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)

REPLY IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 4

I. Plaintiffs have not established Article III standing to bring their claims. 4

II. Plaintiffs' section 3661 claim fails as a matter of law. 7

A. The Court lacks subject-matter jurisdiction over Plaintiffs' section 3661 claim. 7

B. Plaintiffs' section 3661 claim fails as a matter of law. 9

III. Plaintiffs' section 101 and 403 claims fail as a matter of law. 13

A. Plaintiffs' section 101 and 403 claims are not reviewable. 13

B. Even if Plaintiffs' claims were reviewable, they fail as a matter of law. 15

IV. Plaintiffs cannot establish an Elections Clause claim. 19

V. Permanent Injunction and Declaratory Relief. 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Aid Ass'n for Lutherans v. U.S. Postal Serv.,
321 F.3d 1166 (D.C. Cir. 2003) 14, 15

Air Cargo v. U.S. Postal Serv.,
674 F.3d 852 (D.C. Cir. 2012) 16

Bhd. of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.,
457 F.3d 24 (D.C. Cir. 2006) 7

Brookens v. Am. Fed'n of Gov't Emps.,
315 F. Supp. 3d 561 (D.D.C. 2018) 20

**Buchanan v. U.S. Postal Serv.*,
508 F.2d 259 (5th Cir. 1975) 8, 11, 18

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 7

Cobell v. Kempthorne,
455 F.3d 301 (D.C. Cir. 2006) 24

Cobell v. Norton,
334 F.3d 1128 (D.C. Cir. 2003) 25

Cook v. Gralike,
531 U.S. 510 (2001) 20

Carpenter's Indus. Council v. Zinke,
854 F.3d 1 (D.C. Cir. 2017) 5, 6

**DCH Reg'l Med. Ctr. v. Azar*,
925 F.3d 503 (D.C. Cir. 2019) 13

Eagle Tr. Fund v. U.S. Postal Serv.,
365 F. Supp. 3d 57 (D.C. Cir. 2019) 15

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 9

Griffith v. Fed. Labor Rels. Auth.,
842 F.2d 487 (D.C. Cir. 1988) 11, 14

Hadera v. I.N.S.,
136 F.3d 1338 (D.C. Cir. 1998) 6

La Buy v. Howes Leather Co.,
352 U.S. 249 (1957) 25

Leedom v. Kyne,
358 U.S. 184 (1958) 14

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 4, 5

Md. People's Counsel v. F.E.R.C.,
760 F.2d 318 (D.C. Cir. 1985) 6

Mississippi v. Johnson,
71 U.S. 475 (1866) 25

Mittleman v. Postal Regul. Comm'n,
757 F.3d 300 (D.C. Cir. 2014) 11

Nader v. Volpe,
466 F.2d 261 (D.C. Cir. 1972) 8

**Nat'l Ass'n of Postal Supervisors v. U.S. Postal Serv.*,
No. 18-cv-2236, 2020 WL 4039177 (D.D.C. July 17, 2020) 10, 14, 15

Newdow v. Roberts,
603 F.3d 1002 (D.C. Cir. 2010) 25

Nyunt v. Broad. Bd. of Govs.,
589 F.3d 445 (D.C. Cir. 2009) 10

Richardson v. Trump,
No. CV 20-2262 (EGS), 2020 WL 5969270 (D.D.C. Oct. 8, 2020) 25

SEC v. Chenery,
318 U.S. 80 (1943) 16

Smiley v. Holm,
285 U.S. 355 (1932) ..... *passim*

STATUTES

39 U.S.C. § 101 ..... *passim*

39 U.S.C. § 403 18

39 U.S.C. § 3626 14

39 U.S.C. § 3661 ..... *passim*

39 U.S.C. § 3662 ..... *passim*

RULES

Fed. R. Civ. P. 56 1

Fed. R. Civ. P. 65 24

OTHER AUTHORITIES

Commission Report: Complaint on First-Class Mail Standards Service, Docket No. C2001-3 (Apr. 17, 2006), https://go.usa.gov/x7gYp 8

Commission Report: Complaint on Sunday & Holiday Collections, Docket No. C2001-1 (Nov. 5, 2002), https://go.usa.gov/x7gYf 8

Order on Complaint on Express Mail, Docket No. C2005-1 (Apr. 18, 2006), https://go.usa.gov/x7gYV 8

INTRODUCTION

Federal Rule of Civil Procedure 56 requires Plaintiffs to identify concrete evidence establishing that USPS actually adopted and maintained each of the alleged policy changes at issue in this litigation. Unsurprisingly, Plaintiffs failed to do so, and instead relied principally on preliminary injunction orders where courts found—on a limited and incomplete record— that the plaintiffs had made a *preliminary* showing that USPS had adopted these policies. Even if this limited showing were sufficient at the preliminary injunction stage, it is certainly not sufficient to prevail on summary judgment—especially when Plaintiffs have the benefit of document productions, deposition testimony, and interrogatory responses. Plaintiffs have all but conceded that USPS never adopted an overtime ban, never changed its long-standing policies on the classification of Election Mail, and did not adopt a permanent policy requiring carriers to start at a fixed time. And on the one alleged policy change in dispute—an alleged "prohibition on late trips or extra trips," Compl. ¶ 8—Plaintiffs cannot cite to a single piece of conclusive evidence establishing that USPS adopted this policy. Indeed, the undisputed evidence is to the contrary.

But even if Plaintiffs could overcome this fatal factual hurdle, their claims nonetheless fail on the law. To start, Plaintiffs cannot establish standing. This Court (and others) instituted preliminary injunctions unwinding the precise alleged USPS policy changes at issue in Plaintiffs' summary judgment motion, and yet Plaintiffs contend that mail delays have persisted—demonstrating that the alleged USPS policy changes were not driving mail delays. In response, Plaintiffs rely almost exclusively on the assertion that USPS did not fully comply with the preliminary injunctions. But USPS did fully comply and, in any event, even if Plaintiffs could establish that alleged policy changes drove mail delays in the past, they cannot establish that they will do so in the future.

Second, Plaintiffs cannot establish a section 3661 claim. Plaintiffs have no response to the numerous court of appeals and district court decisions holding that complaints over USPS's compliance with Chapter 36 of the Postal Reorganization Act (PRA) must be brought before USPS's regulator, the Postal Regulatory Commission (PRC). Plaintiffs never even *tried* to avail themselves of that body before the election, and Plaintiffs identify no reason why the PRC could not now provide meaningful relief as to Plaintiffs' alleged ongoing injuries. And on the merits, Plaintiffs make no attempt to show that USPS knowingly or intentionally acted to degrade service, as they must to make out a section 3661 claim.

Third, Plaintiffs cannot establish a section 101 or 403 claim. Plaintiffs do not dispute that they lack a private right of action under either the PRA or the Administrative Procedure Act. And, as Defendants have explained, these claims are not reviewable under the *ultra vires* doctrine because they do not challenge USPS's *authority* to implement the alleged Postal Policy Changes, but rather the *prudence* of those decisions themselves. And even if these claims were reviewable (they are not), Plaintiffs cannot show that USPS violated any clear and unequivocal statutory command.

Fourth, Plaintiffs cannot establish an Elections Clause claim. As a threshold matter, it is highly unlikely that the Court can and will provide meaningful relief in time for the November 2020 Election, and so this claim is, or will very soon be, moot. Regardless, the claim fails on the merits. Plaintiffs *still* cite no binding authority supporting their novel theory that the Elections Clause not only empowers States to pass election laws, but also shields States from any and all federal action that may indirectly affect their elections. Plaintiffs' unprecedented reading of the Elections Clause would enable States to challenge any future USPS delay, along with any other federal government policy that has some impact—large or small—on future State elections. The

Court should thus conclude that the Elections Clause means what it says: States are allowed to enact laws that dictate how their citizens may legally vote. USPS has not prevented any State from enacting or maintaining any State election law, and so Plaintiffs cannot establish an Elections Clause claim.

Finally, Plaintiffs' requested injunction is insufficiently precise. Rather than clarifying the precise policies they want the Court to enjoin, Plaintiffs' response simply asks the Court to order USPS to "cease enforcing the unlawful policies," Pls.' Resp., at 34—which is even *less* specific than their requested injunction. Plaintiffs then request, for the first time in their response, a Court-appointed monitor for any resulting permanent injunction. But Plaintiffs cannot justify either extraordinary request, both of which raise significant separation-of-powers concerns.

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

BACKGROUND

As noted in USPS's opening memorandum, USPS never adopted the vast majority of the alleged USPS "policy changes" at issue in this litigation, and importantly, USPS has committed additional resources and adopted additional measures to facilitate the processing and delivery of Election Mail. *See* Defs.' MSJ, at 4–13. Indeed, since filing its opening memorandum, USPS has *continued* issuing guidance reaffirming this commitment. For example, on October 27, 2020, Robert Cintron sent an e-mail to relevant USPS personnel stating:

> The guidelines issued on July 14, 2020, regarding the use of late and extra trips are rescinded. USPS personnel are instructed to perform late and extra trips to the maximum extent necessary to increase on-time mail deliveries, particular for Election Mail. To be clear, late and extra trips should be performed to the same or greater degree than they were performed prior to July 2020 when doing so would increase on-time mail deliveries. Any prior communication that is inconsistent with this instruction should be disregarded.

See Defs.' Ex. 34. Although the Cintron guidelines never prohibited late and extra trips, and although Cintron had previously sent an e-mail clarifying that his guidelines should not be read to conflict with new guidance encouraging late and extra trips as needed, *see* Defs.' Ex. 16 (Second Colin Dec.) ¶ 17, the October 27 e-mail puts to rest any doubt over whether the Cintron guidelines could unduly limit the use of late and extra trips. This addresses Plaintiffs' principal argument for why, in their view, Defendants had not complied in full with the Court's preliminary injunction. *See* Pls.' Resp., at 9-10.

Additionally, on October 28, 2020, USPS sent out an additional Extraordinary Resources memorandum providing specific, day-by-day guidance for the remaining period leading up to Election Day, all to ensure the timely delivery of ballots and proper coordination with Boards of Election. *See* Defs.' Ex. 35. Critically, this memorandum notes that "[e]ach plant must be knowledgeable of the deadlines in each state for which the plant is cancelling local mail," to ensure that ballots reach the Boards of Election in time to be counted. Plaintiffs fail to note, in either of their briefs, what other measures USPS could or should possibly undertake to undo the alleged USPS policies they challenge, or to facilitate the timely processing of Election Mail.

ARGUMENT

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

"The party invoking federal jurisdiction bears the burden of establishing" each element of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "In response to a summary judgment motion . . . the plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts' which for purposes of the summary judgment motion will be taken to be true." *Id.* Through their affidavits or other evidence, Plaintiffs must "demonstrate a substantial probability of injury-in-fact, causation, and redressability." *Carpenter's Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017). Plaintiffs cannot satisfy any of element of standing.

First, Plaintiffs cannot establish that the alleged USPS policy changes at issue have caused any material mail delays. Multiple courts have enjoined the alleged policy changes, and yet Plaintiffs contend that the delays have continued. Thus, the historical evidence demonstrates that these USPS policy changes cannot be causing the mail delays. In response, Plaintiffs contend that USPS did not comply with the injunctions in full since USPS allegedly retained its late and extra trip policy, and thus, in Plaintiffs' view, the injunctions do not disprove their causation theory. But Plaintiffs do not dispute that USPS, at a minimum, ceased (or never maintained) most of the alleged policy changes they complain of here, including an alleged limitation on overtime, and alleged changes to how Election Mail is processed. Thus, Plaintiffs cannot dispute that *those* alleged policy changes were likely not driving any mail delays. And USPS *did* cease the alleged late and extra trip policy alleged by Plaintiffs (a policy which did not ban late and extra trips). Plaintiffs contended that USPS prohibited late and extra trips, Compl. ¶¶ 3, 8, 71, 75, and USPS has issued multiple guidance documents making clear that late and extra trips were not, and never have been, prohibited. *See, e.g.*, Defs.' Ex. 4 ¶ 24 & Ex. 2; Ex. 31 63:25–65:9; Ex. 16 (Second Colin Dec.) ¶ 17 & Exs. 1, 2; Ex. 34. Although Plaintiffs proclaim that certain guidelines issued by Robert Cintron were not revoked sooner, those guidelines did not ban late or extra trips; to the contrary, they identified scenarios where late and extra trips were desirable. Accordingly, Plaintiffs cannot establish that the alleged USPS policy changes have caused and will cause material mail delays.

Second, and by the same token, because Plaintiffs cannot show that these policy changes are causing the current delays, they also cannot show that an injunction against these policy changes will redress the delays.[1]

[1] Plaintiffs assert that USPS did not make a redressability argument. But USPS made a causation argument, and "[c]ausation and redressability typically overlap as two sides of a causation coin," since "if a government action causes an injury, enjoining the action usually will redress that

Third, even if Plaintiffs could establish causation or redressability, they cannot establish that the alleged USPS policy changes will cause material mail delays that will inflict any injury upon Plaintiffs in particular. Plaintiffs do not dispute that their alleged injuries—e.g., tax collection and the administration of State programs—will materialize only if the mail delays are of sufficient magnitude and duration; minor mail delays are insufficient.[2] In response, Plaintiffs assert that USPS is importing a new standing requirement, namely that an injury must be "material." Pls.' Br., at 6. But USPS is not arguing that the injury must be material, but rather that Plaintiffs will not suffer any cognizable injury unless the *mail delays* are material.[3]

To the extent the Plaintiffs do allege injuries based on discrete, limited mail delays, they are injuries suffered by Plaintiffs' citizens, not the Plaintiff States. As noted in USPS's opening memorandum, "[a] State does not have standing as parens patriae to bring an action against the Federal Government." *Md. People's Counsel v. F.E.R.C.*, 760 F.2d 318, 320 (D.C. Cir. 1985). In response, Plaintiffs claim that they are not invoking parens patriae standing, but rather are asserting injuries to their proprietary interest in public health. *See* Pls.' Br., at 7-8. But this is a distinction without a difference. If their "proprietary interest" is the health of their citizens, then they are suing

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injury." *Carpenters Indus. Council*, 854 F.3d at 6. And, regardless, a party cannot "waive" a subject-matter jurisdiction argument. *See Hadera v. I.N.S.*, 136 F.3d 1338, 1340 (D.C. Cir. 1998).

[2] Despite what Plaintiffs suggest, none of the admitted factual statements to which Plaintiffs cite carry Plaintiffs' burden to show that any ongoing mail delays are caused by the challenged conduct. Pls.' Resp. at 5, n. 4. *See, e.g.* ¶¶ 4-12 (describing the dangers of COVID-19 generally), 96-105 (describing on-time delivery scores for First Class Mail and Marketing Mail), 108-10 (describing overall processing performance scores), 112 (describing delays of mail and packages at "some facilities,") 131 (describing a message by Postmaster General DeJoy to employees), 145-51, 157, 173-75 (describing effects of mail delays on Plaintiffs' operations).

[3] *See, e.g.*, USPS, *U.S. Postal Service Continues to Deliver a Record Number of Ballots* (Oct. 29, 2020), https://about.usps.com/newsroom/national-releases/2020/1029-usps-continues-to-deliver-a-record-number-of-ballots.htm ("Since October 1, the average time of delivery for First-Class Mail, including ballots, was 2.5 days[,] with 97.5 percent of all measured First-Class Mail delivered within five days across the country.").

to protect the health of their citizens, and are thus improperly invoking parens patriae standing to sue the federal government. They cannot circumvent this limitation on State standing by simply adding a new label to the same injury. *See id.* (even though a State has a "so-called 'quasi-sovereign' interest" in protecting its citizens," a state cannot invoke "parens patriae [standing] to bring an action against the Federal Government").

Nor can Plaintiffs establish standing based on their voluntary expenditures in response to mail delays. For one, because Plaintiffs cannot establish that these delays were caused by the alleged USPS policy changes, Plaintiffs' expenditures were "not in any meaningful way 'caused' by" these policies. *Bhd. of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). Additionally, Plaintiffs cannot base standing on voluntary expenditures. *See id.* In response to this latter point, Plaintiffs essentially argue that their expenditures were a justified response to the mail delays. *See* Pls.' Resp., at 8. This may be true, but they were nonetheless *voluntary* responses, and thus were not "injuries" imposed by the alleged USPS policy changes.

II. Plaintiffs' section 3661 claim fails as a matter of law.

A. The Court lacks subject-matter jurisdiction over Plaintiffs' section 3661 claim.

Plaintiffs have no substantive response to the long line of cases holding that section 3662 divests district courts of jurisdiction over claims, such as Plaintiffs', that USPS has not complied with Chapter 36 of the PRA. *See* Defs.' MSJ, at 18–19 & n.6. Plaintiffs say that Defendants "concede" that this authority is not binding on this Court, Pls.' Resp., at 14, but Plaintiffs' argument fares no better in this respect, as Plaintiffs point to *no* authority—either mandatory or persuasive—supporting their position. *See id.* The cases cited by Defendants, along with the plain

meaning of the statutory text and legislative history, confirm that Congress intended to channel Plaintiffs' claim to the PRC. Defs.' MSJ, at 18–23.

Contrary to Plaintiffs' suggestion, Defendants do not "ask this Court to divest itself of jurisdiction" solely "based on a series of considerations described in *Nader v. Volpe*, 466 F.2d 261 (D.C. Cir. 1972)." Pls.' Resp., at 14. As noted, Defendants' argument relies on statutory text, legislative history, and firmly established case law. To be sure, *Nader* identifies *further* considerations that counsel against district courts bypassing an established administrative review process, including respect for Congress's conferral of administrative autonomy, administrative expertise, conservation of judicial resources, and avoidance of conflicting litigation. 466 F.2d at 265–69. Plaintiffs do not dispute the relevance of these considerations.

Plaintiffs next argue that Defendants misconstrue Congress's use of the word "may" in section 3662, contending that Defendants' construction does not give "may" its ordinary meaning. Pls. Resp., at 14. But Defendants' construction does give "may" its ordinary meaning, and the only question is the nature of discretion connoted by "may." Plaintiffs' view would render the statutory scheme a nullity, run against the long line of precedent cited by Defendants, and do violence to Congressionally established administrative remedies in other contexts. Indeed, Plaintiffs identify no case that has reached the merits of a section 3661 claim in the 45 years since *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259, 262–63 (5th Cir. 1975). On the other hand, the PRC has conducted formal section 3662 proceedings on matters both large and small—including, in particular, allegations of noncompliance with section 3661(b).[4]

[4] *See generally* Order on Complaint on Express Mail, Docket No. C2005-1 (Apr. 18, 2006), https://go.usa.gov/x7gYV; Commission Report: Complaint on First-Class Mail Standards Service, Docket No. C2001-3 (Apr. 17, 2006), https://go.usa.gov/x7gYp; Commission Report: Complaint on Sunday & Holiday Collections, Docket No. C2001-1 (Nov. 5, 2002), https://go.usa.gov/x7gYf. *Compare* PRC Docket No. C2020-1 (disruption of individual residence's delivery due to dog),

Rather than engage with Defendants' arguments on the merits, Plaintiffs rest primarily on this Court's opinion granting a preliminary injunction, which relied on section 3662's use of the "permissive 'may' coupled with the use of the mandatory 'shall.'" Pls.' Resp., at 15. But, as Defendants have explained, these instances of "shall" refer to action by the PRC and the appellate court once a complaint or petition for review has been filed and, accordingly, do not suggest that the use of "may" in section 3662(a) was intended to be permissive with respect to the *channeling* of any complaints. Defs.' MSJ, at 21.

Lastly, Plaintiffs contend that even if section 3662(a) would ordinarily channel their claim to the PRC, the Court should nonetheless exercise jurisdiction because "a finding of preclusion could foreclose all meaningful review." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010). As Defendants explained, Defs.' MSJ, at 22–23, even if Plaintiffs could have made that argument at the preliminary injunction stage, they cannot do so now. Plaintiffs respond that their election-related injuries may continue shortly after Election Day. Pls.' Resp., at 15. But regardless of the precise date on which Plaintiffs' election-related injuries will become moot, it remains uncontested that Plaintiffs' only alleged injuries for which Plaintiffs contend the PRC could not provide meaningful review will be moot as soon as the election is completed. And because Plaintiffs do not explain how any of the relief that they seek could remedy any election-related injuries by that date, they have not established any reason why this Court—as opposed to the PRC—should continue to exercise jurisdiction over Plaintiffs' claims.

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with PRC Docket No. C2001-1 (national policies for Sunday and holiday collections; Section 3661(b), among others) *and* PRC Docket No. C2003-1 (national policies for collection box removals; Section 3661(b), among others).

B. Plaintiffs' section 3661 claim fails as a matter of law.

Plaintiffs' section 3661 claim also fails because USPS never "determine[d] that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis." 39 U.S.C. § 3661(b). Without such a determination, USPS was not required to request an advisory opinion from the PRC.

Plaintiffs are wrong that Defendants raised this argument only in the context of "reviewability" and not as an argument on the merits. Defendants' opening brief argues that Plaintiffs' section 3661 claim "fail[s] as a matter of law" and explains in detail why, "on the merits," Plaintiffs cannot establish a violation of section 3661. Defs.' MSJ, at 17, 23–30. Because Plaintiffs concede that they lack a private right of action under either the statute or the APA,[5] Defendants argued that Plaintiffs could not satisfy the only other potential avenue for review—the narrow *ultra vires* doctrine. *See id.* But Defendants' arguments as to why Plaintiffs could not satisfy that narrow doctrine go straight to the merits of Plaintiffs' claim.

Plaintiffs are also wrong that the well-established limitations on *ultra vires* review somehow do not apply at the summary judgment stage. *See* Pls.' Resp., at 21. While it is true that summary judgment will be granted if the movant "shows that there is no genuine dispute as to any material fact and . . . is entitled to judgment as a matter of law," this does not mean that the Court should ignore the substantive legal standards that determine whether a party is "entitled to judgment as a matter of law." Plaintiffs do not dispute that the D.C. Circuit has described *ultra vires* review as a "Hail Mary pass" that "rarely succeeds." *Nyunt v. Broad. Bd. of Govs.*, 589 F.3d 445, 449 (D.C. Cir. 2009). If Plaintiffs were correct that this heightened standard has no relevance at the summary judgment stage, then *ultra vires* review would not be a "Hail Mary" pass, but the

[5] *See Nat'l Ass'n of Postal Supervisors ("NAPS") v. U.S. Postal Serv.*, No. 1:19-CV-2236-RCL, 2020 WL 4039177, at *4 (D.D.C. July 17, 2020)

same as any claim that an agency has not complied with a statutory requirement. Such a view is inconsistent with consistent D.C. Circuit precedent describing *ultra vires* review as "quite narrow," *Mittleman v. Postal Regul. Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014), and "extremely limited," *Griffith v. Fed. Labor Rels. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988).

On the merits, Plaintiffs do not dispute that, for a "change" to trigger the advisory-opinion requirement, it must have a "meaningful impact on service," be "in the nature of postal service," and affect service "on a nationwide or substantially nationwide basis." *Buchanan*, 508 F.2d at 262–63. Nor do Plaintiffs dispute that the PRC has interpreted section 3661 as requiring USPS to seek an advisory opinion only if the complainant can show (1) planned implementation of a new service standard or (2) knowing and/or intentional degradation of service. Defs.' MSJ, at 25; Defs.' Ex. 23 at 18. Plaintiffs also do not dispute that this interpretation of the PRC is entitled to *Chevron* deference. *Id.* at 26.

It follows from a straightforward application of these principles that Plaintiffs cannot establish that USPS acted outside the scope of its statutory authority. As noted, Plaintiffs fail to identify any evidence that USPS (i) changed its policies with regard to reducing unnecessary sorting machines, (ii) imposed a cap on overtime, (iii) prohibited late and extra trips, (iv) made any national changes to its morning sortation practices, or (v) changed its long-standing policies on the classification of Election Mail. And even if Plaintiffs could show that USPS made any such changes, there is no evidence that USPS did so intending to degrade service, or even that service degradation was reasonably foreseeable at the time (and not merely in hindsight). Indeed, USPS's intent in reemphasizing transportation discipline was to improve service, as evidenced by the fact that reducing late trips has been identified by the PRC as a way to improve First-Class Mail service performance (a fact that Plaintiffs ignore). *See* Defs.' Ex. 24, PRC Annual Compliance

Determination report, FY 2019 (Mar. 25, 2020), at 109–23. Plaintiffs argue that they should nonetheless prevail because USPS "intend[ed] to alter postal services," Pls.' Resp., at 21, but that is the wrong legal standard. Rather, the question is whether USPS planned to implement a *new service standard* or was *knowingly or intentionally* degrading service. Defs.' MSJ, at 25. Plaintiffs make no attempt to show any of these things, and all of the evidence is to the contrary. Plaintiffs have never contended that USPS planned to implement new service standards. And even accepting as true Plaintiffs' assertion that USPS "implemented five operational changes," Pls.' Resp., at 21, Plaintiffs have presented no evidence that USPS did so intending to degrade service or reasonably expecting that the changes would do so.

Plaintiffs also contend that the OIG report's conclusion that USPS was not required to request an advisory opinion from the PRC "should carry no weight here" because the OIG "is not a federal court." Pls.' Resp., at 22. But Plaintiffs do not dispute that the OIG has unique expertise in the Postal Service's operations and statutory requirements, and the report's analysis of the authoritative PRC interpretations of section 3661 and how they apply to the alleged changes here is persuasive. Plaintiffs do not identify any flaw in the OIG report's analysis.

Instead, Plaintiffs argue that the OIG report contradicts "the factual assertions" on which Defendants rely. Pls.' Resp., at 23. But, as an initial matter, that is simply not true—the OIG report does not contradict, for example, evidence that USPS has been reducing the number of underused processing machines under a model driven-process for years, that it has a long-running process to reduce "unearned time," or that it has sought to improve compliance with its long-established delivery schedules for years. But to the extent that the report criticizes the level of analysis and guidance behind certain USPS operational decisions, those conclusions are immaterial to Plaintiffs' section 3661 claim. If, as the OIG found, the alleged changes did not require an advisory

opinion from the PRC, it is simply irrelevant whether they happened to cause temporary, unintended mail delays. In other words, were the Court to accept the OIG report's analysis *in toto*, there is no dispute that Defendants would be entitled to judgment as a matter of law. Plaintiffs, by contrast, must selectively embrace certain aspects of the report while rejecting others.

Finally, Plaintiffs' claim also fails because they have not shown that "the statutory preclusion of review is implied rather than express" or that "there is no alternative procedure for review of the statutory claim." *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019). As discussed above, section 3662 expressly precludes judicial review. And as Defendants have explained, Defs.' MSJ, at 29–30, Plaintiffs cannot show that there is no alternative procedure for review because they can (and indeed, must) litigate their section 3661 claim before the PRC, with judicial review in the D.C. Circuit. While Plaintiffs previously contended that such a forum could not provide meaningful review in light of the imminence of the election, they cannot rely on this argument now for the reasons explained above. Accordingly, the Court should grant summary judgment for Defendants on Plaintiffs' section 3661 claim.

III. Plaintiffs' section 101 and 403 claims fail as a matter of law.

A. Plaintiffs' section 101 and 403 claims are not reviewable.

Plaintiffs do not dispute that they lack a private right of action to bring their section 101 and 403 claims. Nor do they dispute that they cannot rely on the Administrative Procedure Act. And, as Defendants explained in their motion for summary judgment, review under the *ultra vires* doctrine is unavailable because section 101 and 403 are not "clear and mandatory" statutory commands with "only one unambiguous interpretation," but rather leave "significant room for agency discretion." Defs.' MSJ, at 31–33 (quoting *NAPS*, 2020 WL 4039177, at *3–6).

In contending that Plaintiffs' section 101 and 403 claims are nonetheless reviewable, Plaintiffs rely principally on *Aid Ass'n for Lutherans v. U.S. Postal Service*, 321 F.3d 1166 (D.C.

Cir. 2003). But that case involved an entirely different kind of challenge under a statute that clearly foreclosed the action that USPS had taken. Unlike in this case, the Postal Service in *Lutherans* had formally issued regulations interpreting statutory language that barred the use of reduced nonprofit postage for mailings promoting certain insurance policies. *Id.* at 222. In defending those regulations, USPS relied on a specific delegation of statutory authority from Congress—39 U.S.C. § 3626(j)—that authorized USPS to regulate with respect to "coverage provided by [an insurance] policy." *Id.* at 223. The court held that *ultra vires* review was available because plaintiffs claimed that USPS acted "outside of the scope of its statutory authority" by issuing regulations that the statute unambiguously did not authorize. *Id.* at 223, 227–28. On the merits, the court held that the statute unambiguously foreclosed USPS from promulgating the regulations because they regulated with respect to "types of insurance," while the statute clearly authorized USPS to issue regulations only with respect to "coverage" under an insurance policy. *See id.* at 223, 230–33.[6]

Here, by contrast, there is no question as to USPS's *authority* to implement changes such as the alleged Postal Policy Changes. *See Griffith*, 842 F.2d at 492 (*ultra vires* review available for agency action "in excess of jurisdiction"); *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (*ultra vires* review available for agency action "in excess of its delegated powers and contrary to a specific prohibition"). Rather, Plaintiffs' challenge is a challenge to the USPS's *judgment* that certain alleged actions (that it unquestionably had the *power* to take) were prudent. *See* Defs.' MSJ, at 31–33 (describing significant discretion that PRA vests in USPS over its operations). But the law in this Circuit is clear that *ultra vires* review is inappropriate where plaintiffs simply claim

[6] Additionally, at the time *Lutherans* was decided, the PRC's complaint jurisdiction did not extend to USPS's promulgation of regulations. *See* 39 U.S.C. § 3662 (2005). That is no longer the case. *See* 39 U.S.C. § 3662(a) (including section 401(2) within the PRC's jurisdiction). Thus, the dispute in *Lutherans*, if filed today, would not likely be subject to judicial *ultra vires* review because of the primacy of the PRC's complaint jurisdiction.

that the "agency's authorized action was imprudent" or that the agency "reached the wrong result." *Eagle Tr. Fund v. U.S. Postal Serv.*, 365 F. Supp. 3d 57, 67 (D.C. Cir. 2019). That is precisely what Plaintiffs are claiming here, and thus their claims are not reviewable.[7]

B. Even if Plaintiffs' claims were reviewable, they fail as a matter of law.

Even if Plaintiffs' section 101 and 403 claims were reviewable, Defendants would still be entitled to summary judgment on those claims as a matter of law. *See* Defs.' MSJ, at 33–37.

Plaintiffs first contend that Defendants violated section 101(e), which provides that "[i]n determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail." 39 U.S.C. § 101(e). But again, Plaintiffs fail to tie each of the alleged Postal Policy Changes to a violation of section 101(e), even though Defendants specifically raised Plaintiffs' failure to do so in Defendants' cross-motion for summary judgment. Defs.' MSJ, at 34–35. Plaintiffs continue to address only two alleged changes—the alleged reduction of mail sorting machines and the elimination of late and extra trips—while ignoring the other three (overtime, ESAS pilot program, and handling of Election Mail). Pls.' Resp., at 24. Thus, Plaintiffs have waived any section 101(e) claim as to these alleged changes.

[7] Plaintiffs implicitly concede that *ultra vires* review would not be available under the standard articulated by this Court in *NAPS*, under which plaintiffs must allege an express violation of a clear and mandatory statute. *See* Pls.' Resp., at 19–20 n.14; *NAPS*, 2020 WL 4039177, at *3. Plaintiffs instead argue that *NAPS* is inconsistent with *Lutherans*. But this is incorrect. The court's holding in *Lutherans* was that the statute "unambiguously" foreclosed the agency's action. 321 F.3d at 1178. While the court also stated in *dictum* that the agency had acted *ultra vires* because its interpretation was "utterly unreasonable in the breadth of its regulatory exclusion," the court still did so in the context of addressing whether the agency had *authority* to issue the regulation. Moreover, even if the standard articulated in *NAPS* does not apply to Plaintiffs' section 101 and 403 claims, they still fail as a matter of law for the reasons explained above and in Section III.B.

As to the two changes that Plaintiffs do address, they do so only in conclusory fashion. With respect to mail sorting machines, Plaintiffs state that USPS "doubled its reduction rate" and "removed machines entirely rather than turning them off." Pls.' Resp., at 24. But this simply describes the actions that USPS allegedly took; it does not speak to whether USPS did or did not consider the expeditious movement of mail in taking this action. Again, the undisputed evidence shows that USPS did take this consideration into account when it continued to carry out its longstanding practice of decommissioning underutilized sorting machines. Doing so assists the efficient processing of mail by removing inefficient or outdated machines, freeing up space for package-processing machines, and reducing unnecessary work hours. Defs.' MSJ, at 35 (citing DeChambeau Dec. ¶¶ 7-9, 11, 12, 18–19; Barber Dec. ¶ 6).

Similarly, although Plaintiffs assert that USPS "did not consider" the effect that adherence to transportation schedules would have on the timely delivery of mail, Mr. Cintron, who led the agency's efforts in this regard, explained that this was not the case. *See* Pls.' Ex. 27 (First Cintron Dep.) 56:12–57:5, 57:13–23; *see also* Ex. 24 (PRC annual compliance report) at 109–23. Plaintiffs provide no admissible evidence to dispute Mr. Cintron's testimony. Instead, Plaintiffs discount Mr. Cintron's sworn testimony as a "*post hoc* rationalization," citing *SEC v. Chenery*, 318 U.S. 80 (1943). Not so. Mr. Cintron testified about the *contemporaneous* considerations that went into the Postal Service's efforts to adhere to delivery schedules. *Chenery* holds that an informal adjudication by an agency "can be upheld only on the basis of a contemporaneous justification by the agency itself, not *post hoc* explanation of counsel." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012). *Chenery* does not apply where, as here, there was no change in agency

policy. And even if there were, *Chenery* is not implicated where USPS has relied not on the "*post hoc* explanation of counsel" but on its own contemporaneous deliberation.

Plaintiffs next contend that USPS violated section 101(a)'s requirement that USPS provide "prompt" service. 39 U.S.C. § 101(a). But again, Plaintiffs only reference three of the alleged changes (reduction of mail sorting machines, late and extra trips, and ESAS pilot program), making no attempt to tie a section 101(a) violation to the other two alleged changes (overtime and handling of Election Mail).

As to the three alleged changes that Plaintiffs do reference, their arguments again are conclusory and unsupported by the evidence. First, there is no evidence that the limited ESAS pilot program interfered with the prompt delivery of mail at all, let alone that it caused "dramatic" delays. *See* Defs.' Stmt. of Facts ¶¶ 42–43. The program was scheduled for 30 days at only 384 (out of approximately 18,755) delivery units, and Plaintiffs point to no evidence that it caused any delays. *See id.* Second, there is no evidence that the reduction in underused sorting machines "slowed the processing of mail." *See* Defs.' Resp. to Pls.' Stmt. of Facts ¶¶ 126–27 (citing evidence demonstrating that process of removing machines does not involve using the time of clerks, who are the employees who sort mail). To the contrary, Plaintiffs admit that, at most, machine utilization reaches 65 percent, Pls.' Resp. to Defs.' Stmt. of Facts ¶ 11, demonstrating that there is ample excess capacity for the processing of mail. Nor do Plaintiffs cite any evidence that supports their claim that "the reduction in extra and late trips has caused mail to languish in postal facilities and prevented postal employees from addressing backlogs." Defs.' Resp. to Pls.' Stmt. of Facts ¶¶ 111, 128–29. While there was a "temporary decline in meeting service standards . . . due to the need to adjust other parts of the mail flow," Cintron Dec. ¶ 26, Plaintiffs cite no evidence that the guidelines (which have since been rescinded) caused any material, long-term delays.

More fundamentally, even if Plaintiffs could show that any alleged changes were made and caused a delay, it cannot be the case that any delay in postal services violates section 101(a). As explained in Defendants' motion for summary judgment, the PRA confers "broad authority in postal management" to ensure that it is not "unjustly hampered in its efforts to administer [USPS] in a businesslike way." Defs.' MSJ 24 (quoting *Buchanan*, 508 F.2d at 262–63). If any delay in postal services constituted an actionable section 101(a) violation, management of USPS would be left to plaintiffs and the courts, directly contrary to Congress's intent. Plaintiffs propose no judicially manageable standards for when a delay rises to the level of a section 101(a) violation, let alone show how any of the alleged delays would satisfy such nonexistent standards.

As to their section 403 arguments, Plaintiffs largely rehash arguments from their summary judgment motion to support their contention that Defendants did not "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a). Again, Plaintiffs discuss only two of the alleged Postal Policy Changes in particular—the removal of sorting machines and restrictions on late and extra trips. Pls.' Br. 27. And again, Plaintiffs articulate no standard by which the Court could assess whether USPS is providing "efficient" or "adequate" services or come forward with any evidence establishing that any challenged policy was "inefficient."

Instead, relying on dictionary definitions, Plaintiffs contend that the removal of underused sorting machines had "no apparent legitimate purpose except to increase time wasted and decrease results produced." *Id.* To support this assertion, Plaintiffs rely on a declaration from a single representative of the American Postal Workers Union, who asserts that removing sorting machines can "take resources away from sorting other mail." Pls.' Resp., at 27 (citing Pls.' Stmt. of Facts ¶¶ 126–27). But such a conclusory assertion does not create a genuine factual dispute, especially

in the face of Defendants' uncontroverted evidence that USPS had determined, through a robust modeling process, that the remaining sorting machines had more than ample capacity. *See* Pls.' Resp. to Defs.' Stmt. of Facts ¶ 11; *see also* DeChambeau Dec. ¶¶ 13, 15; Barber Dec. ¶ 11; Couch Dec. ¶ 4.

Nor have Plaintiffs established a genuine factual dispute as to their claim that the alleged restrictions on late and extra trips "increased inefficiency by forcing postal employees to leave for the street before all the mail was ready for delivery" and "prevent[ed] postal employees from taking steps to decrease the mail backlog." Pls.' Resp., at 27. Even if Plaintiffs could show that there were such restrictions, Plaintiffs again cite only one paragraph from the same APWU representative's declaration to support their broad claim of "inefficiency." *See id.*; Coradi Dec. ¶ 16. Again, such a one-paragraph conclusory statement in a single fact witness's declaration cannot create a genuine issue of material fact in the face of Defendants' uncontroverted evidence that adherence to transportation schedules improves operational efficiency. *See, e.g.*, Defs.' Ex. 14 (OIG audit report concluding that USPS's processing network was not operating at optimal efficiency due to late and extra trips); Ex. 24 (PRC annual compliance report) at 109–23 (late trips were a significant cause of First-Class mail service issues); Cintron Dec. ¶¶ 14–28; Pls.' Ex. 27 (First Cintron Dep.) 56:12–57:23; Defs.' Ex. 31 (Second Cintron Dep.) 49:13–50:5. The Court should grant Defendants' motion for summary judgment on Plaintiffs' section 101 and 403 claims.

IV. Plaintiffs cannot establish an Elections Clause claim.

Regardless of how Plaintiffs frame their legal theory, they effectively argue that the Elections Clause gives States a Constitutional right to expect a certain level of service from USPS if they choose to rely upon USPS when crafting their election laws. Plaintiffs, of course, can cite to no binding precedent indicating that the Elections Clause protects States from any and all

government policies that may indirectly affect their elections. Indeed, aside from citing to recent preliminary injunction orders relating to the very USPS policy changes at issue, Plaintiffs cite no case at all—binding or otherwise—expressly supporting their novel theory. The Court should reject Plaintiffs' unprecedented claim.

As an initial matter, this claim is moot since the Court likely cannot institute meaningful relief prior to 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 Emps.*, 315 F. Supp. 3d 561, 568 (D.D.C. 2018). The election is on November 3, 2020—tomorrow. Although certain States accept ballots following Election Day, it is still unclear whether any permanent injunction entered by the Court will provide meaningful relief. It is uncertain whether the Court will resolve the motions for summary judgment within a few days, and even more uncertain whether USPS could promptly implement any new relief if the Court did enter judgment in Plaintiffs' favor. In response, Plaintiffs also note that there will be future elections, but any claims premised on alleged potential injuries relating to future elections are not ripe.

Regardless, Plaintiffs' claim fails on the merits. To start, Plaintiffs do not dispute that the Elections Clause, by its text, simply empowers State legislatures "to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001). The "function contemplated by [the Elections Clause] is that of making laws." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Here, each Plaintiff has passed a law stating that its citizens are legally allowed to vote by mail, and USPS has not altered these procedural rules; these State laws remain intact regardless of any USPS policies.

Plaintiffs cite to no authority to support their novel claim that the Elections Clause not only empowers States to pass procedural rules governing their elections, but also shields States from

external factors that may affect their elections. And the limited, applicable authority undermines Plaintiffs' reading. In *Smiley v. Holm*, the Supreme Court found that even though the Elections Clause specifically grants State *legislatures* the authority to issue certain election laws, a State constitutional provision that allows governors to veto election laws—and thus override election law determinations of State legislatures—does not violate the Elections Clause. 285 U.S. at 368. The Court reasoned 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 only confers upon State legislatures "lawmaking" powers, subject to the inherent "limitation[s]" of lawmaking, then it ipso facto does not protect States from any and all external circumstances that may impact the intended effects of relevant state laws (a fundamental "limitation" of lawmaking).

In response, Plaintiffs argue that *Smiley* found only that the term "legislature" in the Elections Clause encompasses limitations on legislative activity found in *State constitutions* (*e.g.*, a governor's veto right), and that the case at bar does not involve similar limitations found in a State constitution. But *Smiley*'s reasoning was not so limited. Although *Smiley* did concern a governor's veto authority over election laws, the Court never suggested that, under the Elections Clause, State legislatures may only be subject to limitations found in State constitutions. To the contrary, the Court suggested that the Elections Clause includes only a "grant of legislative authority," which involves "lawmaking in its essential features," implying that States are simply allowed the same powers, and are subject to the same limitations, that typically accompany the legislative process. *Id.* at 366, 368. Plaintiffs do not dispute that the effectiveness of State legislation is typically subject to external circumstances beyond a legislature's control. Thus,

pursuant to *Smiley*, the Elections Clause does not protect States from external factors that may impact their elections, including and especially federal policies over which State legislatures have no authority. In short, the Elections Clause is a grant of authority to the States, not a shield they may use to defend against the otherwise valid actions of any other political entity.

Additionally, Plaintiffs' expansive reading of the Elections Clause would allow States to effectively control federal agencies. For example, if a mail delay here may constitute an Elections Clause violation, then Plaintiffs could challenge any future mail delay before any future election, and use the courts to dictate postal reforms. And these lawsuits would not be limited to USPS. Many federal policies may have some incidental effect on State elections. Under Plaintiffs' expansive reading of the Elections Clause, States could challenge any or all of these federal policies, and demand that the federal government modify them to better accommodate State elections. In response, Plaintiffs attempt to cast their claim as a "narrow one," targeting alleged "abrupt and egregious (and unprecedented) actions, occurring in the run-up to a presidential election that depends as never before on mail-in ballots." Pls.' Resp., at 30-31. But Plaintiffs do not, and cannot, contend that their Elections Clause theory would necessarily be so limited, and in any event, there would be no principled basis for such a limitation. If, as Plaintiffs proclaim, the Elections Clause shields States from external factors influencing State elections, then even a "[non-]abrupt and [non-]egregious" action, occurring in the "run-up to" any election (presidential or otherwise) where certain people "depend . . . on mail-in ballots" could likewise be actionable as well.

To salvage their claim, Plaintiffs make two additional arguments. First, they argue that a federal agency cannot adopt a policy that "interferes," in some manner, with a State election unless this interference is authorized by a "clear statement" in the enabling legislation. Once again,

Plaintiffs cite no authority for their novel view of the Elections Clause. To the extent Plaintiffs are suggesting that a statutory "clear statement" is required before an agency can issue a rule that has *any* indirect effect on State elections, the Elections Clause obviously does not support this requirement. Again, this provision empowers States to pass election laws; it does not protect State elections from all external influences. At best, the Elections Clause requires a statutory "clear statement" if Congress is delegating its narrow authority under this provision to "make or alter [State election] regulations." *Smiley*, 285 U.S. at 363. But, as noted in USPS's opening memorandum, USPS has not exercised the authority reserved for Congress in the Elections Clause; USPS has not "ma[de] or alter[ed]" any of Plaintiffs' election laws. To argue otherwise, Plaintiffs posit an irrelevant hypothetical whereby Congress expressly preempts a State-established ballot-courier system and claim that is somehow relevant to the alleged situation here. Pls.' Resp., at 31–32. But, of course, the alleged USPS policies here *are* different. In Plaintiffs' hypothetical, Congress has expressly overridden a State election law and/or has required States to enact laws utilizing Congress' mail-courier system. Neither USPS nor Congress have scrapped a State election law, nor has either compelled States to enact new election laws.

Finally, Plaintiffs reiterate their theory that the alleged USPS policy changes at issue violate the Elections Clause because their *purpose* was to interfere with mail-in voting. In support, Plaintiffs again refer to circumstantial evidence, including the timing of the alleged USPS policies and the process through which they were implemented. But this evidence cannot establish improper intent in light of the litany of measures USPS has adopted to specifically facilitate the processing of Election Mail. *See* Defs.' MSJ, at 42-43. USPS raised this argument in its opening memorandum, and Plaintiffs fail to address it. Furthermore, Plaintiffs offer no authority indicating that improper "purpose" alone can establish an Elections Clause claim. Here, 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. Accordingly, USPS is entitled to judgment on the Elections Clause claim.

V. Permanent Injunction and Declaratory Relief.

Plaintiffs' requested injunction does not satisfy the Federal Rule of Civil Procedure 65(d) specificity requirement. As noted in USPS's opening memorandum, Plaintiffs request an ambiguous injunction that prohibits USPS from implementing certain policies that Plaintiffs fail to identify with any specificity, with compliance seemingly measured on the basis of USPS's service performance results. *See* Defs.' MSJ, at 44 (plaintiffs ask the court to enjoin a "new effort to reduce work hours, especially overtime," without specifying the "new effort"). Remarkably, in their response, Plaintiffs hardly make any attempt to specifically identify the policies they want the Court to enjoin. They do not cite to specific documents memorializing these policies, identify the dates on which these policies were adopted, or even describe the precise terms of any of these policies—despite numerous opportunities to define such policies, including through accelerated discovery. Instead, Plaintiffs note only that this Court, and others, have enjoined the alleged policies at issue here. True, but this proves only that these preliminary injunctions similarly failed to satisfy Rule 65(d) requirements. Unsurprisingly, USPS had to move for clarification here precisely because the preliminary injunction was ambiguous. *See* ECF No. 54. The imprecise permanent injunction sought by the Plaintiffs, if imposed on an agency, also raises separation-of-powers concerns. *See, e.g.*, *Cobell v. Kempthorne*, 455 F.3d 301, 317 (D.C. Cir. 2006) ("A court cannot order programmatic supervision of an agency's operations, nor can it displace an agency as the actor with primary responsibility for carrying out a statutory mandate . . . .").

Plaintiffs also seek, for the first time in their response, a Court-appointed monitor. "The use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' and not to displace the court." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957). The appointment of a monitor to oversee an agency also raises separation-of-powers concerns. *See, e.g.*, *Cobell v. Norton*, 334 F.3d 1128, 1143 (D.C. Cir. 2003) (vacating appointment of monitor where appointment "entailed a license to intrude into the internal affairs of the [agency], which simply is not permissible under our adversarial system of justice and our constitutional system of separated powers"). As this Court recently held, "reference to a master shall be the exception and not the rule," and if "there is no history of Defendants failing to comply with Court orders, no difficult legal issues involved, and relatively few measures for Defendants to take," a Court-appointed monitor is unnecessary. *Richardson v. Trump*, No. CV 20-2262 (EGS), 2020 WL 5969270, at *16 (D.D.C. Oct. 8, 2020). Here, as noted above—and in exhibits appended to filings in related cases[8]—"there is no history of" USPS "failing to comply with" the Court's orders. Accordingly, a Court-appointed monitor is unnecessary and inappropriate.

Finally, Plaintiffs confirm in their response that they are not seeking relief that binds the President. Pls.' Resp., at 34 n.20. As Defendants have explained, the Court lacks jurisdiction to enter such relief. Defs.' MSJ, at 45 (citing *Mississippi v. Johnson*, 71 U.S. 475, 498–99 (1866), and *Newdow v. Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010)).

CONCLUSION

The Court should grant Defendants' Cross-Motion for Summary Judgment.

[8] *See Vote Forward v. DeJoy*, 20-cv-2405, ECF No. 36-1 (D.D.C. Oct. 23, 2020).

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