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)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR CLARIFICATION

Defendants have moved to clarify this Court's Preliminary Injunction Order in order to ensure that the Postal Service is in compliance with the order while avoiding potentially unintended consequences that would have an adverse effect on the delivery of the mail on the eve of Election Day. That motion was limited in nature, seeking to clarify that the order does not require the Postal Service to take actions that are impracticable or even impossible, such as restoring machines that have already been removed or even dismantled; or that would risk severe disruption to the Postal Service's operations, such as moving Election Mail sent as Marketing Mail by air, which would be a significant change how the Postal Service has processed this mail in past elections.

Plaintiffs nominally opposed this motion, but in explaining the basis for their opposition, they do not actually appear to disagree with the substance of Defendants' narrow request. First, Defendants moved to clarify that this Court's order "enjoin[ing]" the Postal Service from enforcing the policy of removing approximately 700 mail processing machines does exactly that—it

prohibits the Postal Service from removing mail processing machines. It does not, however, require machines that have already been removed to be returned to service – particularly those machines that cannot physically be returned to service because, for example, they have already been dismantled and sold for parts.

Plaintiffs offer no objection to this argument, let alone a reason why such machines are necessary to ensure the prompt delivery of Election Mail. Instead, Plaintiffs confusingly assert that Defendants' clarification might conflict with injunctions issued by other courts that require the Postal Service to return machines to service *if necessary to process Election Mail*. But the Postal Service's motion expressly identified these other orders, and explained that the Postal Service had issued instructions to comply with their requirements in this respect. *See* Clarifying Supplemental Instructions, at 3, ECF No. 50-1 ("if it is determined to add processing capacity to fulfill [the Postal Service's] service commitments with regard to Election Mail, available processing equipment will be returned to service."); *see also* Defs.' Mot Clarification, at 4, ECF No. 54. So to the extent Plaintiffs oppose the motion, it is only to the extent that it would permit the Postal Service to ignore a need to return a processing machine *if necessary to fulfill its commitments with regard to Election Mail* in contravention of the Postal Service's direct commitments and other court orders. Defendants do not seek such a broad order from this Court; they seek only to clarify that they need not return every dismantled machine to service if unnecessary to fulfill its Election Mail commitments or if doing so would be impossible.

Second, Plaintiffs nominally oppose Defendants' request to clarify that this Court does not require the Postal Service—contrary to its practice in past elections—to move Election Mail entered as Marketing Mail by air. Such a change is likely not possible, and even attempting to do so would risk significant disruption to the Postal Service's mail processing on the eve of the

election. This request is, again, limited, as it applies only to Marketing Mail sent by election officials to voters that would require air delivery to meet First-Class Mail delivery times (in other words, to voters who live far away from the entity sending the ballot—such as a printer retained by state or local election officials). *See* Supp. Glass Dec. ¶ 6. For example, a Midwestern state might contract with a printer located on the East Coast to print and mail millions of ballots to voters in the Midwestern state. This request does not apply to Election Mail that is returned by voters to their election officials, which is always at least First-Class Mail and can be (and is) moved by air if necessary to meet service standards. *See* Supp. Glass Dec. ¶ 5.

Plaintiffs do not dispute the harm that such an order would cause. Instead, they appear to misunderstand Defendants' limited request. Plaintiffs assert that the Postal Service is seeking an order saying that it is *never* required to move Election Mail by air. But this is not what the Postal Service has requested. As the Postal Service has explained on numerous occasions, all ballots sent by voters to their election officials are First-Class Mail, and they will travel by air, rather than trucks, if they must travel long distances so that they can complete their journey within the published service standards. *See* Supp. Glass Dec. ¶¶ 5, 12. Voters cannot mail their ballots using a lesser class of service, like Marketing Mail, as that service is only eligible to entities that send bulk mailings without any handwritten or personal information, which by definition excludes completed ballots. *See* Domestic Mail Manual 233.2.3-4, *available at* https://pe.usps.com/cpim/ftp/manuals/dmm300/233.pdf. As explained above, the only harm to Postal Service operations comes from requiring Marketing Mail sent by election officials or related entities to voters to travel by air (which would be a significant operational change, and potentially impossible at this late date just prior to the election), because Marketing Mail is an entirely separate class of mail to which different service standards apply. Moreover, the Postal Service has

explicitly instructed that "[f]rom October 26 through November 24, 2020, ballots may be manually separated and moved by air or according to Priority Mail Express delivery standards regardless of paid class." Supplemental Guidance Mem., at 2, ECF No. 85-1, *Jones v. USPS*, No. 20-cv-6516 (VM) (S.D.N.Y. Oct. 9, 2020); *see also* Order ¶ 1(b), ECF No. 57, *Jones v. USPS*, No. 20-cv-6516 (VM) (S.D.N.Y. Sept. 25, 2020). Because Plaintiffs have provided no reason for this Court to deny the more limited request made by Defendants, and because such denial would have indisputably negative effects for the delivery of the mail (even assuming it is possible), Defendants' motion should be granted.[1]

ANALYSIS

In granting Plaintiff's Motion for Preliminary Injunction, this Court "ordered that pursuant to the Order, Defendants are hereby enjoined from enforcing the Postal Policy Changes." Order, ECF No. 51. One of those changes was a plan by which the Postal Service "would be removing 671 high-speed sorting machines nationwide 'over the next several months,'" Mem. Op., at 5, ECF No. 52. Out of an abundance of caution, the Postal Service sought clarification of this order in the event that it could be construed as requiring every one of these machines to be put back into service.

Plaintiffs nominally oppose this request. But they appear to do so only to the extent that Defendants' request seeks a change to the Order that "would risk USPS's noncompliance," Pls.' Opp'n at 3, with the orders of other courts that have required that a machine be returned to service if a postal facility "will be unable to process election mail for the November 2020 election in accordance with First Class delivery standards because of the Postal Service's recent removal and

[1] Plaintiffs do not oppose Defendants' request to clarify that USPS is not required to treat Political Manner in the same manner as Election Mail. *See* Pls.' Opp'n Defs.' Mot. for Clarification, ECF No. 56, at 7-8.

decommissioning of such equipment." *See* Order ¶ 3, ECF No. 81, *Washington v. Trump*, No. 2-cv-3127 (SAB) (E.D. Wash. Sept. 17, 2020). Because this is a requirement of existing injunctions, Defendants have already issued "consistent" instructions to make clear that this is the Postal Service's current policy, *see* Pls.' Opp'n at 3, as Defendants noted in their opening brief. *See* Defs. Mot. Clarification at 4 (citing Clarifying Operational Instructions, at 3, ECF No. 50-1).

Although Defendants do not believe that this Court issued this specific instruction in its order, it is a requirement that Defendants are already meeting. Accordingly, in order to avoid continued debate over this topic, Defendants agree with Plaintiffs that this Court may clarify that its requirement regarding machines applies to the extent that "if it is determined that it is necessary to add processing capability to fulfil [USPS's] service commitments with regard to Election Mail, available processing equipment will be returned to service," Clarifying Operational Instructions, at 3, ECF No. 50,1, consistent with the orders of other district courts. *See, e.g.*, Order ¶ 3, ECF No. 81, *Washington v. Trump*, No. 20-cv-3127 (SAB) (E.D. Wash. Sept. 17, 2020); Joint Stipulation to Stay Case in Light of Settlement Agreement, ECF No. 38, *Bullock v. USPS*, No. 20-cv-0079 (BMM) (Postal Service agrees to comply with Clarifying Operational Instructions, and Court retains jurisdiction to enforce the terms of the agreement). Such clarification would further the goal of ensuring the efficient processing of Election Mail while avoiding disputes over the need to restore all 671 machines noted in this Court's opinion, which would be unnecessary to remedy Plaintiffs' purported injuries, burdensome, and potentially impossible. *See* Defs.'Mot. Clarify at 4-5 (citing, *e.g.*, Couch Dec. ¶¶ 11, 12, ECF No. 30-2). Plaintiffs do not seriously dispute those facts. *See* Pls.' Opp'n at 4.

Plaintiffs also object to Defendants' proposed clarification of this Court's order to require that "Defendants shall ensure that Election Mail 'is generally delivered in line with First-Class

Mail delivery standards,' but are not required to transport Election Mail entered as Marketing Mail by air." Proposed Order, ECF No. 54-2. In so doing, Plaintiffs misinterpret Defendants' motion, arguing that the Postal Service is seeking "a categorical statement that [this Court's] order *never* requires delivery of election mail by air." Pls.' Opp'n at 5-6; *see also id.* at 7 (asserting that the Postal Service is asking the Court "to state that election mail categorically shall *not* be transported by air"). That is simply a misunderstanding of Defendants' current policy and its request for clarification.

USPS has, and will continue, to deliver Election Mail that is sent by voters to election officials—which, as a piece of mail sent by an individual (as opposed to a bulk mailer), is by definition at least First-Class Mail—by air if such transportation is necessary to meet First-Class Mail service standards (i.e., because of the geographic distance involved). What USPS has not done before is move Election Mail sent by election officials to voters *as Marketing Mail* by air. As discussed in Defendants' motion, there are significant technical limitations that prevent it from doing so—especially this close to the Election. *See* Defs. Mot. Clarification at 6-8. And Plaintiffs offer no reason why this Court's order—which explicitly sought to maintain the pre-Postal Policy Change status quo—should be read to affirmatively require the Postal Service to make a major change to its operations that is inconsistent with that status quo, which risks significant disruption, and to do so on the eve of the Election.[2]

State and local officials can choose to send Election Mail to voters using one of two classes of service: First-Class Mail and Marketing Mail. There is no such division for Election Mail sent

[2] As the Supreme Court has noted in the election law context, courts should generally avoid making significant changes close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curium); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

by voters to election officials; individuals mailing a single piece of mail (like their completed ballot) may only send mail via First-Class Mail because Marketing Mail and other bulk services for letters are not available for individual mail pieces. Glass Dec. ¶¶ 17-18, ECF No. 30-2. Any mail that is marked as First-Class Mail—whether sent by election officials to voters or by voters to their election officials—has historically been, and will continue to be, sent by air if necessary to meet First-Class Mail service standards. *See* Supp. Glass Dec. ¶¶ 5-6, 12.[3]

The same has not been true for states that choose to send their Election Mail as Marketing Mail, because Marketing Mail is an entirely different product that is treated separately (which is precisely why it is less expensive). "One of the differences between First-Class Mail and Marketing Mail is that Marketing Mail is transported strictly on a surface network, while a portion of First-Class Mail travels by air transportation. This has been historically true and has not changed." Supp. Glass Dec. ¶ 5, ECF No. 54-1. Moreover, this distinction has significant operational consequences—and those consequences form the basis for Defendants' Clarification Motion. "In limited circumstances, specifically when mail is to be transported across the country, it is not operationally possible for Election Mail entered as Marketing Mail to be transported as quickly as First-Class Mail, and therefore it is not possible to deliver such Election Mail within the same timeframes as First-Class Mail, due to certain inherent differences between the products and the inability of mail processing machines to distinguish Election Mail entered as Marketing Mail and other Marketing Mail." *Id.* As Plaintiffs state, they "s[eek] to assure timely delivery of election mail *consistent with past USPS practice*," Pls.' Opp'n at 5 (emphasis added), that should resolve this matter: the Postal Service's practices regarding Election Mail entered as Marketing

[3] Only First-Class mail travelling longer distances would need to travel by air, as "First-Class Mail sent within shorter distances does not generally travel by air." Supp. Glass Dec. ¶ 12.

Mail "is no different than in past elections, and does not reflect any change in the Postal Service's policies or practices this year." Supp. Glass Dec. ¶ 6.

Moreover, as explained in Defendants' opening brief, "[i]t is not feasible and may be impossible nationwide to change the established practice of transporting Marketing Mail by surface transportation." *Id.* ¶ 5. That is so for numerous technical reasons, none of which can realistically be addressed before the Election concludes. *See id.* ¶¶ 8-11 (discussing technical limitations involved in transporting Marketing Mail by air, including the fact that Postal Service processing machines cannot distinguish Election Mail that is sent as Marketing Mail from other Marketing Mail, and could not automatically move it by air without moving *all* Marketing Mail by air, "which is likely to have a negative impact on the air transportation network," and the fact that manually re-labeling Election Mail that is sent as Marketing Mail would delay the mail, tax existing Postal Service resources, and make it impossible for election officials to track such trays of mail through the Postal network) .

Defendants' motion for clarification, then, seeks only to clarify that the Postal Service need not be required to depart from its past policy and move Election Mail *entered as Marketing Mail* by air (either explicitly, or implicitly, by a requirement that every single piece of Election Mail travel at First-Class Mail speeds under all circumstances). Plaintiffs do not respond to this specific request. Instead they again suggest that another district court has required the Postal Service to move some Election Mail by air. *See* Pls.' Opp'n at 6 (citing *Jones v. USPS*, No. 20-cv-6516 (S.D.N.Y. Sept. 25, 2020). However, the court in *Jones* did not require moving *Marketing Mail* by air. Just the opposite: the court expressly provided that its requirement to "prioritize identifiable Election Mail entered as Marketing Mail" "shall not be construed to require USPS to change its policies that generally do not include transportation of Election Mail entered as Marketing Mail

by air; or to extend other features of First-Class Mail; distinct from delivery speed, to Election Mail entered as Marketing Mail."[4] And the district court in the Eastern District of Washington similarly provided that it was "not specifying that Election Mail entered as Marketing Mail be shipped by any particular means (such as by air)," but rather requiring that Election Mail "is generally delivered in line with First-Class Mail delivery standards." Order, at ¶ (b), *State of Washington v. Trump*, No. 20-cv-3127-SAB (E.D. Wash. Oct. 2, 2020), ECF No. 90. Indeed, notwithstanding the fact that these orders do not require all Election Mail entered as Marketing Mail to be shipped by air if necessary to meet First-Class Mail standards for those pieces, the Postal Service has made clear that "[f]rom October 26 through November 24, 2020, ballots may be manually separated and moved by air or according to Priority Mail Express delivery standards regardless of paid class." Supplemental Guidance Memorandum, at 2, *Jones v. USPS*, No. 20-cv-6516 (VM) (S.D.N.Y. Oct. 9, 2020), ECF No. 85-1.

By referencing the decision in *Jones*, Plaintiffs appear to suggest, again, that they would not oppose this Court adopting the same language relating to Election Mail. But that is all that Defendants are requesting. Accordingly, and in light of the undisputed factual evidence demonstrating the harm that would result from denial, Defendants request that this Court grants its clarification motion.

[4] The *Jones* Court further made clear, as explained *supra*, that "USPS will employ special individualized measures to expedite handling of individual voter ballots mailed close to Election Day, regardless of paid class, which may include manually separating them and moving them by air or according to Priority Mail Express delivery speed standards, consistent with practices used in past elections." Order, at ¶ 1, *Jones v. USPS*, No. 20-cv-6516 (VM) (S.D.N.Y. Sept. 25, 2020), ECF No. 57. And as discussed above, USPS has implemented guidance formalizing these measures.

CONCLUSION

For the aforementioned reasons, and those stated in their opening brief, Defendants respectfully request that this Court grant Defendants' Motion for Clarification of the Preliminary Injunction Order.

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Respectfully submitted,

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