

Multiple Documents

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1	55 pages
2	Defs.' Resp. to Pls.' Statement of Facts
3	Text of Proposed Order

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

State of New York, *et al.*,

Plaintiffs,

v.

Trump, *et al.*,

Defendants.

Civil Docket No. 20-cv-2340 (EGS)

**MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Even with the benefit of multiple document productions and interrogatory responses from the United States Postal Service (“USPS”), and multiple depositions of key USPS personnel, Plaintiffs remarkably cannot produce a single piece of concrete evidence that USPS actually adopted the lion’s share of the alleged policy changes at issue in this litigation. From the start, Plaintiffs proclaimed that USPS imposed a cap on overtime, yet they refer to no document or testimony confirming that this alleged policy ever took effect, nor do they deny that USPS employees continue to use overtime today. Plaintiffs also assert that USPS prohibited late and extra trips by mail trucks, but instead of citing to a formal written policy imposing this prohibition, Plaintiffs principally rely on an informal guidance document that does precisely the opposite: explaining when late and extra trips *should* be used. And like overtime, USPS employees also continue to use late and extra trips.

But even assuming Plaintiffs could point to factual evidence in support of their legal theories, those theories fail as a matter of law and Defendants are therefore entitled to judgment on all of Plaintiffs’ claims. *First*, Plaintiffs do not have standing to bring suit. Plaintiffs’ theories of injury all hinge on the assertion that the alleged USPS policy changes at issue contribute to material mail delays. But even though Defendants have responded to multiple preliminary injunctions by issuing guidance to undo any of these purported changes, Plaintiffs stress that mail delays have continued, demonstrating that these alleged policy changes were not the driving cause of prior mail delays. And even if they were, Plaintiffs cannot establish that these future mail delays will be of a sufficient magnitude and duration to impose any material impact on Plaintiffs in particular.

Second, Plaintiffs fail to establish a claim under section 3661 of the Postal Reorganization Act (“PRA”). As a threshold matter, the PRA divests district courts of jurisdiction over section 3661 claims by channeling those claims to the Postal Regulatory Commission (“PRC”), whose decisions are then subject to review in a federal appellate court. Plaintiffs cannot circumvent this exhaustive statutory procedure by immediately bringing suit in district court. But even if they could, Plaintiffs cannot establish a viable section 3661 claim. No statute creates a cause of action for alleged violations of this provision, and thus Plaintiffs must bring an *ultra vires* claim, which one court has called a “Hail Mary Pass” since it requires a plaintiff to establish a *clear* and *unequivocal* statutory violation. Plaintiffs cannot meet this standard. A violation of section 3661 cannot be “clear” since its terms are broad and ambiguous, requiring USPS to present a proposed policy to the PRC only if the policy represents a “change” to the “nature of postal services” that has “nationwide” effects. Indeed, the USPS’s Office of Inspector General recently concluded that USPS was *not* required to seek an advisory opinion for any of the alleged changes. Thus, at the very least, this question is debatable, and so Plaintiffs cannot establish the clear violation necessary for an *ultra vires* claim.

Third, Plaintiffs also fail to establish a claim under sections 101 and 403 of the PRA. Neither of those provisions provide Plaintiffs with a cause of action to challenge operational decisions of the Postal Service, and thus Plaintiffs must again rely on the *ultra vires* doctrine. But the broad statements of policy of sections 101 and 403, which leave significant room for agency discretion, are not reviewable under the *ultra vires* doctrine. And even if they were, Plaintiffs again cannot show that USPS violated any clear and unequivocal statutory command.

Fourth, Plaintiffs cannot establish an Elections Clause claim. As an initial matter, even if Plaintiffs could demonstrate some injury and legal basis that would entitle them to judgment on

their claims about general mail delays, they certainly cannot demonstrate that a live dispute remains over this claim at this stage of the litigation. The briefing on the cross-motions will conclude the day before the election. If the Court rules on or after Election Day, or orders additional relief that USPS cannot feasibly implement in time to have an appreciable effect on the November 2020 election, the Court cannot provide relief that addresses any of the alleged injuries underlying the Elections Clause claim.

But even if there were a live dispute, Plaintiffs' unprecedented legal theory is meritless. It assumes that because the Plaintiff States crafted their election laws with the expectation that USPS will provide a certain level of service, they now have a *Constitutional right* to expect that level of service. But this is inconsistent with binding Elections Clause precedent, which makes clear that this provision empowers States to enact procedural rules governing how their citizens may legally vote; it does not shield States from any and all external circumstances that may impact State elections. And Plaintiffs' novel reading of the Elections Clause would produce a number of absurd consequences. For one, in the future, States could challenge *any* delay in USPS performance—regardless of its cause—on the grounds that the delay would impact the next election cycle. Plaintiffs' position would also allow States to challenge any number of government policies that may have some incidental effect on elections. The Court should therefore reject Plaintiffs' expansive reading of the Elections Clause, which finds no support in the provision's text or the relevant case law.

Further, if the Court concludes that Plaintiffs are entitled to judgment on one or more of their claims, Plaintiffs' requested injunction is insufficiently precise to meet F.R.C.P. 65(d) requirements. Plaintiffs ask the Court to issue a multi-part, amorphous injunction prohibiting USPS from implementing certain policies, without specifically identifying what those policies are;

e.g., the proposed injunction would stop USPS from implementing “a new effort to reduce work hours, especially overtime,” without identifying the specific “effort” at issue. Accordingly, the Court should deny Plaintiffs’ motion for a preliminary injunction, and grant USPS’s cross-motion for summary judgment.

BACKGROUND

I. The United States Postal Service

USPS is a self-supporting, independent establishment of the executive branch, responsible for providing postal services throughout the United States. It is one of the nation’s largest and most complex business operations. USPS employs more than 630,000 employees; operates more than 31,000 Post Offices; utilizes more than 204,000 delivery vehicles and 8,500 pieces of automated processing equipment; and typically processes and delivers more than 450 million mailpieces to nearly 160 million delivery points in a single day. *See* Ex. 1 (USPS FY2019 Annual Report to Congress) at 2, 7.

II. The Challenged Policies.

Plaintiffs challenge five alleged USPS policy changes. These include “(1) increased reduction of high-speed sorting machines without local input; (2) a new effort to reduce work hours, especially overtime; (3) the first-ever organization-wide policy to eliminate late and extra trips; (4) a new initiative altering letter carrier workflows to reduce work hours; and (5) the decision not to treat all election mail entered as marketing mail on an expedited First Class basis.” *See* Pls.’ Mem. of Law in Supp. Of Summ. J. (“MSJ”) at 3, ECF No. 60.

As explained below, many of the alleged policies that Plaintiffs challenge here and in related cases (such as an alleged elimination of overtime) were never in fact USPS policies, or have been policies since long before Postmaster General DeJoy’s tenure began. In any event, USPS

has now issued clarifying instructions addressing all of the purported policies challenged in the Complaint, rendering moot any dispute over whether those policies previously existed.

a. Alleged Decommissioning of Letter Sorting Machines

USPS regularly identifies mail processing and sorting equipment in approximately 289 mail processing facilities for removal and/or replacement. *See* Declaration of Jason DeChambeau (“DeChambeau Dec.”) ¶ 7; Declaration of Kevin Couch (“Couch Dec.”) ¶ 3; Declaration of Robert Cintron (“Cintron Dec.”) ¶ 5. Based on its data analyses, USPS has been steadily reducing its letter and flat mail processing equipment for many years. DeChambeau Dec. ¶ 7. It does so for many reasons, including removing and replacing older machines with improved technology, or when such machines are no longer necessary given the significantly reduced volume of mail over the past decade, as well as even larger reduced mail volumes of approximately 20 percent due to COVID-19, that the Postal Service does not expect to return after the pandemic. *Id.*; *see also id.* ¶ 8. Maintaining underutilized machines is inefficient and costly, requiring extra and unnecessary staffing and transportation resources. *Id.* ¶¶ 9, 11, 12. And removing unnecessary letter and flat machines frees up space for package processing, the volume of which is increasing substantially. *Id.* ¶ 18.

For years, the Postal Service has reduced the number of machines on an annual basis. *Id.* ¶ 13. This is a model-driven process, where the Postal Service “determine[s] the optimum number of machines required for efficient mail processing at facilities across the nation.” *Id.* ¶¶ 15, 16. Consistent with that process, USPS began Phase 6 of its reduction initiative in May 2020, based on its conclusion that the significant decline in letter and flat mail volume that had been accelerated by the COVID-19 pandemic was unlikely to significantly change, and the increase in package volume would continue. *Id.* ¶ 19. Accordingly, USPS reduced a total of 711 machines in Fiscal

Year 2020, more than the average of 388 machines per year over the last five years, *id.* ¶ 13, but less than the highest year, Fiscal Year 2016, where 1,120 machines were removed. *Id.* ¶ 21. And, removal of 711 machines out of a remaining fleet of 8,500 machines in light of a 20 percent decline in volume amounts to a reduction in machines of only approximately 7 percent. Even with those removals, the Postal Service still has ample excess machine capacity; “machine processing utilization at the national level ranges from 35 percent (when mail volume on a given day is low) to 65 percent (when mail volume on a given day is at its highest). In other words, machines have a range from 35 percent to 65 percent unused capacity. Barber Dec. ¶ 6. Furthermore, local facilities may provide input into the machine removal process. *See* DeChambeau Dec. ¶ 14 (“Headquarters tracked the progress of reductions weekly and addressed any area requests for a deviation from the plan, such as delays in removing machines.”).

On August 18, 2020, Postmaster General DeJoy ordered that all removals of equipment be suspended until after the Election. *See* Ex. 6 (Statement of Postmaster General Louis DeJoy (Aug. 18, 2020)) at 1; DeChambeau Dec. ¶ 22; Couch Dec. ¶¶ 13-15.

b. Overtime and Unearned Time.

USPS’s overtime practices, where overtime is generally approved by local field managers (not Headquarters personnel), have remained unchanged since Postmaster General DeJoy took office. *See* Declaration of Angela Curtis (“Curtis Dec.”) ¶¶ 12, 22-23; Declaration of Joshua Colin, Ph.D. (“Colin Dec.”) ¶¶ 3-4.¹ Postmaster General DeJoy clarified that he never banned overtime,

¹ Because the issues here are largely the same, and in the interest of efficiency, Defendants also rely here on the declarations filed in support of Defendants’ preliminary injunction briefing in *Jones*, No. 1:20-cv-06516 (S.D.N.Y.).

and continues to approve of its appropriate use.² *See, e.g.*, Ex. 9 (Transcript of House Oversight and Reform Committee on Postal Service Operational Changes Hearing (Aug. 24, 2020)) 14.

The Postal Service has also continued a long-running process to reduce “unearned time,” which is the “time that an employee takes to complete those duties over and above the earned time.” Curtis Tr: 53:21-23. (Earned time refers to the fact that, pursuant to collective bargaining agreements, the Postal Service assigns specific tasks particular times to complete – “earned” time is the time in which those employees are expected to complete the task. *Id.* 52:11-24). USPS had nearly one million unearned supervisor hours through 2020. *Id.* 68:8-11. In the summer of 2020, USPS began a process to “[ake] a look at the data again around this particular topic,” and have more conversations about more efficiently scheduling employees to reduce unnecessary unearned hours. *Id.* 76-77.

c. Late and Extra Trips.

For years, the Postal Service has sought to improve compliance with USPS’s long-established delivery schedules. *See* Cintron Dec. ¶¶ 1, 11-13, 21; Cintron Dep. Tr. at 22:9-23 (“So has the Postal Service ever issued any guidance about the need to adhere to transportation schedules? . . . I would say over the last two years it’s kind of been a focal point of mine in my previous job and now in this position. . . . It’s been my area of focus both for lates and extras in the network over the last couple of years.”). When Postmaster General DeJoy took office in June 2020, Mr. Cintron discussed the initiative with the Postmaster General and other Postal executives. Cintron Dec. ¶¶ 22-23. Concurrent with these discussions, the USPS Office of Inspector General

² Further, after the court in *Washington* issued a nationwide injunction on September 17, 2020, USPS issued instructions clarifying that Postal Service Headquarters has not imposed, and will not impose, any nationwide changes of any kind that would ban or newly restrict overtime prior to Election Day. *See* Ex. 3 Clarifying Operational Instructions (Sept. 21, 2020) (“Instructions”) ¶ 1. USPS has reiterated this message several times in response to other preliminary injunctions.

(OIG) published a report addressing “late deliveries . . . late dispatch, extra trips, and all the time and costs” that those issues caused. *See* Ex. 13 (Testimony of Postmaster General Louis DeJoy Before the Senate Homeland Security and Governmental Affairs Committee on USPS Operations During COVID-19 and the Elections) at 10. In that report, OIG found that “generally, the Postal Service’s processing network is not operating at optimal efficiency.” Ex. 14 (USPS OIG Audit Report No. 19XG013NO00O-R20, “U.S. Postal Service’s Processing Network Optimization and Service Impacts” (June 16, 2020)) at 1. In particular, “mail processing operations were not completed on time and mail missed its last scheduled transportation trip. In response, management used overtime . . . and either delayed the scheduled transportation trip or called for an extra trip.” *Id.* at 2. Among interrelated problems, “[a]bout 20 percent of total transportation trips (or four million trips) left mail processing facilities late.” *Id.* Soon after joining USPS, Postmaster General DeJoy reemphasized the need to adhere to USPS’s existing operational plans, including transportation schedules. Cintron Dec. ¶ 23.

A locally-prepared memorandum titled “Mandatory Stand-Up Talk: All Employees” was produced on July 10, 2020, and suggested, incorrectly, that late and extra trips were not permitted. *See* Cintron Dec. ¶ 24 n.1. Although the July 10 memorandum drew from a teleconference discussion conducted between regional and Headquarters officials, it was not created, reviewed, or approved by USPS Headquarters, and did not reflect USPS policy. *See* Supplemental Declaration of Robert Cintron (“Supp. Cintron Dec.”) ¶¶ 3-4. Thus, “[s]tarting on July 11, 2020, in light of some confusion in the field about the scope of USPS policy, members of Headquarters begin to issue clarifications of USPS policy, including with [Area Vice Presidents] making clear that certain statements in the July 10, 2020 [memorandum] were not accurate statements of USPS policy.” *Id.* This included clarifying the circumstances where extra trips were permissible. *Id.* ¶ 4.

Late and extra trips were not (and are not) banned, and USPS employees continue to use both today. *See, e.g., Pennsylvania v. DeJoy*, 20-cv-04096, ECF No. 76-2 (E.D. Pa. Oct. 16, 2020) (on October 13, 2020 alone, 2298 late trips and 935 extra trips were utilized by USPS employees).

Mr. Cintron and his team then developed written guidelines (generally consistent with past practices) regarding the circumstances where the scheduling of extra transportation trips is appropriate. *See* Cintron Dec. ¶ 24 & Ex. 2. On July 14, 2020, the guidelines were distributed to area executives, advising them of USPS's renewed effort to limit unplanned extra and underutilized trips. *Id.* ¶ 25. Importantly, these guidelines did not ban or set a firm limit on late and extra trips. *See* Cintron Dep. 60–61 (explaining guidelines); *id.* 63:25-65:9 (“We didn’t ban extras and lates. These guidelines were purposefully put in place to make sure that we didn’t have any disruption in service. Extras and lates are going to run every single day in this network. There is no way that we are going to be able to eliminate them. It’s too large a network. So there is going to be a failure somewhere, and so extras and lates are put in place to mitigate.”); *id.* at 89:13–20 (guidelines are guidance “to tell you . . . you should be using the lates and extras); Second Declaration of Joshua Colin (“Second Colin Dec.”) ¶ 17 & Exs. 1, 2 (clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance). Indeed, the purpose was not even to minimize such trips, but rather to avoid “occurrences where it doesn’t make any sense” to have extra or late trips, because such a trip would not actually advance the mail any faster than simply following the schedule. *Id.* 65:2-10. Late and extra trips may often contribute to mail delays, and thus the guidelines aimed to increase overall service performance scores. *See* Third Declaration of Robert Cintron (“Third Cintron Dec.”) ¶¶ 3-4.

Moreover, although USPS witnessed a decline in service standards in mid-July 2020, there is no indication that this was attributable to a decrease in late and extra trips alone. Rather, the decline in service was likely caused by the initial failure of other mail processing network components to adjust to the decline in unnecessary late and extra trips. *See* Cintron Dec. ¶ 26. Soon after, USPS “began efforts to correct the decline through focusing on meeting mail processing and delivery schedules, conducting a root cause analysis of why some mail was not timely being loaded on trucks, and identifying corrective measures to improve these issues.” *Id.* ¶ 276.

Additionally, after the *Washington* court issued the nationwide injunction, USPS issued instructions further clarifying that the “Postmaster General has not banned the use of late or extra trips; when operationally required, late or extra trips are permitted.” Ex. 12, Clarifying Operational Instructions (Sept. 21, 2020) ¶ 5. The Instructions expressly provide that mail should not “be left behind,” and “transportation, in the form of late or extra trips that are reasonably necessary to compete timely mail delivery, is not to be unreasonably restricted or prohibited. Managers are authorized to use their best business judgment to meet [USPS] service commitments.” *Id.*

d. Expedited to Street Pilot Program.

Plaintiffs note that USPS adopted a limited pilot program called “Expedited to Street/Afternoon Sortation” (“ESAS”), which sought to reduce morning activities to allow carriers to begin their routes earlier. The ESAS program, however, was planned before Postmaster General DeJoy took office, and it has since been suspended. *See* Colin Dec. ¶ 11. The pilot was scheduled for 30 days at 384 delivery units (out of approximately 18, 755 delivery units), *see id.* ¶ 7, and there is no evidence that it had any impact on service performance scores, *see id.* ¶ 11

e. USPS's Handling of Election Mail

“Election Mail” is defined by USPS as any item mailed to or from authorized election officials that enables citizens to participate in the voting process. *See* Declaration of Robert Glass (“Glass Dec.”) ¶ 3. This includes mail sent by election officials to voters (*e.g.*, voter registration materials, mail-in ballot applications, polling place notifications, blank ballots), and mail returned by voters to election officials (*e.g.*, completed ballots, completed registration or ballot applications). *Id.* USPS regards Election Mail as having special importance.

Notwithstanding USPS's longstanding commitment to the timely delivery of Election Mail, election officials and voters also bear significant responsibility in the successful utilization of postal services for the Election. State and local election officials must choose whether to send Election Mail to voters via either First-Class Mail, which is typically delivered in two to five days, or lower-cost Marketing Mail, which is typically delivered in three to ten days. *Id.* ¶ 4. Regardless of what class of mail election officials use to mail ballots out *to* voters, all ballots returned by mail to election officials *from* voters are First-Class Mail, unless a voter sends it using a premium service with faster delivery standards (*i.e.* Priority Mail or Priority Express Mail). Ex. 19 (USPS Office of Inspector General (OIG) Audit Report No. 20-225-R-20, “Processing Readiness of Election and Political Mail During the 2020 General Elections” (Aug. 31, 2020)) at 1. USPS had not altered, nor had it planned to alter, any of its existing postal services, delivery standards, or rates applicable to the delivery of Election Mail in advance of the Election. *See, e.g.*, Ex. 13 at 18.

Moreover, for many years, USPS has taken special measures for handling Election Mail. First, USPS personnel have long made special efforts to physically identify and track the progress of Election Mail through USPS facilities, to ensure that Election Mail is not delayed or lost in processing or delivery. When a mail bin identifiable as Election Mail enters the system, USPS

personnel log that container at every step of processing, so that it can be easily located if necessary. Glass Dec. ¶ 19. USPS facilities also deploy end-of-day “all clears,” during which in-plant personnel use a checklist to search for all Election Mail within the facility and confirm that it is in the proper location (either already sent out for delivery or further processing, or at the front of the line for the next day). *Id.*

Additionally, and contrary to Plaintiffs’ assertion, USPS has never classified *all* Election Mail as “First-Class Mail.” Glass Dec. ¶ 18. Although Election Mail sent by individual voters has traditionally been (and currently is) First-Class Mail, the Postal Service generally handles Election Mail sent by election officials as Marketing Mail according to established standards for that class of mail. *See id.* ¶¶ 17-18. However, USPS has several longstanding practices to expeditiously process and deliver of Election Mail entered as Marketing Mail, particularly ballots sent by election officials. *See id.* ¶ 20. USPS devotes excess First-Class Mail processing capacity to Election Mail sent as Marketing Mail, and thereby advances it through the processing network ahead of other marketing mail. *See id.* ¶ 21. As a result, delivery timeframes for Election Mail entered as Marketing Mail are often comparable to those of Election Mail entered as First-Class Mail. *See id.* And, when identifiable, USPS prioritizes placing ballots on outgoing trucks, whether sent using First-Class Mail or Marketing Mail. *See id.* ¶ 22.

USPS will continue these longstanding practices in support of mail-in voting for the Election. *See Glass Dec.* ¶ 28. USPS Headquarters has not issued any direction interfering with, discouraging, or prohibiting USPS personnel from taking appropriate measures to ensure the timely delivery of Election Mail, especially ballots. *See id.* ¶¶ 1, 27.

In anticipation of the additional mail volume associated with the Election, USPS has issued multiple memoranda reiterating its dedication to the timely processing and delivery of Election

Mail. For example, on September 21, 2020, USPS issued instructions clarifying that it will prioritize Election Mail that is entered as Marketing Mail, regardless of the paid class. *See* Instructions ¶ 7. This includes using standardized log sheets to track Election Mail through processing; conducting daily “all clears” to ensure that all Election Mail is accounted for in the system and mail scheduled or “committed” to go out is processed accordingly; advancing Election Mail entered as Marketing Mail ahead of all other Marketing Mail and processing it expeditiously to the extent feasible so that it is generally delivered in line with the First-Class Mail Delivery standards; expanding processing windows on letter and flat sorting equipment to ensure that all Election Mail received prior to the First-Class Mail Critical Entry Time is processed the same day; and prioritizing Election Mail when loading trucks. *See id.*

And as recently as October 20, 2020, USPS issued yet another guidance document—the Extraordinary Measures Memorandum—further emphasizing the additional resources USPS will commit to Election Mail. USPS formed a special Command Center to address Election Mail-related issues, and reiterated that it would employ special measures, such as “expedited handling, extra deliveries, and special pickups . . . to connect blank ballots entered by election officials to voters, or completed ballots returned by voters entered close to or on Election Day to their intended destination.” Ex. 20, Extraordinary Resources Memo., at 1-2.

LEGAL STANDARD

“Summary judgment may be granted only when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Durant v. D.C. Gov’t*, 875 F.3d 685, 693 (D.C. Cir. 2017). “When assessing a motion for summary judgment, we view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in his favor.” *Id.* “A dispute about a material fact is ‘genuine’” if “the evidence is such that a reasonable

jury could” side with the nonmoving party. *Cruz v. McAleenan*, 931 F.3d 1186, 1191 (D.C. Cir. 2019).

ARGUMENT

I. Plaintiffs have not established Article III standing to bring their claims.

“To establish Article III standing, a plaintiff must allege (i) a concrete and particularized injury that is actual or imminent; (ii) that the injury is caused by the challenged conduct of the defendant; and (iii) that the requested relief is likely to redress the injury.” *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017).³ When a plaintiff seeks prospective relief, the “threatened injury must be certainly impending to constitute injury in fact.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013). “[A] plaintiff moving for summary judgment in the district court . . . must support each element of its claim to standing by affidavit or other evidence.” *Sierra Club v. E.P.A.*, 292 F.3d 895, 899 (D.C. Cir. 2002). Furthermore, “[w]here, as here, a plaintiff alleges that it will suffer future . . . harm as the result of a government action, the complaint and declarations must together demonstrate a *substantial probability* of injury-in-fact, causation, and redressability.” *Zinke*, 854 F.3d at 5 (emphasis added).

Here, Plaintiffs fail to establish that there is a “substantial probability” that any of their alleged injuries have been (and will continue to be) caused by the alleged USPS policy changes at issue. Plaintiffs’ alleged injuries—*e.g.*, delayed State tax collections and interference with State agency operations—all hinge on current and future mail delays. But Plaintiffs fail to show that the alleged USPS policy changes at issue are materially responsible for current mail delays, and will continue to cause material mail delays. Indeed, the lack of a causal relationship is shown by the numerous injunctions that have been issued against the Postal Service in this and related cases.

³ Internal quotation marks are omitted throughout this brief, unless otherwise stated.

Critically, in response to these preliminary injunctions,⁴ USPS adopted measures targeting the precise alleged policy changes at issue in Plaintiffs' summary judgment motion. *See, e.g.*, Clarifying Operational Instructions, at 3 (“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.”); *id.* at 1 (“Overtime use has not been banned, nor have any caps been placed on overtime hours.”). Yet Plaintiffs continue to assert that they are witnessing material mail delays. Plaintiffs themselves note: “The decline in Service Scores has persisted even after the Postal Service . . . suspended” most of the USPS “initiatives” at issue, and “[t]herefore, the observed declines in Service Scores are not attributable” to these initiatives. Pls.’ Stmt. of Facts ¶ 106. Although Plaintiffs contend that USPS did not suspend the policy “limiting the number of Extra or Late Trips,” *id.*, as explained above, USPS never prohibited or set a firm limit on late and extra trips, and has sent multiple guidance documents making clear that extra and late trips are permitted.⁵ *See, e.g.*, Clarifying Operational Instructions, at 3; Ex. 25, October 13, 2020 Supplemental Guidance Memorandum, at 3-4; Ex. 26, October 16, 2020 Mandatory Stand-Up Talk, at 3.

⁴ *See Washington v. Trump*, No. 20-cv-3127 (E.D. Wash.) (nationwide preliminary injunction entered on September 17, 2020; clarifying order entered October 2, 2020); *Jones v. U.S. Postal Service*, No. 20-cv-6516 (S.D.N.Y.) (nationwide preliminary injunction entered September 25, 2020; clarifying order entered September 29, 2020); *Pennsylvania v. DeJoy*, No. 20-cv-4096 (E.D. Pa.) (nationwide preliminary injunction entered September 28, 2020; clarifying order entered October 13, 2020); *New York v. Trump*, No. 20-cv-2340 (D.D.C.) (nationwide preliminary injunction entered September 28, 2020); *Vote Forward v. DeJoy*, No. 20-cv-2405 (nationwide preliminary injunction entered on September 28, 2020); *Richardson v. Trump*, No. 20-cv-2262 (D.D.C.) (nationwide preliminary injunction entered October 8, 2020); and *NAACP v. U.S. Postal Service*, No. 20-cv-2295 (D.D.C.) (nationwide preliminary injunction entered October 10, 2020).

⁵ Plaintiffs stress the Cintron Guidelines which did not prohibit late and extra trips. Again, these guidelines simply identify when late and extra trips may improve overall efficiency.

To demonstrate that the alleged USPS policy changes at issue are responsible for mail delays, Plaintiffs largely rely on evidence indicating that USPS service performance levels are lower now than they were previously. But this does not demonstrate that the drop in service performance levels was *caused* by the alleged USPS policy changes. As the Southern District of New York observed, a “variety of issues—such as the COVID-19 pandemic, wildfires on the west coast, and inclement weather— . . . [could] contribute to . . . delays and are outside of USPS’s control.” *Jones v. USPS*, 20-cv-6516, ECF No. 82, at 6 (S.D.N.Y. Oct. 9, 2020); *see also* Declaration of Linda Crawford ¶¶ 3-12 (other factors have contributed to delays); Declaration of Lisse Garrett ¶¶ 9-11 (natural disaster can cause mail delays).

But even if Plaintiffs could establish that the alleged USPS policy changes may cause mail delays, they cannot establish that these policy changes will cause *material* mail delays in the future that will harm *Plaintiffs* in particular. Plaintiffs’ theories require them to show that the mail delays will affect a sufficient amount of mail in the Plaintiff States in particular and will be of sufficient duration. For example, Plaintiffs argue that they may receive delayed tax payments. *See* MSJ, at 11. But obviously, this injury will only materialize if the mail delays will be of a material length and affect a sufficient number of mail-pieces containing tax payments. Plaintiffs make little attempt to submit evidence showing that there is a “substantial probability” that this scenario will occur in support of their motion for summary judgment.

Perhaps recognizing that they cannot establish causation, or future injury, with a sufficient degree of certainty, Plaintiffs focus on a number of alleged injuries inflicted upon their citizens, such as health risks and delayed housing assistance. *See* MSJ, at 9-11. But even though “a state’s so-called ‘quasi-sovereign’ interest” in protecting its citizens is often “sufficient to confer standing upon the state as *parens patriae* . . . [a] State does not have standing as *parens patriae* to bring an

action against the Federal Government.” *Maryland People’s Counsel v. F.E.R.C.*, 760 F.2d 318, 320 (D.C. Cir. 1985). Plaintiffs also try to manufacture an injury by claiming that they elected to spend funds in response to mail delays. *See* MSJ, at 9-10. But as explained above, there is no indication that material mail delays are being caused by the alleged USPS policy changes, and thus Plaintiffs’ expenditures were “not in any meaningful way ‘caused’ by” these policies. *Bhd. of Locomotive Eng’rs & Trainmen, a Div. of Rail Conference-Int’l Bhd. of Teamsters v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006). In any event, these expenditures were *voluntary*; they were “entirely self-inflicted and therefore insufficient to confer standing.” *Id.*

II. Plaintiffs’ 39 U.S.C. § 3661 Claim Fails as a Matter of Law

Even if Plaintiffs could establish standing, their legal claims fail as a matter of law. Plaintiffs first contend that they are entitled to summary judgment on their claim that the alleged Postal Policy Changes violate 39 U.S.C. § 3661(b). *See* MSJ, at 13–23. That section 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 must first submit a proposal to the PRC requesting an advisory opinion. 39 U.S.C. § 3661(b).

Plaintiffs’ section 3661 claim fails as a matter of law for multiple, independent reasons. First, this Court does not have jurisdiction to hear the claim, which Congress has channeled to the PRC. Second, on the merits, Plaintiffs have not met their burden to demonstrate as a matter of law that Defendants are violating a “clear and mandatory” statutory provision that “has only one unambiguous interpretation,” as they must to succeed where, as here, Plaintiffs are pursuing their claim under the *ultra vires* doctrine. *Nat’l Ass’n of Postal Supervisors (“NAPS”) v. U.S. Postal Serv.*, No. 18-cv-2236-RCL, 2020 WL 4039177, at *3 (D.D.C. July 17, 2020). Indeed, after this Court issued its preliminary injunction order, the Postal Service’s Office of Inspector General issued a report concluding that the Postal Service was *not* required to consult with the PRC before

implementing the alleged changes. *See* Ex. 14 at 3 (“Based on our review of the applicable legal requirements for consulting the PRC at the time the Postal Service was making its determination, the Postal Service was in compliance with policies and legal requirements.”); *id.* at 18–19. This decision was consistent with longstanding PRC precedent that section 3661 comes into play only where the Postal Service knowingly and intentionally acts to degrade service. Plaintiffs do not come close to making that showing here.

A. The Court Lacks Subject-Matter Jurisdiction Over Plaintiffs’ 39 U.S.C. § 3661 Claim

As a threshold matter, Defendants maintain that this Court lacks subject-matter jurisdiction over Plaintiffs’ section 3661 claim. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). In section 3662 of Title 39, Congress specified that any person “who believes the Postal Service is not operating in conformance with the requirements of various provisions, including “*this chapter* [*i.e.*, Chapter 36 of Title 39, which includes 39 U.S.C. § 3661] (or any regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission.” 39 U.S.C. § 3662(a) (emphasis added). If that person is dissatisfied with the PRC’s ruling, she may petition for review in the D.C. Circuit. *Id.* § 3663. And if she is satisfied with the PRC’s ruling, she may *then* move to enforce the PRC’s decision in district court. *Id.* § 3664.

As Defendants explained in their opposition to Plaintiffs’ motion for a preliminary injunction, numerous courts of appeals have held that 39 U.S.C. §§ 3662 through 3664 constitute the exclusive jurisdictional remedy for complaints about postal services that fall within the statutory provisions identified in section 3662, which includes a claim that the Postal Service is not complying with section 3661. *See, e.g., Foster v. Pitney Bowes Corp.*, 549 F. App’x 982, 986 (Fed. Cir. 2013) (PRC has “exclusive jurisdiction . . . over claims enumerated in § 3662”); *LeMay v. U.S. Postal Serv.*, 450 F.3d 797, 799-800 (8th Cir. 2006) (“In this case, Congress removed the

district courts’ jurisdiction over claims regarding postal rates and services. It did so by enacting 39 U.S.C. § 3662.”); *see also Bovard v. U.S. Post Office*, 47 F.3d 1178 (10th Cir. 1995). These courts of appeals have been joined by “countless decisions” of lower courts. *Pep-Wku, LLC v. USPS*, No. 20-cv-0009-GNS, 2020 WL 2090514, at *3 (W.D. Ky. Apr. 30, 2020).⁶

In its order granting Plaintiffs’ motion for a preliminary injunction, the Court observed that these cases are not “mandatory authority.” *New York v. Trump*, No. 20-CV-2340(EGS), 2020 WL 5763775, at *6 (D.D.C. Sept. 27, 2020). But the rationale behind this long, unbroken line of precedent is, at a minimum, persuasive and undisputed. “Generally, when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 589 (2010). “It is well settled that even where Congress has not expressly stated that statutory jurisdiction is ‘exclusive’ . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.” *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see also Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 186 (D.C. Cir. 2017); *Public Util. Comm’r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 627 (9th Cir. 1985). A number of considerations militate against allowing courts to short-circuit an established administrative review process, including respect for Congress’s conferral of administrative autonomy; administrative expertise and discretion as to specialized, complex

⁶ *See, e.g., McClintock v. United States*, No. 3:18-CV-01937-SB, 2020 WL 1868264, at *2 (D. Or. Mar. 18, 2020); *McDermott v. Potter*, No. C09-0776RSL, 2009 WL 2971585, at *3 (W.D. Wash. Sept. 11, 2009); *Rodriguez v. Hemit*, No. C16-778 RAJ, 2018 WL 3618260, at *2 (W.D. Wash. July 30, 2018); *Striley v. U. S. Postal Serv.*, No. 16-CV-07233-HRL, 2017 WL 513166, at *3 (N.D. Cal. Feb. 8, 2017); *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 134 F. Supp. 3d 365, 382 (D.D.C. 2015); *Murphy v. U.S. Postal Serv.*, No. C 14-02156 SI, 2014 WL 4437731, at *3 (N.D. Cal. Sept. 9, 2014); *Powell v. U.S. Postal Serv.*, No. CV 15-12913-FDS, 2016 WL 409672, at *1–2 (D. Mass. Feb. 2, 2016).

problems; development of an initial factual record; conservation of judicial resources; and avoidance of conflicting litigation. *Nader v. Volpe*, 466 F.2d 261, 265-68 (D.C. Cir. 1972). This principle applies particularly in situations where there are multiple layers of review, *i.e.*, review first by an agency, and then by the federal courts. *See In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008). Here, Congress has created just such a channeling scheme: complaints within the ambit of section 3662 go first to the Commission, an agency with deep expertise in postal matters, and then to the D.C. Circuit and the district courts. This scheme serves all of the interests identified in *Nader*, including the avoidance of conflicting precedent that could arise if multiple federal courts exercised jurisdiction in parallel with the PRC and D.C. Circuit. Under such circumstances, this court lacks subject matter jurisdiction.

In concluding otherwise in its preliminary injunction order, the Court focused primarily on Congress's use of the permissive "may" in section 3662, instead of the mandatory "shall." *New York*, 2020 WL 5763775, at *7. Plaintiffs argue that Congress's use of the permissive "may" suggests that Congress did not intend sections 3662(a) and 3663 to be the exclusive avenue for bringing a challenge to USPS's failure to comply with section 3661. But the most natural reading of this provision is simply that the permissive language suggests that one who "believes the Postal Service is not operating in conformance with" statutory requirements *may* lodge a complaint with the PRC, but may also choose to take no action at all. Including the word "shall" would have created the odd outcome that *anyone* with a grievance against the Postal Service would arguably be obligated to file a complaint with the PRC. To read the provision as Plaintiffs do would create the very types of "external intrusions on the Postal Service's managerial experience" that motivated Congress to create the administrative review scheme in the first place. *LeMay*, 450 F.3d at 800.

Indeed, statutes channeling review in a particular court or agency commonly use the phrase “may appeal,” without any suggestion that such a channel is optional or that an applicant could appeal via a separate path. *See, e.g.*, 28 U.S.C. § 569(a) (“An individual denied reemployment under this section in a position because the individual is not qualified for that position may appeal that denial to the Merit Systems Protection Board under section 7701 of title 5.”); 30 U.S.C. § 823(d)(2)(A)(i) (“Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.”). Even elsewhere in Title 39, it is clear that “may” means that a party has discretion over whether or not to file, but not over whether to file in a forum other than the one that Congress specified. *See* 39 U.S.C. § 3663 (aggrieved parties “may” petition D.C. Circuit for judicial review of a PRC). The instances of “shall” in Sections 3662(c) and 3663 refer to action by the PRC and appellate court once a complaint or petition for review has been filed. As such, they do not shed any contrasting light on the meaning of “may” in Sections 3662(a); rather, they form part of a harmonious statutory scheme whereby parties are entitled, but not obligated, to file a complaint or seek appellate review.

Courts have repeatedly rejected exactly this type of textual argument that hinges on Congress’s use of the permissive “may.” In *LeMay*, reviewing a challenge to the earlier version of section 3662 – but which included the same “may” phrasing – the Eighth Circuit acknowledged that “as a general rule of statutory construction, ‘may’ is permissive, whereas ‘shall’ is mandatory.” *LeMay*, 450 F.3d at 799. It noted, however, that “this general rule does not close the inquiry,” as “Courts will infer foreclosure of judicial review where congressional intent to preclude judicial review is ‘fairly discernable’ in the details of the particular legislative scheme.” *Id.* at 799-800.

The Court went on to conclude that “Congress intended to afford postal management ‘the unfettered authority and freedom that has been denied for years to maintain and operate an efficient service,’” *id.* at 800, and that review by the Postal Regulatory Commission was the way that “Congress gave meaning to this intention,” *id.* The Federal Circuit reached the same conclusion regarding the now-operative 2006 amendments to section 3662. *See Foster*, 549 F. App’x at 986 (“There is nothing in the statutory text or legislative history to suggest that the [2006 Postal Accountability and Enhancement Act (“PAEA”)] eliminated the exclusive jurisdiction conferred to the [PRC] over claims enumerated in § 3662”); *see also, Nat’l Post Office Collaborative v. Donahoe*, No. 3:13-cv-1406, 2013 WL 5818901, at *4 (D. Conn. Oct. 28, 2013); *Foster v. Pitney Bowes Inc.*, No. 11-cv-7303 2012 WL 2997810, at *5 (E.D. Pa. July 23, 2012). Indeed, were Plaintiffs’ construction correct, decades of case law concluding that the PRC had exclusive jurisdiction over claims brought within the ambit of section 3662 would be wrong, and the district courts could be flooded with the precise type of complaints that Congress intended to channel to the PRC. If Congress intended to preserve a judicial remedy alongside the statutory complaint process, it presumably would have said so, as it has in other statutes. *See, e.g.*, 7 U.S.C. §§ 4510(c), 7419(g); 15 U.S.C. §§ 719i(a), 1713, 3615, 8708(d); 29 U.S.C. § 2105; 42 U.S.C. §§ 5405(a)(6), 33117.

In its order granting a preliminary injunction, the Court also found that it had jurisdiction on the ground that (1) “a finding of preclusion could foreclose all meaningful judicial review”, (2) Plaintiffs’ claim was “wholly collateral to [the] statute’s review provisions”, and (3) Plaintiffs’ claim was “outside the agency’s expertise.” *New York*, 2020 WL 5763775, at *7 (quoting *Free Enter. Fund.*, 561 U.S. at 489–90). But even if Plaintiffs could have established these elements when they moved for a preliminary injunction, they certainly cannot do so now. The Court’s basis

for holding that it had jurisdiction was that there was no other meaningful or adequate avenue for judicial review because the PRC’s “90-day window . . . to respond to a complaint” meant that the PRC may not be able to remedy Plaintiffs’ election-related injuries before November 3. *New York*, 2020 WL 5763775, at *7. But any alleged election-related injuries will be moot at or immediately after the time the Court issues a decision on Plaintiffs’ motion for summary judgment, and Plaintiffs identify no reason why the PRC could not provide meaningful relief as to any non-election injuries that Plaintiffs allege are ongoing. Accordingly, even if Plaintiffs could have relied on the lack of review when they sought a preliminary injunction, they cannot do so now.

B. Plaintiffs Lack a Private Right of Action to Bring Their Section 3661 Claim, and the *Ultra Vires* Doctrine Does Not Provide an Avenue for Judicial Review

Because the Court lacks subject-matter jurisdiction over Plaintiffs’ section 3661 claim, it is subject to the standards of the *ultra vires* review doctrine, which Plaintiffs cannot satisfy. But even if the Court had subject-matter jurisdiction over Plaintiffs’ section 3661 claim, it would still fail as a matter of law. There is no dispute that section 3661 does not provide Plaintiffs with a private right of action to bring their claim. And because the Postal Service “is exempt from review under the Administrative Procedure Act,” *Mittleman v. Postal Regul. Comm’n*, 757 F.3d 300, 305 (D.C. Cir. 2014), Plaintiffs acknowledge that the only potential avenue for relief is the *ultra vires* review doctrine. Review under this doctrine, however, “is quite narrow,” *id.* 307, and “is essentially a Hail Mary pass – and in court as in football, the attempt rarely succeeds.” *Nyunt v. Broad. Bd. of Govs.*, 589 F.3d 445, 449 (D.C. Cir. 2009); *see Griffith v. Fed. Labor Rels. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988) (doctrine has “extremely limited scope”); *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1312 (D.C. Cir. 1984) (doctrine is “extraordinarily narrow”). To justify relief under the doctrine, a plaintiff must show, “(i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim;

and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory.” *DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019).

Plaintiffs have not demonstrated that they can meet these requirements. First, as discussed above, section 3662 expressly precludes judicial review.

Second, Plaintiffs have not demonstrated that the Postal Service is acting “in excess of its delegated powers and contrary to a specific prohibition.” *DCH Reg’l Med. Ctr.*, 925 F.3d at 509. To meet this requirement, Plaintiffs must show that the Postal Service is violating a “clear and mandatory” statutory provision that “has only one unambiguous interpretation.” *NAPS*, 2020 WL 4039177, at *3. The agency’s error must be “so extreme that one may view it as jurisdictional or nearly so.” *Nyunt*, 589 F.3d at 449 (quoting *Griffith*, 842 F.2d at 493)).

Section 3661(b) does not unambiguously require the Postal Service to request an advisory opinion before implementing the alleged Postal Policy Changes. MSJ, at 18–23. Section 3661(b) states that the Postal Service must seek an advisory opinion when it “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.” But as the leading case on this issue explains, this provision must be read within the context of the PRA’s overall statutory scheme, which is designed to give the Postal Service “broad authority in postal management” to ensure that management is not “unjustly hampered in its efforts to administer the Department in a businesslike way.” *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259, 262–63 (5th Cir. 1975). As the *Buchanan* court explained, “[t]he 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*.” *Id.* (emphasis added). Congress left postal management with “with broad decision-making power, subject to 3661’s

requirements for specified decisions.” *Id.* at 262. To ensure that the extensive on-the-record hearing procedures required by section 3661 align with Congress’s intent that the Postal Service has the ability to manage postal operations in a business-like way, section 3661(b) comes into play only if (i) there is a change that has a “meaningful impact on service,” (ii) the change is “in the nature of postal service,” and (iii) the change affects service “on a nationwide or substantially nationwide basis.” *Id.* at 262-63.

Applying these principles, the PRC has interpreted section 3661 to require the Postal Service to seek an advisory opinion from the PRC only if the complainant can show (1) “that the Postal Service has already, or plans to implement, new service standards” or (2) “that the Postal Service is knowingly and/or intentionally denigrating service.”⁷ Because it is a *before-the-fact* procedure, section 3661 applies only when a Postal Service action or program “has *as its goal*, or will have as a *reasonably foreseeable* effect, an appreciable alteration in the accessibility of postal services to the public or in the type and quality of postal services offered to the public which is substantial and extends over a broad geographic area.”⁸ For example, the PRC has interpreted section 3661 to require the Postal Service to request an advisory opinion before formally changing the service standards for certain pieces of mail,⁹ changing the hours of operations at tens of

⁷ American Postal Workers Union, PRC Docket No. C2013-10, Order No. 1892, at 13 https://www.prc.gov/Docs/88/88438/Order_1892.pdf; *see also* Ex. # at 18 (Oct. 19, 2020 OIG Report).

⁸ *See* Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services, PRC Docket No. N 75-1, at 10, <https://www.prc.gov/prcarchive/viewpdf.aspx?docid=508276839> (emphasis added).

⁹ Advisory Opinion on Service Changes Associated With Standard Mail Load Levelling, Docket No. N2014-1 (Mar 26, 2014), at 1, 10, https://www.prc.gov/docs/89/89493/Docket%20No.%20N2014-1_Advisory%20Opinion.pdf; Advisory Opinion on Mail Processing Network Rationalization Service Changes, Docket No. N2012-1 (Sept. 28, 2012), at 1 https://www.prc.gov/docs/85/85269/Advisory_Opinion_%20PDF%20_09282012.pdf; Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services, Docket No. 2006-1 (Dec. 12, 2006), at 7.

thousands of post offices or retail operations,¹⁰ or eliminating an entire day of mail delivery.¹¹ All of these proposals constitute formal changes in published service standards or which customer-facing operations are open—not the basic, managerial operational changes of the type at issue here. These PRC interpretations of section 3661 are entitled to *Chevron* deference. *See United Parcel Serv., Inc. v. Postal Regul. Comm’n*, 890 F.3d 1053, 1062 (D.C. Cir. 2018) (PRC’s reasonable interpretation of ambiguous provision of PAEA entitled to *Chevron* deference).

None of the five alleged “changes” that Plaintiffs identify meets these standards. Rather, as explained above, the so-called “Postal Policy Changes” were either (i) never in fact made or (ii) were not “changes,” but were instead longstanding USPS policies:

- **Alleged decommissioning of sorting machines.** The Postal Service has been removing excess machines for years, and has followed the same model-driven process as it has done since 2017. *See* DeChambeau Dec. ¶¶ 13-21. Indeed, the May 2020 equipment reduction plan of which Plaintiffs complain was “Phase 6 of the reduction initiative.” *Id.* ¶ 109. There was thus no “change,” and certainly no change intentionally designed to degrade service. *See id.* ¶¶ 9, 11, 12, 18 (explaining that removing underutilized machines improves efficiency and lowers costs); Barber Dec. ¶ 6.
- **Overtime.** As noted above, USPS never made changes to its overtime policy (including banning overtime). *See* Curtis Dec. ¶¶ 12, 22–23, 32–35; Colin Dec. ¶ 3; Curtis Dep. Tr. 53:21–23; Defs.’ Resp. to Pls.’ Stmt. of Facts ¶ 29 (disputing Plaintiffs’ assertion that USPS began new efforts to reduce overtime in June and July 2020).
- **Alleged Ban on Late and Extra Trips.** USPS never prohibited extra or late trips. *See* Cintron Dec. ¶¶ 23-24. While USPS developed written guidance clarifying the circumstances under which late and extra trips were acceptable, *id.*, that is not a “change” within the meaning of section 3661. *See, e.g.*, Second Declaration of Joshua Colin (“Second Colin Dec.”) ¶ 17 & Exs. 1, 2 (clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance). Rather, this is precisely the type of management direction to which

¹⁰ Advisory Opinion on Post Office Structure Plan, Docket No. N2012-2 (Aug. 23, 2012), at 1, 3, https://www.prc.gov/docs/85/85013/N2012-2_Adv_Op_082312.pdf; Advisory Opinion on Retail Access Optimization Initiative, Docket No. N2011-1 (Dec. 23, 2011), at 1, https://www.prc.gov/docs/78/78971/N2011-1_AdvisoryOP.pdf; Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, Docket No. N2009-1 (Mar. 10, 2010), https://www.prc.gov/docs/67/67174/Advisory_Opinion_031010.pdf.

¹¹ Advisory Opinion on Elimination of Saturday Delivery, Docket No. N2010-1 (Mar. 24, 2011), at 1, https://www.prc.gov/docs/72/72327/Advisory_Opinion_032411.pdf.

section 3661 does not apply.

- **ESAS Pilot Program.** This limited pilot program was not in effect when Plaintiffs filed their Complaint, and in any event, involved only “384 delivery units (out of a total of approximately 18,755 delivery units),” Colin Dec. ¶ 7; it can hardly be considered “national.”
- **Election Mail.** As explained, USPS has not changed Election Mail policies and practices, except to enhance them. As it has for many years, it puts in place numerous practices to expedite Election Mail so that even mail that is entered at the lower class of service is often given delivery *speeds* comparable to First-Class Mail. *See* Glass Dec. ¶ 21. Nothing has changed.

Plaintiffs have not met their burden of demonstrating that there is a genuine factual dispute on these issues.

The Postal Service’s own Office of Inspector General agrees that the Postal Service was *not* required to request an advisory opinion as to any of the alleged changes. *See* Ex. 14 at 3, 18–19. After the Court issues its preliminary injunction, the OIG issued a report explaining that the advisory opinion requirement is triggered only when “the Postal Service determines that there should be change,” and thus the statute “leaves much to Postal Service determination and intent.” *Id.* at 18. “If the Postal Service does not conceptualize its actions, instructions, and directives as a change in the nature of postal services, those actions likely fall outside the scope of [the section 3661] requirement.” *Id.* Unsurprisingly, there have been only four challenges to Postal Service actions on the ground that a PRC advisory opinion was not requested, and the PRC has “dismissed them all.” *Id.* Rather, as noted, the PRC has held that failure to meet service standards will not trigger the section 3661 requirement unless plaintiffs can show “(1) implementation or planned implementation of a new standard or (2) knowing and intentional degradation of service.” *Id.*

Applying those standards, the OIG concluded that “[b]ased on [its] review of the applicable legal requirements for consulting the PRC at the time the Postal Service was making its determination, the Postal Service was in compliance with policies and legal requirements.” *Id.* at 3. “In the absence of evidence that these initiatives were intended to disrupt service, the Postal

Service was not required by then existing precedent to request an advisory opinion,” as “the PRC’s authority to evaluate service degradation is effectively limited to an after-the-fact evaluation, as part of the annual compliance determination process.” *Id.* As part of that process, the Postal Service must file an annual report that includes service performance data for each market-dominant product. 39 U.S.C. § 3652(a)(1), (a)(2)(B). The PRC then issues a determination as to whether service standards are met, and if they are not, the PRC has broad remedial powers. *Id.* § 3653. As the OIG report explains, it is *this* process—not the advisory opinion process contemplated in section 3661—through which the PRC assesses service degradation. Ex. 14 at 18–19.

Plaintiffs have come forward with no evidence suggesting that the OIG’s conclusion is incorrect and that the Postal Service has implemented new service standards or knowingly and intentionally degraded service. To the contrary, to the extent that the Postal Service implemented any changes, its intent was to *improve* service. *See, e.g.*, Cintron Dep. Tr. 56:12–57:5; 57:13–23 (adherence to transportation schedule would maintain service standards and “directly . . . improve service”). For example, the Postal Service’s efforts to improve compliance with its long-established delivery schedules were partly in response to the PRC’s conclusion, in its March 25, 2020 annual compliance determination (“ACD”), that late trips were a significant cause of First-Class Mail service issues. *See* Ex. 24, ACD Report, FY 2019 (Mar. 25, 2020), at 109–23. Specifically, in discussing the Postal Service’s plans to remediate First-Class Mail service performance in 2020, the top “improvement initiative” was “ensur[ing] on time departures,” and specific actions for improvement include driving “adherence to operating plan targets to avoid holding trips for departure,” and reviewing “late trips on a daily basis.” *Id.* at 110. The PRC further required the Postal Service to provide a “transit evaluation” to “explain how the progress made in FY2020 (or lack thereof) toward ensuring on-time departures, ensuring timely tender to air transit

suppliers, and minimizing *en route* delays affected on-time service performance for First-Class Mail in FY2020 (which the Postal Service did in June). *Id.* at 119. To disregard this evidence and hold that the Postal Service must seek an advisory opinion for any action that happens to result in delayed mail would cripple the Postal Service's ability to operate on a daily basis.

Importantly, if there were any doubt as to whether these "changes" are covered by section 3661, that doubt would be an insufficient basis for Plaintiffs' *ultra vires* claim. Plaintiffs' claim emerges at the intersection of two lines of doctrine: the requirement that section 3661 be narrowly interpreted, in order to preserve USPS's "broad management power," *see Buchanan*, 508 F.2d at 263-64, and the *ultra vires* doctrine, which requires that any error be clear and unambiguous. The basic, operational activities that Plaintiffs seek to challenge here cannot meet this set of unequivocal requirements, as the recent OIG report indicates. Indeed, were it otherwise, the *ultra vires* doctrine would swallow Congress's preclusion of judicial review of these types of claims in district court. Almost any sort of operational or management initiatives that could have an impact on Postal Service operations would fall within the ambit of section 3661 – and require extensive hearings – exactly the sort of ossification Congress intended to avoid. *See id.*

And even if Plaintiffs could show that Defendants expressly violated a specific command, Plaintiffs' *ultra vires* claim would also fail because they cannot show that "there is no alternative procedure for review of the statutory claim." *DCH Reg'l Med. Ctr.*, 925 F.3d at 509. *Ultra vires* review is available *only* where there is no other potential remedy. But here, Plaintiffs have a "meaningful and adequate means of vindicating [their] statutory rights," *Bd. of Governors, Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) – Plaintiffs can file a complaint to the Postal Regulatory Commission, with judicial review in the D.C. Circuit if Plaintiffs remain

unsatisfied. Plaintiffs' failure to even attempt to pursue the remedy provided by Congress yet another reason why it cannot succeed on its section 3661 claim.

III. Plaintiffs' 39 U.S.C. §§ 101 and 403 Claims Fail As a Matter of Law

Plaintiffs also contend that the Postal Service's alleged changes violate two other statutory provisions: 39 U.S.C. §§ 101 and 403. Section 101 broadly provides, among other things, that the Postal Service "shall be operated as a basic and fundamental service provided to the people by the Government of the United States," *id.* § 101(a), that it "shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities," *id.*, that it "shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining," *id.* § 101(b), and that it "shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of importation letter mail," *id.* § 101(e). Similarly, section 403 provides that the Postal Service "shall receive, transmit, and deliver throughout the United States . . . written and printed matter, parcels and like materials" and "shall serve as nearly as practicable the entire population of the United States." *Id.* § 403(a). These claims fail as a matter of law for several reasons.

A. Plaintiffs Lack a Private Right of Action to Enforce Sections 101 and 403

As an initial matter, neither section 101 nor section 403 provides Plaintiffs with a private right of action to seek relief against the Postal Service. *See NAPS*, 2020 WL 4039177, at *4 ("Of the few courts to review cases brought under § 101 or § 1003, all determined that the provisions do not provide private causes of action. . . . This Court agrees."); *Contemporary Mission, Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 103 n.7 (2d Cir. 1981) (sections 101(a) and 403(c) do not provide a private right of action); *Tedesco v. U.S. Postal Serv.*, 553 F. Supp. 1387, 1389 (W.D. Pa. 1983) (no private right of action under §§ 101, 403(b)(3), and 404(a)(3)). Nor can Plaintiffs rely on the APA. *NAPS*, 2020 WL 4039177, at *4. Plaintiffs must therefore rely on the "Hail Mary" pass of

ultra vires review. As explained below, however, Plaintiffs cannot rely on the doctrine of *ultra vires* review to seek enforcement of the broad, general provisions of sections 101 or 403.¹²

B. Plaintiffs Cannot Demonstrate Entitlement to Relief Under the *Ultra Vires* Doctrine

1. Plaintiffs’ Section 101 and 403 Claims Are Not Reviewable under the *Ultra Vires* Doctrine

Recognizing that they lack a cause of action under the PRA or APA, Plaintiffs attempt to shoehorn their claims under the *ultra vires* doctrine. *See* MSJ, at 23, 29, 32. In *NAPS*, this Court held that such review is available only in the narrow circumstance where a statute provides a “clear and mandatory” directive that “has only one unambiguous interpretation.” *NAPS*, 2020 WL 4039177, at *3. *Ultra vires* review is *not* available where a statute leaves an agency with discretion in how to comply with broadly articulated aims or goals. *See id.* at *3, *5–6. Thus, in *NAPS*, the court held that 39 U.S.C. §§ 101(c), 1003(a), and 1004 were not susceptible to *ultra vires* review, as those provisions “leave[] significant room for agency discretion and provide[] specific procedures other than judicial review to challenge agency action.” *Id.* at *6.

The statutory provisions on which Plaintiffs rely here are even broader—and leave more room for agency discretion—than the provisions at issue in *NAPS*. Among the statutory provisions that Plaintiffs contend that the Postal Service is expressly violating are requirements that the Postal Service “be operated as a basic and fundamental service provided to the people,” that it provide “prompt, reliable, and efficient services,” and that it “give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter

¹² Plaintiffs (at 23–24) include an extended discussion of *Chevron*’s two-step framework, under which courts will defer to an agency’s reasonable interpretation of an ambiguous statute. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124, 195 L. Ed. 2d 382 (2016). But Plaintiffs do not explain how *Chevron* supports their claims, which do not involve a challenge to an agency interpretation of a statute it administers, but rather involves a claim that an agency has acted *ultra vires* in violation of a clear statutory command.

mail.” 39 U.S.C. §§ 101(a), (e). These general provisions are anything but “clear and mandatory”; nor do they create “judicially manageable standards of review.”¹³ *See NAPS*, 2020 WL 4039177, at *4; *cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (claim is non-justiciable where “there are no discernible and manageable standards for deciding whether there has been a violation”). Rather, these are statements of broad policies that the Postal Service strives toward in exercising its “significant” discretion that the PRA gives the Postal Service over its operations pertaining to the handling, collection, transportation, and delivery of mail. *NAPS*, 2020 WL 4039177, at *6; *see also DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 510 (D.C. Cir. 2019) (no *ultra vires* review where statute required agency to choose “appropriate data”; such an “open-ended” provision was “worlds apart” from a clear statutory command); *Eagle Tr. Fund v. U.S. Postal Serv.*, 365 F. Supp. 3d 57, 67 (D.D.C. 2019) (*ultra vires* review available only where there is a “specific prohibition in an Act”); *see* 39 U.S.C. §§ 401, 404(a).

Indeed, after Congress charged the PRC with interpreting sections 101 and 403, the PRC in an exhaustive report emphasized repeatedly that the “broad formulations” of sections 101 and 403 are “subject to differing interpretations,” flexible,” and “indefinite” in scope.¹⁴ The PRC concluded that the “general parameters” of Sections 101 and 403 “provide[] the Postal Service with *considerable latitude to exercise discretion*” over such operational matters as the location of facilities and the manner of delivery. PRC Report at 26-27, 29 (emphasis added). Because “what

¹³ Plaintiffs cite *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 676 F.3d 1105 (D.C. Cir. 2012), for the proposition that section 101 includes “statutory mandates,” Br. 26, but the court used that term in passing simply to distinguish the “mandates” of section 101 (which apply to all Postal Service production) from those of other provisions that apply only where a product is market-dominant or a “competitive product.” *Id.* at 1107. Nothing in the court’s opinion addresses or suggests that section 101’s provisions are “clear and mandatory” such that they would be judicially reviewable under the *ultra vires* doctrine.

¹⁴ *See* Postal Regulatory Comm’n, Report on Universal Postal Serv. & the Postal Monopoly (“PRC Report”) 22, 25-27 (2008), <https://go.usa.gov/x7raF>.

is necessary to bind the Nation together changes over time,” the “overlapping requirements” of sections 101 and 403 give the Postal Service a range of options for how to meet the public’s evolving needs. *Id.* at 25-26. And the PRC has reiterated this understanding of sections 101 and 403 in advisory opinions concerning claims similar to those Plaintiffs seek to assert here.¹⁵ Thus, under the standard set forth in *NAPS*, the broad statements of sections 101 and 403 are not susceptible to judicial review under the *ultra vires* doctrine. But even if that was not the correct standard, as explained below, Plaintiffs would still not be entitled to relief on their section 101 and 403 claims.

2. Even If Plaintiffs’ Claims Were Reviewable Under the *Ultra Vires* Doctrine, They Cannot Establish Entitlement to Relief

Even if sections 101 and 403 were subject to *ultra vires* review (they are not), Plaintiffs have not adequately alleged—let alone demonstrated as a matter of law—violations of those provisions. *First*, as noted above, most of the alleged Postal Policy Changes were never in fact USPS policies. USPS never made changes to its overtime policy. Curtis Dec. ¶¶ 12, 22–23, 32–35; Colin Dec. ¶ 3. Nor did it ever ban late or extra trips, Cintron Dec. ¶¶ 23–24, or change its Election Mail policies and practices, Glass Dec. ¶ 21. It has not changed its longstanding policy on decommissioning underutilized sorting machines. DeChambeau Dec. ¶¶ 9, 11, 12 18. And the

¹⁵ *See, e.g.*, Postal Regulatory Comm’n, Docket No. N2011-1, Advisory Opinion on Retail Access Optimization Initiative 7-9 (2011), <https://go.usa.gov/x7rYc> (“Many of the terms used to delineate the Postal Service’s obligations [under Sections 101 and 403] are not defined in title 39. . . . The Postal Service is afforded a significant amount of authority under the statute, and has reasonable discretion to interpret the ambiguous terms delineating its powers and obligations.”); Postal Regulatory Comm’n, Docket No. N2010-1, Advisory Opinion on Elimination of Saturday Delivery 11-13 (2011), <https://go.usa.gov/x7rr6> (“The Postal Service is afforded a significant amount of flexibility in determining how to” fulfill Sections 101 and 403, which “set[] out general postal policies[.]”)

ESAS pilot program was not in effect when Plaintiffs’ filed their complaint. Colin Dec. ¶ 7. This alone is reason enough to deny Plaintiffs’ motion and enter summary judgment for Defendants.

Second, even if Plaintiffs could show that a change took place and remains in effect, Plaintiffs cannot show that the Postal Service “expressly violated” a “clear and mandatory” directive. *NAPS*, 2020 WL 4039177, at *7. “[A] claim that an agency acted *ultra vires* is a claim that the agency acted in excess of its delegated powers and contrary to a *specific prohibition* in an Act, not that an agency’s authorized action was imprudent or that, in validly exercising its judgment the agency reached the wrong result.” *Eagle Trust Fund*, 365 F. Supp. 3d at 67 (emphasis added). Plaintiffs’ argument—that the Postal Service acted without properly weighing “efficiency” and “adequacy” considerations—may be appropriate under the APA (a statute from which the Postal Service is expressly exempt), but it is not the type of argument that supports a claim of *ultra vires* review. *Id.* at 65 (claim that a decision is not “reasoned” or is arbitrary and capricious is “unmistakably” rooted in the APA and not available against the Postal Service); *see also Mittleman*, 757 F.3d at 305. If it were, any plaintiff could sue in federal court to enjoin Postal Service operations whenever they believed that an operational decision was “inefficient” or “inadequate.” Such interference with Postal Service operations would be unprecedented, and inconsistent with the significant discretion that Congress vested in the Postal Service to manage its own operations under the PRA. *NAPS*, 2020 WL 4039177, at *3.

Third, Plaintiffs make no serious attempt in either their complaint or their brief to tie each of the five alleged Postal Policy Changes to any specific violation of sections 101 and 403. Rather, Plaintiffs simply lump the alleged changes together and then assert that the “Postal Policy Changes” violate sections 101 and 403. *See, e.g., MSJ*, at 28 (“the Postal Policy Changes violate . . . 39 U.S.C. § 101(a)”); *id.* at 29 (“The Postal Policy Changes violate section 403 . . .”).

For example, Plaintiffs do not even mention the alleged change on overtime in the section of their brief concerning sections 101 and 403. *See* MSJ, at 27–32. They refer to the ESAS pilot program only in passing, asserting, without any explanation, that the program “failed in [its] purpose and effect to give the ‘highest consideration’ to the expeditious delivery of mail.” *Id.* at 27. Their treatment of the other alleged changes is similarly conclusory. Without showing how each alleged change violates a specific provision of section 101 or 403, Plaintiffs cannot meet their burden to demonstrate that they are entitled to judgment as a matter of law.

Fourth, in the few instances where Plaintiffs do cite evidence to support their claims, they cherry-pick the facts that and ignore Defendants’ contrary evidence. For example, in contending that the Postal Service violated section 101, Plaintiffs assert that the Postal Service gave *no* consideration to the expeditious delivery of important letter mail, citing paragraphs 116–29 of their statement of facts. Again, Plaintiffs do not articulate with any specificity which alleged changes they believe were made without “any consideration.” MSJ, at 27. And contrary to Plaintiffs’ general assertion, the record evidence demonstrates that the Postal Service has always given the highest consideration to the expeditious delivery of the mail in all of its decisions. *See, e.g.*, DeChambeau Dec. ¶¶ 7–9, 11, 12, 18–19 (consideration given to removing unnecessary processing machines); Barber Dec. ¶ 6 (even with removals, Postal Service has ample excess machine capacity); Curtis Dep. Tr. 76–77 (consideration given to efficiently scheduling employees to reduce unnecessary unearned hours); Ex. 14 at 1 (late and extra trips hurt service); Cintron Dep. Tr. 56:12–57:5; 57:13–23 (providing clarity on the appropriate use of late and extra trips would directly improve service); Cintron Dep. Tr. 49:13–50:5 (same); *see generally* Glass Dec. (outlining considerations given to special measures Postal Service would take to process and deliver Election Mail)

Plaintiffs also assert that the “Postal Policy Changes” (again, no specific change is identified) caused dramatic delays in the delivery of mail across the United States,” citing paragraphs 95–116, but, again, the record evidence belies Plaintiffs’ assertion. *See, e.g.*, Defs.’ Resp. to Pls.’ Stmt. of Facts ¶ 95 (denying Plaintiffs’ assertion that that impacts of the Postal Service’s alleged operational policy changes were immediately noticeable); *id.* ¶ 107 (denying Plaintiffs’ assertion that alleged policy limiting number of late and extra trips continued to delay mail as recently as October 3rd and citing evidence that the relative decrease in Service Scores throughout 2020 began with the onset of the COVID-19 pandemic in March); Ex. 31 (Dearing Dec.). Nor does the evidence support Plaintiffs’ assertion that USPS removed sorting machines and prohibited late and extra trips without giving effect to the expeditious delivery of mail, Defs.’ Resp. to Pls.’ Stmt. of Facts ¶¶ 19–28, 119–29, or their assertion that agency leaders acknowledged that the alleged changes caused substantial delays, *id.* ¶¶ 130–31, 136.

Plaintiffs’ argument that the Postal Service is violating section 403 fares no better. Relying on the dictionary definitions of “efficient” and “adequate,” *see* MSJ, at 29–30, Plaintiffs assert that the Postal Service is violating section 403’s requirement that the Postal Service “plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees.” 39 U.S.C. § 403(a). But Plaintiffs mention only two alleged changes—the alleged removal of sorting machines and alleged ban on late and extra trips. MSJ, at 30. As to these changes, Plaintiffs contend that the changes fail an amorphous “efficiency” test because they “increase the amount of effort expended by postal workers and reduce the Postal Service’s output.” MSJ, at 30. But again, even if an “efficiency” claim were reviewable, the evidence does not support Plaintiffs’ claim that any changes were “inefficient.” *See, e.g.*, Defs.’ Resp. to Pls.’ Stmt. Of Facts ¶ 118 (Postal Service considered effect of changes on service and efficiency); DeChambeau Dec. ¶¶ 9, 11, 12, 18, 19

(removing underused sorting machines improves); Curtis Dep. Tr. 76-77 (reducing “unearned time” improves efficiency); Cintron Dep. Tr. 56:12–57:5; 57:13–23 (adherence to transportation schedules improves efficiency).

Plaintiffs likewise cannot show that the alleged Postal Policy Changes “undermine the adequacy of critical postal services.” MSJ, at 31. Plaintiffs assert that the alleged changes “threaten the timely delivery and return of ballots in Plaintiffs’ jurisdictions” and “disrupt Plaintiffs’ carefully-crafted plans to administer the general election,” *id.*, but, again, the evidence is to the contrary. *See, e.g.*, Defs.’ Resp. to Pls.’ Stmt. of Facts ¶¶ 150–78; Glass Dec. ¶¶ 27–29 (detailing steps Postal Service is taking to ensure timely delivery of return ballots); Ex. 20 (Extraordinary Measures Memorandum). Nor did the Postal Service “disavow[] . . . its prior practice of delivering election mail at First Class speeds regardless of the paid class of service.” Defs.’ Resp. to Pls.’ Stmt. of Facts ¶¶ 84–88 (noting that Postal Service is continuing its longstanding practices of prioritizing the expeditious processing and delivery of Election Mail); DeChambeau Dec. ¶ 23. Accordingly, the Court should enter summary judgment in favor of Defendants.

II. Plaintiffs cannot establish an Elections Clause claim.

Plaintiffs, at bottom, claim that the Elections Clause grants them a constitutional right to expect a certain level of service from USPS. Plaintiffs have allowed their citizens to cast ballots by mail. Although USPS has not interfered with Plaintiffs’ actual election laws—their citizens are legally allowed to vote by mail regardless of what USPS does—Plaintiffs contend that because USPS’s business decisions may have produced mailing delays, Plaintiffs’ election laws may not produce the precise results anticipated by Plaintiffs. Plaintiffs thus argue that USPS must have somehow violated Plaintiffs’ right to regulate the “times, places and manner of holding elections.”

As a threshold matter, this claim is now moot because the Court can no longer provide effective relief before the November 2020 election. “A claim becomes moot if, among other things, it is no longer likely to be redressed by a favorable judicial decision.” *Brookens v. Am. Fed’n of Gov’t Employees*, 315 F. Supp. 3d 561, 568 (D.D.C. 2018). Here, the alleged injury underlying the Elections Clause claim is that the alleged USPS policy changes at issue will interfere with Plaintiffs’ procedures for the November 2020 election. *See* MSJ, at 9-10. But briefing for the cross-motions for summary judgment will complete on November 2, 2020, *the day before the November 2020 election*. *See* October 20, 2020 Minute Order. The Court will likely decide the motion on or after election day, and if the Court does somehow decide it beforehand, it is unclear how USPS could implement any additional, meaningful relief in time for it to have a material impact on the election. Accordingly, the Court likely cannot redress any of the alleged harms underlying the Elections Clause claim, and the claim is therefore moot.

Regardless, Plaintiffs’ Elections Clause theory—that this provision creates ancillary rights against any government action that may indirectly affect State elections—is unprecedented and without merit. The Elections Clause states that “[t]he times, places and manner of holding elections for” congresspersons “shall be prescribed in each state by the legislature thereof,” but Congress may generally “make or alter such regulations” by law. *Smiley v. Holm*, 285 U.S. 355, 363 (1932). The Elections Clause thus allows State legislatures “to prescribe the procedural mechanisms for holding congressional elections.” *Cook v. Gralike*, 531 U.S. 510, 523 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832 (1995) (“The Framers intended the Elections Clause to grant States authority to create procedural regulations.”). The “function contemplated by [the Elections Clause] is that of making laws.” *Smiley*, 285 U.S. at 366.

Here, USPS has not violated the right of Plaintiffs' legislatures under the Elections Clause. First and foremost, there is no support whatsoever for Plaintiffs' novel theory that the Elections Clause not only confers upon State legislatures the authority to pass laws governing how their citizens may vote, but also restricts federal activity which may have an incidental impact on the effects of these State regulations. The Elections Clause, by its terms, empowers Plaintiffs' legislatures to enact laws governing "the times, places, and manner" in which their citizens may vote, and USPS has done nothing to limit that authority. Plaintiffs have all enacted laws allowing some or all of their citizens to cast their ballots by mail, and those laws remain operative today. Even if Plaintiffs purportedly based these laws on an expectation of a certain level of performance by USPS in delivering the mail, that subjective expectation does not mean the Elections Clause now grants Plaintiffs a concomitant Constitutional right to have this Court oversee USPS operations to ensure that their expectations are met.

Unsurprisingly, Plaintiffs do not cite to a single Elections Clause case that has recognized the validity of such a theory, and Defendants are aware of none. The overwhelming majority of Elections Clause cases concern whether State legislatures have enacted elections laws permissible under the Elections Clause, not whether other actors have interfered with powers granted to the States therein.¹⁶ And to the limited extent there is case law concerning whether third parties (other than the federal government) have violated the right of State legislatures under this provision, that

¹⁶ See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831-35(1995) (an Arkansas law that functionally created congressional term limits could not be justified under the Elections Clause); *Roudebush v. Hartke*, 405 U.S. 15, 26 (1972) (Indiana Senate election vote recount was consistent with the Elections Clause); *Cook v. Gralike*, 531 U.S. 510, 525 (2001) (Missouri law which required that ballots must identify a candidate's position on term limits could be justified under the Elections Clause); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 459 (2008) (Washington State blanket primary was permissible exercise of Elections Clause power).

case law undermines Plaintiffs' theory. In *Smiley v. Holm*, for example, the Supreme Court found that the Elections Clause does not protect State legislatures from the inherent limitations of legislative activity, including circumstances external to a legislature which may affect the consequences of (or even undo) relevant election laws. 285 U.S. 355 (1932). There, the Minnesota legislature enacted an election law, which the governor vetoed. The State nevertheless sought to implement the law, arguing that the governor could not constitutionally veto a law passed pursuant to the Elections Clause, because that provision confers the relevant authority upon the "legislature" alone. *Id.* at 362-63. The Supreme Court rejected this argument, noting that the "subject-matter" of the Elections Clause "involves lawmaking in its essential features," and that "limitation[s]" to lawmaking—including the prospect of a veto—are not "incongruous with the grant of legislative authority to regulate congressional elections." *Id.* at 366, 368. If the Elections Clause does not shield a State legislature from an event which entirely negates an election law, it certainly does not give States a constitutional right against any external event which may incidentally impact an election.

Furthermore, Plaintiffs' theory, if accepted, would effectively allow States to wield the Elections Clause as a means to commandeer federal agencies. Here, for example, Plaintiffs effectively claim the right to force USPS to adopt policy changes whenever service performance levels drop, all because Plaintiffs chose to use USPS for mail-in voting. In any and all future elections, States could challenge *any* USPS delays—including those caused by events beyond USPS's control—and secure a federal judgment directing the content of USPS's business operations or forcing USPS to incur additional costs. And these claims would not be limited to USPS. For example, a State could challenge the decisions of federal agencies not to allow their employees the day off to vote on election days, or the decision of a federal health and safety agency

to condemn a building (or otherwise ensure safe conditions) in a facility that has been selected as a polling place. Federal agencies would “be impressed into service for the execution of state laws,” undermining “the independence and autonomy of the United States.” *Printz v. United States*, 521 U.S. 898, 928 (1997). Federal courts would be drawn in to serve as overseers of federal agencies, presenting significant separation of powers concerns and risking a “confrontation between the two branches” that “should be avoided whenever possible.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389–90 (2004).

This result is, of course, not the one that the Framers intended in crafting the narrow scope of the Elections Clause. Indeed, far from establishing the primacy of State interests, the Elections Clause, if anything, reflects a principle of “federal supremacy over the procedural aspects of determining the times, places, and manner of elections.” *U.S. Term Limits, Inc.* 514 U.S. at 810 (describing Congress’s authority to preempt State election laws). The Court should therefore conclude that the Elections Clause means what it says: States can issue procedural rules concerning the times, places, and manner of their elections, but the federal government need not contort its programs and policies to best accommodate any given State’s election law.

Plaintiffs’ arguments in support of creating this new cause of action lack merit. To start, Plaintiffs assert that the Elections Clause grants Congress the authority to pass laws which “make or alter” State “regulations” enacted under the Elections Clause, and Congress did not expressly delegate this authority to USPS in the PRA. But USPS is not exercising any authority reserved for Congress under the Elections Clause, and so no delegation is necessary. The Elections Clause allows Congress to “supplement” or “substitute” relevant State laws; it can dictate when, where, and how States’ citizens are allowed to vote in Congressional elections. *Smiley*, 285 U.S. at 366–67. Congress thus “has a general supervisory power over the whole subject.” *Id.* at 367. USPS has

not exercised this authority. It has not even attempted to prescribe how a State's citizens are allowed to vote, nor has it preempted a State law on the subject.¹⁷ Thus, no express Congressional delegation of this pre-emptive authority is necessary.

Plaintiffs also argue that USPS violated the Elections Clause because the "purpose" of the alleged USPS policy changes at issue was to interfere with mail-in voting. But there is no evidence, or even well-pled allegation, to support this assertion. For months now, USPS has reaffirmed its commitment to process and deliver Election Mail consistent with its historical practices. USPS has now even committed additional resources towards Election Mail. In a recent memorandum, USPS noted: "To help support the timely delivery of Election Mail, and consistent with our practices in past election cycles, the use of extraordinary measures beyond our normal course of operations is authorized and expected to be executed . . . between October 26 and November 24, to accelerate the delivery of ballots," and "[t]hese extraordinary measures include, but are not limited to, expedited handling, extra deliveries, and special pickups as used in past elections." Extraordinary Measures Memorandum, at 2. All of these measures are inconsistent with a purported attempt to somehow delay Election Mail.

To demonstrate improper intent, Plaintiffs largely rely on the timing of the alleged policy changes, and the process leading up to their adoption. *See* MSJ, at 39-40. But again, this

¹⁷ In their brief, Plaintiffs frame this argument more broadly, arguing that Congress has not expressly granted USPS the authority to "interfere" with State election laws. To the extent Plaintiffs are arguing that USPS cannot exercise its rulemaking authority in a manner that indirectly affects State elections unless Congress *specifically* allows it, there is no basis for this assertion. The Elections Clause does not support this requirement since, once more, that provision does not protect against any and all indirect "interferences" with State election laws. It grants States the right to enact procedural election rules, and grants Congress the authority to "make or alter" State procedural election rules. USPS does not dispute that it cannot "make or alter" a State election law without express Congressional authorization, but USPS is not making or altering any State election laws.

circumstantial evidence is not probative in light of the specific measures adopted by USPS to facilitate Election Mail delivery in particular. Even assuming the Court were persuaded that the alleged USPS policy changes have resulted in general mail delays, there is no evidence that these delays are materially affecting Election Mail in particular in light of the special measures adopted by USPS. Plaintiffs also refer to certain comments from the President. But they submit no evidence connecting these statements to the alleged USPS policy changes at issue. Indeed, they do not cite to a single piece of evidence in the record suggesting that any of these alleged policy changes took place at the behest of the President. To the contrary, the evidence in the record indicates only that relevant policy statements and determinations originated from certain long-serving, professional USPS officers in an attempt to enhance postal efficiency, and long before the tenure of the Postmaster General. *See, e.g.*, Cintron Dec. ¶¶ 2, 19-20.

Furthermore, it is unclear how an abstract “purpose” has any bearing on the relevant Elections Clause analysis. As explained earlier, USPS has not inhibited States from issuing laws governing how their citizens are allowed to vote in Congressional elections, and so USPS has not violated the right of State legislatures under the Elections Clause. And the States remain free to alter their policies to account for any fears over the performance of USPS. It is unclear how subjective “motivation” could change this conclusion. Accordingly, USPS is entitled to judgment on the Elections Clause claim.

III. Permanent Injunction and Declaratory Relief.

“Any injunctive relief is considered an extraordinary and drastic remedy.” *Indian Educators Fed'n Local 4524 of Am. Fed'n of Teachers, AFL-CIO v. Kempthorne*, 590 F. Supp. 2d 15, 17 (D.D.C. 2008). An injunction must “state its terms specifically and describe in reasonable

detail—and not by referring to the complaint or other document—the act or acts restrained or required,” and must provide an “operative command capable of enforcement.” *Id.* at 20.

Here, Plaintiffs’ requested injunction is too vague to satisfy this standard. Plaintiffs ask the Court to enjoin USPS “from enforcing the Postal Policy Changes,” ECF No. 58-1, which Plaintiffs define to include five separate “policies,” none of which are identified with any level of specificity (despite Plaintiffs having the benefit now of expedited discovery):

1. “[I]ncreased reduction of high-speed sorting machines without local input.” Plaintiffs do not identify what new initiative or policy has “increased” the rate of reduction of high-speed sorting machines—a process which Plaintiffs acknowledge had begun before Postmaster General DeJoy began his tenure. Nor do they specifically describe what it means to enjoin this “increased reduction” when it lacks sufficient “local input.” They note that, in the past, “local managers were typically afforded the opportunity to negotiate” before a sorting machine was removed, but it is unclear whether the requested injunction would require this precise type of negotiation in all circumstances.
2. “[A] new effort to reduce work hours, especially overtime.” Again, Plaintiffs fail to specifically identify the “new effort” to reduce overtime. Although they refer to documents which generally speak to a *goal* of reducing overtime hours, *see* MSJ, at 4, Plaintiffs do not claim that any of these documents actually lay out a precise policy by which overtime is capped or limited.
3. “[T]he first-ever organization-wide policy to eliminate late and extra trips.” As noted above, however, USPS never “eliminate[d]” late and extra trips, and thus it is unclear what policy this provision would enjoin. To establish that USPS did adopt a prohibition on late/extra trips, Plaintiffs rely on certain comments made during a telephone conference, certain documents informal documents, and then a set of guidelines that Robert Cintron circulated which identify certain criteria for when late/extra trips may be helpful. But USPS has since made clear that it has not eliminated these trips, and that any prior statement to that effect does not represent company policy.
4. “[A] new initiative altering letter carrier workflows to reduce work hours.” In their brief, Plaintiffs clarify that the “new initiative” they refer to is the “ESAS” program, *see* MSJ, at 5, which USPS has already suspended, and which affected a relatively tiny number of delivery units for one month. Plaintiffs do not identify any other initiative this provision is intended to prohibit.
5. “[T]he decision not to treat all election mail entered as marketing mail on an expedited First Class basis.” It is unclear whether this provision would require USPS to classify all Election Mail as First Class Mail—inconsistent with historical USPS practice, or require USPS to prioritize Election Mail entered as Marketing Mail so that it may be delivered

consistent with First Class Mail standards. If the latter, then this provision simply mirrors longstanding as well as current USPS policy.

Thus, Plaintiffs' proposed injunction, as written, fails to satisfy the applicable specificity requirement.¹⁸ Indeed, Plaintiffs' requested preliminary injunction, which the Court granted, used similar language and thus included similar deficiencies, ultimately requiring a motion for clarification. *See* ECF No. 54.

Finally, the Court lacks jurisdiction to enter the requested injunctive relief against the President, whom Plaintiff has named as a Defendant in this action. The Supreme Court has repeatedly held that, in general, the federal courts may not enter injunctive relief against the President in the context of his official, non-ministerial duties. *See Miss. v. Johnson*, 71 U.S. 475, 498-99 (1866). The same rule applies to declaratory relief. *See Newdow v. Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010).

CONCLUSION

The Court should deny Plaintiffs' Motion for Summary Judgment, and grant Defendants' Cross-Motion for Summary Judgment.

¹⁸ These concerns apply equally to Plaintiffs' request for declaratory relief. *See Nat'l Coal Ass'n v. Marshall*, 510 F. Supp. 803, 806 (D.D.C. 1981) ("declaratory and injunctive relief must be drawn with sufficient specificity to remedy the harm done.").

Dated: October 26, 2020

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 20 Civ. 2340 (EGS)

DEFENDANTS’ COUNTER-STATEMENT OF DISPUTED FACTS

Pursuant to Local Rule 7(h)(1) and Rule 13 of the Standing Order Governing Civil Cases before Judge Emmet G. Sullivan (ECF No. 9), Defendants respectfully submit the following response to Plaintiffs’ statement of material facts as to which there is no genuine issue.

I. Plaintiffs depend on the U.S. mail, especially during the ongoing pandemic.	
<p>1. On January 30, 2020, the World Health Organization designated the coronavirus disease 2019 (“COVID-19”) outbreak as a Public Health Emergency of International Concern; and on March 11, the WHO declared COVID-19 a global pandemic. <i>See</i> World Health Org., <i>WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19</i> (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.</p>	<p>Admit.</p>
<p>2. On March 13, 2020, the President declared a national emergency as a result of the outbreak. Proclamation 9994 of Mar. 13, 2020, <i>Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak</i>, 85 Fed. Reg. 15,337 (Mar. 18, 2020).</p>	<p>Admit.</p>

<p>3. The pandemic has since swept across the country, causing an unprecedented crisis with devastating economic and public health consequences. As of October 19, 2020, over eight million individuals nationwide have confirmed cases of COVID-19 and over 218,000 people have died. Centers for Disease Control & Prevention, <i>Coronavirus Disease 2019 (COVID-19): United States COVID-19 Cases and Deaths by State</i>, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated Oct. 19, 2020).</p>	<p>Admit.</p>
<p>4. COVID-19 is a contagious, potentially fatal respiratory disease primarily spread by person-to-person contact. Ku¹ Decl. ¶ 13 (Ex. 14).²</p>	<p>Admit.</p>
<p>5. COVID-19 is the most serious epidemic in over 100 years. Ku Decl. ¶ 8 (Ex. 14).</p>	<p>Admit.</p>
<p>6. To prevent further spread of COVID-19, the Centers for Disease Control and Prevention (“CDC”) has issued recommendations and guidelines on social distancing, wearing masks, and washing hands. Ku Decl. ¶¶ 14–15 (Ex. 14).</p>	<p>Admit.</p>
<p>7. The CDC has specifically warned against the risks of gatherings, explaining that the lowest risks occur with virtual gatherings where there is no physical presence and the highest risks occur with large indoor gatherings—particularly if some attending do not observe safety strategies like social distancing or mask wearing. Ku Decl. ¶ 14 (Ex. 14).</p>	<p>Admit.</p>

¹ Dr. Leighton Ku is a Professor of Health Policy and Management and Director of the Center for Health Policy Research at the Milken Institute School of Public Health, George Washington University.

² All references in this Statement of Facts to “Ex. ___” are to the exhibits to the accompanying Declaration of Daniela Nogueira dated October 19, 2020 (ECF No. 59). The depositions cited in this Statement of Facts were conducted within the last thirty days, and deponents who requested an opportunity to review and sign the transcript have not had the full period allowed by the rules to do so. Fed. R. Civ. P. 30(e). To the extent necessary, Plaintiffs will supplement the exhibits cited in this filing with any errata sheets the deponents submit.

<p>8. Because COVID-19 is primarily spread through person-to-person contact with high risks for indoor gatherings, Plaintiffs have undertaken serious efforts to minimize in-person gatherings. N.Y. Exec. Order No. 202.8; Hawaii Sixth Supplementary Proclamation Relating to COVID-19; N.J. Exec. Order No. 107; San Francisco Third Supplement to Mayoral Proclamation Declaring the Existence of a Local Emergency dated Feb. 25, 2020; N.Y. City Emergency Executive Order No. 100.</p>	<p>Admit.</p>
<p>9. Plaintiffs have also expended time, money, and resources to educate the public and facilitate social distancing. <i>See</i> Adinaro Decl. ¶ 8 (Ex. 1); Kellner³ Decl. ¶ 27 (Ex. 13).</p>	<p>Admit.</p>
<p>10. Plaintiffs have also increased reliance on U.S. mail to continue to meet their legal obligations to their residents and to administer public benefits programs. <i>See</i> Banks⁴ Decl. ¶¶ 4–7, 11, 14 (Ex. 2); Betts⁵ Decl. ¶ 8 (Ex. 3); Newton⁶ Decl. ¶ 9 (Ex. 16).</p>	<p>Admit.</p>

³ Douglas Kellner is a Co-Chair and Commissioner of the New York State Board of Elections.

⁴ Steven Banks is the Commissioner of the New York City Department of Social Services.

⁵ Catherine Betts is the Director of the Hawaii Department of Human Services.

⁶ Jack Newton is the Director of the Public Benefits Unit at Bronx Legal Services.

11. Plaintiffs provide various services and benefits to their residents that rely on U.S. mail, including public assistance to low-income families, healthcare benefits, child support enforcement, and drivers' licenses. Banks Decl. ¶¶ 3–7 (Ex. 2), 14; Betts Decl. ¶ 3 (Ex. 3); DiGiovanni-Abatto ⁷ Decl. ¶ 3 (Ex. 5); Hein ⁸ Decl. ¶¶ 2–3 (Ex. 8); Jacobs ⁹ Decl. ¶¶ 4–10 (Ex. 11); Lau ¹⁰ Decl. ¶ 3 (Ex. 15); Poole ¹¹ Decl. ¶ 2 (Ex. 17).	Admit.
12. These services depend upon the timely delivery and receipt of U.S. mail. Banks Decl. ¶¶ 4–7, 11, 14 (Ex. 2); Betts Decl. ¶ 6 (Ex. 3); DiGiovanni-Abatto Decl. ¶¶ 3–5 (Ex. 5); Hein Decl. ¶¶ 4–5 (Ex. 8); Jacobs Decl. ¶¶ 5–10 (Ex. 11); Lau Decl. ¶ 5 (Ex. 15); Poole Decl. ¶¶ 3–11 (Ex. 17);.	Admit.
II. The U.S. Postal Service upended its past policies and practices by implementing abrupt changes in June and July 2020 that have had a nationwide impact.	
13. For decades, the U.S. Postal Service has employed an “every piece, every day” ethos to mail delivery. Second Cintron ¹² Dep. Tr. 118; Goldway ¹³ Decl. ¶ 28 (Ex. 6); Coradi ¹⁴ Decl. ¶ 11 (Ex. 4).	Admit.

⁷ Kimberly DiGiovanni-Abatto is the Deputy Administrator of Agency Operations for the New Jersey Motor Vehicle Commission.

⁸ Michael Hein is the Commissioner of the New York State Office of Temporary and Disability Assistance.

⁹ Jennifer Langer Jacobs is the Assistant Commissioner of the New Jersey Department of Human Services.

¹⁰ Lynette Lau is the Administrator of the Child Support Enforcement Agency for the State of Hawaii.

¹¹ Sheila Poole is the Commissioner of the New York State Office of Children and Family Services.

¹² Robert Cintron is the Vice President for Logistics for the U.S. Postal Service.

¹³ Ruth Goldway is the former Chairwoman of the U.S. Postal Regulatory Commission.

¹⁴ Peter Coradi is a National Business Agent for the American Postal Workers Union.

<p>14. In the past, postal workers have been fired for delaying just one or two pieces of mail. Coradi Decl. ¶ 11 (Ex. 4).</p>	<p>Deny to the extent that the cited exhibit does not provide a basis to admit the asserted fact. For example, “In the past”, “postal worker” and “delaying” are not defined terms. Ex. 4, ¶ 11. It is unclear which level of employee or which bargaining unit is being referred to. Moreover, decisions regarding employee discipline of any Postal Service employee are highly fact specific inquiries. Curtis Decl. (DEx. 7)¹⁵ ¶¶ 10-11x.</p> <p>Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit. <i>See Anderson v. Liberty Lobby, Inc.</i>, 477 U.S. 242, 247–48 (1986) (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”). Otherwise, admit.</p>
<p>15. At times, local postmasters have personally delivered pieces of mail to ensure that they do not remain in a delivery unit overnight. Goldway Decl. ¶ 29 (Ex. 6).</p>	<p>Deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>16. Traditionally, the U.S. Postal Service has had a certain amount of operational flexibility to ensure that mail is delivered in accordance with its service standards. Goldway Decl. ¶ 29 (Ex. 6); Coradi Decl. ¶¶ 13–14 (Ex. 4).</p>	<p>Admit.</p>

¹⁵ All references to “DEx. ___” are to the exhibits accompanying Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of Defendants’ Cross-Motion for Summary Judgment.

<p>17. In June and July 2020, the U.S. Postal Service began overhauling how the agency collects, processes, and delivers mail throughout the country. Curtis¹⁶ Dep. Tr. 137–38 (Ex. 26); Exs. 37, 39–41, 43, 46–48, 50.</p>	<p>Deny. The cited deposition testimony does not characterize the Postal Service’s actions as an “overhaul.” Curtis Dep. Tr. (DEX. 10) (DEX. 7)137-38.</p> <p>Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
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¹⁶ Angela Curtis is the Vice President of Retail and Post Office Operations at the U.S. Postal Service.

<p>18. Specifically, the U.S. Postal Service made five operational changes challenged in this case: (1) increased reduction of high-speed sorting machines without local input; (2) a new effort to reduce work hours, especially overtime; (3) the first-ever organization-wide policy to eliminate late and extra trips; (4) a new initiative altering letter carrier workflows; and (5) the decision not to treat all election mail mailed as Marketing Mail on an expedited First Class basis. Exs. 37, 39–41, 43–50.</p>	<p>Deny. The Postal Service did not “increase[] reduction of high-speed sorting machines without local input.” DeChambeau Decl. (DEx. 2) ¶¶ 7, 14. Further, the cited exhibits do not support Plaintiffs’ characterization of these various actions as either “changes” or as “new” or “first-ever.” Rather, efforts to improve efficiency and control expenses are part of the Postal Services’ long-standing practice. First Cintron Decl. (DEx. 4) ¶¶ 19; Curtis Dep. Tr. (DEx. 10) (DEx. 7) 76-77, 155. Finally, the Postal Service is continuing its practice to ensure that “Election Mail entered as Marketing Mail should be . . . processed expeditiously to the extent feasible so that it is generally delivered in line with the First-Class Mail delivery standards.” See Clarifying Operational Instructions (DEx. 12) at 4.</p> <p>Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the “operational changes” described are not current Postal Service policy or practice. See Clarifying Operational Instructions (DEx. 12). See <i>Anderson</i>, 477 U.S. at 247–48.</p>
<p>Policy Change 1: Reduced sorting machines.</p>	
<p>19. For FY 2020, the agency reduced 711 high-speed sorting machines by mid-August 2020. DeChambeau¹⁷ Decl. ¶ 21 (ECF No. 30-2); Ex. 37.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. See <i>Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

¹⁷ Jason DeChambeau is Headquarters Director of Processing Operations for the U.S. Postal Service.

<p>20. This figure includes the reduction of 52 machines in New York State, 27 machines in New Jersey, 9 in San Francisco, and 4 machines in Hawaii. Ex. 37.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p> <p>Otherwise, admit.</p>
<p>21. All told, the reduction of these 711 machines constitutes an approximately 14.7 percent reduction in the number of machines across the country. DeChambeau Decl. (DEx. 2) ¶ 21 (ECF No. 30-2).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p> <p>Otherwise, admit.</p>
<p>22. Of the 711 sorting machines reductions, over 600 were abruptly announced on June 17, 2020 to start taking place “over the next several months.” Ex. 37.</p>	<p>Deny to the extent that the cited exhibit does not support that an announcement was made or that the letter providing notice to a union was “abrupt.” <i>See Ex. 37.</i></p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p> <p>Otherwise, admit.</p>

<p>23. Prior to 2020, the U.S. Postal Service had been reducing sorting machines at significantly low rates since FY2016. DeChambeau Decl. (DEx. 2) ¶ 21 (ECF No. 30-2).</p>	<p>Deny to the extent that the cited exhibit does not support the characterization of the reduction as “significantly low rates.” DeChambeau Decl. (DEx. 2) ¶ 21.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p> <p>Otherwise, admit.</p>
<p>24. The agency reduced its fleet of sorting machines by about 3.3 percent in FY2020, 1.9 percent in FY2019, 6.5 percent in FY2018, 3.5 percent in FY2017, and 0 percent in FY2015. DeChambeau Decl. (DEx. 2) ¶ 21 (ECF No. 30-2). Only FY2016 had a reduction rate above 10 percent. DeChambeau Decl. (DEx. 2) ¶ 21 (ECF No. 30-2).</p>	<p>Deny, to the extent the exhibit cited shows reductions in the Postal Service’s inventory of all sorting machines (as opposed to letter and flat sorting machines) and to the extent the cited exhibit shows reductions of 3.3 percent in FY2020. DeChambeau Decl. (DEx. 2) ¶ 21.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p> <p>Otherwise, admit.</p>

<p>25. Even when mail volume was down prior to 2020, the U.S. Postal Service often did not reduce or remove machines in case other machines malfunctioned or—as is typical during election and holiday seasons—mail volume increased again. Coradi Decl. ¶ 15 (Ex. 4).</p>	<p>Deny. The Postal Service has a longstanding practice of removing unnecessary mail processing equipment based on monitoring of the volume of mail flow at facilities throughout the nation. DeChambeau Decl. (DEx. 2) ¶ 8. Since 2017, the Postal Service has determined the optimum number of machines by running computer models, which calculate the variation in volume by using the 95th percentile of heaviest daily mail excluding December, machine capacity, and processing windows. <i>Id.</i> ¶ 15.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>26. When the U.S. Postal Service did reduce sorting machines prior to 2020, managers at processing facilities typically negotiated if, when, and how a sorting machine would be reduced through an iterative process. Coradi Decl. ¶ 15 (Ex. 4).</p>	<p>Deny. The Postal Service has a longstanding practice of removing unnecessary mail processing equipment based on monitoring of the volume of mail flow at facilities throughout the nation. DeChambeau Decl. (DEx. 2) ¶ 8. Since 2017, the Postal Service has determined the optimum number of machines by running computer models, which calculate the variation in volume by using the 95th percentile of heaviest daily mail excluding December, machine capacity, and processing windows. <i>Id.</i> ¶ 15.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>27. Often, the U.S. Postal Service would first just turn off sorting machines on a trial basis to test whether the machine would still be necessary for operations going forward. Coradi Decl. ¶ 15 (Ex. 4).</p>	<p>Deny. The Postal Service has a longstanding practice of removing unnecessary mail processing equipment based on monitoring of the volume of mail flow at facilities throughout the nation. DeChambeau Decl. (DEx. 2) ¶ 8. Since 2017, the Postal Service has determined the optimum number of machines by running computer models, which calculate the variation in volume by using the 95th percentile of heaviest daily mail excluding December, machine capacity, and processing windows. <i>Id.</i> ¶ 15.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>28. Unlike prior years, facility managers were not given the opportunity to weigh in on if, when, or how to reduce sorting machines. Coradi Decl. ¶ 15 (Ex. 4); Ex. 37.</p>	<p>Deny. The Postal Service has a longstanding practice of removing unnecessary mail processing equipment based on monitoring of the volume of mail flow at facilities throughout the nation. DeChambeau Decl. (DEx. 2) ¶ 8. Since 2017, the Postal Service has determined the optimum number of machines by running computer models, which calculate the variation in volume by using the 95th percentile of heaviest daily mail excluding December, machine capacity, and processing windows. <i>Id.</i> ¶ 15.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. (DEx. 2) ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>Policy Change 2: Reduced unearned overtime.</p>	

<p>29. In June and July 2020, the U.S. Postal Service began new efforts to reduce unearned overtime. Exs. 39–40; Curtis Dep. Tr. (DEX. 10) 75–76 (Ex. 26).</p>	<p>Deny to the extent that the cited deposition testimony does not support the characterization of the “efforts to reduce unearned overtime” as “new.” To the contrary, the testimony states that these efforts “are not new. These are things that have been around for a long time. . .” Curtis Dep. Tr. (DEX. 10) 76–77.</p> <p>Deny to the extent that this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEX. 12). <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>30. Under collective bargaining agreements, U.S. Postal Service employees are expected to complete a certain number of tasks in order to “earn” time. Curtis Dep. Tr. (DEX. 10) 51–53 (Ex. 26).</p>	<p>Deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEX. 12). <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>31. For example, for every 18 letters that a city-based letter carrier puts into a case, they earn one minute. Curtis Dep. Tr. (DEX. 10) 52 (Ex. 26).</p>	<p>Deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEX. 12). <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>32. “Unearned” time is the “time that an employee takes to complete those duties over and above the earned time.” Curtis Dep. Tr. (DEX. 10) 53 (Ex. 26).</p>	<p>Deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEX. 12). <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>33. If the number of tasks completed earn time of eight hours and 15 minutes, but the carrier takes 8 hours and 45 minutes to complete those tasks, that would result in 30 minutes of “unearned overtime.” Curtis Dep. Tr. (DEx. 10) 54 (Ex. 26).</p>	<p>Deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEx. 12). <i>See Anderson, 477 U.S. at 247–48.</i> Otherwise, admit.</p>
<p>34. “Unearned overtime” is sometimes necessary for the U.S. Postal Service to achieve its mission for a given day. Curtis Dep. Tr. (DEx. 10) 54 (Ex. 26).</p>	<p>Deny. The cited deposition testimony responded to a question regarding the purpose of “overtime” generally, not “unearned overtime” specifically. Curtis Dep. Tr. (DEx. 10) 54.</p> <p>Also deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEx. 12). <i>See Anderson, 477 U.S. at 247–48.</i></p>
<p>35. On June 26, 2020, the U.S. Postal Service held a teleconference with Area Vice Presidents on strategies to reduce work hours, especially unearned overtime. Ex. 39.</p>	<p>Deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEx. 12). <i>See Anderson, 477 U.S. at 247–48.</i> Otherwise, admit.</p>
<p>36. Participating Area Vice Presidents were asked to go “all in” on these strategies. Curtis Dep. Tr. (DEx. 10) 60–61 (Ex. 26); Ex. 39 (slide 6).</p>	<p>Deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEx. 12). <i>See Anderson, 477 U.S. at 247–48.</i> Otherwise, admit.</p>

<p>37. As part of its new efforts to reduce work hours, the U.S. Postal Service launched a “Caseless” pilot at 60 different sites to require letter carriers to case mail without any casing equipment. Ex. 39; Curtis Dep. Tr. (DEx. 10) 95 (Ex. 26).</p>	<p>Deny. The cited deposition testimony does not support the characterization of “new efforts to reduce work hours. To the contrary, the testimony states that these efforts “are not new. These are things that have been around for a long time. . .” Curtis Dep. Tr. (DEx. 10) 76-77. In addition, the deposition testimony does not support the statement that the pilot was “launched.” To the contrary, the testimony states that Caseless was a pilot program postal officials “were working with our union partners on,” one of two one of two new pilots that “we were going to launch,” and that the pilots “were . . . stopped.” Curtis Dep. Tr. (DEx. 10) 95-96, 161.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>38. “Casing” means sorting letter mail and flats into walk sequence or delivery point sequence, i.e. the sequence necessary for carriers to deliver mail door-to-door. Curtis Dep. Tr. (DEx. 10) 82 (Ex. 26).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted facts that is material to the outcome of this suit, <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>39. In the “Caseless” pilot, carriers must case letters and flats manually in the office or while out on their routes. Curtis Dep. Tr. (DEx. 10) 82 (Ex. 26).</p>	<p>Deny. The cited deposition testimony does not support the asserted fact. To the contrary, Mr. Curtis stated that the Caseless pilot would “allow carriers . . . to merge . . . raw volume [of mail] that came from the plant without all of that equipment to determine if that was more efficient in the office” and does not state that the pilot took place. Curtis Dep. Tr. (DEx. 10) 95.</p> <p>Also deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEx. 12). <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>40. On July 7, 2020, the U.S. Postal Service reiterated its efforts to reduce work hours in a teleconference. Ex. 40; Curtis Dep. Tr. (DEx. 10) 132–33 (Ex. 26).</p>	<p>Deny to the extent that the cited deposition testimony characterizes the July 7, 2020 teleconference as a “continuation of our prior meeting to continue talking about our end of the year projections, how we thought we would end and what we would do differently for the new year.” Curtis Dep. Tr. (DEx. 10) 132-133.</p> <p>Deny to the extent this paragraph does not set an forth uncontroverted facts that is material to the outcome of this suit, as the Postal Service has issued guidance reinforcing that overtime is not banned or otherwise restricted. Clarifying Operational Instructions (DEx. 12). <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>Policy Change 3: Reduced late trips and extra trips.</p>	
<p>41. In July 2020, the U.S. Postal Service established an organization-wide policy on the use of late and extra trips for the first time ever. Second Cintron Dep. Tr. (DEx. 11) 50 (Ex. 28).</p>	<p>Deny. The cited deposition testimony explains that prior to July 2020, there was no “formal written guidance,” but “over two years,” there was “plenty” of trainings and meetings “that were given to management about the need to adhere to transportation schedules,” and that national strategy had always been to adhere to the operating plan, i.e., truck schedules. Second Cintron Dep. Tr. (DEx. 11) 50-51. Curtis Dep. Tr. (DEx. 10) 25-28.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as USPS has issued updated guidance. <i>See</i> Second Declaration of Joshua Colin (“Second Colin Decl.”) (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>42. Late trips are trips that depart after their scheduled departure time. Curtis Dep. Tr. (DEx. 10) 31 (Ex. 26); Coradi Decl. ¶¶ 13–14 (Ex. 4).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>43. Extra trips are additional trips that were not originally scheduled to occur. Curtis Dep. Tr. (DEx. 10) 31 (Ex. 26); Coradi Decl. ¶¶ 13–14 (Ex. 4).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>44. For FY2019, 20 percent of total transportation trips were late. Ex. 54.</p>	<p>Deny to the extent that the cited exhibit does not support the asserted fact. <i>See</i> Ex. 55.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>45. Four percent of total transportation trips were considered “extra.” Ex. 54.</p>	<p>Deny to the extent that the cited exhibit does not support the asserted fact. <i>See</i> Ex. 55.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>46. Together, these late and extra trips cost the U.S. Postal Service about \$280 million out of \$80.1 billion in total expenses for the year—or about 0.35 percent. Exs. 43, 54–55.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>47. Prior to July 2020, U.S. Postal Service employees typically utilized late trips or extra trips when necessary to account for fluctuations in mail volume, machine malfunctions, truck breakdowns, inclement weather, health and safety concerns, or the like. Coradi Decl. ¶ 13 (Ex. 4); Curtis Dep. Tr. (DEx. 10) 41–43 (Ex. 26).</p>	<p>Deny to the extent this is not an exhaustive list for reasons employees utilized late or extra trips. For example, a common reason for utilizing late trips or extra trips not accounted for in this statement of fact is the contractor being late. Curtis Dep. Tr. (DEx. 10) at 43.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>48. Prior to July 2020, frontline supervisors and managers could authorize late or extra trips. Second Cintron Dep. Tr. (DEx. 11) 32, 34–35, 53 (Ex. 28).</p>	<p>Deny to the extent that the statement implies that this changed in July 2020. With respect to late and extra trips, managers are still authorized to “use their best business judgment to meet our service commitments.” <i>See</i> Clarifying Operational Instructions (DEx. 12).</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>49. Prior to July 2020, approval was not required from middle managers, plant managers, or Area Vice Presidents. Second Cintron Dep. Tr. (DEx. 11) 32 (Ex. 28).</p>	<p>Deny. The cited deposition testimony states that while given the size and scope of the Postal Service organization, it was “possible” for nonmanagerial employees to decide on their own that a late trip was necessary, it was required for nonmanagerial employees to seek approval before running a late trip. Second Cintron Dep. Tr. (DEx. 11) 32–34.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>50. Prior to July 2020, when Area Vice Presidents or U.S. Postal Service Headquarters identified a particular plant or route that appeared to be using higher than usual numbers of late or extra trips, they would work with that particular plant or postal office to determine the root cause and tailor an appropriate solution through an iterative process. Second Cintron Dep. Tr. (DEx. 11) 20–21 (Ex. 28); Curtis Dep. Tr. (DEx. 10) 29–31 (Ex. 26).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>51. Prior to July 2020, there was no organization-wide policy from U.S. Postal Service Headquarters dictating when late trips or extra trips were not acceptable. Second Cintron Dep. Tr. (DEx. 11) 50 (Ex. 28).</p>	<p>Deny. The cited deposition testimony states that prior to July 2020, there was no “formal written guidance.” However, the national strategy had always been to adhere to the operating plan, i.e. truck schedules. Second Cintron Dep. Tr. (DEx. 11) 50-51.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>52. Prior to July 2020, there was no organization-wide policy from U.S. Postal Service Headquarters requiring plant manager or Area Vice President approval for late or extra trips. Second Cintron Dep. Tr. (DEx. 11) 50 (Ex. 28).</p>	<p>Deny. While given the size and scope of the Postal Service organization, it was “possible” for nonmanagerial employees to decide on their own that a late or extra trip was necessary, it was “required” for nonmanagerial employees to seek approval before running a late or extra trip. Second Cintron Dep. Tr. (DEx. 11) 32-34.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>53. On July 10, 2020, U.S. Postal Service Chief Operating Officer Dave Williams held a teleconference with what were then known as Area Vice Presidents. Second Cintron Dep. Tr. (DEx. 11) 69–70 (Ex. 28); Cintron Suppl. Decl. (DEx. 15) ¶ 3 (ECF No. 39-1).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>54. During the July 10, 2020, teleconference, Mr. Williams gave a presentation on the elimination of late trips and extra trips. Second Cintron Dep. Tr. (DEx. 11) 70–71 (Ex. 28).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>55. Mr. Williams supported his July 10, 2020 presentation with slides, including a slide stating “NO EXTRA TRANSPORTATION” and “NO LATE TRANSPORTATION.” Ex. 41 (USPS_EDPA00000843, at slide 9).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>56. Another slide stated: “Effective July 13 all extra trips and Postal caused late trips are unauthorized contractual commitments.” Ex. 41 (USPS_EDPA00000843, at slide 10).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>57. A third slide further stated that “Management Instruction MI SP-G4-2006-2” should be followed for “unauthorized extra trips and late trips.” Ex. 41 (USPS_EDPA00000843, at slide 11). The slide further stated that the “Area Vice President is the ratifying official and must ratify and submit to COO” and the “Area Vice President will call COO daily if extra trips or late trips occur the prior day to discuss next steps.” Ex. 41 (USPS_EDPA00000843, at slide 11).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>58. Following the teleconference, Area Vice Presidents turned to implementing the new policy. Curtis Dep. Tr. (DEx. 10) 41 (Ex. 26).</p>	<p>Deny to the extent that the cited testimony does not refer to a “new policy,” but instead that “this was going to be an area of focus and energy for us in my perception.” Curtis Dep. Tr. (DEx. 10) 41. Further deny that this was a new policy, as the national strategy had always been to adhere to the operating plan, i.e. truck schedules. Second Cintron Dep. Tr. (DEx. 11) 50-51. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>59. Some U.S. Postal Service employees distributed instructions that same day. Ex. 42 (USPS_EDPA00003038) (“[T]here is no more waiting on mail and there is no coming back for parcels. The excuses of why people can’t get done with their routes is gone. We NEED to start capturing the downtime.”).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>60. One Area Vice President’s team prepared and distributed a “Mandatory Stand-Up Talk: All Employees,” with contents “draw[n] from” and “reflected” in the teleconference held that same day. Ex. 43 (the “July 10 Stand-Up Talk”); Cintron Suppl. Decl. (DEx. 15) ¶ 3 (ECF No. 39-1).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>61. At the U.S. Postal Service, a “Stand-Up Talk” is a document with talking points that local postal managers use to relay information to U.S. Postal Service employees. Curtis Dep. Tr. (DEx. 10) 176–77 (Ex. 26).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>62. The July 10 Stand-Up Talk stated: “Right now, we are at a critical juncture in our organization and must make immediate, lasting, and impactful changes in our operations and in our culture,” and asserted that “[t]his operational pivot is long overdue.” Ex. 43.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>63. The July 10 Stand-Up Talk document further stated: “The initial step in our pivot is targeted on transportation and the soaring costs we incur, due to late trips and extra trips, which costs the organization somewhere around \$200 million in added expenses.” Ex. 43.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>64. The July 10 Stand-Up Talk listed the following “examples of transportation changes being implemented immediately (today).”</p> <ul style="list-style-type: none"> a. “All operations must meet our 24-hour clock commitment” b. “All trips will depart on time (Network, Plant and Delivery); late trips are no longer authorized or accepted” c. “Extra trips are no longer authorized or accepted” d. “There must be proper annotation in the scanner, if a Contractor Failure occurs” e. “All PVS/HCR drivers must be notified that trips depart on time.” f. “Function 4 must start on time and end on time and we must make scheduled DUTV Carriers must begin on time, leave for the street on time, and return on time” g. “Carriers must make the final dispatch of value; no additional transportation will be authorized to dispatch mail to the Plant after the intended dispatch” h. “The right mail must go on the right truck - every time” i. “ALL EMPLOYEES have an essential role with trips departing on time.” <p>Ex. 43.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>65. The July 10 Stand-Up Talk acknowledged that the new policy could result in mail being left behind in postal facilities. The document states: “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 is not typical.” Ex. 43.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>66. Following the July 10, 2020 teleconference and the distribution of the July 10 Stand-Up Talk, some U.S. Postal Service managers contacted Vice President of Logistics Robert Cintron to get clarification regarding the new policy. Suppl. Cintron Decl. ¶ 3 (ECF No. 39-1); Second Cintron Dep. Tr. (DEx. 11) 46–47 (Ex. 28).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>67. On July 11, 2020, Vice President Cintron began drafting a document to explain the policy presented in the July 10, 2020 teleconference. Cintron Suppl. Decl. (DEx. 15) ¶ 4 (ECF No. 39-1); Second Cintron Dep. Tr. (DEx. 11) 65 (Ex. 28).</p>	<p>Deny to the extent the guidelines are characterized as a “document to explain the policy presented in the July 10, 2020 teleconference.” The cited paragraph explains that “clarifications” were made to make “clear that certain statements in the July 10, 2020 Stand-Up Talk [not the teleconference] were not accurate statements of USPS policy” and that the guidelines explained “when extra trips could be taken, clarifying that extra trips remained authorized under certain circumstances.” Cintron Suppl. Decl. (DEx. 15) ¶ 4.</p> <p>Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>68. On July 14, 2020, Vice President Cintron finalized a document entitled “Keys to Success for Elimination of Extras and Lates.” Ex. 46 (the “Cintron Guidelines”); Cintron Suppl. Decl. (DEx. 15) ¶ 4 (ECF No. 39-1).</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>68. On July 14, 2020, Vice President Cintron distributed the “Keys to Success for Elimination of Extras and Lates” via email, stating that the “focus is to eliminate unplanned extra transportation,” “[d]eviations to the extent possible should be utilized to eliminate extras,” and “[t]rips must depart on time.” Ex. 45.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>69. The Cintron Guidelines listed when a late or extra trip was “Acceptable” or “Not Acceptable.” Ex. 46.</p>	<p>Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>70. The Cintron Guidelines remain operative today. Second Cintron Dep. Tr. (DEx. 11) 76–77 (Ex. 28).</p>	<p>Deny. The Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>71. On October 14, 2020, Vice President Cintron testified that the Cintron Guidelines had never been rescinded. Second Cintron Dep. Tr. (DEx. 11) 91 (Ex. 28).</p>	<p>Deny to the extent that supplemental guidance has since been issued to Postal Service employees. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit. Otherwise, admit.</p>
<p>72. In late September and into October, the U.S. Postal Service sent various guidance documents to either postal managers or all employees that explained late and extra trips were permitted, but did not explicitly rescind the Cintron Guidelines. Colin Decl. ¶ 17 & Exs. 1–5 (Ex. 60).</p>	<p>Deny to the extent that supplemental guidance has since been issued to Postal Service employees. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit. Otherwise, admit.</p>
<p>73. As a result of the new organization-wide policy announced in July 2020, the number of late and extra trips fell “significantly.” Second Cintron Dep. Tr. (DEx. 11) 123–24 (Ex. 28); Grimmer Decl. ¶ 19 (Ex. 7); Exs. 32–33, 53, 59.</p>	<p>Deny to the extent that the cited deposition testimony and Exhibits 32-33, 53, 59 do not support that there was a “new organization-wide policy” or attribute the decline in the number of late and extra trips solely to the renewed focus on adherence to transportation schedule. Second Cintron Dep. Tr. (DEx. 11) 123-24. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>74. While the number of late trips fluctuated between 2,500 and 6,413 from January 1, 2020 through July 10, 2020 on all but 16 days, late trips have remained below 1,600 on all but nine days since July 15, 2020 (clustered around the Labor Day and Columbus Day holidays). Ex. 32.</p>	<p>Deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, <i>see Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

75. While the number of extra trips fluctuated between 1,028 and 3,725 from January 1, 2020 through July 11, 2020, extra trips have remained below 800 on all but six days since July 15, 2020 (clustered around the Labor Day and Columbus Day holidays). Ex. 33.	Deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, <i>see Anderson</i> , 477 U.S. at 247–48. Otherwise, admit.
Policy Change 4: Reduced morning sortation.	
76. As part of its efforts to reduce work hours, the U.S. Postal Service began an initiative in July 2020 entitled “Expedited to Street/Afternoon Sortation” (or “ESAS”) at 384 facilities. Exs. 39, 47.	Deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson</i> , 477 U.S. at 247–48. Otherwise, admit.
77. The 384 facilities that are part of the ESAS initiative include those located in the jurisdictions of Plaintiffs here—New Jersey, New York State, New York City, and San Francisco. Ex. 48.	Deny to the extent that the statement is drafted in the present tense, despite the pilot not currently being in effect. Curtis Dep. Tr. (DEx. 10) 97. Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson</i> , 477 U.S. at 247–48. Otherwise, admit.
78. ESAS “reduces morning office time,” requiring “carriers to leave for the street earlier.” Ex. 47.	Deny to the extent that the statement is drafted in the present tense, despite the pilot not currently being in effect. Curtis Dep. Tr. (DEx. 10) 97. Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson</i> , 477 U.S. at 247–48. Otherwise, admit.

<p>79. Specifically, in facilities participating in ESAS, “[c]ity carriers will not sort any mail during the morning operation.” Ex. 47.</p>	<p>Deny to the extent that the statement is drafted in the present tense, despite the pilot not currently being in effect. Curtis Dep. Tr. (DEx. 10) 97. Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson, 477 U.S. at 247–48.</i> Otherwise, admit.</p>
<p>80. Instead, under ESAS, “[a]ny unsorted First Class flats will go directly to the street with the carrier and will be routed in delivery sequence while on the street.” Ex. 47.</p>	<p>Deny to the extent that the statement is drafted in the present tense, despite the pilot not currently being in effect. Curtis Dep. Tr. (DEx. 10) 97. Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson, 477 U.S. at 247–48.</i> Otherwise, admit.</p>
<p>81. After completing their routes, city carriers return to the office and “[s]tage [mail] for [d]elivery the [n]ext [s]cheduled [d]ay,” meaning that certain mail that had already been in the office that morning will necessarily go out on the next scheduled day instead of that day. Ex. 47.</p>	<p>Deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson, 477 U.S. at 247–48.</i> Otherwise, admit.</p>
<p>82. Consistent with the Cintron Guidelines, instructions on how ESAS works direct that “[a]ll [m]orning [t]rips [m]ust be on [t]ime” and “[n]o [e]xtras [a]fter [s]cheduled DOV [t]rip” are permitted. Ex. 47.</p>	<p>Deny to the extent that the statement is drafted in the present tense, despite the pilot not currently being in effect. Curtis Dep. Tr. (DEx. 10) 97. Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson, 477 U.S. at 247–48.</i> Otherwise, admit.</p>

<p>83. The expectation for ESAS was that it would “[r]educe [c]ity [c]arrier [o]vertime.” Ex. 22.</p>	<p>Deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the cited pilot is not currently in effect. Curtis Dep. Tr. (DEx. 10) 97. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>Policy Change 5: Reduced delivery speed for election mail.</p>	
<p>84. The U.S. Postal Service changed its prior practice of delivering election mail at First Class speeds regardless of the paid class of service. Glass Dep. Tr. 107 (Ex. 29); Exs. 35 (slide 8, “Election Mail sent as Marketing Mail is not upgraded to First Class service.”), 49, 56 (at 12).</p>	<p>Deny. The Postal Service did not previously have a policy “providing that Election Mail (including ballots) entered as Marketing Mail be automatically upgraded to First-Class Mail, even if the mail bears the official Election Mail logo. Glass Decl. (DEx. 18) ¶ 18. As such, the Postal Service did not “change its prior practice.” The Postal Service is continuing its longstanding practices of prioritizing the expeditious processing and delivery of Election Mail, including issuing the directive that “Election Mail entered as Marketing Mail should be . . . processed expeditiously to the extent feasible so that it is generally delivered in line with the First-Class Mail delivery standards.” <i>See Clarifying Operational Instructions</i> (DEx. 12) at 4. <i>See also</i> Glass Decl. (DEx. 18) ¶¶ 19-22 discussing past and ongoing practices regarding expedited and prioritized treatment of Election Mail.</p> <p>Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit. <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>85. Prior to 2020, the U.S. Postal Service also processed and delivered election mail at First Class rate speeds—or better—regardless of the actual postage class. Coradi Decl. ¶ 11 (Ex. 4); Ex. 56 (at 12).</p>	<p>Deny. The cited page of Exhibit 56 states that “[t]he Postal Service often prioritizes Election . . . Mail mailed as Marketing Mail and treats it as First-Class Mail,” but does not support the assertion that the Postal Service processed and delivered election mail at First Class rate speeds—or better. The Postal Service did not previously have a policy “providing that Election Mail (including ballots) entered as Marketing Mail would be automatically upgraded to First-Class Mail, even if the mail bears the official Election Mail logo. Glass Decl. (DEx. 18) ¶ 18. Also deny to the extent that this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>86. For example, the U.S. Postal Service’s green tags to identify trays and sacks of ballot mail in order to improve visibility of ballots as they travel through the mail stream is an “important component” of processing election mail. Ex. 61; Coradi Decl. ¶ 17 (Ex. 4); Second Glass Dep. Tr. 57–58 (Ex. 30).</p>	<p>Admit.</p>
<p>87. On or around July 30, 2020, the U.S. Postal Service’s General Counsel informed 46 states—including Plaintiffs New York and New Jersey—and the District of Columbia that failure to pay the First Class rate would risk ballots not being delivered on time and, consequently, the disenfranchisement of large swaths of voters. Second Glass Dep. Tr. 64-65 (Ex. 30); Ex. 49.</p>	<p>Deny to the extent that the cited testimony and exhibit do not refer to “disenfranchisement of large swaths of voters.” Otherwise, admit.</p>
<p>88. Other U.S. Postal Service officials indicated that states should mail election mail as First Class Mail, not Marketing Mail. Ex. 38 (USPS_EDPA00000396 to USPS_EDPA00000398).</p>	<p>Admit.</p>
<p>III. The changes the U.S. Postal Service began to implement in June and July 2020 caused dramatic delays in mail delivery across the country.</p>	

<p>89. The U.S. Postal Service establishes formal “service standards” that set the delivery speed of each class of mail, which are codified in regulations. Ex. 36.</p>	<p>Admit that the USPS establishes formal “service standards” that set goals for delivery speed for each class of mail. Deny that these service standards reflect guaranteed delivery times. Goldway Decl. (Ex. 6) ¶ 12.</p>
<p>90. First Class Mail has delivery standards of one to five days, depending on the subclass. Ex. 36.</p>	<p>Deny to the extent the cited exhibit does not support the assertion that First-Class Mail service standards for delivery “depend[] on the subclass.” Otherwise, admit.</p>
<p>91. On its website, the U.S. Postal Service lists a service standard of one to three days for the delivery of First Class Mail. First-Class Mail, U.S. Postal Service, https://www.usps.com/ship/first-class-mail.htm (last visited Oct. 19, 2020).</p>	<p>Admit.</p>
<p>92. The U.S. Postal Service has delivery standards of three to 10 days for Marketing Mail, which is a class available for bulk mailings sent by business or non-profit customers. Delayed mail and packages?, U.S. Postal Service, https://faq.usps.com/s/article/Delayed-Mail-and-Packages (last visited Oct. 19, 2020).</p>	<p>Deny to the extent the cited evidence does not support the assertions that USPS “has delivery standards of three to 10 days for Marketing Mail” or that Marketing Mail “is a class available for bulk mailing sent by business or non-profit customers.” Rather, USPS has a service standard of “3 to 10 <i>business days (not guaranteed)</i>” for Marketing Mail. Delayed mail and packages?, U.S. Postal Service, https://faq.usps.com/s/article/Delayed-Mail-and-Packages (emphasis added) (last visited Oct. 22, 2020). Marketing Mail is mail matter not required to be mailed as First-Class Mail or Periodicals. How can we help?, U.S. Postal Service, https://faq.usps.com/s/article/What-is-USPS-Marketing-Mail (last visited Oct. 22, 2020).</p>

93. Typically, the U.S. Postal Service sets targets for the on-time delivery of First Class and Marketing Mail. For FY2020, the U.S. Postal Service set targets between 95.25 and 96.8 on-time delivery for First Class Mail and a target of 91.80 ¹⁸ on-time delivery for Marketing Mail. Ex. 54 (at 20).	Admit.
94. Although the numbers vary year to year, the U.S. Postal Service targets for on-time delivery are usually around 95 percent. Goldway Decl. ¶ 14 (Ex. 6).	Admit.
95. The impacts of the U.S. Postal Service’s five operational policy changes in June and July 2020 on meeting service standards were immediately noticeable. Exs. 31, 34–35, 44, 56 (at 1).	Deny. The cited exhibits do not support the assertion that there were, in fact, “five operational policy changes in June and July 2020” or that the alleged “five operational policy changes” resulted in the metrics reflected in the cited evidence. DeChambeau Decl. (DEx. 2) ¶¶ 7, 14; First Cintron Decl. (DEx. 4) ¶¶ 19; Curtis Dep. Tr. (DEx. 10) 76-77, 155; Clarifying Operational Instructions (DEx. 12) at 4.
96. Nationally, on-time delivery for First Class Mail had fluctuated between 89.52 and 93.88 percent between the first week of 2020 and the week of July 4, 2020. Ex. 31.	Admit.
97. For the week of July 11, 2020, on-time delivery for First Class Mail dropped to 85.26 percent. Ex. 31.	Admit.
98. During the week of August 8, 2020, on-time delivery for First Class Mail dropped to a year-low of 81.47 percent. Ex. 31.	Admit.
99. The drop in on-time delivery during the week of August 8, 2020 meant that approximately 85 million more deliveries were late that week than they would have been prior to the challenged changes. Ex. 57 (at 3).	Admit.
100. Nationally, on-time delivery for Marketing Mail had fluctuated between 87.39 and 93.69 percent between the first week of 2020 and the week of July 4, 2020. Ex. 31.	Admit.
101. For the week of July 11, 2020, on-time delivery for Marketing Mail dropped to 82.94 percent. Ex. 31.	Admit.

¹⁸ This is a composite target with both Marketing Mail and Periodicals.

102. The following week, that figure dropped to 79.76 percent. Ex. 31.	Admit.
103. Although every single one of the U.S. Postal Service’s 67 districts saw a decline in on-time delivery in mid-July, the on-time delivery rate was even lower in certain regions. Exs. 34–35, 57 (at 3).	Deny to the extent the cited exhibits do not support the assertion that “the on-time delivery rate was even lower in certain regions.” Otherwise, admit.
104. Although on-time delivery of First Class and flat mail in the agency’s Eastern service area had hovered between roughly 91 and 95 percent in the preceding five months, on-time delivery in that region dropped for three weeks straight in July—down to 79 percent the week of July 19. Exs. 34–35.	Admit.
105. From July 18th to October 3rd, the average on-time delivery service score for First Class Mail was 85.2%. This represents a 6.1 percentage point decrease as compared to the average score from January 4, 2020 to July 11, 2020. Grimmer Suppl. Decl. ¶ 7 (Ex. 23).	Admit.
106. The decline in Service Scores has persisted even after the Postal Service has suspended all other new initiatives other than the policy limiting the number of Extra or Late Trips. Therefore, the observed declines in Service Scores are not attributable to other initiatives at the Postal Service. Grimmer Suppl. Decl. 13 (Ex. 23).	Deny to the extent the statement suggests that a purported “policy limiting the number of Extra or Late Trips” caused “the observed declines in Service Scores.” Further deny to the extent that service performance scores improved in August while the use of late and extra trips declined. USPS Congressional Briefing: Transportation & Service Performance Updates (Aug. 31, 2020) (DEx. 27). There are a variety of issues – such as the COVID-19 pandemic, holiday backlogs, natural disasters, and inclement weather – which have contributed to the declines in service scores and are outside of USPS’s control. <i>See</i> Press Release, The U.S. Postal Service Issues New Performance Report for the Week of September 12th Consistent with Performance Metrics Following a Federal Holiday (Sept. 24, 2020) (DEx. 29); Dearing Decl. (DEx. 31) ¶¶ 5-8.

<p>107. The policy limiting the number of Extra and Late trips continued to delay mail as recently as October 3rd. Changes in staffing levels due to COVID-19 cannot explain the decrease in Service Scores that correspond with the policy change. Grimmer Suppl. Decl. ¶¶ 17 (Ex. 23).</p>	<p>Deny. The cited declaration asserts a correlation between limiting the number of extra and late trips and a decrease in Service Scores, but does not establish a causal link between the two. The relative decrease in Service Scores throughout 2020 began with the onset of the COVID-19 pandemic in March and continues through the present. <i>See</i> FY20 Q2-FY21 Q1 Weekly Service Performance of Market Dominant Products through Week of Oct. 10, 2020 (DEx. 28) (DEx. 28). Further deny to the extent that service performance scores improved in August while the use of late and extra trips declined. USPS Congressional Briefing: Transportation & Service Performance Updates (Aug. 31, 2020) (DEx. 27). There are a variety of issues – such as the COVID-19 pandemic, holiday backlogs, natural disasters, and inclement weather – which have contributed to the service delays and are outside of USPS’s control. <i>See</i> Press Release, The U.S. Postal Service Issues New Performance Report for the Week of September 12th Consistent with Performance Metrics Following a Federal Holiday (Sept. 24, 2020) (DEx. 29); Dearing Decl. (DEx. 31) ¶¶ 5-8.</p>
<p>108. In mid-July 2020, processing performance also dropped. Ex. 51.</p>	<p>Admit.</p>
<p>109. In mid-July 2020, the U.S. Postal Service’s overall processing performance score for First Class Mail dropped 8.1 percent below baseline. Ex. 51.</p>	<p>Admit.</p>
<p>110. In mid-July 2020, the U.S. Postal Service’s overall processing performance score for Marketing Mail dropped 8.42 percent below baseline. Ex. 51.</p>	<p>Admit.</p>

<p>111. Due to these delays, mail began to pile up in postal facilities. Coradi Decl. ¶ 9 (Ex. 4)</p>	<p>Deny. The cited evidence does not establish the cause of mail “pil[ing] up.” Deny to the extent that delayed mail existed in facilities prior to July due to backlog caused by COVID-19. <i>See</i> Office of Inspector General (OIG) Report No. 20-292-R21, “Operational Changes to Mail Delivery” (Oct. 19, 2020) (DEx. 23). Further deny to the extent that any increase in delayed mail in July leveled off by the end of August. USPS Congressional Briefing: Transportation & Service Performance Updates (Aug. 31, 2020) (DEx. 27).</p>
<p>112. In some facilities, mail and packages were delayed for days and weeks. Coradi Decl. ¶ 9 (Ex. 4).</p>	<p>Admit.</p>
<p>113. Delayed mail continues to exist at certain facilities. Coradi Suppl. Decl. ¶¶ 5, 10–11(Ex. 22).</p>	<p>Deny to the extent that the Statement of Fact suggests or implies that alleged policy changes (<i>see</i> paragraph 18) caused the subject mail delays. Delayed mail existed in facilities prior to July due to backlog caused by COVID-19. <i>See</i> Office of Inspector General (OIG) Report No. 20-292-R21, “Operational Changes to Mail Delivery” (Oct. 19, 2020) (DEx. 23). Further deny to the extent that any increase in delayed mail in July leveled off by the end of August. USPS Congressional Briefing: Transportation & Service Performance Updates (Aug. 31, 2020) (DEx. 27). Otherwise, admit.</p>
<p>114. By early October, on-time delivery for First Class Mail had still not rebounded to pre-July 2020 levels. Ex. 31; Second Cintron Dep. Tr. (DEx. 11) 167 (Ex. 28).</p>	<p>Deny to the extent that service performance scores improved for a number of weeks in August and September and fluctuated since. Ex. 31. Otherwise, admit.</p>
<p>115. By early October, late trips and extra trips were still running at significantly reduced levels. Ex. 32–33, 59; Second Cintron Dep. Tr. (DEx. 11) 122 (Ex. 28).</p>	<p>Deny to the extent the cited evidence does not support the assertion that the reduction in late and extra trips in early October were “significant.” Otherwise, admit.</p>

IV. The U.S. Postal Service failed to consider or account for the negative impact that the June and July 2020 changes would have on important letter mail, even after delays became apparent.	
116. The U.S. Postal Service did not seek advice or guidance from the Postal Regulatory Commission prior to implementing any of the five operational changes. Ex. 58.	Admit.
117. Typically, the U.S. Postal Service conducts written analysis before implementing or adopting nationwide policies. Goldway Decl. ¶¶ 17–25 (Ex. 6).	Deny in part. Defendants dispute the statement’s characterization of the “written analysis” conducted to the extent the statement conveys or implies that USPS engages in any particular analysis before implementing or adopting policies of nationwide scope, which is not supported by the cited exhibit. Admit that, pursuant to 39 U.S.C. § 3661(b), USPS submits a written proposal to the Postal Regulatory Commission when it seeks to implement “a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis.”
118. Prior to implementation, U.S. Postal Service Headquarters did not consider the impact that its new organization-wide policy on late trips and extra trips would have on the timely and efficient delivery of mail. First Cintron Dep. Tr. 53–58 (Ex. 27).	Deny. The cited exhibit does not support the statement’s characterization of Mr. Cintron’s deposition testimony. Prior to issuance of the USPS guidelines for authorization of late and extra trips issued in July 2020, USPS took into consideration that providing clarity on the appropriate use of late and extra trips would result in maintaining service standards and “directly . . . improve service.” First Cintron Dep. Tr. (DEx. 11) 56:12-57:5; 57:13-23. Further deny to the extent this statement does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i> , 477 U.S. at 247–48.

<p>119. Prior to drafting the Cintron Guidelines, Vice President Cintron did not conduct any written analysis. First Cintron Dep. Tr. 53–54 (Ex. 27); Second Cintron Dep. Tr. 59–61, 63 (Ex. 28).</p>	<p>Deny. The exhibits cited do not establish the asserted statement of fact. Mr. Cintron testified that he studied the issue for two years. Second Cintron Dep. Tr. (DEx. 11) 22:9-23:5. Further deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>120. Prior to drafting the Cintron Guidelines, the modeling and analytics team that Vice President Cintron oversees did not “ma[k]e any analytics around this” or prepare any report. First Cintron Dep. Tr. 54 (Ex. 27).</p>	<p>Deny to the extent the statement suggests or implies that USPS does not routinely review and analyze trip data, which it does. Second Cintron Dep. Tr. (DEx. 11) 25:10-27:4. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>121. Prior to drafting the Cintron Guidelines, neither Vice President Cintron nor anyone on his team estimated whether the Cintron Guidelines would result in any cost savings. First Cintron Dep. Tr. 54 (Ex. 27).</p>	<p>Deny. Mr. Cintron prepared the guidelines to support adherence to the USPS operating plan by counseling managers on how to best utilize extra and late trips. First Cintron Dep. Tr. 50:5-51:3, 55:10-22. Cintron took into account the fact that failure to adhere to the operating plan results in unnecessary extra service trips, which have negative cost impacts on the organization. Second Cintron Dep. Tr. (DEx. 11) 49:13-50:5. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247-48.</p>
<p>122. Prior to drafting the Cintron Guidelines, Vice President Cintron did not conduct any analysis or have any conversations with other U.S. Postal Service Headquarters officials about the Cintron Guidelines' potential impact on election mail. First Cintron Dep. Tr. 61 (Ex. 27).</p>	<p>Deny. The exhibit cited does not support the asserted statement of fact. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. <i>See Anderson</i>, 477 U.S. at 247-48.</p>

123. Prior to drafting the Cintron Guidelines, Vice President Cintron did not conduct any analysis or have any conversations with other U.S. Postal Service Headquarters officials about how the Cintron Guidelines would be implemented in light of the COVID-19 pandemic. First Cintron Dep. Tr. 62 (Ex. 27).

Deny. The exhibit cited does not support the statement's characterization of Mr. Cintron's deposition testimony. In preparing the "Cintron Guidelines," Mr. Cintron considered how better adherence to the USPS transportation schedule would help maintain service, particularly in areas under-staffed as a result of the COVID-10 pandemic. First Cintron Dep. Tr. (DEx. 11) 61:1-62:1. Indeed, delayed service due to unnecessary late and extra trips would compound service delays attributable to COVID-19-related staffing issues. First Cintron Dep. Tr. (DEx. 11) 61:22-62:1.

Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. *See Anderson*, 477 U.S. at 247-48.

124. Prior to drafting the Cintron Guidelines, Vice President Cintron did not consider the potential impact the Cintron Guidelines might have on meeting the U.S. Postal Service's service standards. First Cintron Dep. Tr. 58 (Ex. 27).

Deny. The exhibit cited does not support the statement's characterization of Mr. Cintron's deposition testimony. In preparing the "Cintron Guidelines," Mr. Cintron considered how better adherence to the USPS transportation schedule would help maintain service, particularly in areas under-staffed as a result of the COVID-10 pandemic. First Cintron Dep. Tr. (DEx. 11) 61:1-62:1. Indeed, delayed service due to unnecessary late and extra trips would compound service delays attributable to COVID-19-related staffing issues. First Cintron Dep. Tr. (DEx. 11) 61:22-62:1. Mr. Cintron also took into consideration that providing clarity on the appropriate use of late and extra trips would result in maintaining service standards and "directly . . . improve service." First Cintron Dep. Tr. (DEx. 11) 56:12-57:5; 57:13-23. Also deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit, as the Postal Service has issued guidance clarifying that the Cintron guidelines did not ban late/extra trips, and that USPS employees should follow updated, October 16, 2020 guidance. Second Colin Decl. (DEx. 16) ¶ 17 & Exs. 1, 2. *See Anderson*, 477 U.S. at 247-48.

125. Even without any analysis, the negative impact of the new initiatives on reducing sorting machines, reducing work hours, and eliminating late and extra trips on service performance was predictable. Goldway Decl. ¶ 31 (Ex. 6); Coradi Decl. ¶ 16 (Ex. 4).

Deny. The purported “new initiatives” referenced in this statement concern efforts to improve efficiency and control expenses are part of the Postal Services’ long-standing practice and are not “new.” First Cintron Decl. (DEx. 4) ¶¶ 19; Curtis Dep. Tr. (DEx. 10) 76-77, 155; DeChambeau Decl. (DEx. 2) ¶¶ 7, 14. Further, there was no negative impact on service performance due to any of the listed factors, except for a short, temporary time after mid-July regarding miscommunication about late and extra trips. *See* USPS Congressional Briefing: Transportation & Service Performance Updates (Aug. 31, 2020) (DEx. 27). Other factors, chiefly COVID-19, caused the negative impact on service performance. *See* Press Release, The U.S. Postal Service Issues New Performance Report for the Week of September 12th Consistent with Performance Metrics Following a Federal Holiday (DEx. 29); Dearing Decl. (DEx. 31) ¶¶ 5-8. Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the “new initiatives” described are not current Postal Service policy or practice. *See* Clarifying Operational Instructions (DEx. 12). *See Anderson*, 477 U.S. at 247–48.

<p>126. With fewer sorting machines for letter and flat mail, postal employees must adapt the remaining machines to accommodate more volume or sort letter and flat mail manually. Coradi Decl. ¶ 16 (Ex. 4).</p>	<p>Deny. Postal employees do not need to adapt based on the number of remaining machines. Maintenance staff sometimes uses parts of reduced machines to enhance the processing capacity of remaining machines, but the removal of machines does not require further adjustments because remaining machines have ample capacity to process the volume of flat and letter mail. DeChambeau Decl. (DEx. 2) ¶¶ 13, 15; Barber Decl. (DEx. 5) ¶ 11; Couch Decl. (DEx. 3) ¶ 4.</p> <p>Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>127. These efforts take resources away from sorting other mail, such as packages. Coradi Decl. ¶ 16 (Ex. 4).</p>	<p>Deny. Any additions of parts of removed machines to remaining machines does not involve using the time of clerks, the employees who sort mail. <i>See</i> DeChambeau Decl. (DEx. 2) ¶¶ 13, 15; Barber Decl. (DEx. 5) ¶ 11; Couch Decl. (DEx. 3) ¶ 4.</p> <p>Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the Postal Service has suspended all removals of equipment until after the November election. DeChambeau Decl. ¶ 22. <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>128. If postal drivers are no longer allowed to make adjustments for processing delays and must leave at their prescribed time, then mail that would otherwise have been sorted gets left behind at the processing facility. Coradi Decl. ¶ 16 (Ex. 4).</p>	<p>Deny to the extent the statement suggests or implies that late or extra trips to facilitate the timely delivery of mail is, or was, prohibited or unnecessarily restricted. Late and extra trips were not prohibited. Transcript of House Oversight and Reform Committee on Postal Service Operational Changes Hearing (Aug. 24, 2020) (DEx. 9); Second Cintron Decl. (DEx. 15) ¶¶ 3-4; Clarifying Operational Instructions (DEx. 12). Further, Postal truck drivers do not make adjustments for processing delays and departure times – their supervisors and managers do, using their best business judgment. Clarifying Operational Instructions (DEx. 12). Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, prohibition or unnecessary limitations on extra or late trips are not current Postal Service policy or practice. <i>See</i> Clarifying Operational Instructions (DEx. 12). <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
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<p>129. If postal employees are also prevented from making extra trips throughout the day, then postal employees cannot begin to reduce the backlog. Coradi Decl. ¶ 16 (Ex. 4).</p>	<p>Deny. The Postal Service does not prevent employees from making necessary extra trips. Transcript of House Oversight and Reform Committee on Postal Service Operational Changes Hearing (Aug. 24, 2020) (DEx. 9); Second Cintron Decl. (DEx. 15) ¶¶ 3-4; Clarifying Operational Instructions (DEx. 12). Postal truck drivers do not make adjustments for processing delays and departure times – their supervisors and managers do, using their best business judgment. Clarifying Operational Instructions (DEx. 12). Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, prohibition or unnecessary limitations on extra or late trips are not current Postal Service policy or practice. <i>See</i> Clarifying Operational Instructions (DEx. 12). <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>130. The Postmaster General recognized the new June and July 2020 policies as part of an effort “to transform,” which would require “a number of significant changes.” Ex. 52.</p>	<p>Deny. The cited exhibit does not support the statement’s characterization of Postmaster General DeJoy’s August 13, 2020 statement. Postmaster General DeJoy’s statement does not refer to “the new June and July 2020 policies.” Ex. 52. Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the purported “new June and July 2020 policies,” which presumably refers to the “five operational changes challenged in this case” (<i>see</i> paragraph 18), are not current Postal Service policy or practice. <i>See</i> Clarifying Operational Instructions (DEx. 12). <i>See Anderson</i>, 477 U.S. at 247–48.</p>

<p>131. On August 13, 2020, Postmaster General DeJoy acknowledged sent out a message to employees acknowledging that the agency’s “transformative initiative has had unintended consequences that impacted our overall service levels,” but still did not reverse any of the changes. Ex. 52.</p>	<p>Admit.</p>
<p>132. On August 18, 2020, Postmaster General DeJoy issued a statement that the U.S. Postal Service would be “suspending” certain of the changes. Ex. 53.</p>	<p>Deny to the extent the cited exhibit does not support the statement of fact’s characterization of Postmaster General DeJoy’s August 18, 2020 statement as suspending “changes.” Admit that, on August 18, 2020, Postmaster General DeJoy issued a statement noting that there were “longstanding operational initiatives—efforts that predate [his] 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.” Statement from the Postmaster General (Aug. 18, 2020) at 1 (DEx. 6). Admit further that, in order “[t]o avoid even the appearance of any impact on election mail,” Postmaster General DeJoy “suspend[ed] these initiatives until after the election is concluded.” <i>Id.</i></p>
<p>133. In his August 18, 2020 statement, DeJoy stated that “[m]ail processing equipment and blue collection boxes will remain where they are” and that overtime would be approved “as needed.” Ex. 53.</p>	<p>Admit.</p>

<p>134. The August 18, 2020 statement from DeJoy did not address whether he would be returning the over 600 reduced sorting machines to service or suspend the new organization-wide policy on late and extra trips. Ex. 53.</p>	<p>Deny to the extent the cited exhibit does not support the statement of fact's characterization of Postmaster General DeJoy's August 18, 2020 statement as suspending "the new organization-wide policy on late and extra trips." On August 18, 2020, Postmaster General DeJoy issued a statement noting that there were "longstanding operational initiatives—efforts that predate [his] 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." Statement from the Postmaster General (Aug. 18, 2020) at 1 (DEx. 6). In order "[t]o avoid even the appearance of any impact on election mail," Postmaster General DeJoy "suspend[ed] these initiatives until after the election is concluded," specifically staying removal of mail processing equipment. <i>Id.</i> Otherwise, admit.</p>
<p>135. Three days later, on August 21, 2020, Postmaster General DeJoy testified before the Senate Homeland Security and Governmental Affairs Committee. <i>Senate Hearing on U.S. Postal Service</i>, C-SPAN (Aug. 21, 2020), https://www.c-span.org/video/?474940-1/senate-hearing-us-postal-service (video).</p>	<p>Admit.</p>

<p>136. In his testimony, DeJoy provided testimony acknowledging the delays caused by the operational changes. He testified that “[w]e all feel, you know, bad about, you know, what the dip in our service level has been.” <i>Senate Hearing on U.S. Postal Service</i>, C-SPAN (Aug. 21, 2020), https://www.c-span.org/video/?474940-1/senate-hearing-us-postal-service (video).</p>	<p>Deny to the extent the cited evidence does not support the statement of fact’s characterization of Postmaster General DeJoy’s August 21, 2020 testimony as “acknowledging the delays caused by the operational changes.” Transcript of Senate Homeland Security and Governmental Affairs Committee Hearing (Aug. 21, 2020) (DEx. 13) at 21-22 . Further deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the purported “operational changes,” which presumably refers to the “five operational changes challenged in this case” (<i>see</i> paragraph 18), are not current Postal Service policy or practice. <i>See</i> Clarifying Operational Instructions (DEx. 12). <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
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137. DeJoy testified that the changes did not “align” the separate systems for sorting, transporting, and delivering mail. *Senate Hearing on U.S. Postal Service*, C-SPAN (Aug. 21, 2020), <https://www.c-span.org/video/?474940-1/senate-hearing-us-postal-service> (video).

Deny. Deny to the extent the cited evidence does not support the statement of fact’s characterization of Postmaster General DeJoy’s August 21, 2020 testimony. Postmaster General DeJoy’s only testimony using the word “align” concerned restructuring of the management team: “And one of the first things--the first big change I embarked upon is how do I get the organization, the management team, the structure, to align with what we . . . —I felt there were—that we had 600,000 people reporting to one person and other executives doing assessorial types of--important, but not integrated into the operational activity. *See* Transcript of Senate Homeland Security and Governmental Affairs Committee Hearing (Aug. 21, 2020) (DEx. 13) at 10. Further deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the purported “changes,” which presumably refers to the “five operational changes challenged in this case” (*see* paragraph 18), are not current Postal Service policy or practice. *See* Clarifying Operational Instructions (DEx. 12). *See Anderson*, 477 U.S. at 247–48.

<p>138. DeJoy testified that he would not reinstall the hundreds of reduced sorting machines to postal facilities or reverse his policy eliminating extra trips. <i>Senate Hearing on U.S. Postal Service</i>, C-SPAN (Aug. 21, 2020), https://www.c-span.org/video/?474940-1/senate-hearing-us-postal-service (video).</p>	<p>Deny to the extent the cited evidence does not support the statement’s characterization of Postmaster DeJoy’s testimony. Postmaster General DeJoy testified that, as of the date of his testimony, there was no intention to “bring[] back” mail sorting machines that had been removed since he took office, as the machines were “not needed.” Transcript of Senate Homeland Security and Governmental Affairs Committee Hearing (Aug. 21, 2020) (DEx. 13) at 15. Postmaster General DeJoy also answered “yes” when asked whether “local managers [will] be authorized to make decisions and have postal employees make extra trips or late trips . . . to ensure that plants and post offices don’t fall behind in processing election mail.” <i>Id.</i> at 60. Otherwise, admit.</p>
<p>139. DeJoy committed to delivering election mail at the First Class rate speed, but did not address how this commitment would play out in practical terms given that he was not rescinding the challenged policies. <i>Senate Hearing on U.S. Postal Service</i>, C-SPAN (Aug. 21, 2020), https://www.c-span.org/video/?474940-1/senate-hearing-us-postal-service (video).</p>	<p>Deny to the extent the cited evidence does not support the statement’s characterization of Postmaster DeJoy’s testimony. Postmaster General DeJoy answered “yes” when asked whether he would “commit to the goal of delivering at least 95% of election mail within one to three days this year . . . the same as the Postal Service did in 2018.” Transcript of Senate Homeland Security and Governmental Affairs Committee Hearing (Aug. 21, 2020) (DEx. 13) at 34. Postmaster General DeJoy was not asked to detail how the foregoing would be achieved. <i>Id.</i> There is no reference in the relevant testimony referring to “rescinding the challenged policies” or the like. <i>See id.</i> Otherwise, admit.</p>

<p>140. On August 24, 2020, DeJoy testified before the House of Representatives Committee on Oversight and Reform that he would not replace sorting machines unless Congress provided \$1 billion in funding, which he stated Congress had “no way” of doing. <i>Postmaster General Louis DeJoy Testifies on Postal Service Operations & Mail-In Voting</i>, C- SPAN (Aug. 24, 2020), https://www.c-span.org/video/?474917-1/postmaster-general-louis-dejoy-testifies-postal-service-operations-mail-voting (video).</p>	<p>Deny to the extent the statement mischaracterizes Postmaster General DeJoy’s August 24, 2020 testimony. Admit that Postmaster General DeJoy was presented with a hypothetical question concerning whether he would replace sorting machines, if Congress were to provide \$1 billion in funding to compensate USPS for the operational cost of doing so. Transcript of House Oversight and Reform Committee Hearing (Aug. 24, 2020) (DEx. 9) at 101-103. Further admit that, in response, Postmaster General DeJoy testified that he would replace the machines, if Congress were to provide the funding. <i>Id.</i></p>
<p>141. DeJoy again testified that he would not lift the prohibition on late trips or extra trips. <i>Postmaster General Louis DeJoy Testifies on Postal Service Operations & Mail-In Voting</i>, C- SPAN (Aug. 24, 2020), https://www.c-span.org/video/?474917-1/postmaster-general-louis-dejoy-testifies-postal-service-operations-mail-voting (video).</p>	<p>Deny. The cited evidence does not support the statement’s characterization of Postmaster General DeJoy’s testimony. Postmaster General DeJoy testified that late and extra trips were not prohibited. Transcript of House Oversight and Reform Committee Hearing (Aug. 24, 2020) (DEx. 9) at 30-31, 5. Indeed, there are still a “significant amount of trucks that run delayed and a significant amount of extra trips.” Rather, Postmaster General DeJoy asked his team “to run the trucks, transportation on time and mitigate extra trips,” based on a review of an OIG audit concluding that an “astonishing” amount of money was spent on late and extra trips and the desire to support timely delivery of mail. <i>Id.</i> at 139. Postmaster General DeJoy’s testimony acknowledged the “fundamental, basic principles” of timely transportation for mail network and the difficulty in reversing these principles. <i>Id.</i></p>

<p>142. On election mail, DeJoy testified that the U.S. Postal Service would act “in a manner consistent with the proven processes and procedures that we have relied upon for years,” while maintaining that “it would be best if the State election boards follow the recommendations” from the U.S. Postal Service’s general counsel. <i>Postmaster General Louis DeJoy Testifies on Postal Service Operations & Mail-In Voting</i>, C-SPAN (Aug. 24, 2020), https://www.c-span.org/video/?474917-1/postmaster-general-louis-dejoy-testifies-postal-service-operations-mail-voting (video).</p>	<p>Deny to the extent the statement suggests or implies that Postmaster General DeJoy’s testimony regarding USPS recommendations to state election boards contradicts USPS’s commitment to act “in a manner consistent with the proven processes and procedures that [it] has relied upon for years.” In response to a question regarding whether Pennsylvania should adjust its application deadline for mail and absentee ballots to ensure voters can timely receive, complete, and return ballots, Postmaster General DeJoy testified that “it would be best” if state election boards “followed the recommendation” from the USPS general counsel to reduce unnecessary risk in the system, and reiterated that USPS is “still going to do everything that [it] need[s] to do.” Transcript of House Oversight and Reform Committee Hearing (Aug. 24, 2020) (DEx. 9) at 141-42.</p>
<p>V. The June and July 2020 changes’ impact on mail delivery injures Plaintiffs.</p>	
<p>143. Mail delays have increased and risk further increasing in-person governmental interactions so residents can access these services and programs, which has frustrated Plaintiffs’ ability to mitigate the spread of COVID-19—a disease that is spread through person-to-person contact. Banks Decl. ¶¶ 7–9 (Ex. 2); Newton Decl. ¶¶ 13–16 (Ex. 16); Roye¹⁹ Decl. ¶¶ 11–12 (Ex. 18); Roye Suppl. Decl. ¶ 13 (Ex. 24); Ku Decl. ¶ 13 (Ex. 14).</p>	<p>Deny to the extent the statement of fact suggests or implies that service performance have been consistently declining this year. The relative increase in delays throughout 2020 began with the onset of the COVID-19 pandemic in March and continues through the present. <i>See</i> FY20 Q2-FY21 Q1 Weekly Service Performance of Market Dominant Products through Week of Oct. 10, 2020 (DEx. 28). Service performance experienced marked improvements for a period of time in August. USPS Congressional Briefing: Transportation & Service Performance Updates (Aug. 31, 2020) (DEx. 27). Otherwise, admit.</p>

¹⁹ Karen Roye is the Executive Director of the Department of Child Support Services for the City and County of San Francisco.

144. State and local agencies in Plaintiffs' jurisdictions have implemented changes to their practices to accommodate mail delays.	Deny. Plaintiffs fail to cite any evidentiary support for this Statement of Material Fact. Thus, it should be disregarded.
145. New York City's Department of Social Services has seen its rent payments to landlords delayed in the mail, which has forced shelter residents to spend additional days or weeks in City-operated shelters. Banks Decl. ¶ 14 (Ex. 2).	Admit.
146. Child Support Services for the City and County of San Francisco has expended resources and time setting up telephone lines, reassigning staff, and answering client questions about child support payments delayed in the mail. Roye Decl. ¶¶ 5, 12–13 (Ex. 18); Roye Suppl. Decl. ¶¶ 18–20 (Ex. 24).	Admit.
147. The San Francisco Treasurer's Office expects to lose operational funds from delayed or missed tax payments and interest the Treasurer's Office would have earned by earlier investment of those funds. Shah ²⁰ Decl. ¶¶ 3, 6, 8 (Ex. 19); Shah Suppl. Decl. ¶¶ 8–10, 15 (Ex. 25).	Admit.
148. Mail delays have impaired Plaintiffs' ability to perform legally mandated tasks, including provide health coverage and prescription medications, ensure that children and families receive court-ordered financial and medical support, and send applications for SNAP and other benefits to eligible residents. Adinaro Decl. ¶ 12 (Ex. 1); Banks Decl. ¶¶ 3–5, 10–12 (Ex. 2); Betts Decl. ¶¶ 7–15 (Ex. 3); DiGiovanni-Abatto Decl. ¶¶ 3–5 (Ex. 5); Hein Decl. ¶¶ 2–3, 8, 13, 15 (Ex. 8); Jacobs Decl. ¶¶ 4–10 (Ex. 11); Lau Decl. ¶¶ 3, 5–9 (Ex. 15); Poole Decl. ¶¶ 2, 6–11 (Ex. 17); Roye Decl. ¶ 4 (Ex. 18).	Admit.
149. Plaintiffs have expended resources in an effort to address these disruptions. Banks Decl. ¶ 8 (Ex. 2); Roye Decl. ¶¶ 5, 12–13 (Ex. 18); Roye Suppl. Decl. ¶¶ 18–20 (Ex. 24); Shah Decl. ¶¶ 3, 5–6, 10 (Ex. 19).	Admit.

²⁰ Tajel Shah is the Chief Assistant Treasurer of the Office of the Treasurer and Tax Collector for the City and County of San Francisco.

VI. The Postal Policy Changes, and President Trump’s statements and conduct, severely undermine Plaintiffs’ electoral schemes, which rely substantially on mail-in voting.	
150. Due to the COVID-19 pandemic, Plaintiffs have devoted resources to overhauling their election processes to expand absentee and mail voting and otherwise to minimize in-person voting. Adinaro Decl. ¶ 9 (Ex. 1); Kellner Decl. ¶¶ 11, 16–17, 19 (Ex. 13); Ku Decl. ¶¶ 8–10 (Ex. 14).	Admit.
151. Other Plaintiffs already had mail-based election systems, which they seek to preserve during the pandemic. <i>See</i> Henricks ²¹ Decl. ¶ 3 (Ex. 9); Kaohu ²² Decl. ¶ 3 (Ex. 12); Takahashi ²³ Decl. ¶ 3 (Ex. 20); Haw. Rev. Stat. § 11-101; P.L. 2020, ch.72 (N.J. Aug. 28, 2020).	Admit.
152. Approximately 150 million ballots are expected to be cast in the November 2020 election. Hersh ²⁴ Decl. ¶ 10 (Ex. 10).	Admit.
153. Because of COVID-19, which has both resulted in new state laws that make mail balloting easier and has increased voters’ preference to avoid in-person interactions, a conservative estimate of 53 percent of all voters in the November 2020 election may cast mail-in ballots—amounting to approximately 80 million mail-in ballots nationwide. Hersh Decl. ¶¶ 11–14 (Ex. 10).	Admit.
154. An estimated 9 percent of Americans who will cast mail-in ballots in 2020—approximately 7 million voters—are expected to submit those ballots on the Saturday right before Election Day. Hersh Decl. ¶¶ 1, 24 (Ex. 10).	Admit.

²¹ Jon Henricks is the County Clerk for the County of Hawaii.

²² Kathy Kaohu is the County Clerk for the County of Maui.

²³ Glen Takahashi is the City Clerk for the City and County of Honolulu.

²⁴ Dr. Eitan Hersh is an associate professor of political science at Tufts University.

<p>155. Before the Postal Service’s policy changes, ballots mailed on the Saturday before Election Day would be received by election offices on time, but delays caused by the policy changes put a significant number of ballots at risk of not being counted. Hersh Decl. ¶ 24 (Ex. 10).</p>	<p>Deny. Further deny because, as held by the Postal Regulatory Commission (PRC), delivery service standards do not provide any guarantee of service and are not, therefore, legally enforceable requirements. Order Granting Motion for Reconsideration and Granting Motion to Dismiss, No. C2013-10, (Postal Regulatory Comm’n May 27, 2015) (DEx. 30) at 10. Also deny to the extent that this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the purported “policy changes,” which presumably refers to “the five operational changes challenged in this case” (<i>see</i> paragraph 18), are not current Postal Service policy or practice. <i>See</i> Clarifying Operational Instructions (DEx. 12). <i>See Anderson</i>, 477 U.S. at 247–48.</p>
<p>156. Mail delays threaten timely delivery of ballots, which in turn encourages or forces voters to travel to in-person polling stations when they would not otherwise have need to do so. Kellner Decl. ¶¶ 13–14, 27–28 (Ex. 13); Ku Decl. ¶¶ 17–18, 21 (Ex. 14).</p>	<p>Deny to the extent that USPS has counseled local election officials with recommendations on how to use available tools and best practices to facilitate mail-in voting, assuming conservative delivery times to ensure secure, efficient, and effective participation by mail. Glass Decl. (DEx. 18) ¶¶ 5-9, 11-14, 18, 32. USPS has also consistently urged voters to return their completed ballots early. <i>Id.</i> at ¶ 42; Ex. 1 at 2. Otherwise, admit.</p>
<p>157. Plaintiffs have committed resources to public education campaigns and installing additional ballot drop-boxes in response to mail delays. Henricks Decl. ¶¶ 13–14 (Ex. 9); Kaohu Decl. ¶ 10 (Ex. 12); Takahashi Decl. ¶¶ 13–14 (Ex. 20).</p>	<p>Admit.</p>
<p>158. Evidence, theory, and public health principles indicate that greater use of in-person voting could lead to higher COVID-19 infections. Ku Decl. ¶¶ 16–21 (Ex. 14); Adinaro Suppl. Decl. ¶ 7 (Ex. 21).</p>	<p>Admit.</p>

<p>159. States, including Plaintiffs, have adopted or maintained electoral schemes to provide increased access to mail-in ballots. On April 9, 2020, Governor Cuomo issued an Executive Order to provide for expanded absentee ballot access for New York voters, by permitting voters to cite the risk of COVID-19 as a basis to apply for an absentee ballot. N.Y. Exec. Order No. 202.15 (Apr. 9, 2020), https://www.governor.ny.gov/news/no-20215-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>
<p>160. Nearly 40% of ballots cast in New York’s June 2020 primary election were absentee, a number that is expected to rise to half of all votes in New York for the November general election. Kellner Decl. ¶¶ 11, 19 (Ex. 13).</p>	<p>Admit.</p>
<p>161. During the New York June 2020 primary, State election officials were informed of complaints by voters who had not received their absentee ballots by Election Day, and who would have missed the opportunity to vote early because they were waiting for their absentee ballot in the mail. Kellner Decl. ¶ 13 (Ex. 13).</p>	<p>Deny to the extent the Statement of Fact suggests or implies that delays were caused by USPS. New York election officials mailed thousands of ballots to voters less than a week before the primary election. <i>See</i> Glass Decl. (DEx. 18) ¶ 25. Also deny to the extent this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the past primary election is irrelevant to Plaintiffs’ claims which challenge purported operational changes that took place after the New York primary in June 2020. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>162. The only way for such New York primary voters to vote would have been to cast their ballot in person, adding to significant crowds and delays at certain poll sites. Kellner Decl. ¶¶ 13–15 (Ex. 13).</p>	<p>Deny to the extent the Statement of Fact suggests or implies that such voters could only vote in-person due to delays caused by USPS. New York election officials mailed thousands of ballots to voters less than a week before the primary election. <i>See</i> Glass Decl. (DEx. 18) ¶ 25. Also deny to the extent this paragraph does not set forth uncontroverted facts that are material to the outcome of this suit, as the past primary election is irrelevant to Plaintiffs’ claims which challenge purported operational changes that took place after the New York primary in June 2020. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>
<p>163. New York enacted legislation providing for similar expanded absentee access for the November 2020 general election. N.Y. Elec. Law § 8-400 (McKinney 2020).</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>
<p>164. In New York, voters are entitled under State law to request an absentee ballot up to seven days before Election Day. N.Y. Elec. Law § 8-400(2)(c) (McKinney 2020).</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>
<p>165. An absentee ballot either must be postmarked by Election Day and received within seven days after Election Day to be counted, or, if it lacks a postmark, be received by the day after Election Day. N.Y. Elec. Law § 8-412 (McKinney 2020).</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>
<p>166. On July 1, 2019, Act 136 went into effect for the State of Hawaii. <i>See</i> 2019 Haw. Sess. Laws Act 136, §§ 2 & 63 at 475-79, 499 (codified at Haw. Rev. Stat. Chapter 11, Part VIIA). Act 136 adopted a system of virtually universal voting by mail for Hawaii, starting with the 2020 Primary Election. Haw. Rev. Stat. § 11-101.</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>
<p>167. Act 136 provides that Hawaii voters who do not receive a mail ballot within five days of the election still have a right to request a ballot electronically and return it by mail. Haw. Rev. Stat. § 11-107.</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>

168. Under Hawaii law, if someone does not receive a mail ballot five days before the election (or otherwise needs a replacement ballot within five days of the election), Act 136 authorizes voters to request that a replacement ballot be sent to them electronically. Haw. Rev. Stat. § 11-107.	This statement constitutes a conclusion of law, not a statement of fact.
169. Hawaii law also provides that those ballots, when completed, may be returned by mail (in addition to three other methods). Haw. Rev. Stat. § 11-107(b)(2).	This statement constitutes a conclusion of law, not a statement of fact.
170. Mail in ballots were utilized by 99% of Hawaii voters in the 2020 primary election. Dan Nakaso, <i>Record primary election sees 99% of votes cast by mail-in ballots</i> , Honolulu Star-Advertiser (Aug. 11, 2020), https://www.staradvertiser.com/2020/08/11/hawaii-news/record-primary-election-sees-99-of-votes-cast-by-mail-in-ballots .	Deny to the extent that the asserted fact relies on inadmissible hearsay. Otherwise, admit.
171. Hawaii’s State Office of Elections previously recommended that for the November general election, voters mail ballots three to five days before Election Day. Compl. ¶ 128.	Admit.
172. In a July 29, 2020 letter, the U.S. Postal Services informed Hawaii that its voters must mail their ballots a full week before the election. Ex. 49.	Deny. The cited evidence does not support the asserted statement of fact. On July 31, 2020, USPS sent a letter to Hon. Scott Nago, Chief Election Officer, Office of Elections in Hawaii. Ex. 49 at 10. The letter provided a <i>recommended</i> “timeline for domestic voters to account for [USPS] delivery standards and to allow for contingencies (e.g., weather issues or unforeseen events), including the following recommendation: “To allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state’s due date.” <i>Id.</i>
173. Election officials in Hawaii have expended resources educating voters on returning their ballots earlier than previously advised, including through print and radio media campaigns. Henricks Decl. ¶ 13 (Ex. 9).	Admit.

<p>174. Hawaii officials have designed and implemented alternative means for voters to return mail ballots, including through installation of drop boxes. Henricks Decl. ¶ 14 (Ex. 9); Takahashi Decl. ¶ 13 (Ex. 20).</p>	<p>Admit.</p>
<p>175. Although such efforts are coordinated at the local level, local officials have, or intend to, receive funds from the state of Hawaii for these purposes. Henricks Decl. ¶¶ 13–14 (Ex. 9); Takahashi Decl. ¶¶ 13–14 (Ex. 20).</p>	<p>Admit.</p>
<p>176. On May 15, 2020, New Jersey Governor Murphy issued NJ EO 144, which provided that the New Jersey 2020 primary election be conducted primarily via vote-by-mail to reduce overcrowding at polling locations and minimize the risk of community spread of COVID-19. Exec. Order No. 144, 52 N.J.R. § 1238(a) (2020).</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>
<p>177. On August 14, 2020, Governor Murphy issued a similar Executive Order, NJ EO 177, which provides that “in light of the dangers posed by Coronavirus disease 2019,” New Jersey’s 2020 general election will be conducted primarily via vote-by-mail to reduce overcrowding at polling locations and minimize the risk of community spread of COVID-19. Exec. Order No. 177, 52 N.J.R. § 1701(b) (2020).</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>

<p>178. Pursuant to NJ EO 177, all active registered voters were automatically sent a mail-in ballot for the election, without the need to apply for one, at least 29 days before the election and in a manner to ensure the ballot's timely receipt and return; whenever a county clerk forwards a mail-in ballot by mail to a voter between the 29th day and the 13th day before the election, it shall be transmitted within three business days of receipt of the application and in a manner to ensure the ballot's timely receipt and return; all vote-by-mail return envelopes will have prepaid First-Class postage; the deadline to apply for a mail-in ballot by mail will be October 23, 2020; the deadline for returning a vote-by-mail application in person is suspended; and each county, to the extent possible, will have at least ten secure ballot drop boxes placed in locations readily accessible to the registered voters within the county. Exec. Order No. 177, 52 N.J.R. § 1701(b) (2020).</p>	<p>This statement constitutes a conclusion of law, not a statement of fact.</p>
<p>179. President Trump has made a number of public comments disparaging vote-by-mail regimes. On March 30, 2020, President Trump disparaged a congressional proposal in coronavirus relief legislation, arguing that “[t]he things they had in there were crazy. They had things—levels of voting that, if you ever agreed to it, you’d never have a Republican elected in this country again.” Aaron Blake, <i>Trump just comes out and says it: The GOP is hurt when it’s easier to vote</i>, Wash. Post (Mar. 30, 2020), https://washingtonpost.com/politics/2020/03/30/trump-voting-republicans/.</p>	<p>Deny to the extent the statement mischaracterizes President Trump’s public comments and that the asserted fact relies on inadmissible hearsay. Otherwise, admit.</p>
<p>180. On April 8, 2020, President Trump tweeted that “Republicans should fight very hard when it comes to state wide mail-in voting,” noting that, “for whatever reason, [mail-in voting] doesn’t work out well for Republicans.” Donald J. Trump (@realDonaldTrump), Twitter (Apr. 8, 2020, 8:20 a.m.), https://twitter.com/realDonaldTrump/status/1247861952736526336.</p>	<p>Admit.</p>

<p>181. On May 28, 2020, President Trump tweeted that mail-in voting would “LEAD TO THE END OF OUR GREAT REPUBLICAN PARTY.” Donald J. Trump (@realDonaldTrump), Twitter (May 28, 2020, 9:00 p.m.), https://twitter.com/realDonaldTrump/status/1266172570983940101.</p>	<p>Admit.</p>
<p>182. On July 2, 2020, President Trump tweeted about mail-in voting, urging that “Republicans, in particular, cannot let this happen!” Donald J. Trump (@realDonaldTrump), Twitter (July 2, 2020, 7:41 p.m.), https://twitter.com/realDonaldTrump/status/1278836342609379328.</p>	<p>Admit.</p>
<p>183. On August 3, 2020, President Trump tweeted in response to expanded mail-in voting in Nevada: “In an illegal late night coup, Nevada’s clubhouse Governor made it impossible for Republicans to win the state.” Donald J. Trump (@realDonaldTrump), Twitter (Aug. 3, 2020, 7:37 a.m.), https://twitter.com/realDonaldTrump/status/1290250416278532096.</p>	<p>Admit.</p>
<p>184. President Trump has criticized specific states for increasing access to mail-in voting—including Plaintiffs New York and New Jersey. Donald J. Trump (@realDonaldTrump), Twitter (July 29, 2020, 6:28 p.m.) (“New York Mail-In voting is in a disastrous state of condition. . . . Rigged Election.”), https://twitter.com/realDonaldTrump/status/1288602262567153664; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2020, 4:51 p.m.), https://twitter.com/realDonaldTrump/status/1287490820669616128; Donald J. Trump (@realDonaldTrump), Twitter (July 2, 2020, 7:41 p.m.), https://twitter.com/realDonaldTrump/status/1278836342609379328.</p>	<p>Admit.</p>

<p>185. President Trump has supported mail-in voting in certain other states. On August 4, 2020, the President tweeted: “Whether you call it Vote by Mail or Absentee Voting, in Florida the election system is Safe and Secure, Tried and True. Florida’s Voting system has been cleaned up (we defeated Democrats attempts at change), so in Florida I encourage all to request a Ballot & Vote by Mail! #MAGA.” Donald J. Trump (@realDonaldTrump), Twitter (Aug. 4, 2020, 12:55 p.m.), https://twitter.com/realDonaldTrump/status/1290692768675901440.</p>	<p>Deny to the extent the cited evidence does not support the assertion that President Trump has supported mail-in voting in certain other states. Otherwise, admit.</p>
<p>186. On August 5, 2020, the President again differentiated between states, tweeting: “Nevada has ZERO infrastructure for Mail-In Voting. It will be a corrupt disaster if not ended by the Courts. It will take months, or years, to figure out. Florida has built a great infrastructure, over years, with two great Republican Governors. Florida, send in your Ballots!” Donald J. Trump (@realDonaldTrump), Twitter (Aug. 5, 2020, 7:08 p.m.), https://twitter.com/realDonaldTrump/status/1290967953542909952.</p>	<p>Deny to the extent the cited evidence does not support the assertion that President Trump has differentiated between states. Otherwise, admit.</p>
<p>187. On August 17, 2020, President Trump tweeted: “Some states use ‘drop boxes’ for the collection of Universal Mail-In Ballots. So who is going to ‘collect’ the Ballots, and what might be done to them prior to tabulation? A Rigged Election? So bad for our Country. Only Absentee Ballots acceptable!” Donald J. Trump (@realDonaldTrump), Twitter (Aug. 17, 2020, 11:40 a.m.), https://twitter.com/realDonaldTrump/status/1295385113862090753.</p>	<p>Admit.</p>
<p>188. Consistent with President Trump’s position, his campaign has sued Nevada, New Jersey, Pennsylvania, and “two Democratic-leaning Iowa counties” over their mail-in ballot policies. Ryan J. Foley, <i>Trump campaign sues key Iowa counties over absentee mailings</i> (Aug. 13, 2020), https://apnews.com/22e6d33f1a2eeadde8e193a9330cde16.</p>	<p>Deny to the extent that the asserted fact relies on inadmissible hearsay. Deny to the extent this paragraph does not set forth an uncontroverted fact that is material to the outcome of this suit. <i>See Anderson</i>, 477 U.S. at 247–48. Otherwise, admit.</p>

<p>189. In New Jersey and Nevada, President Trump’s campaign has opposed plans to mail ballots to voters. <i>See</i> Complaint, <i>Donald J. Trump for President, Inc. v. Murphy</i>, No. 320-CV-10753 (D.N.J. filed Aug. 18, 2020); Complaint, <i>Donald J. Trump for President, Inc. v. Cegavske</i>, No. 20-CV-1445, 2020 WL 5626974 (D. Nev. filed Aug. 4, 2020).</p>	<p>Admit.</p>
<p>190. In Pennsylvania, President Trump’s campaign sued to challenge the state’s use of drop-off boxes for ballots. <i>See</i> Complaint, <i>Trump for President, Inc. v. Boockvar</i>, No. 20-CV-966 (W.D. Pa. filed June 29, 2020).</p>	<p>Admit.</p>
<p>191. President Trump has opposed emergency funds and supplemental election-related funds for the U.S. Postal Service, citing his opposition to expanded mail-in voting. <i>Remarks by President Trump in Press Briefing</i>, The White House (Aug. 13, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-briefing-august-13-2020.</p>	<p>Admit.</p>
<p>192. On August 13, 2020, President Trump stated in a Fox Business interview that “[i]f we don’t make a deal [on U.S. Postal Service funding], that means they don’t get the money. That means they can’t have universal mail-in voting. They just can’t have it.” Megan Henney, <i>Trump rips Dems for holding up coronavirus stimulus deal with demand for post office aid</i>, Fox Bus. (Aug. 13, 2020), https://www.foxbusiness.com/politics/trump-rips-dems-for-holding-up-coronavirus-stimulus-deal-with-demand-for-post-office-aid.</p>	<p>Admit.</p>

<p>193. On August 22, 2020, President Trump tweeted that “[r]epresentatives of the Post Office have repeatedly stated that they DO NOT NEED MONEY,” claiming that recent pushes for funding are “all another HOAX by the Democrats to give 25 Billion unneeded dollars for political purposes, without talking about the Universal Mail-In Ballot Scam.” Donald J. Trump (@realDonaldTrump), Twitter (Aug. 22, 2020, 4:51 p.m.), https://twitter.com/realDonaldTrump/status/1297275235432005632.</p>	<p>Admit.</p>
<p>194. On August 22, 2020, the President encouraged his readers to “fight the []51 million unasked for Ballots.” Donald J. Trump (@realDonaldTrump), Twitter (Aug. 22, 2020, 4:51 p.m.), https://twitter.com/realDonaldTrump/status/1297275241203458048.</p>	<p>Admit.</p>

In the above responses, Defendants identified several of Plaintiffs’ statements of fact that are in dispute. However, as reflected in Defendants’ responses, in the vast majority of instances, Defendants do not concede that such disputes are material to the outcome of the case. *See Anderson*, 477 U.S. at 247–48. Defendants otherwise dispute Plaintiffs’ statement of facts in ¶¶ 95, 107, 112, 141, and 172.

Dated: October 26, 2020

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

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

Defendants.

Civil Docket No. 20-cv-2340 (EGS)

[PROPOSED] ORDER

Upon consideration of Plaintiffs' motion for summary judgment, the memorandum and exhibits in support thereof, Defendants' opposition, any reply thereto, and any oral argument, it is hereby ORDERED that Plaintiffs' motion for summary judgment is DENIED.

Dated: _____

Emmet G. Sullivan
United States District Judge

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with LCvR 7(k), listed below are the names and addresses of the attorneys entitled to be notified of the proposed order's entry:

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