss and dispose of the various defenses and arguments put forward by the Defendant and amici.

This country is deeply divided along political lines. This division is compounded by a broad and strongly held mistrust of the election processes employed and their putative result by a very large segment of the American population. The Congress is set for a showdown on January 6th with over 140 House members pledging to object to Mr. Biden’s claim of victory. By reaffirming the Constitutional prerequisites and processes for deciding the Presidential election and granting the relief requested, this Court can set the stage for a calm and permanent resolution of any and all objections and help smooth the path toward a reliable and peaceful conclusion to the presidential election process. Accordingly, Plaintiffs’ motion for declaratory and injunctive relief should be granted.

FACTS

In addition to the opposition (ECF #18) filed by the Defendant, Vice President Michael R. Pence, the Democrat-dominated Bipartisan Legal Advisory Group (“BLAG”) of the U.S. House of Representatives filed an *amicus* brief (ECF #22), with the two Republican BLAG members—the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip—dissenting. *See* BLAG Br. at 1 n.1. In addition, a Texas resident— Timothy P. Dowling—

who supports former Vice President Joseph R. Biden’s candidacy moved to intervene (ECF #19), also filing a motion to dismiss (ECF #20), and a Colorado elector for Mr. Biden— Alan Kennedy— moved to intervene in a unified document (ECF #15) that includes a section opposing the merits of Plaintiffs’ claims. For purposes of their Motion, Plaintiffs will treat the Dowling and Kennedy filings as *amicus* briefs opposed to Plaintiffs’ Motion. *See, e.g., Lelsz v. Kavanagh*, 98 F.R.D. 11, 13 (E.D. Tex. 1982) (denying leave to intervene but allowing movant to file *amicus* brief). Plaintiffs reserve the right to oppose the two motions to intervene, as well as to respond to the Dowling motion to dismiss in the event that the Court grants the Dowling motion to intervene.

In the interval since Plaintiffs filed their Motion, Sen. Josh Hawley of Missouri has announced the intent to object to Biden electors. On the House side, in addition to Plaintiff Louie Gohmert (“Rep. Gohmert”), approximately 140 Republican Members of the House have announced plans to object to the Biden electors.

ARGUMENT

I. LEGAL AND HISTORICAL BACKGROUND.

A. The Vice Presidents of the Framers’ Generation Acted as Presiding Officers and Established Rules of Parliamentary Procedure

While the discussion of the Vice President’s role in the Constitutional Convention and Ratification Debates is sparse, two of the most significant Framers, John Adams and Thomas Jefferson, subsequently served as Vice Presidents. In these roles, they immediately established that the Vice President was not a merely ceremonial position, but rather an active and leading role as Presiding Officer of the Senate in establishing rules of parliamentary procedure for the new Congress.

Vice President Adams drew upon his knowledge of British parliamentary procedure in presiding over the Senate. *See* Richard Allan Baker, *The Senate of the United States*: “Supreme

Executive Council of the Nation,” 1787-1800, in 1 THE CONGRESS OF THE UNITED STATES, 1787-1989, at 135, 148 (Joel H. Silbey ed., 1991). Vice President Jefferson, also an expert on British parliamentary procedure, authored the Senate’s first manual of procedure. See Thomas Jefferson, A Manual of Parliamentary Practice: for the Use of the Senate of the United States, in JEFFERSON'S PARLIAMENTARY WRITINGS: “PARLIAMENTARY POCKET-BOOK” AND A MANUAL OF PARLIAMENTARY PRACTICE (Wilbur Samuel Howell ed., 1988). Thus, two of the most important men who not only wrote the Constitution, but also established and documented the Senate’s first rules as Presiding Officers, did not see their role as clerks or tabulators in counting votes. They were candidates and parliamentarians who also established the rules and processes for deciding the winner (i.e., them in both cases). This is not a new or convenient theory. In fact, this has been the case since the founding of the nation.

The process for electing the President was one of the most divisive of all issues debated in the Philadelphia Convention, with competing proposals for direct election, federal congressional election and state election argued. See 3 Jonathan Elliot, Debates on the Adoption of the Federal Constitution 547 (James McClellan & M.E. Bradford eds., James River Press 1989) (2d ed. 1836). Sixty ballots were taken before the original 1787 Constitution was adopted, pursuant to which electors from each State, appointed by the State Legislature under the Electors Clause, elect the President; or in the event no candidate receives a majority as counted by the Vice President, the House of Representatives chooses the President by the “one vote per state delegation” rule.

U.S. CONST. art II, § 1, cl. 3, amended by U.S. CONST. amend. XII. Article II of the Constitution provides, in relevant part:

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which

List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. **The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.**

U.S. Const., art. II, § 1, cl. 3 (amended by U.S. Const. amend. XII). (Emphasis added)

In *The Federalist Papers*, No. 68, Alexander Hamilton provides the rationale for the unique role of Presidential Electors in electing the President of the United States. Hamilton first explains that the choice of indirect election through electors, rather than direct democracy, because it is preferable for “[a] small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations,” and it will “afford as little opportunity as possible to tumult and disorder.” Hamilton, Alexander. *The Federalist Papers*, No. 68, at 410-11 (C. Rossiter, ed. 1961).

Hamilton reasoned that the Electoral College should not meet as a national body in one place, but instead should meet and elect the President in each State: the electors chosen in each State are to assemble and vote in the State in which they are chosen. This detached and divided construct intentionally exposes the electors to far less heats and ferments which might be communicated from them to the people than if they were all convened at one time in one place.

Nothing was more desired by the Framers than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter -- but chiefly from foreign powers desire to gain an improper ascendant in our councils. *Id.*

If no candidate received a majority of the Electors’ vote, then and only then, should the decision be made by the national legislature, namely the House of Representatives: *Id.*

B. Presidential Electoral Count Provisions.

The presidential electoral count procedures in the original Constitution are largely identical to those in the Twelfth Amendment. These procedures – in particular those regarding the Vice President’s role as Presiding Officer in counting electoral votes and the House’s “one vote per state delegation” for choosing the President – were carried over into the Twelfth Amendment *verbatim* -- with one important exception.

A critical and near fatal flaw in this process became apparent immediately after the Presidency of George Washington, in the elections of 1796 and 1800, namely, that the while the original Constitutional language gave each elector two votes, “it did not allow the electors to designate one of their votes for President and one for Vice President.”² As a result, “the vice presidency went to the losing Presidential candidate with the largest number of electoral votes.” Richard K. Neumann, *The Revival of Impeachment as a Partisan Political Weapon*, 34 *Hastings Const. L.Q.* 161, 180 (2002).

1. The Election of 1800.

Thomas Jefferson lost the election of 1796 to John Adams, receiving the second highest number of electoral votes. As a result, he became President Adams’ Vice President. Jefferson ran for President again in 1800 for the Democratic-Republican Party, as the candidate for President and Aaron Burr as candidate for Vice President. As sitting Vice President, Vice President Jefferson was also President of the Senate and Presiding Officer over the Electoral College proceedings. As such, he was responsible for counting electoral votes for himself and competing candidates.

² *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, Nathan L. Colvin & Edward B. Foley, 65 *U. MIAMI L. REV.* 475, 489 (2010).

2. **Legislative History and Ratification.**

In 1803, both Houses approved the text of the Twelfth Amendment, and 13 of 17 States had ratified it by June of 1804. Foley (2010) at 490. The Amendment provides, in relevant part:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- **The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted[.]**

U.S. Const. amend. XII (emphasis added).

Commentators argue that the passive voice in the sentence “and the votes shall then be counted” means that the President of the Senate, the Vice President, has “further powers hidden in the passive voice” which today would be referenced as “discretion.” Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. at 629 (2004).

This is consistent with the Framers’ original intent and their inherent bias that a presiding officer was not merely a ceremonial figure, but one that has authority to render substantive decisions in the face of disputes or other disruptions to the electoral process devolved to his mandate.

C. **The Congress That Enacted 3 USC 5 Recognized that It Required a Constitutional Amendment but Adopted the ECA as a Shortcut Because They did not Have the Votes.**

In Section 2 of the Electoral Count Act of 1887, codified at 3 U.S.C. § 5, Congress sought to require States to resolve any disputes over the appointment of Presidential electors to avoid the necessity for Congress to do so in the 1876 election. “What Congress wanted was for the states to

develop, or apply, their existing, more streamlined election laws to Presidential Elections.” Stephen A Siegel, *The Conscientious Congressman’s Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 585 (2004). Members of Congress recognized at the time that they could not require states to do so “absent a constitutional amendment.” *Id.* at 586 (citations omitted). Because Congress was “[u]nable to agree on any constitutional amendment,” it attempted, “to remove, as far as it is possible to be done by legislation . . . , a difficulty which grows out of an imperfection in the Constitution itself.” *Id.* at 658-59 (*quoting* 17 Cong. Rec. 1019 (1886) (statement of Sen. Hoar)).

This was a continuation of Congress’ prior debate over the repeal of the Reconstruction-Era Twenty-Second Joint Rule of 1865 (“Joint Rule”), which had authorized either house of Congress to reject a State’s electors. Republicans had been dominant in the Reconstruction Era following 1865, but by 1875 it was “anticipated that the Democrats would control the House of Representatives for the first time in two decades,” and “Senate Republicans were no longer willing to allow the House to unilaterally discard electoral votes that could turn the outcome of the election or throw the election to the House.” Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 499 (2010).

In the run up to the 1876 election, the Senate debated repeal or modification of the Joint Rule where the “primary disagreement” was whether Congress could adopt a rule permitting one house of Congress to reject a State’s electoral votes “without a constitutional amendment,” and “[t]he dividing lines were drawn between those did not believe the Constitution gave Congress a right to say whether votes shall be counted or not be counted and those who did.” *Id.* at 500 (internal quotations and citations omitted). Consequently, if Congress itself cannot determine

whether to count (or not count votes), then that function must remain with the President of the Senate.

1. History of Competing State Electoral Slates

Historical precedent for dual electoral slates getting to the President of the Senate arose, before the ECA. While the circumstances varied, in the Tilden and Hayes election of 1876 each of three states submitted two or three slates of electors with at least one each for Tilden and Hayes. There were also serious allegations of violence, voter intimidation, fraud, and corruption.

- **Florida:** Three sets of electors: (1) Hayes, from Board of State Canvassers and signed by Governor; (2) Tilden, alleging violence, voter intimidation, fraud, and discarding Tilden ballots, “the slate of Presidential electors pledged to Tilden decided to go ahead and meet as if they were the authorized Electoral College delegates from Florida,” certified by Florida Attorney General; and (3) Tilden, when the Florida legislature called for a new canvas, which certified electors for Tilden and a Florida court ruling that Tilden electors were legitimate, the newly elected Democratic Governor certified third slate of electors for Tilden. Foley (2010) at 503-04.
- **Louisiana:** “The first slate of electors was for Hayes; it came from the canvassing board and was certified by the ostensible governor. The second was for Tilden, with these electors disregarding the work of the canvassing board on the ground that the board was corrupt. 157 This slate was certified by a different individual who purported to be the lawful governor. The third slate was in effect a duplicate of the first.” Id. at 504.
- **South Carolina:** “South Carolina submitted two slates, one for Hayes from the Board of Canvassers, certified by the governor, and another for Tilden, alleging that the Tilden electors were the rightful voters.” Id.

- **Oregon:** “In Oregon, the voters had elected a postmaster general as one of Hayes’s electors, a possible violation of the constitutional prohibition against federal office holders acting as electors. Because of this, the elector resigned from his office as postmaster, and Oregon law allowed the remaining electors to choose a replacement; they chose the resigned elector. The Democratic Oregon governor refused to certify this slate of electors and instead certified a slate with two Hayes electors and a Tilden elector as a replacement for the former postmaster. The secretary of state, on the other hand, submitted a certificate that contained the three original Hayes electors and noted that there was no question that the Hayes electors received the most votes on election day.” *Id.* at 504-05.

As a result of this tumult, Congress found a quick fix to potential future disruptions through enactment of the ECA.

a) **Binding Law, Congressional Rule, or Unreviewable Statement of Principle/Moral Obligation?**

“Whether the ECA is a statute or a joint rule enacted in statutory form is ambiguous. In truth, both theories underlay its enactment. The difference between the two theories disappears, however, to the extent that the ECA involves political questions not subject to judicial review. The difference between the two theories also disappears to the extent that Congress self-enforces its own internal rules.” Siegel at 565.

Internal Rule: “Many congressmen spoke in opposition to the ECA on the grounds that legislating the matter was an unconstitutional attempt to bind Congress's discretion. It was unconstitutional, they said, because enacting and amending legislation required Presidential approval (or an extraordinary majority in Congress), and thus improperly involved the President in implementing the rules for determining Presidential Elections. In addition, one Congress could never bind another in this matter. Congress could govern itself, they reasoned, by enacting

concurrent rules for each vote count, or a continuing joint rule which the houses could amend at any time.” Siegel at 560-61.

Binding Legislation: “Many other congressmen believed that electoral vote counting was a proper subject for binding legislation. Congress's rulemaking authority governed its own proceedings, and the ECA was properly legislative because through it the two houses adopted rules to govern each other's actions. Moreover, the power to count electoral votes was a power vested in the national government, and the Sweeping Clause allows Congress to “make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department . . . thereof.” Siegel at 561.

“Recognizing the equality of the houses of Congress, the authors of the ECA presumed that, under the Constitution, Congress could not count an electoral vote unless both the House and the Senate agreed that it should be counted. Given the frequency of houses of Congress being controlled by different political parties, frequent tie votes and the inability to decide questions raised during the count were ever-present threats when Congress met to count electoral votes. . . . The ECA, in effect, arbitrated differences between the houses by “reduc[ing] to a minimum the cases where any difference [between the houses] can properly arise.” Stephen A Siegel, *The Conscientious Congressman’s Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 557 (2004).

Unreviewable/Unenforceable Statement of Principle/Moral Obligation: “These congressmen assumed that Congress's electoral count decisions were not subject to judicial review. Because they believed that ‘[n]o power in this Government can or ever will set aside and annul the

declaration of who is elected President . . . when that declaration is made in the presence of the two Houses of Congress.” Siegel at 563.

“Yet, to these congressmen, an unenforceable law was better than no agreement at all. In addition, they believed an unenforceable law was better than a joint rule because of the law's greater ability to bind Congress's conscience and create a moral obligation to abide by its terms. Congress understood that even if the ECA enacted rules of only moral obligation, it nonetheless would constrain behavior both outside and inside Congress” Siegel at 564. In Chris Land & David Schultz, ON THE UNENFORCEABILITY OF THE ELECTORAL COUNT ACT, 13 Rutgers J.L. & Pub. Pol'y 340, 386 (2016), Land and Shultz note that, while the concept of non-binding “rulemaking statutes” and “anti-entrenchment clauses” developed during the 20th Century, “a number of Congressmen stated during debate on the ECA that this measure would attempt in vain to entrench procedures that would bind future Congresses.” Land at 376 (*citing* 8 CONG. REC. 164 (1878))

As stated by Sen. Augustus Garland in debate on a precursor to the ECA: “**An act passed by a previous Congress assuming to bind ... a succeeding Congress need not be repealed because it is void; and for that I reason I oppose this bill.**” Id. (Emphasis added).

Plaintiffs could not have stated the principle any clearer. The ECA is void and unconstitutional because a previous Congress cannot bind a succeeding one.

D. Plaintiffs’ requested remedy is warranted.

Amicus BLAG argues that abandoning the ECA will create havoc and cast the upcoming January 6th Joint Session into turmoil. They offer a “parade of horrors” that somehow justify continuing with a statutory scheme that flies in the face of the Constitution and the Framers’ intent. They argue, “we know better” than those who framed the Constitution. Indeed, under their casual

degradation of the Vice-President's role at the Joint Session, they may be right. If we abandon the ECA, there is no one in charge. And that's precisely the point.

The Constitution did not leave matters to chance. It empowered the Vice-President to take control of the proceeding and resolve disputes. Therefore, the remedy sought by Plaintiffs is easily crafted. The Court should declare that:

- ECA sections 5 and 15 are unconstitutional.
- When a member of the House objects to a slate of electors or between two slates of competing electors presented for any single state, the Vice President, as President of the Senate, shall determine the dispute as he sees fit. He may choose between competing elector slates or he may choose to disregard electors altogether from any state.
- If after all the states' electors are counted, no single candidate had 270 votes, the House shall vote for President, which each State delegation having one vote.

The sections that follow demonstrate Plaintiffs' entitlement to that relief.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

In evaluating a plaintiff's claim for interim or emergency relief, the first—and most important—factor is the likelihood of movants' prevailing. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As set forth in this section, Plaintiffs are likely to prevail because they are right on the merits, have a cause of action against the Defendant in this Court, and this Court has jurisdiction over Plaintiffs' claims.

A. The Electoral Count Act is unconstitutional.

With limited exceptions, the Defendant and *amici* rely jurisdictional and prudential gate-keeper arguments to avoid the merits. In so doing, they largely concede the merits. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409, 425 (5th Cir. 2014).

1. **Unconstitutional laws are nullities.**

Neither the Defendant nor *amici* dispute that—to the extent a statute is unconstitutional—the statute is a nullity. *See* Pls.’ Mot. at 18.

2. **The Electoral Count Act violates the Electors Clause and the Twelfth Amendment.**

Neither the Defendant nor his *amici* dispute that nothing in the Constitution supports the Electoral Count Act’s use of the state executive’s decisions on a state’s voting. *See* Pls.’ Mot. at 18-22.

3. **The Electoral Count Act violates the Constitution’s structural protections of liberty.**

Neither the Defendant nor his *amici* dispute that the Electoral Count Act violates the Presentment Clause. *See* Pls.’ Mot. at 22-23.

4. **The Electoral Count Act’s enactment in 1887 does not create a vested right or tradition of violating the Constitution.**

Amicus BLAG argues not only that the Electoral Count Act creates a “tradition” but also that “since the Presidential election of 1888 that Congress has conducted the Joint session pursuant to the procedures set forth in the Electoral Count Act of 1887.” BLAG Br. at 2. Citing *Chiafalo v. Washington*, 140 S.Ct. 2316, 2326 (2020), *Amicus* BLAG further argues that “[s]uch a long and established practice [carries] great weight in a proper interpretation of constitutional provisions.” BLAG Br. at 20. Similarly, Defendant’s brief argues that the Electoral Count Act is “procedure” that “[f]ollow[s] a century of debate over the appropriate process under the Constitution for counting electoral votes and resolving any objections thereto, Congress enacted the Electoral Control Act of 1887.” Def.’s Opp’n at 2.

The *Chiafalo* Court, however, held that

“[T]he presidential electors,” one historian writes, “were understood to be instruments for expressing the will of those who selected them,

not independent agents authorized to exercise their own judgment.” Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 *Ariz. L. Rev.* 904, 911 (2017). And when the time came to vote in the Electoral College, all but one elector did what everyone expected, faithfully representing their selectors’ choice of presidential candidate.

Chiafalo v. Washington, 140 S.Ct. at 2326. Wherein Presidential Electors went against their own party candidates as individuals - despite their elected roles... and completely in opposite to the case at bar where Plaintiff Electors, unified with their Party’s Presidential nominee, seek relief on the unconstitutional application of the ECA because of its direct violation of how their slate of electors’ votes are to be treated under it versus the Twelfth Amendment. The Supreme Court explained that in *Chiafalo*, “[t]he Electors’ constitutional claim has neither text nor history on its side.” *Id.* at 2328. Whereas these Plaintiffs submit that both history and text of the Twelfth Amendment is on their side – which neither the House in its Amicus or the Defendant actually genuinely dispute, but instead relying heavily on the history of process since 1888³--while ignoring the history that led to the Congressional Amendment of the Twelfth Amendment.

The passage of time does not bar fresh challenges to the application of unconstitutional or *ultra vires* laws or regulations. *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). “Arbitrary [governmental] action becomes no less so by simple dint of repetition.” *Judulang v. Holder*, 565 U.S. 42, 61 (2011). Mere “tradition” is no basis for preserving legal doctrines that plainly violate the Constitution. *Compare Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) with *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Defendant cannot claim “prejudice” from a suit that challenges the Electoral Count Act in the first election since that statute’s enactment in 1887 where the statute could unconstitutionally affect the outcome.

³ The Electoral Count Act was amended in 1948 in its present form, but never has it been passed as a Constitutional Amendment.

5. **The Necessary and Proper Clause does not save the Electoral Count Act.**

Amicus BLAG argues that the Necessary and Proper Clause authorized Congress to enact the Electoral Count Act.⁴ BLAG Br. at 21. The Twelfth Amendment is not one of the “foregoing powers” under the Clause, *id.*, and the Twelfth Amendment does not expressly vest any power in the Congress to count votes or to vote, unless and until no candidate achieves a majority of electoral votes. *See* U.S. CONST. amend. XII. To the extent that the Constitution does vest a dispute-resolution power for the vote-counting function, that power could just as easily be assigned to the Vice President as an “officer thereof” as to Congress itself under the express terms of the Necessary and Proper Clause. U.S. CONST. art. I, §8, cl. 18. Indeed, Vice Presidents Adams and Jefferson undertook such actions in the 1796 and 1800 elections, Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 585, 571-90 (2004), and the United States adopted the Twelfth Amendment shortly thereafter, without trimming the Vice President’s responsibilities.

To contrary, as Justice Story explained, neither the original Constitution nor the Twelfth Amendment included a dispute-resolution provision:

In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.

⁴ The Clause provides that “Congress shall have power ... [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” U.S. CONST. art. I, §8, cl. 18.

J. Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464 (Boston, Hilliard, Gray, & Co. 1833). Whatever the Vice President’s dispute-resolution powers, the House’s theory of dispute resolution by the House and Senate is constitutionally impossible.

Constitutional law recognizes two distinct types of unconstitutionality: “laws for the accomplishment of objects not entrusted to the government” and those “which are prohibited by the constitution.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Put another way, “a federal statute, in addition to *being authorized* by Art. I, § 8, must also ‘*not [be] prohibited*’ by the Constitution.” *United States v. Comstock*, 560 U.S. 126, 135 (2010) (*quoting McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock*, emphasis added). Clearly, “the Constitution does not conflict with itself by conferring, upon the one hand, a ... power, and taking the same power away, on the other, by the limitations of the due process clause.” *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). As applied here, that means that the Necessary and Proper Clause did not authorize the joint session or the two houses, separately, to violate the Presentment Clause. *See* Pls.’ Mot. at 22-23 (all votes, resolutions, and orders—except adjournments—require presentment).

The fact that Congress steadfastly believed in bicameral resolutions steadfastly until the Supreme Court resolved the issues almost 200 years into the Constitution, *INS v. Chadha*, 462 U.S. 919, 946 (1983), goes a long way to explaining how the Electoral Count Act survived 133 years:

A close reading of *Chadha*, unavailable of course to the participants in the Electoral Count Act debates, fortifies the basic argument made by Senator George and casts further doubt upon the constitutionality of the Electoral Count Act. The *Chadha* Court carefully explained why the "one-House veto" provision of the Immigration and Nationality Act was subject to the requirements of bicameralism and presentment in Article I. The Court began by noting that whether actions taken by either House are, in law and

fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect. The Court then described the one-House veto provision in that case as one that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch[.]

Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C.L. REV. 1653, 1791 (2002).

A second factor is that the last election where the Electoral Count Act would have mattered was in 1876 (*i.e.*, more than a decade *prior* to its enactment). It should be no surprise that Plaintiffs bring this suit now, a fortnight after an electoral vote in which the Electoral Count Act matters for the first time. These two factors—the advent of *Chadha* in 1983 and the novelty of this pandemic election in 2020—readily answer the House’s incredulity about “why now?”

B. Plaintiffs have a cause of action in this Court.

Plaintiffs have a cause of action under *Ex parte Young* and the Declaratory Judgment Act.

1. Ex parte Young applies.

The availability of judicial review does not hinge on the merits of an argument that government action violated a statute or the Constitution: “inquiry into whether suit lies [for judicial review] under *Ex parte Young* does not include [merits] analysis,” *Verizon Md., Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 636-37 (2002). Plaintiffs allege that proceeding under the Electoral Count Act violates the Constitution, and this is all that is required for purposes of a cause of action.

2. The Declaratory Judgment Act and Rule 57 apply.

With the advent of the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 (“DJA”), equitable relief in the form of a declaration of the law is even more readily available than traditional equitable relief in the form of injunctions. The federal-question statute, 28 U.S.C. §1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (1976 amendments to §1331 removed the amount-in-controversy

threshold for “any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity”) (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)), and 28 U.S.C. §2201(a) authorizes declaratory relief “whether or not further relief ... could be sought.” *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70-71 n.15 (1978); *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974). Since 1976, §1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *Sanders*, 430 U.S. at 105 (quoted *supra*). Declaratory relief makes it even easier for parties to obtain pre-enforcement review.⁵

Significantly, the availability of declaratory relief against federal officers predates the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (“APA”), *see* WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* APA LEG. HIST., at 37, 212, 276; 5 U.S.C. §559; *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded APA’s preclusion of review). Thus, even if APA §10(c) precludes declaratory relief *under the APA*, 5 U.S.C. §704, suitable plaintiffs nonetheless can obtain that relief *under the DJA*.

The Fifth Circuit has identified a nonexclusive list of seven factors that a district court must consider when exercising its discretion to hear, stay, or dismiss a case brought under the DJA.

⁵ In 1980, Congress amended §1331 to its current form, Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980), without repealing the 1976 amendment relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988); *U.S. v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari*, 417 U.S. 535, 550 (1974) (repeal by implication is disfavored). Indeed, “‘repeals by implication are disfavored,’ and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available.” *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975).

(1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams Co. v. Holmes Cty., 343 F.3d 383, 388 (5th Cir. 2003); *see also Frye v. Anadarko Petroleum Corp.*, 953 F.3d 285, 293-94 (5th Cir. 2019) (requiring actual controversy, the court’s authority for declaratory relief, and the court’s discretion).

Under the *Sherwin-Williams* factors, this Court should grant the requested declaratory relief:

- **Pending state action.** There is no pending state action.
- **Anticipatory suit.** The declaratory-judgment Plaintiffs did not race the Defendant to the courthouse; Defendant did not plan to sue Plaintiffs.
- **Forum shopping.** Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do. Plaintiff Arizona Electors have no other ties to this forum, but their claims do not materially change the claims before this Court.
- **Possible inequities on timing and forum.** Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do.
- **Federal court’s convenience.** Given that Plaintiffs have sued the Vice President of the United States on a question of federal law, a state forum would not be an option.
- **Judicial economy.** There are no concerns about judicial economy because this is the only action .between the parties.

- **Federalism concerns from parallel actions.** There are no parallel state-court actions for Rep. Gohmert, and—although the Arizona Elector Plaintiffs have engaged in state-court litigation—the issues here are purely federal.

This Circuit’s primary concern with declaratory-judgment actions is whether, under that the standard of *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942), “the questions in controversy between the parties to the federal suit . . . can be better settled in the proceeding pending in the state court.” *Sherwin-Williams*, 343 F.3d at 389 (quoting *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. at 494). As indicated, this is an entirely federal action that does not raise that concern.

Under the parallel *Anadarko Petroleum* standards, declaratory relief is also appropriate under the exigent circumstances here:

- **An actual controversy is imminent.** The concern with that an actual controversy exists is easily met by the exigent circumstances of a contested election potentially being decided under an unconstitutional process as early as January 6. *See* Section II, *supra*. That does not trigger the Fifth Circuit’s concern that the dispute is “not sufficiently definite and immediate to be justiciable.” *Anadarko Petro. Corp.*, 953 F.3d at 293.
- **Jurisdiction.** This Court has jurisdiction for this dispute, *see* Section II.C, *supra*, and none of the concerns about superior state-court jurisdiction or burdens of factual proof for diversity jurisdiction enter into the analysis. *See id.*
- **Discretion.** Plaintiffs respectfully submit that this Court must address the constitutional concerns presented here: “ flores

3. The action is not barred by laches.

Amicus BLAG cites laches—namely, an “unreasonable, prejudicial delay in commencing suit,” *Petrella v. MGM*, 572 U.S. 663, 667 (2014)—as a basis to dismiss this action or deny relief.

BLAG Br. at 14-19. Because Plaintiffs did not have a ripe claim until December 14, 2020 and filed this action on December 27, 2020, laches presents no question of unreasonable delay. Plaintiffs' timing is measured from their claims' arising, not from the enactment of the Electoral Count Act in 1887:

It is axiomatic that a claim that has not yet accrued is not ripe for adjudication.

Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., 99 F.3d 746, 756 (5th Cir. 1996). For that reason, Justice Blackmun aptly called laches “precisely the opposite argument” from ripeness. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting); *accord What-A-Burger of Va., Inc. v. Whataburger, Inc.*, 357 F.3d 441, 449-50 (4th Cir. 2004) (“One cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable”) (quoting 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31: 19 (4th ed. 2003); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 777 (Fed. Cir. 1995) (same); *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002) (same). Because Plaintiffs could not have brought this action before the electoral college vote on December 14, 2020., this Court should reject any suggestion of unreasonable delay.⁶

⁶ In support of its timing argument, BLAG cites a raft of extra-Circuit district court decisions and one unreported decision from this Court. See BLAG Br. at 15 n.5. In *Collins v. W. Digital Techs., Inc.*, 2011 WL 3849310, 2011 U.S. Dist. LEXIS 96663, at *14 (E.D. Tex. Aug. 29, 2011) (No. 2:09-cv-219-TJW), the plaintiff waited 13 years to file suit. By contrast, Plaintiffs waited 13 days to file their Complaint. Specifically, Plaintiffs' claims arose on December 14, 2020, and Plaintiffs filed their complaint on December 27, 2020. Comparing 13 years to 13 days is absurd. Although BLAG's citation to *Day v. McDonough*, 547 U.S. 198, 209 (2006), has higher pedigree than the other citations in BLAG's footnote, *Day* is simply inapposite to this case: “In sum, we hold that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's *habeas* petition.” *Id.*

Even if Plaintiffs had delayed bringing suit, the Defendant still would need to show *prejudice* as a prerequisite to obtaining dismissal for laches. *Env'tl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 479 (5th Cir. 1980). The test for prejudice requires balancing the equities: “Measuring prejudice entails balancing equities.” *Id.* The Vice Presidency has not acquired a vested right to violate the Constitution because 133 have passed since Congress enacted the Electoral Count Act in 1887. The passage of time does not bar fresh challenges to the application of unconstitutional or *ultra vires* laws or regulations. *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). “Arbitrary [governmental] action becomes no less so by simple dint of repetition.” *Judulang v. Holder*, 565 U.S. 42, 61 (2011). In truth, however, the Electoral Count Act has laid dormant since its enactment in 1887, and the only prior elects in which it might have mattered occurred prior to 1887 (*e.g.*, 1800 or 1876). The Defendant cannot claim “prejudice” from a suit that challenges the Electoral Count Act in the first election since that statute’s enactment in 1887 where the statute could unconstitutionally affect the outcome.

4. Transfer would be inappropriate.

BLAG suggests that Rep. Gohmert lacks standing and that he should therefore be dismissed and the case transferred to a venue suitable to the Arizona Electors. BLAG Br. at 12. Courts do not generally dismiss plaintiffs piecemeal, and Rep. Gohmert—a Tyler resident with his principal home-state office here—satisfies the venue rules and statutes. Since only one plaintiff needs to have standing, it would be entirely possible that an out-of-state plaintiff would provide standing while an in-state resident provides venue. But that is a mere hypothetical because Rep. Gohmert has standing. *See* Section I.C.1, *infra*.

5. No absent third parties are necessary parties.

An *amicus* has suggested that the rival state of Arizona electors are necessary parties that must be joined under FED. R. CIV. P. 19. Dowling Br. at 6-8. While *amicus* arguments should be

deemed waived unless raised by a party, *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) (“an issue waived by appellant cannot be raised by *amicus curiae*”), the Rule 19 necessary-party argument is meritless.

Leaving aside whether Arizona citizens are “subject to service of process” in Texas, FED. R. CIV. P. 19(a)(1) so as even to be relevant here, this Court can “accord complete relief among existing parties” with respect to declaratory and injunctive relief regarding the Electoral Count Act and the Constitution’s alternate procedures. *Id.* 19(a)(1)(A). More importantly, the rival electors cannot claim an “interest” in an unconstitutional statute:

It is undoubtedly true that even expectancies characterized as “vested rights” under state law must fall before a court adjudication that [federal law] mandates that the expectancies not be fulfilled.

United States v. City of Miami, 614 F.2d 1322, 1341-42 (5th Cir. 1980) (subjective expectations on the continued adherence to past practice are not a sufficient interest). Here, as in *Miami*, “the crucial point here, to wit, that the [proposed relief] orders no relief against the [absent party].” *Id.* at 1329, Simply put, the relief requested has no legally prejudicial effect on any absent party:

Unless the [absent party] can demonstrate that it has been ordered to take some action by the decree, or ordered not to take some action, or that its *rights or legitimate interests* have otherwise been affected, it has no right to prevent the other parties and the Court from signing the decree.

Id. (emphasis added). As indicated with respect to laches, *see* Section I.B.3, *supra*, there is no vested right in anyone to the continued following of the blatantly unconstitutional Electoral Count Act.

6. 28 U.S.C. § 2403(a) does not require pausing relief.

Mr. Dowling argues that this Court should defer reaching the merits until Plaintiffs serve the U.S. Attorney General pursuant to 28 U.S.C. § 2403(a). See Dowling Br. at 8-9. That section provides as follows:

In any action, suit or proceeding in a court of the United States to which *the United States or any agency, officer or employee thereof is not a party*, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(a) (emphasis added). As signaled by the emphasized text, Defendant here is an officer of the United States. Moreover, Plaintiffs have served the United States Attorney for the Eastern District of Texas (ECF #5) and the United States Attorney General (ECF #10). This argument is meritless.⁷

C. This Court has constitutional and prudential jurisdiction over Plaintiffs' claims.

Although jurisdiction and the merits are “independent,” *Howard v. Dretke*, 157 F.App'x 667, 670 (5th Cir. 2005), a plaintiff needs to be right on both issues to obtain interim relief: “Absent an adequate jurisdictional basis for the Court’s consideration of the merits, there is *no likelihood* that the Plaintiff will prevail on the merits.” *Herwald v. Schweiker*, 658 F.2d 359, 363 (5th Cir. 1981) (emphasis added). In this section, Plaintiffs establish this Court’s jurisdiction.

⁷ The remaining arguments in Mr. Dowling’s motion to dismiss are similarly meritless (*e.g.*, Plaintiffs do not plead a fraud count and so need not plead with particularity under FED. R. CIV. P. 9(b) and no party has requested discovery). Moreover, to the extent he raises bases for dismissal that differ from those raised by Defendant, Mr. Dowling would need to prove—and has not—his own standing: “For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, ... an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.” *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017).

1. **This case presents an Article III case or controversy.**

In a case where Plaintiffs ask an Article III court to hear a case against a federal defendant who is simultaneously a part of the Article I legislature and the Article II executive, Plaintiffs acknowledge that the jurisdictional scope of the federal judicial power under Article III is “important[t] ... in maintaining separation of powers among the branches of the federal government.” *In re Frazin*, 732 F.3d 313, 319 (5th Cir. 2013). It is also important for courts to “protect[] litigants,” *id.*, and ultimately the judiciary’s role to interpret the Constitution in properly presented cases and controversies: “The power to interpret the Constitution in a case or controversy remains in the Judiciary.” *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). By bringing a proper case or controversy under Article III, Plaintiffs present this Court not only the opportunity but also the *duty*⁸ to resolve issues that other courts have not decided because those courts found those cases, by those parties, to fall outside their Article III jurisdiction under the law of those other circuits. In some respects, this Court’s opportunity and duty arise because these Plaintiffs press different claims that are justiciable, whereas other plaintiffs did not; in other respects, the law of this Circuit simply differs from the law of other circuits. *Compare, e.g., Donald J. Trump for President, Inc. v. Sec’y Pa.*, No. 20-3371, 2020 U.S. App. LEXIS 37346, at *20 (3d Cir. Nov. 27, 2020) (candidate suffers generalized grievance from Elections Clause violations) *with LULAC v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011) (Rep. Gohmert has standing to vote for President under the Twelfth Amendment if the contested states’ voters are constitutionally compromised); *cf. Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (Plaintiff Arizona Electors have standing

⁸ “The existence of the jurisdiction creates an implication of duty to exercise it.” *Howlett v. Rose*, 496 U.S. 356, 369-70 (1990) (interior quotations omitted).

either to void the rival Arizona electors' votes or to count the Plaintiff Arizona Electors' votes in their place because the latter's votes are constitutionally compromised under the Elections Clause).

While Article III jurisdiction most often involves standing—*i.e.*, a plaintiff's injury in fact, the defendant's causation or traceability, and the court's power to redress, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)—the scope of Article III extends to other overlapping issues:

“All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to ... the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”

Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). As explained in the following eight subsections, all of these Article III gate-keeping tests are met here.

a) The parties seek different relief.

The Defendant argues that “Plaintiffs’ suit seeks to empower the Vice President to unilaterally and unreviewably decide objections to the validity of electoral votes” such that “Plaintiffs are ... not sufficiently adverse to the legal interests of the Vice President.” Def’s Opp’n at 3. But the Defendant seeks dismissal, whereas Plaintiffs seek declaratory and injunctive relief. Moreover, Plaintiffs express no opinion on whether Defendant’s actions would be unreviewable. Instead, Plaintiffs merely seek declaratory and injunctive relief against an unconstitutional statute.

This is not an instance where “the parties desire precisely the same result” so that there is no Article III case or controversy. *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 383 (1980) (interior quotations omitted); *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (*per curiam*). The Defendant seeks the dismissal of this action, and Plaintiffs ask this Court to enter a judgment in their favor. Even if one Plaintiff and the

Defendant were “friendly” in the sense of wanting the same thing, “[o]nly one plaintiff is needed to establish standing for each form of requested relief.” *Pool v. City of Houston*, 978 F.3d 307, 312 n.7 (5th Cir. 2020) (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017)). Whatever public statement one plaintiff made is not binding on the other plaintiffs, especially not a statement by one of the Arizona Electors on Rep. Gohmert.

b) This Court must assume Plaintiffs’ merits views to assess Plaintiffs’ standing to sue.

All of the briefs opposed to Plaintiffs’ claims make the mistake of disputing Plaintiffs on the merits to attack Plaintiffs’ standing. If that were how it works, every losing plaintiff would lose for lack of standing.

Put simply, that “confuses standing with the merits.” *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006); *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) (“standing does not depend upon ultimate success on the merits”); accord *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005); *In re Columbia Gas Systems Inc.*, 33 F.3d 294, 298 (3d Cir. 1994); cf. *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). Instead, federal courts have jurisdiction over a case if “the right of [plaintiffs] to recover under [their] complaint will be sustained if the ... laws of the United States are given one construction,” even if the plaintiffs’ rights “will be defeated if [those federal laws] are given another.” *Wheeldin v. Wheeler*, 373 U.S. 647, 649 (1963) (interior quotations omitted). Accordingly, federal courts should assume *the plaintiff’s* merits views in evaluating their jurisdiction to hear the plaintiff’s claims: “standing in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (“one must assume the validity of a plaintiff’s substantive claim at the standing inquiry”); *Adar v. Smith, supra (en banc)*.

With the idea in mind that this Court should assume Plaintiffs' merits views in evaluating standing, the need to contest this election should become apparent. The Constitution's Elections Clause and Electors Clause give state legislatures the plenary power to set election provisions, and yet—citing the COVID pandemic as either a reason or as an excuse—non-legislative actors in all the contested states systematically eroded ballot-integrity measures like signature or witness requirements and registration or mail-in deadlines to the point where Plaintiffs respectfully submit it is impossible to state who won from the mail-in votes because legal ones have been commingled with illegal ones.

Moreover, although ostensibly a question of state election law, these questions are federal the state election laws apply “not only to elections to state offices, but also to the election of Presidential electors,” meaning that state law operates, in part, “by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Logically, “any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution,” meaning that any “such power had to be delegated to, rather than reserved by, the States.” *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted). “It is no original prerogative of State power to appoint a representative, a senator, or President for the Union.” J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). For these reasons, any “significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.” *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

c) Plaintiffs suffer an injury in fact.

The briefs opposed to Plaintiffs argue that Plaintiffs' claimed injuries are generalized grievances insufficient for Article III. As indicated, however, Plaintiffs here assert particularized injuries under this Circuit's Article III decisions and these Plaintiffs claims. *See* Section I.C.1,

supra. First, Rep. Gohmert has standing to challenge unconstitutional elector slates and to vote for President under the Twelfth Amendment as opposed to voting for objections under the Electoral Count Act. See *LULAC v. City of Boerne*, 659 F.3d at 430; *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993) (*en banc*).

This voting injury also answers BLAG’s attempt to classify Rep. Gohmert’s injuries under the rubric of legislative standing under *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). Under those decisions, a legislator or legislative body would only have standing for issues within their power (*e.g.*, information to be gotten by subpoena) or if they had a working majority of the relevant number of houses to enact or block legislation. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 n.6 (2019); *Coleman v. Miller*, 307 U. S. 433, 446 (1939). Here, Rep. Gohmert seeks to vote for President under the Twelfth Amendment rather than in dispute-resolution proceedings for rival voter slates when the states in question have impossibly commingled the legal and illegal ballots so that it is impossible to know the result. As indicated in this section, this Circuit’s voting-rights cases make clear that that is not a generalized grievance.

d) Plaintiffs’ injuries are traceable to Defendant.

Defendant cites *Common Cause v. Biden*, 748 F.3d 1280, 1285 (D.C. Cir. 2014), and *CastaÑon v. United States*, 444 F. Supp. 3d 118, 133 (D.D.C. 2020), for the proposition that the House and the Senate—not the Vice President—caused Plaintiffs’ injuries. See Def.’s Opp’n at 4. Along the same lines, Defendant deems it “a walking legal contradiction” to sue “the Vice President [to establish his] discretion over the count.” *Id.* Defendant’s false contradiction is readily set right.

First, *Common Cause* concerned the Senate filibuster rule’s blocking immigration reform sought by the plaintiffs there (*i.e.*, legislation), and *CastaÑon* sought voting rights for District of Columbia residents (*i.e.*, also a legislative issue, as well as a constitutional issue in light of the

District’s unique role under the Constitution). In those circumstances, the Vice President was not the party denying the plaintiffs’ alleged rights. Here, by contrast, Vice President Pence is the presiding officer who will invoke the constitutional Twelfth Amendment process or the statutory Electoral Count Act process. As the presiding officer under both alternate paths, Defendant is an entirely reasonable person to seek to enjoin. *See, e.g., Beeman v. Mays*, 163 S.W. 358, 358 (Tex. Civ. App. 1914) (“suit against appellant to enjoin him, as presiding officer, from holding an election”); 42 U.S.C. § 1988(a) (civil rights actions can incorporate state law that is not inconsistent with federal law).⁹

Second, Defendants’ “walking legal contradiction” is no contradiction at all. Through declaratory and injunctive relief, Plaintiffs ask this Court to prevent Defendant from invoking the unconstitutional Electoral Count Act. As in *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017), Defendant cannot rely on this Circuit’s *en banc* decision in *Okpalobi v. Foster* because—unlike in *Okpalobi*¹⁰—Plaintiffs have sued someone who implements the statute that Plaintiffs challenge. *Compare OCA-Greater Houston*, 867 F.3d at 613-14 with *Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001) (*en banc*). (defendants had no "enforcement connection with the challenged statute"). Here, Defendant is the presiding officer of the process that Plaintiffs seek to enjoin and declare unconstitutional. Under that circumstance, Plaintiffs have “met [the] burden under *Lujan* to show that [their] injury is fairly traceable to and redressable by the defendant[.]” *OCA-Greater Houston*, 867 F.3d at 614; *see also* Pls.’ Mot at 7-9 (discussing traceability).

⁹ While § 1988(a) most typically imports state-law procedures for survivorship or statutes of limitations for federal civil-rights claims, *see, e.g., Jefferson v. City of Tarrant*, 522 U.S. 75, 79 (1997), nothing prevents citing state common-law cases for the proper party to sue to enjoin the operation of an unconstitutional process.

¹⁰ In *Okpalobi*, the plaintiffs had sued Louisiana’s Governor and Attorney General to challenge a statute that empowered private parties and state courts to act. *See* 244 F.3d at 415.

e) **This Court can redress Plaintiffs' injuries.**

As indicated in the prior section, Plaintiffs injuries are traceable to Defendant and thus also redressable by the Court because Defendant is the presiding officer of the challenged statutory process. *OCA-Greater Houston*, 867 F.3d at 613-14; *see also* Pls.' Mot at 9-10 (discussing redressability).

f) **Plaintiffs' procedural injuries lower the constitutional bar for immediacy and redressability.**

Defendant and the amicus briefs do not dispute that the procedural injuries that Plaintiffs seek to press lower the Article III bar for immediacy of injury and redressability. *See* Pls.' Mot. at 11-12.

g) **This action is not moot.**

“A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotations omitted, emphasis added). The joint session will not meet until January 6, and Congress could extend its statutory deadlines, as it did in connection with the only other similarly contested election. Ch. 37, 19 Stat. 227 (1877). Indeed, even without a new statute, the January 6 joint session could be extended further into January.

Simply put, “it ain’t over ‘til it’s over.” Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 *FORDHAM L. REV.* 257, 260 (1991) (quoting Yogi Berra). It remains possible for this Court to enter a judgment that addresses the constitutionality of the Electoral Count Act and its application to the 2020 election.

h) This action is ripe.

It is undisputed that rival slates of electors have been submitted for an outcome-determinative number of electoral votes. It is indisputable that at least one Representative and one Senator will, or are likely to, object to the slates from these contested states.¹¹ *See* Ex. A-B (Sen. Hawley plans to object); Ex. C (Sen.-Elect Tuberville); Ex. D (140 Republican House Members). The timing of future events provides no barrier to justiciability: “Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.” *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662, 670 n.2 (2010). Indeed, even without objecting Representatives and Senators, the presence of an outcome-determinative number of rival slates of electors guarantees the need for the joint session to engage in some form of dispute-resolution process, which squarely presents the question of whether that process lies under the Electoral Count Act that Plaintiffs challenge.

2. Prudential limits on Article III jurisdiction do not apply.

In addition to Article III’s jurisdictional limits, the judiciary has adopted prudential limits on standing that bar judicial review even when the plaintiff meets Article III’s minimum criteria. *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (zone-of-interests test); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (litigants must raise their own rights); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (litigants cannot sue over generalized grievances more

¹¹ The Senate.gov press release and the related news reports about objections next week when Congress convenes in joint session are judicially noticeable. *Concerned Citizens for Equal. v. McDonald*, 863 F. Supp. 393, 394 (E.D. Tex. 1994) (newspapers); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (government website).

appropriately addressed in the representative branches). Prudential issues are non-judicial and can be waived. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). In any event, none of those prudential limits apply here.¹²

a) Plaintiffs are within the relevant zones of interests.

The zone-of-interests test requires that a plaintiff's claims be “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Here, Rep. Gohmert will proceed as a Member of the House of Representatives in the joint session, and he asks this Court to resolve whether the extant statutory procedure is unconstitutional (*i.e.*, he asks whether the Electoral Count Act is viable under the Twelfth Amendment and the rest of the Constitution). That claim is squarely within the zone of the constitutional provisions that he invokes. Similarly, the Plaintiff Arizona Electors ask to be treated fairly in the joint session, *vis-à-vis* their relative merits with the rival slate of Arizona electors. Under the constitutional process that the Plaintiff Arizona Electors invoke, they have a chance to be counted. Under the Electoral Count Act, the Democrat majority in the House has made clear it will vote for Mr. Biden, and the Governor of Arizona has supported that position (*i.e.*, the Plaintiff Arizona Electors will not be counted under the Electoral Count Act). The Plaintiff Arizona Electors' claims thus also fall within the zone of interests of the constitutional provisions that Plaintiffs invoke.

¹² Arguments not pressed by an actual party (*e.g.*, if raised solely by an *amicus*) are waived. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) (“an issue waived by appellant cannot be raised by *amicus curiae*”); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (distinguishing jurisdictional arguments raised solely by *amicus*).]

b) **Rep. Gohmert can press the interests of his constituents and of himself as a Texas voter.**

In addition to his own standing as a Texas voter in the election and as a Member of Congress in the procedures under the Electoral Count Act and Twelfth Amendment, Rep. Gohmert has standing to raise his constituents' rights under the prudential test for third-party standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004) (requiring the plaintiff to have its own Article III standing, a relationship with the rights holder, and that some hindrance keeps the rights holder from asserting its own rights). The only *constitutional* and jurisdictional requirements are the Article III requirements, with the others being prudential. *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 623 n.3 (1989). Prudential limits are generally waivable by a party, " *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) ("[u]nlike constitutional standing, prudential standing arguments may be waived"); *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2117 (2020) ("the rule that a party cannot ordinarily rest his claim to relief on the legal rights or interests of third parties ... does not involve the Constitution's case-or-controversy requirement ... [a]nd so ... it can be forfeited or waived") (interior quotations and citations omitted), and the Defendant has waived all non-jurisdictional arguments not raised in his opposition.

c) **This suit is not prudentially improper as a "friendly" suit.**

Citing a public statement by one plaintiff, the Defendant and his *amici* argue that that this is a "friendly suit" that the Court should dismiss. Any bar against friendly suits in prudential, not *jurisdictional*. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 (1979). As indicated in Section II.C.1, *supra*, this action is not "friendly" in the Article III sense. To the extent that the "friendly" remark refers to personal relationships, it would be irrelevant to this official-capacity action: "while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where

official action is at issue, no matter how important the *official action* was to the ambitions or the reputation of the Government officer.” *Cheney v. United States Dist. Court*, 541 U.S. 913, 916 (2004) (Scalia, J., in chambers) (emphasis in original). But Plaintiffs seek relief that Defendant opposes, which is not “friendly” in the prudential sense.

3. The Speech or Debate Clause does not insulate the Vice President.

Defendant does not dispute that the Speech or Debate Clause provides him no protection.

4. Sovereign immunity does not bar this action.

Amicus BLAG argues that Plaintiffs have named the wrong defendant and instead should have named the House and Senate as the parties that injured Plaintiffs. For the reasons set forth in their motion and not directly disputed by Defendant or his *amici*, *see* Pls.’ Mot. at 13-14, Plaintiffs respectfully submit that they have properly invoked an *Ex parte Young* officer suit against the Vice President for the unconstitutional application of the Electoral Count Act. To the extent that this Court disagrees, however, denial of relief or dismissal would be inappropriate. Instead, the Court should allow Plaintiffs to amend their complaint to name alternate officers such as the House and Senate parliamentarians

First, the United States has waived sovereign immunity for

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]

5 U.S.C. § 702.

Second, “[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.” 28 U.S.C. § 1653. If the Court finds the pleadings inadequate as the Vice

President Pence, Plaintiffs could amend their pleadings to include the United States as a defendant.

See also FED. R. CIV. P. 15(a)(1)(B).

5. The political-question doctrine does not bar this suit.

Defendant does not dispute that the political question doctrine provides him no protection.

6. This case presents a federal question.

Defendant does not dispute that this case raises a federal question within this Court's original jurisdiction under 28 U.S.C. §§ 1331 and 1343(3).

7. No abstention principles apply.

Defendant does not dispute that no abstention the political question doctrine provides him no protection.

III. PLAINTIFFS ARE ENTITLED TO EMERGENCY INJUNCTIVE RELIEF.

Neither Defendant nor his *amici* dispute that the remaining *Winter* factors support the entry of interim relief.

CONCLUSION

For the reasons set forth in their Motion and this reply, Plaintiffs respectfully request that the Court grant the requested relief.

Dated: January 1, 2021

Respectfully submitted,

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the date specified below, I electronically filed the foregoing motion (together with its accompanying proposed order) with the Clerk of the Court using the CM/ECF system, which I understand to have caused the service of all parties' counsel of record.

Dated: January 1, 2021

/s/ William Lewis Sessions
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Counsel for Plaintiffs

Sen. Hawley Will Object During Electoral College Certification Process On Jan 6

Wednesday, December 30, 2020

Today U.S. Senator Josh Hawley (R-Mo.) announced he will object during the Electoral College certification process on January 6, 2021. Senator Hawley will object to highlight the failure of some states, including notably Pennsylvania, to follow their own election laws as well as the unprecedented interference of Big Tech monopolies in the election. He will call for Congress to launch a full investigation of potential fraud and election irregularities and enact election integrity measures.

Democrats have previously objected during the certification process for the 2004 and 2016 Presidential elections.

Senator Hawley said, "Following both the 2004 and 2016 elections, Democrats in Congress objected during the certification of electoral votes in order to raise concerns about election integrity. They were praised by Democratic leadership and the media when they did. And they were entitled to do so. But now those of us concerned about the integrity of this election are entitled to do the same.

"I cannot vote to certify the electoral college results on January 6 without raising the fact that some states, particularly Pennsylvania, failed to follow their own state election laws. And I cannot vote to certify without pointing out the unprecedented effort of mega corporations, including Facebook and Twitter, to interfere in this election, in support of Joe Biden. At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act.

"For these reasons, I will follow the same practice Democrat members of Congress have in years past and object during the certification process on January 6 to raise these critical issues."

Background On Previous Objections to Electoral College Vote Certification

In 2005, Senator Barbara Boxer and Representative Stephanie Tubbs Jones Objected to the Electoral College Votes from Ohio.

Stephanie Tubs-Jones Said, "I Raise This Objection Because I Am Convinced That We As A Body Must Conduct A Formal And Legitimate Debate About Election Irregularities." (C-SPAN

(<https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?>

https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05,

3:10-3:20)

EXHIBIT A

12/30/2020

Sen. Hawley Will Object During Electoral College Certification Process On Jan 6 | Senator Josh Hawley

Boxer views her 2005 objection as "her proudest moment on the Senate floor," according to CNN. (CNN

([https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?](https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2f20:college-objection-bush-boxer%2findex.html&redir_log=628933907465617)

https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2f20:college-objection-bush-boxer%2findex.html&redir_log=628933907465617), 12/27/2020)

In January 2005, 31 Congressional Democrats Voted To Reject Ohio's Electoral Votes. (CNN

([appleweebdata://849C88A2-A8F5-4FBA-9175-](http://appleweebdata://849C88A2-A8F5-4FBA-9175-C87F69402B4D/Bush%20carries%20Electoral%20College%20after%20delay)

[C87F69402B4D/Bush%20carries%20Electoral%20College%20after%20delay](http://appleweebdata://849C88A2-A8F5-4FBA-9175-C87F69402B4D/Bush%20carries%20Electoral%20College%20after%20delay)), 1/6/05)

Nancy Pelosi Praised The 2005 Objections, Saying Democrats Were "Speaking Up For Their Aggrieved Constituents" During "Their Only Opportunity To Have This Debate While The Country Is Listening"

Nancy Pelosi Said "We Are Witnessing Democracy At Work" And "This Debate Is Fundamental To Our Democracy." "

[T]oday we are witnessing democracy at work. This is not, as some of our Republican colleagues have referred to it, sadly, frivolous. This debate is fundamental to our democracy." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 32:49-33:08)

Pelosi Said Democrats Were "Speaking Up For Their Aggrieved Constituents, Many Of Whom May Have Been

Disenfranchised In This Process." "The Members of Congress who have brought this challenge are speaking up for their aggrieved constituents, many of whom may have been disenfranchised in this process. This is their only opportunity to have this debate while the country is listening, and it is appropriate to do so. If there were other venues of this caliber, we would have taken that opportunity. But this is the opportunity. We have a responsibility to take advantage of it." (C-SPAN ([https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?](https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514)

https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 34:14-34:45)

- **Pelosi Said "This Is Their Only Opportunity To Have This Debate While The Country Is Listening" And "We Have A Responsibility To Take Advantage Of It."** (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 34:14-34:45)

Pelosi Said "Do Not Talk About This As A 'Conspiracy Theory.'" "[P]lease do not talk about this as a 'conspiracy theory.' It is not about that. It is not about conspiracy; it is about the Constitution of the United States." (C-SPAN ([https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?](https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514)

https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 39:50-40:03)

In 2017, At Least Seven House Democrats Sought To Object To Electoral Votes In Favor Of President Trump:

- **Jim McGovern Said "The Electors Were Not Lawfully Certified, Especially Given The Confirmed And Illegal Activities Engaged By The Government Of Russia."** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%3a%2f%2fcollege-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Raul Grijalva Objected After North Carolina's Tally.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%3a%2f%2fcollege-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Pramila Jayapal Objected To Georgia's Vote Certificate.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%3a%2f%2fcollege-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Jamie Raskin Objected To 10 Of Florida's 29 Electoral Votes, Saying "They Violated Florida's Prohibition Against Dual Office Holders."** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%3a%2f%2fcollege-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Maxine Waters Objected.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%3a%2f%2fcollege-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)

Issues

General (/issues/general)

(/HAWLEY-WONT-CONSENT-NDAA-

< PREVIOUSVOTE-WITHOUT-VOTE-2000-DIRECT-ASSISTANCE)



(<https://www.facebook.com/SenatorHawley/>)



(<https://twitter.com/SenHawleyPress>)



(https://www.youtube.com/channel/UCMzt8xq6qQ3XQ_DINfjx0-w)



(<https://www.instagram.com/senatorhawley/>)

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EXHIBIT B

The Washington Post
Empowering People and Progress

Sen. Hawley announces he will contest certification of electoral college vote

By John Wagner

Dec. 30, 2020 at 11:24 a.m. EST

Sen. Josh Hawley (R-Mo.) announced Wednesday that he would object next week when Congress convenes to certify the electoral college vote, a move that all but ensures at least a short delay in cementing President-elect Joe Biden's victory.

President Trump has repeatedly suggested congressional intervention as a last-ditch way to reverse the election results, despite opposition from Senate Majority Leader Mitch McConnell (R-Ky.) and other leading Republicans, who have conceded it is bound to fail and will put their members in an awkward position.

In a statement, Hawley said he feels compelled to put a spotlight on purported election irregularities.

"At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act," Hawley said.

Any member of the House, joined by a member of the Senate, can contest the electoral votes on Jan. 6. The challenge prompts a floor debate followed by a vote in each chamber.

Trump will inevitably lose that vote, given that Democrats control the House and a number of Senate Republicans have publicly recognized Biden's victory, including Sen. Mitt Romney (Utah), who has called Trump's refusal to accept the election dangerous.

Even in the unlikely event that Trump were to prevail in the Senate, where Vice President Pence would be in position to cast a tie-breaking vote if needed, the challenge still would fail given the House vote.

Still, a number of Republican members of the House, led by Rep. Mo Brooks (R-Ala.) and encouraged by the president, have said they plan to challenge votes in swing states where they have made unfounded allegations that the vote was marred by fraud.

Prior to Hawley's announcement, one incoming Republican senator, newly elected Tommy Tuberville of Alabama, has said he is considering signing on, as well.

Hawley has been mentioned as a potential 2024 presidential candidate, and his move is certain to appeal to Trump supporters and parts of the Republican base.

EXHIBIT C

WP NEWSLETTER WEEKDAYS

A 5-minute breakdown to track the presidential transition [Sign Up →](#)

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Trump, nevertheless, has played up what is usually a ceremonial milestone as a potential turning point in his quest to reverse the election results.

“See you in Washington, DC, on January 6th. Don’t miss it,” Trump tweeted Sunday.

Meanwhile, a lawsuit filed Sunday by U.S. Rep. Louie Gohmert (R-Tex.) and several Arizona Republicans against Pence attempts to get a federal judge to expand Pence’s power to affect the outcome.

Rosalind S. Helderman and Tom Hamburger contributed to this report.



Sen.-elect Tuberville suggests back effort on challenge Electoral College vote

BY TAL AXELROD 12/31/20 04:11 PM EST

Just In...

15,831 SHARES

1:11 PM

Bidens honor frontline workers in NYE address: 'We owe them, we owe them, we owe them'

ADMINISTRATION 12/31/20 12:57 PM EST

Florida reports first case of new, contagious coronavirus strain

STATE WATCH 12/31/20 12:57 PM EST

NY restaurant that hosted Republican club's holiday party gets liquor license revoked

STATE WATCH 12/31/20 12:57 PM EST

Roberts commends courthouses for their ability to adapt amid the pandemic

LEGAL 12/31/20 12:57 PM EST

Photos show Wuhan, once epicenter of pandemic, crowded for New Year's celebrations

NEWS 12/31/20 12:57 PM EST

Trump hotel in DC raises room rates for Biden inauguration

NEWS 12/31/20 12:57 PM EST

Indiana law going into effect Jan. 1 will require women to have ultrasound before abortion

HEALTHCARE 12/31/20 12:57 PM EST

GOP lawmaker criticizes Trump,

Sen.-elect Tommy Tuberville (R-Ala.) indicated in a video that surfaced Thursday that that he thinks the Senate should support a challenge to the results of the Electoral College, which certified President-elect Joe Biden's victory this week.

Tuberville suggested he would back a challenge Rep. Mo Brooks (R-Ala.) has vowed to bring against the vote. If a senator joins Brooks, it would require the House and Senate to debate and then vote on the issue.

"You see what's coming. You've been reading about it in the House. We're going to have to do it in the Senate," Tuberville said in the video taken by liberal activist Lauren Windsor at a rally for Sens. Kelly Loeffler (R-Ga.) and David Perdue (R-Ga.) in Georgia.

It appeared that Tuberville believed he was speaking with another rallygoer rather than a liberal activist, and Windsor asked the senator-elect what he could do to "fight to make this election right." The video was taken Wednesday night.

Lauren Windsor
@lwindsor



BREAKING: Defying McConnell, Sen.-elect Tuberville suggests he will challenge Electoral College, while stumping in Georgia

EXHIBIT D

1/1/2021

Sen.-elect Tuberville suggests he'll back effort on challenge Electoral College vote | The Hill

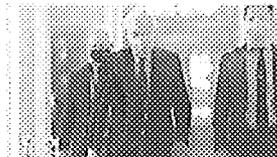
colleagues for 'trying to discredit' the election

NEWS

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9:35 AM Dec 17, 2020

64.3K 23.6K people are Tweeting about this



McConnell signals Senate has votes to...

Tuberville's campaign did not immediately respond to a request from comment from The Hill, but earlier this week Tuberville's campaign chairman had said that the senator-elect might back the Brooks effort.

"I think that he [Tuberville] and Ted Cruz are the two best candidates to do this," said Stan McDonald, Tuberville's campaign chairman, during an interview on WYNN radio in Huntsville on Tuesday. "I don't know yet if or when he will do this. He's very seriously considering it."

Senate Majority Leader Mitch McConnell (R-Ky.) pleaded with Republican senators this week to dismiss the drive to challenge the results, which has been spearheaded by Brooks. McConnell indicated that forcing a debate would ultimately lead to a contentious vote to swat away the challenge, which would divide Republicans from President Trump, who remains wildly popular with the GOP base despite his loss.

HP 312X Black Toner Cartridge, High Yield...

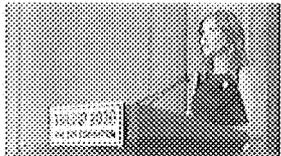
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GOP Georgia senators throw support behind...

"I think that there was encouragement on the phone for us to accept the result, as much as it's not what we, you know, would have envisioned for the next four years, and to try to do what's best for American people, which is to look forward," Sen. Shelley Moore Capito (R-W.Va.) said after a conference call with McConnell.

If the vote took place, it would not change the outcome of the election as there is not enough support in the House or Senate for it to be successful.



Noem rules out Thune challenge after Trump...

Trump and his allies have launched a sprawling legal campaign to overturn the election results on claims that widespread voter fraud cost him reelection. But virtually all of the lawsuits have been thrown out, at times by Trump-appointed judges, for lack of evidence or standing.

"We got to grab a hold and hold on. We have no choice. Listen to me now, we have no choice but to win this election. They're going to try to steal it, they're going to try to buy it, they're going to do everything they can, lie, cheat, steal to win this election, like they did in the presidential election," Tuberville told the rally crowd in Georgia.

GOP senator criticizes 'ambitious politicians' for 'dangerous'...

Hawley jams GOP with Electoral College fight

Sen. John Thune (S.D.), the No. 2 Senate Republican, told reporters Thursday he hopes Tuberville does not vote to have a debate on the Electoral College, saying, "it's time ... to move on."

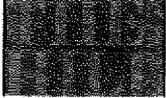
1/1/2021

Sen.-elect Tuberville suggests he'll back effort on challenge Electoral College vote | TheHill

"The fact of the matter is that's been litigated over and over... it's time to be done with this," Thune said. "I would hope that we wouldn't have members of the Senate who would decide that that makes sense. I don't think it's a good decision right now and I don't think it's good for the country."

Jordain Carney contributed to this report.

**TAGS SHELLEY MOORE CAPITO MITCH MCCONNELL KELLY LOEFFLER DAVID PERDUE
DONALD TRUMP JOHN THUNE JOE BIDEN MO BROOKS TED CRUZ TOMMY TUBERVILLE**



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ELECTION '20 | DEC 31, 2020, 05:31pm EST | 32,917 views

At Least 140 House Republicans Expected To Challenge Electoral College Result



Andrew Solender Forbes Staff

Business

I write about politics and the Biden transition.

TOPLINE: As many as 140 Republican House members are expected to object to certification of President-elect Joe Biden's Electoral College victory as part of President Donald Trump's continued efforts to overturn his reelection loss.



WASHINGTON, DC - DECEMBER 10: House Minority Leader Kevin McCarthy (R-CA), surrounded fellow

EXHIBIT E

Page 2 of 4

1/1/2021

At Least 140 House Republicans Expected To Challenge Electoral College Result

- ◆ “2 House Republicans tell me they expect as of now that at least 140 Republican Members of the House will on Jan. 6 object to and vote against the Electoral College results,” tweeted CNN host Jake Tapper on Thursday.

 - ◆ Rep. Denver Riggleman (R-Va.) told *Forbes* a “staggering number” of his Republican House colleagues will likely object, adding, “140 certainly seems possible... I wouldn't be surprised if it were a little higher.”

 - ◆ Riggleman said he initially expected around a hundred objections but that “pressure [is] being exerted” on House Republicans – as evidenced by state delegations putting out joint statements vowing to object to the vote.

 - ◆ “I would be getting pressure right now,” said Riggleman – who lost renomination to a right-wing challenger in June – adding that the vote to object “keeps their base happy, they know it'll keep the conference happy and they know it's not gonna win anyway.”

 - ◆ Riggleman said there is “not a whole lot of excitement for that vote” because most of his colleagues don't believe in the systemic fraud Trump has alleged, echoing Sen. Ben Sasse, who said, “When we talk in private, I haven't heard a single Congressional Republican allege that the election results were fraudulent – not one.”

 - ◆ Just one senator has confirmed they will join the effort: Sen. Josh Hawley (R-Mo.) said Wednesday he plans to object because “some states, particularly Pennsylvania, failed to follow their own state election laws” –
-

Page 2 | 1/1/2021

1/1/2021

At Least 140 House Republicans Expected To Challenge Electoral College Result

Hawley's plan to object is in defiance of Senate Majority Leader Mitch McConnell, who has instructed members of his caucus not to object to the electoral college because the eventual vote on whether to sustain objections would put Republican senators in a difficult position. Hawley was absent from a call with Republican senators Thursday morning in which McConnell hoped to challenge him on his position, according to *Politico* and *Axios*. Sen. Pat Toomey (R-Pa.) also opposes Hawley's move.

TANGENT

Just 49 Republican members of Congress have publicly acknowledged Biden as president-elect – 25 House members and 24 senators, including McConnell and Toomey. Biden said during an interview with Stephen Colbert earlier this month that several Republicans called him to ask for time to recognize his victory because they are in a “tough spot” politically.

BIG NUMBER

9. That's how many objections Biden himself – as President of the Senate – shut down during certification of Trump's victory at a joint session of Congress in 2017. All the objections came from House Democrats alleging Russian meddling, voter suppression and civil rights violations, but because none had a senator backing them, Biden repeatedly said the objections “cannot be entertained” and that there was “no debate.”

KEY BACKGROUND

The last time a senator and a House member teamed up to challenge an electoral college vote was 2005, when Sen. Barbara Boxer and Rep. Stephanie Tubbs Jones challenged President George W. Bush's 2004 victory in Ohio on the basis of civil rights violations. The objections precipitated two hours of debate in the House and one hour in the Senate before being rejected by wide margins in both chambers.

For a limited time

1/1/2021

At Least 140 House Republicans Expected To Challenge Electoral College Result

in debate but will undoubtedly be rejected by the Democrat-controlled House -- and, likely, the Republican-controlled Senate. Thus, certification of the result will be delayed but not thwarted.

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Andrew Solender

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I am a news reporter covering politics and the Biden transition. I have previously worked for MSNBC and Chronogram Magazine. I attended Vassar College and the London... **Read More**

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Byrd, 521 U.S. 811, 829 (1997).

The other Plaintiffs, the slate of Republican Presidential Electors for the State of Arizona (the “Nominee-Electors”), allege an injury that is not fairly traceable to the Defendant, the Vice President of the United States, and is unlikely to be redressed by the requested relief.

Accordingly, as explained below, the Court lacks subject matter jurisdiction over this case and must dismiss the action.

I.

A.

The Electors Clause of the U.S. Constitution requires that each state appoint, in the manner directed by the state’s legislature, the number of presidential electors to which it is constitutionally entitled. U.S. CONST. art. II, § 1, cl. 2. Under the Twelfth Amendment, each state’s electors meet in their respective states and vote for the President and Vice President. U.S. CONST. amend XII. The electors then certify the list of their votes and transmit the sealed lists to the President of the United States Senate—that is, the Vice President of the United States. The Twelfth Amendment then provides that, “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.” *Id.* A candidate winning a majority of the electoral votes wins the Presidency. However, if no candidate obtains a majority of the electoral votes, the House of Representatives is to choose the President—with each state delegation having one vote. *Id.*

The Electoral Count Act, informed by the Hayes-Tilden dispute of 1876, sought to standardize the counting of electoral votes in Congress. Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 547–50 (2004). Section 5 makes states' determinations as to their electors, under certain circumstances, "conclusive" and provides that these determinations govern the counting of electoral votes. 3 U.S.C. § 5. Section 15 requires a joint session of Congress to count the electoral votes on January 6, with the President of the Senate presiding. *Id.* § 15.

During that session, the President of the Senate calls for objections on the electoral votes. Written objections submitted by at least one Senator and at least one Member of the House of Representatives trigger a detailed dispute-resolution procedure. *Id.* Most relevant here, Section 15 requires both the House of Representatives and the Senate—by votes of their full membership rather than by state delegations—to decide any objection. The Electoral Count Act also gives the state governor a role in certifying the state's electors, which Section 15 considers in resolving objections. *Id.* § 6.

It is these dispute-resolution procedures that Plaintiffs challenge in this case.

B.

On December 14, 2020, electors convened in each state to cast their electoral votes. *Id.* § 7; Docket No. 1 ¶ 5. In Arizona, the Democratic Party's slate of eleven electors voted for Joseph R. Biden and Kamala D. Harris. These votes were certified by Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs and submitted as required under the Electoral Count Act. Docket No. 1 ¶ 22. That same

day, the Nominee-Electors state that they also convened in Arizona and voted for Donald J. Trump and Michael R. Pence. *Id.* ¶ 20. Similar actions took place in Georgia, Pennsylvania, Wisconsin, and Michigan (with Arizona, the “Contested States”). *Id.* ¶ 20–21. Combined, the Contested States represent seventy-three electoral votes. *See id.* ¶ 23.

On December 27, Plaintiffs filed this lawsuit, alleging that there are now “competing slates” of electors from the Contested States and asking the Court to declare that the Electoral Count Act is unconstitutional and that the Vice President has the “exclusive authority and sole discretion” to determine which electoral votes should count. *Id.* ¶ 73. They also ask for a declaration that “the Twelfth Amendment contains the exclusive dispute resolution mechanisms” for determining an objection raised by a Member of Congress to any slate of electors and an injunction barring the Vice President from following the Electoral Count Act. *Id.* On December 28, Plaintiffs filed an Emergency Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief (“Emergency Motion”). Docket No. 2. Plaintiffs request “an expedited summary proceeding” under Federal Rule of Civil Procedure 57. *Id.*

On December 31, the Vice President opposed Plaintiffs’ motion. Docket No. 18.

II.

As mentioned above, before the Court can address the merits of Plaintiff’s Emergency Motion, it must ensure that it has subject matter jurisdiction. *See, e.g., Cary*, 44 U.S. at 245 (“The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.”); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006)

“If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.”). Article III of the U.S. Constitution limits federal courts to deciding only “cases” or “controversies,” which ensures that the judiciary “respects ‘the proper—and properly limited—role of the courts in a democratic society.’” *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); see also *Raines*, 521 U.S. at 828 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974)) (“Our regime contemplates a more restricted role for Article III courts . . . ‘not some amorphous general supervision of the operations of government.’”).

“[A]n essential and unchanging part of the case-or-controversy requirement of Article III” is that the plaintiff has standing. *Lujan*, 504 U.S. at 560. The standing requirement is not subject to waiver and requires strict compliance. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *Raines*, 521 U.S. at 819. A standing inquiry is “especially rigorous” where the merits of the dispute would require the Court to determine whether an action taken by one of the other two branches of the Federal Government is unconstitutional. *Raines*, 521 U.S. at 819–20 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986), and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & St., Inc.*, 454 U.S. 464, 473–74 (1982)). This is because “the law of Art. III standing is built on a single basic idea—the idea of separation of powers.” *Allen*, 468 U.S. at 752, *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Article III standing “enforces the Constitution’s case-or-controversy requirement.”

DaimlerChrysler Corp., 547 U.S. at 342 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). And “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines*, 521 U.S. at 818.

Article III standing requires a plaintiff to show: (1) that he “has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”; (2) that “the injury is fairly traceable to the challenged action of the defendant”; and (3) that “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *El Paso Cnty. v. Trump*, 982 F.3d 332, 336 (5th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). “The party invoking federal jurisdiction bears the burden of establishing these elements,” and “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Id.*

III.

Here, Plaintiffs have failed to demonstrate that they have standing to bring the claim alleged in Count I of their complaint.

A.

The first Plaintiff is the Representative for Texas’s First Congressional District, the Honorable Louie Gohmert. Congressman Gohmert argues that he will

be injured because “he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment.” Docket No. 2 at 4. Specifically, Congressman Gohmert argues that on January 6, 2021, when Congress convenes to count the electoral votes for President and Vice President, he “will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States.” Docket No. 1 ¶ 6. If a member of the Senate likewise objects, then under Section 15 of the Electoral Count Act, each member of the House and Senate is entitled to vote to resolve the objections, which Congressman Gohmert argues is inconsistent with the state-by-state voting required under the Twelfth Amendment. Docket No. 2 at 5. Congressman Gohmert argues that the Vice President’s compliance with the procedures of the Electoral Count Act will directly cause his alleged injury. *Id.* at 7. And he argues that a declaration that Sections 5 and 15 of the Electoral Count Act are unconstitutional would redress his alleged injury. *Id.* at 9–10.

Congressman Gohmert’s argument is foreclosed by *Raines v. Byrd*, which squarely held that Members of Congress lack standing to bring a claim for an injury suffered “solely because they are Members of Congress.” 521 U.S. at 821. And that is all Congressman Gohmert is alleging here. He does not identify any injury to himself as an individual, but rather a “wholly abstract and widely dispersed” institutional injury to the House of Representatives. *Id.* at 829. Congressman Gohmert does not allege that he was “singled out for specially unfavorable treatment as opposed to other Members of their respective bodies,” does not claim that he has

“been deprived of something to which [he] *personally* [is] entitled,” and does not allege a “loss of any private right, which would make the injury more concrete.” *Id.* at 821 (emphasis in original). Congressman Gohmert’s alleged injury is “a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress.” *Id.* Under these circumstances, the Supreme Court held in *Raines*, a Member of Congress does not have “a sufficient ‘personal stake’” in the dispute and lacks “a sufficiently concrete injury to have established Article III standing.” *Id.* at 830.

For the first time in their reply brief, Plaintiffs assert that Congressman Gohmert has standing as a Texas voter, relying on *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011). Docket No. 30 at 30, 33–34. The Court disagrees. In *LULAC*, the Fifth Circuit held that an individual voter had standing to challenge amendments to the City of Boerne’s city council election scheme that would allegedly deprive him of a “pre-existing right to vote for certain offices.” 659 F.3d at 430. That is not the case here. Congressman Gohmert does not allege that he was denied the right to vote in the 2020 presidential election. Rather, he asserts that under the Electoral Count Act, “he will not be able to vote *as a Congressional Representative* in accordance with the Twelfth Amendment.” Docket No. 2 at 4 (emphasis added). Because Congressman Gohmert is asserting an injury in his role as a Member of Congress rather than as an individual voter, *Raines* controls.

Further weighing against Congressman Gohmert's standing here is the speculative nature of the alleged injury. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); see also *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (alleged injury cannot be "conjectural" or "hypothetical"). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409 (quoting *Lujan*, 504 U.S. at 565 n.2).

Here, Congressman Gohmert's alleged injury requires a series of hypothetical—but by no means certain—events. Plaintiffs presuppose what the Vice President will do on January 6, which electoral votes the Vice President will count or reject from contested states, whether a Representative and a Senator will object under Section 15 of the Electoral Count Act, how each member of the House and Senate will vote on any such objections, and how each state delegation in the House would potentially vote under the Twelfth Amendment absent a majority electoral vote. All that makes Congressman Gohmert's alleged injury far too uncertain to support standing under Article III. *Id.* at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

Accordingly, the Court finds that Congressman Gohmert lacks standing to bring the claim alleged here.

B.

The Nominee-Electors argue that they have standing under the Electors Clause “as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party’s President and Vice President is cast for the Republican Presidential Electors.” Docket No. 2 at 6 (citing ARIZ. REV. STAT. § 16-212). The Nominee-Electors were injured, Plaintiffs contend, when Governor Ducey unlawfully certified and transmitted the “competing slate of Biden electors” to be counted in the Electoral College. *Id.* at 7.

This alleged injury, however, is not fairly traceable to any act of the Vice President. Nor is it an injury likely to be redressed by a favorable decision here. *See Friends of the Earth*, 528 U.S. at 180–81.¹ Plaintiffs do not allege that the Vice President had any involvement in the “certification and transmission of a competing

¹ The Court need not decide whether the Nominee-Electors were “candidates” under Arizona law. Plaintiffs cite *Carson v. Simon*, in which the Eighth Circuit held that prospective presidential electors are “candidates” under Minnesota law and have standing to challenge how votes are tallied in Minnesota. 978 F.3d 1051, 1057 (8th Cir. 2020). But the U.S. District Court for the District of Arizona has distinguished *Carson*, holding that presidential electors in Arizona are ministerial and are “not candidates for office as the term is generally understood” under Arizona law. *Bowyer v. Ducey*, — F. Supp. 3d —, 2020 WL 7238261, at *4 (D. Ariz. Dec. 9, 2020); *see also Feehan v. Wis. Elections Comm’n*, No. 20-CV-1771-PP, 2020 WL 7250219, at *12 (E.D. Wis. Dec. 9, 2020) (nominee-elect is not a candidate under Wisconsin law). “Arizona law makes clear that the duty of an Elector is to fulfill a ministerial function, which is extremely limited in scope and duration, and that they have no discretion to deviate at all from the duties imposed by the statute.” *Bowyer*, 2020 WL 7238261, at *4 (citing ARIZ. REV. STAT. § 16-212(c)). Arizona voters, moreover, vote “for their preferred presidential candidate,” not any single elector listed next to the presidential candidates’ names. *Id.* (citing ARIZ. REV. STAT. § 16-507(b)). The court in *Bowyer* therefore held that nominee-electors in Arizona lacked standing to sue state officials for alleged voting irregularities. *See id.* In any event, even if the Nominee-Electors had standing to sue state officials to redress the injury alleged here, they have not done so. Plaintiffs have named only the Vice President, and they have not shown “a fairly traceable connection between [their] injury and the complained-of conduct of defendant.” *E.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998).

slate of Biden electors.” Docket No. 2 at 7. Nor could they. *See* 3 U.S.C. § 6. That act is performed solely by the Arizona Governor, who is a “third party not before the court.” *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)). Indeed, Plaintiffs acknowledge that their injury was caused by Arizona officials in Arizona, the “Vice President did not cause [their] injury,” and their “unlawful injuries [were] suffered in Arizona.” Docket No. 2 at 7.

The Nominee-Electors argue that their injury is nevertheless fairly traceable to the Vice President because he will “ratify and purport to make lawful the unlawful injuries that Plaintiffs suffered in Arizona.” *Id.* For support, Plaintiffs cite *Sierra Club v. Glickman*, in which the Fifth Circuit held that an environmental injury was fairly traceable to the Department of Agriculture, even though the injury was directly caused by third-party farmers, because the Department had “the ability through various programs to affect the pumping decisions of those third party farmers to such an extent that the plaintiff’s injury could be relieved.” 156 F.3d 606, 614 (5th Cir. 1998). Nothing like that is alleged here. The Vice President’s anticipated actions on January 6 will not affect the decision of Governor Ducey regarding the certification of presidential electors—which occurred more than two weeks ago on December 14. Even “ratifying” or “making lawful” the Governor’s decision, as Plaintiffs argue will occur here, will not have any “coercive effect” on Arizona’s certification of electoral votes. *See Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

For similar reasons, the Nominee-Electors’ claimed injury is not likely to be redressed here. To satisfy redressability, Plaintiffs must show that it is “likely” their

alleged injury will be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 561. But here, Plaintiffs seek declaratory and injunctive relief as to the manner of the Vice President’s electoral vote *count*. See Docket No. 1 ¶ 73. Such relief will not resolve their alleged harm with respect to Governor Ducey’s electoral vote *certification*. See Docket No. 2 at 7. As the Supreme Court has long held, “a federal court can act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Simon*, 426 U.S. at 41–42; see also *El Paso Cnty.*, 982 F.3d at 343 (plaintiff lacks standing where an order granting the requested relief “would not rescind,” and “accordingly would not redress,” the allegedly harmful act).

Even if their injury were the loss of the right to vote in the Electoral College, see Docket No. 2 at 6, Plaintiffs’ requested relief would not redress that injury. Plaintiffs are not asking the Court to order the Vice President to count the Nominee-Electors’ votes, but rather that the Vice President “exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State,” or alternatively, to decide that no Arizona electoral votes should count. See Docket No. 1 ¶ 73. It is well established that a plaintiff lacks standing where it is “uncertain that granting [the plaintiff] the relief it wants would remedy its injuries.” *Inclusive Comtys. Project, Inc. v. Dep’t of Treasury*, 946 F.3d 649, 657–58 (5th Cir. 2019).

Accordingly, the Court finds that the Nominee-Electors lack standing.²

² Plaintiffs Hoffman and Kern claim without supporting argument that they have standing as members of the Arizona legislature. Docket No. 2 at 4. This claim fails for the reasons Congressman Gohmert’s standing argument fails. See *supra* Part III.A.

IV.

Because neither Congressman Gohmert nor the Nominee-Electors have standing here, the Court is without subject matter jurisdiction to address Plaintiffs' Emergency Motion or the merits of their claim. *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 202 (5th Cir. 2018). The Court therefore **DISMISSES** the case without prejudice.

So **ORDERED** and **SIGNED** this 1st day of **January, 2021**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE