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13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF WASHINGTON**
15 **AT YAKIMA**

16 STATE OF WASHINGTON, et al.,

17 Plaintiffs,

18 v.

19 DONALD J. TRUMP, et al.,

20 Defendants.

NO. 1:20-cv-03127-SAB

PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO
CLARIFY THE PRELIMINARY
INJUNCTION

NOTED FOR: October 2, 2020
Without Oral Argument

1 **I. INTRODUCTION**

2 Defendants moved to clarify the Court’s preliminary injunction, maintaining
3 that some aspects of the Court’s order could be interpreted to cause an overall
4 degradation in service or to create obligations that cannot be fulfilled. The States
5 of course would not support such an interpretation, and the States are therefore
6 submitting an alternative proposed order on which the parties have now conferred.
7 Defendants do not oppose the entry of Plaintiffs’ proposed order.¹ The States
8 therefore propose that the Court clarify its preliminary injunction according to the
9 terms of their proposed order, submitted herewith.

10 **II. ARGUMENT**

11 **A. Requested Clarification Regarding Transportation Schedules**

12 The Court ordered that Defendants DeJoy and USPS (collectively USPS) be
13 enjoined from “continued implementation or enforcement of policy changes
14 announced in July 2020 that have slowed mail delivery, including: (i) instructing
15 mail carriers to leave mail behind for processing or delivery at a later date; (ii)
16 requiring mail carriers or delivery trucks to leave at set times regardless of whether
17 the mail is actually ready; (iii) prohibiting or unreasonably restricting return trips
18 to distribution centers, if necessary, to complete timely mail delivery; and (iv)
19 taking any actions to implement or enforce the operational changes outlined in the
20 USPS’s ‘Mandatory Stand-Up Talk: All Employees,’ dated July 10, 2020[.]” ECF
21 No. 81 (PI Order) at 12.

22 In his supplemental declaration submitted in support of Defendants’ Motion
23 to Clarify, USPS Vice President for Logistics Robert Cintron asserts that “[t]he
24

25 ¹ Defendants also specified that they are preserving their right to appeal the
26 preliminary injunction.

1 Postal Service *has not* and will not ban the use of late or extra trips in its
2 transportation network.” ECF No. 83-2 (2d Supp. Cintron Decl.), ¶ 7 (emphasis
3 added). Notably, however, the July 10, 2020 Mandatory Stand-Up Talk referenced
4 in the Court’s order mandated that late and extra trips were “no longer authorized
5 or accepted,” and as of early September, a banner hung in an Oregon plant banning
6 all late trips, as cited in the States’ reply brief and referenced in the Court’s order.
7 *See* ECF No. 55-2 at 2; ECF No. 79 at 9; PI Order at 10.

8 USPS’s Motion to Clarify requested that the Court’s order be modified to
9 provide that USPS is not required to hold trucks “where waiting for a small amount
10 of mail will cause the delay of a greater volume of mail, resulting in an overall
11 delay in the delivery of mail.” ECF No. 83 (Mtn. to Clarify) at 9. Specifically, they
12 asked that the Court’s injunction be modified to say that “the Postal Service is not
13 required to delay a trip when the impact of the delay will be an overall degradation
14 in service, *e.g.*, in order to prevent a small amount of mail from being delayed if
15 doing so would cause a larger amount of mail to be delayed.” *Id.* at 10. Defendants
16 pointed to two potential scenarios wherein waiting for a small amount of mail
17 could prevent a truck from: (1) making an air transportation connection, or (2)
18 reaching a delivery unit by the time when letter carriers “must leave the facility in
19 order to safely and efficiently deliver mail along their routes.” *Id.* at 11; 2d Supp.
20 Cintron Decl., ¶¶ 14-15. Notably, it is not clear how the latter scenario would
21 square with the Court’s order that USPS cannot require “mail carriers ... to leave
22 at set times regardless of whether the mail is actually ready[.]” PI Order at 12.

23 In any event, the States of course do not want or intend that any aspect of
24 the Court’s order be interpreted to cause an overall degradation in service. At the
25 same time, USPS’s own materials indicate that the circumstance USPS is
26 concerned about here will be rare and that “extra trips can often remedy at least

1 some of this delay,” though “there are circumstances ‘when extra trips are not
2 feasible,’ such as where contractors have no trucks available.” Mtn. to Clarify at
3 10.

4 The States therefore ask that the Court enter the clarification contained in
5 the States’ proposed order, which Defendants do not oppose, and which provides
6 that the Postal Service is not required to delay a trip when the impact of the delay
7 will be an overall degradation in service, e.g., in order to prevent a small amount
8 of mail from being delayed if doing so would cause a larger amount of mail to be
9 delayed, but that the Postal Service shall use extra trips to minimize the effect of
10 such delays and to meet service commitments, except when not feasible. “[E]xtra
11 trips that are reasonably necessary to complete timely mail delivery [are] not to be
12 unreasonably restricted or prohibited,” as the Postal Service committed to in its
13 September 21, 2020 memorandum to employees.²

14 **B. The Requested Clarification Regarding Delivery of Election Mail by Air**

15 The Court ordered that USPS is enjoined from “deviating from the USPS’s
16 long-standing policy of treating election mail in accordance with First Class Mail
17 delivery standards, regardless of the paid class[.]” PI Order at 12. USPS’s Motion
18 to Clarify requested that the Court’s order be modified to provide that USPS is “not
19 required to ship Election Mail sent as Marketing Mail by air.” Mtn. to Clarify at
20 13. USPS asserts that practical barriers prevent it from identifying Election Mail
21 amongst other Marketing Mail for air transportation “at the scale required by the
22 Court’s order.” *Id.* at 12. USPS maintains that this would only affect Election Mail
23 entered as Marketing Mail that is “traveling long distances.” *Id.* at 13.

24
25 ² U.S. Postal Service, *Clarifying Operational Instructions*, Sept. 21, 2020
26 (submitted as Grunberg Decl., Ex. C).

1 The States' priority for Election Mail has always been timely delivery, not
2 mandating a specific transportation mechanism. Given the limited time available
3 to respond to USPS's motion and the lack of additional discovery, the States are
4 unable to assess the credibility of Defendants' claims that "technical reasons"
5 prevent the Postal Service from transporting Election Mail entered as Marketing
6 Mail by air, and that "it is not possible to implement [contemplated] solutions this
7 close to an election." *Id.* at 12-13. The Postal Service's original proposed
8 clarification did not specifically address the possibility of using Priority Mail
9 Express ground transportation for Election Mail that has to be transported long
10 distances, as contemplated by the agreed order entered by the U.S. District Court
11 for the Southern District of New York on September 25, 2020, which provided that
12 "USPS will employ special individualized measures to expedite handling of
13 individual voter ballots mailed close to Election Day, regardless of paid class,
14 which may include manually separating them and moving them by air or according
15 to Priority Mail Express delivery speed standards, consistent with practices used
16 in past elections."³ This is consistent with the Postal Service's own September 25,
17 2020 memorandum regarding Election Mail, which committed to using
18 "extraordinary measures beyond our normal course of operations" and "consistent
19 with our practices in past election cycles" to "accelerate the delivery of ballots,"
20 including but not limited to "Priority Mail Express, Sunday deliveries, special
21 deliveries, running collected ballots to Boards of Elections on Election Day, etc."⁴

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23 ³ See *Jones et al. v. U.S. Postal Service et al.*, No. 20 Civ. 6516 (VM) (Sept.
24 25, 2020 Order), ECF No. 57 (Grunberg Decl., Ex. A).

25 ⁴ U.S. Postal Service, *Additional Resources for Election Mail Beginning*
26 *October 1*, Sept. 25, 2020 (Grunberg Decl., Ex. B).

1 The States propose that the Court could address the concerns of both parties
2 by entering the clarification contained in the States’ proposed order, which
3 Defendants do not oppose, and which provides that the Postal Service is required
4 to ensure that Election Mail “is generally delivered in line with First-Class Mail
5 delivery standards,” as the Postal Service committed to in its September 25, 2020
6 memorandum to employees⁵, but the Court need not specify that Election Mail
7 entered as Marketing Mail be shipped by any particular means (such as by air). To
8 facilitate this goal, the Postal Service will, as it has promised, take “extraordinary
9 measures” “between October 26 and November 24, to accelerate the delivery of
10 ballots, when the Postal Service is able to identify the mailpiece as a ballot. These
11 extraordinary measures include, but are not limited to, expedited handling, extra
12 deliveries, and special pickups as used in past elections, to connect blank ballots
13 entered by election officials to voters or completed ballots returned by voters
14 entered close to or on Election Day to their intended destination (e.g., Priority Mail
15 Express, Sunday deliveries, special deliveries, running collected ballots to Boards
16 of Elections on Election Day, etc.).”^{6, 7}

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20 ⁵ *See id.*

21 ⁶ *See id.*

22 ⁷ The States have no objection to Defendants’ expressed understanding of
23 the term Election Mail to mean “any item mailed to or from authorized election
24 officials that enables citizens to participate in the voting process, including ballots,
25 voter registration forms, ballot applications, polling place notifications, and similar
26 materials.” Mtn. to Clarify at 11.

1 **C. Requested Clarification Regarding “Dismantled” Machines**

2 The Court ordered that “[i]f any post office, distribution center, or other
3 postal facility will be unable to process election mail for the November 2020
4 election in accordance with First Class delivery standards because of the Postal
5 Service’s recent removal and decommissioning of equipment, such equipment will
6 be replaced, reassembled, or reconnected to ensure that the Postal Service can
7 comply with its prior policy of delivering election mail in accordance with First
8 Class delivery standards[.]” PI Order at 12-13. USPS’s Motion to Clarify asked the
9 Court to clarify that under this provision, it is required only to return “available
10 processing equipment to service,” defined as “machines that were disconnected,
11 but not dismantled.” Mtn. to Clarify at 14-15.

12 At the moment, this appears to be a theoretical concern, given USPS’s
13 representation that it has “‘more than sufficient capacity to process current and
14 anticipated mail volumes with the existing machine fleet,’ and therefore does not
15 expect the availability of machines to be an issue.” *Id.* at 15. If it becomes apparent,
16 at a later point, that USPS cannot comply with the injunction’s terms concerning
17 the treatment of Election Mail without replacing or reassembling equipment that
18 has been dismantled, USPS can return to the Court to request appropriate relief,
19 and the Court can assess that request on its merits.

20 The States therefore propose, and Defendants do not oppose, that the Court
21 deny Defendants’ proposed clarification to Paragraph 3 of the Preliminary
22 Injunction, without prejudice to the same arguments being raised again in the
23 future.

24 The States also note that Paragraph 3 of the Court’s order additionally
25 requires USPS to present to the Court any request from a local facility to reconnect
26 or replace a decommissioned or removed machine within three days of the request,

1 if USPS has not already approved the request. PI Order at 13. Given the likelihood
2 that a local facility manager is best placed to understand the practicalities of
3 reconnecting a particular machine prior to making such a request, the States submit
4 that this provision should continue to apply regardless of whether USPS considers
5 the subject of the request for approval to be a machine that has been “disconnected”
6 or “dismantled.”

7 **III. CONCLUSION**

8 For the foregoing reasons, the Plaintiff States respectfully request that,
9 should the Court grant in part Defendants’ Motion to Clarify, it do so in accordance
10 with the clarifications set forth in the States’ proposed order submitted herewith,
11 which Defendants do not oppose.

12 DATED this 1st day of October, 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 1st day of October, 2020, at Tumwater, Washington.

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