

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

NATIONAL ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED)
PEOPLE,)

Plaintiff,)

v.)

Civil Action No. 20-cv-2295 (TSC)

UNITED STATES POSTAL SERVICE,)
et al.,)

Defendants.)

_____)

**MEMORANDUM IN SUPPORT OF
PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Since the earliest days of the Republic, prompt and reliable mail delivery has been essential to our constitutional democracy. Today, it is more important than ever. Over three-quarters of Americans are potentially eligible to vote by mail in November 2020, and election officials are preparing for a surge in mail-in voting due to the COVID-19 pandemic. That pandemic has already cost over 175,000 Americans their lives, with death rates particularly high for Black people, due to disparities in access to health care and structural discrimination. In addition to voting, Americans depend—particularly now, during the ongoing pandemic—on the postal service to receive medicines, checks, legal notices, and other important communications.

At the same time, when prompt mail delivery matters more than ever, the Postal Service has made significant changes that have resulted in unreliable service and widespread delays. Specifically, on July 10, 2020, just weeks after assuming office as Postmaster General, Louis DeJoy announced a new plan and major operational “Pivot,” imposing significant new restrictions on the timing and nature of letter carrier routes. In so doing, he acknowledged that employees would “see mail left behind or on the workroom floor or docks” as a result. In the month since, there have been substantial delays in mail service across the nation, with entire towns in rural areas not receiving their mail on certain days and people in some cities going days or weeks without receiving any mail at all.

Plaintiff National Association for the Advancement of Colored People (NAACP), the nation’s largest and oldest civil rights grassroots organization, seeks a preliminary injunction requiring the Postal Service to rescind these changes and to restore prompt and reliable mail delivery. This Court should grant the NAACP’s motion because all four factors governing preliminary injunctions are satisfied.

First, NAACP has a substantial likelihood of success on the merits. Congress has mandated that, before implementing changes that have a nationwide impact on mail delivery, the Postal Service must provide an opportunity for public comment and seek an opinion from the Postal Regulatory Commission. *See* 39 U.S.C. § 3661(b). The Postal Service failed to do so before implementing the changes it adopted as part of the Pivot. Its changes are therefore unlawful. Moreover, the Pivot is a classic example of decisionmaking that is arbitrary, capricious, and contrary to statutory mandate. In a rush to adopt the Pivot, notwithstanding the pandemic, Defendants failed to consider key statutory objectives about reliable mail service and the need to give the highest consideration to delivery important letter mail, including ballots and checks, *see id.* § 101, and failed to consider the adverse impact on timely delivery of medications.

Second, NAACP and its members are likely to experience irreparable harm absent preliminary injunctive relief. The NAACP's members rely on the mail, including for delivery of medications and ballots, yet have experienced delays since the Pivot was implemented. As for the NAACP itself, the Pivot has frustrated the organization's mission of promoting civic engagement and political participation among Black voters and caused it to divert resources from its ordinary activities so that it can disseminate information and organize transportation for voters to drop off absentee ballots at elections officials' offices or drop boxes. Absent mail delays, the NAACP would expend these resources on other aspects of its civic engagement program, such as registering voters, contacting registered voters to ensure they have accurate voting information and encouraging them to vote, organizing events to get out the vote, and conducting voter protection activities during early voting. NAACP has also been deprived of the opportunity to which it was entitled by law, 39 U.S.C. § 3661(b), to comment on significant postal service changes before they are instituted.

Finally, the balance of equities and the public interest support Plaintiff's request for preliminary relief. The Postal Service would not be harmed by an order requiring it to follow the law, and the public interest would be served by enjoining changes that are negatively impacting the timely delivery of ballots, medicines, checks, and other important mail.

STATEMENT OF FACTS

Statutory and Regulatory Background

In 1970, Congress enacted the Postal Reorganization Act, Public Law 91-375, 84 Stat. 719, which replaced the Post Office Department with the United States Postal Service, "an independent establishment of the executive branch of the Government of the United States, under the direction of a Board of Governors, with the Postmaster General as its chief executive officer." 39 C.F.R. § 1.1. The Postal Service is required to "operate[] as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people." 39 U.S.C. § 101(a). It has "as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities." *Id.* Congress has directed 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." *Id.* § 101(e).

The Postal Reorganization Act also established the Postal Rate Commission, later renamed the Postal Regulatory Commission. *See* Postal Accountability and Enhancement Act of 2006, 84 Stat. at 759; Pub. L. 109-435 §§ 601, 604. The Commission is "an independent establishment of the executive branch," *id.* § 601(a)(1), and "is composed of 5 Commissioners,

appointed by the President, by and with the advice and consent of the Senate. The Commissioners shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration, and may be removed by the President only for cause.” *Id.* “Each individual appointed to the Commission shall have the qualifications and expertise necessary to carry out the enhanced responsibilities accorded Commissioners under the Postal Accountability and Enhancement Act.” *Id.*

The Postal Service is tasked with “develop[ing] and promot[ing] adequate and efficient postal services.” *Id.* § 3661(a). “When the Postal Service determines that there should be a change in the nature of postal services [that] will generally affect service on a nationwide or substantially nationwide basis,” it must “submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.” *Id.* § 3661(b).

Before issuing its opinion, the Commission must provide “an opportunity for hearing on the record under sections 556 and 557 of [the Administrative Procedure Act (APA)] ... to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public.” *Id.* § 3661(c). The Commission’s Rules of Practice and Procedure require the Postal Service to file its request “not less than 90 days before the proposed effective date of the change in the nature of postal services involved.” 39 C.F.R. § 3020.112.

The Commission’s rules permit two forms of voluntary participation in Commission proceedings: (1) A person may file a notice of intervention pursuant to 39 C.F.R. § 3010.142(a) and, as a party, participate in discovery and motions practice, file testimony, and submit briefs, among other rights and responsibilities. (2) A person may participate by submitting comments in

proceedings before the Commission except those involving an appeal of a Postal Service determination to close or consolidate a post office, pursuant to 39 C.F.R. § 3010.140.

Factual Background

The COVID-19 Pandemic

On March 11, 2020, the World Health Organization declared a global pandemic resulting from the spread of COVID-19.¹ Two days later, President Trump announced that the outbreak of COVID-19 in the United States constituted a national emergency.²

By April 2020, the United States became the epicenter of the COVID-19 pandemic with the highest number of confirmed COVID-19 cases in the world.³ As of August 2020, there have been over 5,740,000 COVID-19 cases reported in the United States, including more than 175,000 deaths.⁴ According to the CDC, as of August 2020, COVID-19 is the third leading cause of death in the United States.⁵ Given a combination of shortages in testing, false negatives, and asymptomatic carriers, the actual number of cases and deaths is likely higher than officially

¹ Dr. Tedros Adhanom, WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

² Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020), <https://www.federalregister.gov/documents/2020/03/18/2020-05794/declaring-a-national-emergency-concerning-the-novel-coronavirus-disease-covid-19-outbreak>.

³ David Smith, *US surpasses China for highest number of confirmed Covid-19 cases in the world*, The Guardian (Mar. 27, 2020), <https://www.theguardian.com/world/2020/mar/26/coronavirus-outbreak-us-latest-trump>.

⁴ CDC, *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Aug. 26, 2020).

⁵ Lauren Mascarenhas, et al., *Birx says she wishes US lockdown had resembled the one in Italy*, CNN (Aug. 17, 2020), <https://www.cnn.com/2020/08/17/health/us-coronavirus-monday/index.html>.

reported.⁶ Globally, there have been over 21,700,000 confirmed cases of COVID-19, with over 770,000 deaths.⁷

COVID-19 is a respiratory infection caused by the novel coronavirus SARS-CoV-2. It spreads via respiratory droplets, particularly through close in-person contacts.⁸ The virus can be spread by asymptomatic, pre-symptomatic, and symptomatic individuals.⁹ Symptoms may be severe, including fever, difficulty breathing, and loss of taste or smell.¹⁰ Individuals hospitalized with COVID-19 may continue to experience persistent symptoms for months.¹¹ Lethal at its worst, COVID-19 infection can also lead to long-term damage to the lungs, heart, brain, kidneys, or liver.¹²

⁶ Apoorva Mandavilli, *Coronavirus Infections Much Higher Than Reported Cases in Parts of the U.S., Study Shows*, NY Times (July 21, 2020), <https://www.nytimes.com/2020/07/21/health/coronavirus-infections-us.html>; Andrew Joseph, *Actual Covid-19 case count could be 6 to 24 times higher than official estimates, CDC study shows*, STAT (July 21, 2020), <https://www.statnews.com/2020/07/21/cdc-study-actual-covid-19-cases/>.

⁷ WHO, *WHO Coronavirus Disease (COVID-19) Dashboard*, <https://covid19.who.int/> (last visited Aug. 26, 2020).

⁸ CDC, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself and Others* (last updated July 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁹ Nathan W. Furukawa, et al., *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, 26 CDC Emerging Infectious Diseases (July 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article.

¹⁰ Mayo Clinic, *Coronavirus Disease 2019 (COVID-19), Symptoms and Causes* (updated August 7, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>.

¹¹ Victoria Foster, *80% Of People Hospitalized With Coronavirus Still Had Symptoms Two Months Later, Says New Study*, Forbes (July 11, 2020), <https://www.forbes.com/sites/victoriaforster/2020/07/11/80-of-people-hospitalized-with-coronavirus-still-had-symptoms-two-months-later-says-new-study/#37aedd2b1e93>.

¹² Jacqueline Howard, *Covid-19's impact on the heart: Two new studies suggest 'the plot thickening'*, CNN (July 28, 2020), <https://www.cnn.com/2020/07/28/health/covid-heart-damage-two-studies/index.html>; CDC, *Coronavirus Disease 2019 (COVID-19): Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (last updated June 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance->

The CDC and the World Health Organization have estimated that approximately one out of five people infected with COVID-19 will require hospitalization.¹³ People of all ages have contracted and died from COVID-19.¹⁴ Preexisting medical conditions such as kidney disease, heart disease, asthma, hypertension, and diabetes can increase the risk of serious complications from COVID-19, regardless of age.¹⁵ The pandemic has had a particularly devastating impact on Black people in the United States. As a result of disparities in access to health care and structural discrimination that leads to higher rates of co-morbidities, Black people comprise a disproportionate number of both cases of infection and deaths caused by the virus.¹⁶

There is no approved medication to cure COVID-19,¹⁷ and there is currently no vaccine to prevent it.¹⁸ There is consensus among medical experts and government agencies that a

management-patients.html; Zoe Cormier, *How Covid-19 can damage the brain*, BBC (June 22, 2020), <https://www.bbc.com/future/article/20200622-the-long-term-effects-of-covid-19-infection>.

¹³ WHO, *Q&A on Coronaviruses (COVID-19)*, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last visited Aug. 26, 2020); CDC, *Coronavirus Disease 2019 (COVID-19): Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, *supra* note 12.

¹⁴ CDC, *COVID-19 Guidance for Older Adults* (last updated Aug. 17, 2020), <https://www.cdc.gov/aging/covid19-guidance.html>; *see also* CDC, *Hospitalization Rates and Characteristics of Children Aged <18 Years Hospitalized with Laboratory-Confirmed COVID-19* (Aug. 14, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932e3.htm> (“Children are at risk for severe COVID-19. Public health authorities and clinicians should continue to track pediatric SARS-CoV-2 infections.”).

¹⁵ CDC, *Coronavirus Disease 2019 (COVID-19): Groups at Higher Risk of Severe Illness* (last updated Aug. 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

¹⁶ *See* Richard A. Opiel, Jr., et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, NY Times (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>; *see also* The COVID Tracking Project, *The COVID Racial Data Tracker*, <https://covidtracking.com/race> (last visited Aug. 26, 2020).

¹⁷ WHO, *Coronavirus Disease (COVID-19), Advice for the Public: Mythbusters*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/mythbusters> (last visited Aug. 26, 2020).

COVID-19 vaccine will not be available to the public in 2020.¹⁹ Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases and White House coronavirus advisor, has stated that U.S. health officials cannot see “an end in sight” to the pandemic.²⁰

In the interim, experts have identified techniques that are effective in decreasing transmission of COVID-19, including practicing social distancing by avoiding close in-person contacts, avoiding large gatherings, wearing masks in public, and practicing frequent and thorough handwashing.²¹

The Importance of Timely Mail Delivery During the Pandemic

The Postal Service’s statutory obligation to provide “prompt, reliable, and efficient services to patrons in all areas,” 39 U.S.C. § 101(a), has taken on even greater significance as a result of the COVID-19 pandemic. Consistent with social distancing guidance, more people have opted to obtain their prescription medications through the mail.²² Medicines delivered by mail

¹⁸ CDC, *Coronavirus Disease 2019 (COVID-19), How to Protect Yourself and Others*, *supra* note 8.

¹⁹ HHS, *Fact Sheet Explaining Operation Warp Speed*, (June 16, 2020), <https://www.hhs.gov/about/news/2020/06/16/fact-sheet-explaining-operation-warp-speed.html>; Gisela Crespo, *US gets reality checks on Covid-19 vaccine, duration of symptoms*, CNN (July 24, 2020), <https://www.cnn.com/2020/07/24/health/us-coronavirus-friday/index.html>.

²⁰ Berkeley Lovelace, Jr., *Dr. Anthony Fauci warns the coronavirus won’t ever be eradicated*, CNBC (July 22, 2020), <https://www.cnbc.com/2020/07/22/dr-anthony-fauci-warns-the-coronavirus-wont-ever-be-totally-eradicated.html>.

²¹ Lisa Lockerd Maragakis, *Coronavirus, Social and Physical Distancing and Self-Quarantine*, Johns Hopkins Medicine (updated July 15, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social%20distancing-and-self-quarantine>.

²² See Christina Farr, *Patients say post office slowdown is delaying delivery of life-saving medications*, CNBC (Aug. 19, 2020), <https://www.cnbc.com/2020/08/19/usps-slowdown-delays-delivery-of-life-saving-meds-patients.html>.

include critical and life-saving drugs, including for the treatment of chronic infections, and chronic conditions like diabetes, heart disease, asthma, and high blood pressure.²³

In addition, because of the pandemic, many states expect a record-breaking volume of mail-in voting for the November 2020 election. The CDC has provided guidance regarding safe voting practices during the COVID-19 pandemic, warning of the risk person-to-person COVID-19 transmission at polling sites and urging the use of “voting methods that minimize direct contact and reduce crowd size at polling locations,” such as mail-in voting.²⁴ Consistent with the CDC’s guidance, states have expanded mail-in voting access to ensure that eligible voters can vote both safely and securely during the 2020 primary and general election cycle.²⁵ State and local elected officials have likewise encouraged people to rely on mail-in voting for primary and general elections to vote safely and reduce the spread of the COVID-19 virus.²⁶

²³ See *id.*; Reed Ableson, *U.S. Mail Delays Slow Delivery of Medicines*, N.Y. Times (Aug. 20, 2020); <https://www.nytimes.com/2020/08/20/health/Covid-us-mail-prescription-drugs.html>; see also Rosalind Adams, et al., *USPS Delays Are Causing People to Get their Prescriptions Late*, BuzzFeed News (Aug. 17, 2020) <https://www.buzzfeednews.com/article/rosalindadams/post-office-delay-prescription-medicine>.

²⁴ See CDC, *Coronavirus Disease 2019 (COVID-19): Considerations for Election Polling Locations and Voters* (last updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

²⁵ National Conference of State Legislatures, *COVID-19 and Elections*, (last updated July 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx> (cataloguing legislative actions—enacted and pending—and executive actions taken by states to expand voting options for eligible voters in response to COVID-19).

²⁶ See, e.g., Alan Yuhas, *How Mail-in Voting Works*, NY Times (Aug. 18, 2020), <https://www.nytimes.com/article/Vote-by-mail.html>; Don Walton, *Ricketts encourages vote by mail, eyes gradual easing of COVID-19 restrictions possibly in May*, Lincoln Journal Star (May 14, 2020), https://journalstar.com/news/state-and-regional/govt-and-politics/ricketts-encourages-vote-by-mail-eyes-gradual-easing-of-covid-19-restrictions-possibly-in-may/article_2770d931-fa51-591f-b04b-d5e516a72888.html; Ed Kilgore, *New Hampshire Says COVID-19 is a ‘Disability’ Justifying Voting by Mail*, New York Magazine (Apr. 10, 2020), <https://nymag.com/intelligencer/2020/04/in-nh-covid-ruled-a-disability-justifying-voting-by-mail.html>.

As a result of states' expansion of mail-in voting, a record 76 percent of American voters will be eligible to receive a ballot in the mail for the November 2020 election.²⁷ States have already experienced surges in vote-by-mail ballot requests attributable to the pandemic,²⁸ and historical levels of mail-in voting during recent primaries. For example, Pennsylvania saw an 18-fold increase in mail-in voting for the June 2020 primary compared to the June 2016 primary.²⁹ Likewise, Florida saw a record number of mail-in votes, with 2.1 million mail-in ballots cast (as of August 16) for the August 18, 2020 primary as compared to 1.35 million for the August 2016 primary.³⁰

Defendants Implement a "Pivot" Affecting Postal Service Nationwide

On June 15, 2020, Louis DeJoy assumed office as Postmaster General of the United States.³¹ Mr. DeJoy had no prior experience working at the Postal Service. Within weeks, Postmaster DeJoy directed the Postal Service to implement significant operational changes on a nationwide basis. Internal Postal Service documents acknowledged that those changes would

²⁷ Alan Yuhas, *How Mail-in Voting Works*, *supra* note 26.

²⁸ See, e.g., Jim Morrill, *Coronavirus gears spark 'striking surge' of mail-in ballot requests*, *Charlotte Observer* (July 13, 2020), <https://www.charlotteobserver.com/news/politics-government/article244187737.html>; Beth LeBlanc, *Michigan absentee ballot requests increase 1 million from 2016*, *The Detroit News* (July 2, 2020) <https://www.detroitnews.com/story/news/politics/2020/07/02/michigan-absentee-ballot-requests-rise-1-million-ahead-august-primary/5365799002/>; Letter from Nat'l Ass'n of Secretaries of State to Louis DeJoy (Aug. 7, 2020), *available at* <https://www.npr.org/2020/08/14/902545891/amid-fears-about-mail-in-ballots-election-officials-havent-met-with-new-postmast>.

²⁹ Andree Hsu & Mary Louise Kelly, *'Swing County, USA' Prepares for Unprecedented Influx of Ballots by Mail*, *NPR* (July 21, 2020), <https://www.npr.org/2020/07/21/893115504/swing-county-u-s-a-prepares-for-unprecedented-influx-of-ballots-by-mail>.

³⁰ Steve Patrick, *Amid pandemic, record number of Florida voters use mail-in ballots*, *News 4 Jax* (Aug. 17, 2020), <https://www.news4jax.com/election-2020/2020/08/11/amid-pandemic-mail-in-ballots-smash-primary-records/>.

³¹ See Jessica Dean & Ellie Kaufman, *US Postal Service faces challenges as new postmaster takes over*, *CNN* (June 15, 2020), <https://www.cnn.com/2020/06/15/politics/postal-service-new-director/index.html>.

impact the Postal Service's provision of postal services to the public, including by resulting in delays in mail delivery.

Specifically, on or about July 10, 2020, the Postal Service circulated to employees a document entitled "New PMG's expectations and plan" (PMG Plan), which outlined the significant nationwide changes Postmaster DeJoy was implementing. In that document, Postmaster DeJoy announced that overtime would be eliminated, that letter carriers would have to make changes limiting the timeframe and affecting the scope of their delivery routes, and that certain customer service windows would be closed during lunchtime.³² Postmaster DeJoy directed employees to leave mail behind at distribution centers if it delayed letter carriers from their routes. These represented significant departures from prior practices, as postal workers had been trained not to leave letters behind and to make multiple trips to ensure timely distribution of letters and parcels.

The Postal Service also circulated a document on July 10, 2020, entitled "Mandatory Stand-Up Talk: All Employees," with a subtitle "Pivoting For Our Future" (Pivot Instructions).³³ The Pivot Instructions describe significant changes being immediately implementing on a nationwide basis and acknowledge that these changes will impact the delivery of mail. The document states that the Postal Service "must make immediate, lasting, and impactful changes in our operations and in our culture," and stress that "[e]very single employee will receive this information" because every employee was "integral" to the success of those changes.³⁴ It

³² See, e.g., Jacob Bogage, *Postal Service memos detail 'difficult' changes, including slower mailer delivery*, Wash Post (Aug. 14, 2020), <https://www.washingtonpost.com/business/2020/07/14/postal-service-trump-dejoy-delay-mail/>.

³³ Available at <https://federalnewsnetwork.com/wp-content/uploads/2020/07/071020-stand-up-talk.pdf>.

³⁴ *Id.*

explains that the “initial step in our pivot is targeted on transportation” and will involve “challenging” changes “as we seek to change our culture and move away from past practices previously used.”³⁵ The Pivot Instructions then provide numerous specific examples of “transportation changes being implemented immediately (today),” including limiting the timeframe when employees are permitted to make mail delivery trips.³⁶ And it acknowledges that, as a result of these changes, employees “may see mail left behind or on the workroom floor or docks,” which is “not typical” and “may be difficult for employees.”³⁷

The Pivot Instructions appear to contemplate that “delayed mail volumes” would result from the first phase of this Pivot; the Instructions state that the transportation pivot is part of an “ongoing pivot” that would include additional phases, and that “operations will begin to run more efficiently and that delayed mail volumes will soon shrink significantly.”³⁸ The Pivot Instructions do not, however, explain what those additional phases will be, when they will be implemented, or how they will reduce the anticipated delays.

Despite the significant changes in the postal service operations and their predictable impact on the public, the Postal Service did not follow the procedures set forth in 39 U.S.C. § 3661 before implementing them. Specifically, the Postal Service did not submit a proposal to the Postal Regulatory Commission requesting an advisory opinion on those changes prior to implementing them. As explained below, these changes have led to widespread, nationwide delays in mail service.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

ARGUMENT

To secure a preliminary injunction, plaintiff must show “that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of equities in [their] favor, and accord with the public interest.” *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). Likelihood of success on the merits is the “‘most important’ of these four factors.” *Jones v. Hurwitz*, 324 F. Supp. 3d 97 (D.D.C. 2018) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014)). Here, each of those factors weighs strongly in favor of issuing the requested preliminary injunction.

I. NAACP is likely to prevail on the merits.

A. Defendants’ actions are subject to judicial review.

This action primarily seeks non-statutory review of *ultra vires* official action as described in the Supreme Court’s decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), and its progeny. As those cases recognize, “[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.” *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). “Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review.” *Id.* As the Supreme Court has more recently explained, adjudicating claims for non-statutory review “federal courts may in some circumstances grant injunctive relief against ... violations of federal law by federal officials.” *Armstrong v. Exceptional Child Ctr.*, 525 U.S. 30, 327 (2015) (citing *McAnnulty*). The availability of non-statutory review of illegal conduct by federal officers “reflects a long history of judicial review of illegal executive action, tracing back to England.” *Id.* Otherwise, where review under the APA is not available, the individual would be “left to the absolutely uncontrolled and arbitrary action of a public and administrative officer.” *McAnnulty*, 187 U.S. at 110.

For example, in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (*Reich II*), the D.C. Circuit, holding that this Court had authority to review President Clinton’s executive order related to qualifications for government contractors, explained that “courts will ‘ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.’” *Id.* at 1328 (collecting cases) (citation omitted); *see id.* at 1339 (holding executive order unlawful because it conflicted with the National Labor Relations Act); *see also UAW-Labor Emp’t & Training Corp. v. Chao*, 325 F.3d 360, 367 (D.C. Cir. 2003) (employing non-statutory review but concluding executive order not preempted by National Labor Relations Act).

Importantly, although the D.C. Circuit has held that judicial review of USPS action is not available under the APA, *see Mittleman v. Postal Regulatory Comm’n*, 757 F.3d 300, 307–08 (D.C. Cir. 2014) (relying on 39 U.S.C. § 410(a)), it has reviewed USPS actions under the *McAnnulty* line of cases. *See N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 858 (D.C. Cir. 2012) (“We should note, preliminarily, that the Postal Service is exempt from review under the Administrative Procedure Act, but its actions are reviewable to determine whether it has acted in excess of its statutory authority.”); *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1168, 1173 (D.C. Cir. 2003) (concluding that Postal Service regulations could be reviewed on non-statutory basis notwithstanding exemption from APA because “the case law in this circuit is clear that judicial review is available when an agency acts *ultra vires*” and holding regulations void); *see also Doehla Greeting Cards, Inc. v Summerfield*, 116 F. Supp. 68, 74 (D.D.C. 1953) (reviewing allegation that Postmaster General acted arbitrarily and capriciously in setting postal zone rates).

Plaintiff's claims fit comfortably within the *McAnnulty* framework. They are premised on actions by Defendants that are arbitrary, capricious, or in violation of statute, and unauthorized by the statute from which they derive their authority. *See Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.").

B. NAACP is likely to prevail on the merits of its claims.

1. Violation of 39 U.S.C. § 3661(b)

In enacting the Postal Reorganization Act of 1970, Congress sought to balance two "basic policies": giving sufficient flexibility to the post office to implement certain managerial decisions while "providing the American people a public service which is sensitive and responsive to their needs." *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259, 262 (5th Cir. 1975). Congress balanced those goals by enacting a statute "whereby management is given the freedom to manage without unnecessary limitations and the public is given an opportunity to present their views on decisions of the Postal Service which affect them." *Id.* Thus, although the Postal Service has flexibility to adopt a range of changes without public input, the statute mandates a process that includes an opportunity for public comment before the Postal Service adopts changes that will impact mail delivery services on a nationwide or substantially nationwide basis. *See* 39 U.S.C. § 3661(b); *Buchanan*, 508 F.2d at 262. Here, USPS's own documents and Postmaster DeJoy's admissions establish that the PMG Plan and Pivot Instructions (hereafter referred to jointly as the "Pivot") are impacting mail delivery service on a substantially nationwide basis. Accordingly, USPS was required to solicit public comment and seek an advisory opinion before implementing the Pivot. Its failure to do so constitutes a violation of § 3661(b).

Section 3661 begins by directing the Postal Service to “develop and promote adequate and efficient postal services,” 39 U.S.C. § 3661(a). Given the importance of postal service, Congress built in to the statute a public and agency oversight mechanism for any proposed “change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis,” by requiring that such proposed changes be submitted to the Postal Regulatory Commission “within a reasonable time prior to [the proposal’s] effective date” for an “advisory opinion on the change.” *Id.* § 3661(b). Before issuing the advisory opinion, the Commission must afford a “hearing on the record under [the Administrative Procedure Act]” to “the Postal Service, users of the mail, and an officer of the [PRC] ... represent[ing] the interests of the general public.” *Id.* § 3661(c).

As the text of section 3661(b) makes plain, the advisory opinion and public comment process is triggered when three requirements are met. “First, there must be a ‘change.’ This implies that a quantitative determination is necessary. There must be some meaningful impact on service.” *Buchanan v. U.S. Postal Serv.*, 508 F.2d at 262. “Second, the change must be ‘in the nature of postal services.’ This involves a qualitative examination of the manner in which postal services available to the user will be altered.” *Id.* “Third, the change must affect service ‘on a nationwide or substantially nationwide basis.’ A broad geographical area must be involved.” *Id.*; accord *NAACP v. U.S. Postal Serv.*, 398 F. Supp. 562, 565 (N.D. Ga. 1975) (quoting *Buchanan*). Because each of these elements is satisfied here, Plaintiff is likely to succeed on the merits of its claim. See *Buchanan*, 508 F.2d at 266–67 (upholding preliminary injunction against USPS for failure to submit to Commission proposed “‘postal facilities deployment’ program [that] includes a decision making process whereby postal facilities are relocated and altered’’).

Change in the nature of postal services: The first two elements of section 3661(b) are easily met: The Pivot resulted in both quantitative and qualitative impacts on the postal service provided to customers. The Pivot Instructions required specific “transportation changes,” including limiting the timeframe when employees are permitted to make mail delivery trips by prohibiting additional transportation, prohibiting extra trips, and prohibiting late trips to deliver mail. Pivot, *supra* note 33. As a result of these changes, the memo circulated to all USPS employees anticipated that employees “may see mail left behind or on the workroom floor or docks,” which is “not typical” and “may be difficult for employees.” *Id.* And as expected, the changes caused and are causing delays and disruptions in service.

Indeed, Postmaster DeJoy has candidly described the changes as “fundamental,” and “transformative.”³⁹ And he acknowledged that the Pivot “impacted our overall service levels,” and led to a “dip in our service.”⁴⁰ These assertions are confirmed by an internal USPS document showing a stark drop in on-time delivery rates between early July and early August.⁴¹ Over half

³⁹ DeJoy, Testimony before House Oversight Committee, Aug. 24, 2020, at 51:10, *available at* <https://www.c-span.org/video/?474917-1/postmaster-general-louis-dejoy-testifies-postal-service-operations-mail-voting> (hereafter DeJoy House testimony); Kristen Holmes & Veronica Stracqualursi, *In new letter, USPS chief acknowledges ‘unintended consequences’ of recent policy changes*, CNN (Aug. 14, 2020), https://www.cnn.com/2020/08/14/politics/dejoy-usps-changes-2020-election/index.html?utm_term=image&utm_source=twCNNp&utm_content=2020-08-14T14%3A04%3A07&utm_medium=social (quoting DeJoy letter dated Aug. 10, 2020, stating “Unfortunately, this transformative initiative has had unintended consequences that impacted our overall service levels.”).

⁴⁰ DeJoy, Testimony before Senate Homeland Security and Governmental Affairs Committee, Aug. 21, 2020, at 47:08, *available at* <https://www.c-span.org/video/?474940-1/senate-hearing-us-postal-service>.

⁴¹ USPS, Service Performance Measurement, PMG Briefing, Aug. 12, 2020, *available at* https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

of Americans polled in a survey conducted from August 14 through August 16 said they noticed delays in mail service over the prior few weeks.⁴²

In his congressional testimony, Postmaster General DeJoy, who is new to the Postal Service, suggested that he had not announced a change to the nature of postal service—that he was enforcing existing policies and that the “[t]he only change I made . . . was the trucks leave on time.”⁴³ But those assertions are contradicted by DeJoy’s own statements recognizing that the transportation changes he implemented were “fundamental” and “transformative,” and by his directive that the announcement of the changes be sent to “every single employee.” Pivot, *supra* note 33. As a postal worker in Tennessee explained, the transportation Pivot is so significant because “the new policy will not allow holding a truck for even five minutes so it can be loaded with mail, adding that Express Mail and Priority Mail are often left sitting on the docks because trucks have already left.”⁴⁴ The worker explained, “That is very important mail - cremated remains, legal documents, things that must be delivered on time, guaranteed delivery - and we are not making that guarantee.”⁴⁵ Elsewhere, the Postal Service has advised that, under the new procedures, “Overtime will be eliminated,” and “[i]f the plants run late they will keep the mail for the new day. If you get the mail late and the carriers are gone and you cannot get the mail out without [overtime] it will remain for the next day.”⁴⁶

⁴² See Orion Rummel, *USPS priority mail delays got worse in early August, internal brief for postmaster general shows*, Axios (Aug. 22, 2020), <https://www.axios.com/usps-mail-delays-postmaster-general-9a5d4076-c87a-4468-9fa5-2c7f3e17fbd6.html>.

⁴³ Ben Hall, *Postal trucks sometimes travel across country - with no mail - after USPS cuts*, News Channel 5 (Aug. 24, 2020), <https://www.newschannel5.com/news/newschannel-5-investigates/postal-trucks-sometimes-travel-across-country-with-no-mail-after-usps-cuts>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Roger Sollenberger, *Internal USPS memo appears to contradict postmaster general's testimony*, Salon (Aug. 21, 2020), <https://www.salon.com/2020/08/21/internal-usps-memo->

Thus, Defendants cannot avoid their section 3661 obligations by characterizing the changes at issue as “[m]inor alteration[s] which have a minimal effect on the general class of postal users,” or a simple “reorganization of the management structure which would have no impact on the service available to users.” *Buchanan*, 508 F.2d at 262, 267. Instead, because the Pivot resulted in a “meaningful impact on service” that specifically affected the availability of “postal services ... to the user,” the first two elements of section 3661(b) are satisfied. *See id.* at 262–63.

The Postal Service’s past practice confirms that the changes to postal service announced in the Pivot should have gone through the section 3661 advisory opinion process. *See United Farm Workers v Chao*, 227 F. Supp. 2d 102 (D.D.C. 2002) (“[P]ast practice ... should be given the deference ordinarily accorded any interpretation of a statute by the agency charged with its enforcement.” (quoting *Gelman v. Federal Election Comm’n*, 631 F.2d 939, 943 (D.C. Cir. 1980)); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (“A central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it.”). For example, in 2014, the Postal Service sought an advisory opinion on a proposal to change the manner of processing and dispatching mail that qualifies for a discounted price. For certain mail entered on Fridays or Saturdays, the Postal Service proposed to change the delivery expectation or delivery service standard from 3 days to 4 days, in part justified based on cost considerations. *See PRC*, Advisory Op. on Service

appears-to-contradict-postmaster-generals-testimony/; also available at Nat’l Alliance of Nonprofit Mailers, *Leaked USPS PowerPoint indicates PMG DeJoy focus on getting operating costs under control* (July 14, 2020), <https://www.nonprofitmailers.org/leaked-usps-powerpoint-indicates-pmg-dejoy-focus-on-getting-operating-costs-under-control/>.

Changes Associated with Standard Mail Load Levels, N2014-1, at 1–2, Mar. 26, 2014.⁴⁷ Although the Postal Service proposed lengthening the delivery standard by only a single day, and only for mail that was entered on two days of the week, it recognized the requirement that it follow the process set forth in section 3661. After receiving comments and briefs from intervenors, the Commission found that the Postal Service’s proposal was based on limited test information and sometimes anecdotal accounts, criticized the Postal Service for failing to conduct a more rigorous cost-benefit analysis and consult with mail users in evaluating the potential impact of the proposed change, and noted concern that the proposal did not have sufficient “support within the mailing community.” *Id.* at 5.

Similarly, in 2012, the Postal Service sought an advisory opinion under section 3661 on a proposal to reduce the hours of operation at more than 13,000 post offices nationwide by 6, 4, or 2 hours per weekday, and to increase hours at approximately 73 locations. The Postal Service stated that its proposed plan was intended “to achieve cost savings with limited reductions in access and service,” and included provisions for soliciting community input with respect to the changes in hourly operations at specific offices. PRC, Advisory Op. on Post Office Structure, N2012-2, at 1–2, Aug. 23, 2012.⁴⁸ Although the Postal Service intended the rule to have a limited impact on service, it recognized the need to seek public comment and an advisory opinion under Section 3661. After soliciting public comment, the Commission made recommendations concerning access, community input, revenue, and staffing. *Id.*

Like the changes proposed in 2014 and 2012, the changes adopted by Defendants this summer affect the speed of delivery and the operations at post offices across the country. The

⁴⁷ Available at https://www.prc.gov/docs/89/89493/docket%20no.%20n2014-1_advisory%20opinion.pdf; *id.* at 5.

⁴⁸ Available at https://www.prc.gov/docs/85/85013/n2012-2_adv_op_082312.pdf.

recent changes thus encompass the topics of both the 2012 and 2014 proposals, which went through the section 3661 notice and comment process. In short, the changes directly addressed the “nature of postal services.”

Substantial nationwide impact: The third element of section 3661—that the change must affect service “on a nationwide or substantially nationwide basis,” 39 U.S.C. § 3661(b)—is also satisfied here. Defendants’ Pivot has resulted in widespread reports of mail piling up in regional distribution centers and post offices around the country, and of customers experiencing substantial delays and disruptions in mail service.⁴⁹ “A broad geographical area” is indisputably affected by the changes. *Buchanan*, 508 F.2d at 263.

The substantial nationwide impact of the changes is reflected in Postal Service documentation showing that on-time delivery of first-class mail, mass marketing mail, and periodicals declined markedly between early July and early August, resulting in 8–9 percent declines in on-time delivery. *See* USPS, Service Performance Measurement, Aug. 12, 2020.⁵⁰ The substantial nationwide impact is also reflected in the testimony of Postmaster General DeJoy, acknowledging an impact on our “overall service levels,” and a “dip in our service.”⁵¹ It is reflected in the survey (*see supra* note 42) showing that more than half of all Americans in one poll noticed delays in mail service over the prior few weeks. And it is reflected in a poll from August 18, which similarly found that over a third of Americans expecting a package in the mail over the previous week experienced a delay or non-delivery of the package.⁵²

⁴⁹ Luke Broadwater, *Crisis Ripples Across Nation as Election Looms*, NY Times (Aug. 18, 2020), <https://www.nytimes.com/2020/08/15/us/post-office-vote-by-mail.html>.

⁵⁰ *See supra* note 41.

⁵¹ *See supra* note 40.

⁵² *Between Democratic and Republican conventions, Americans more likely to trust Biden on COVID-19 than Trump*, Ipsos (Aug. 25, 2020), <https://www.ipsos.com/en-us/news-polls/axios-ipsos-coronavirus-index>.

Specific examples abound. In Philadelphia, Pennsylvania, residents reportedly experienced delays of up to three weeks in receiving mail, leading to missed worker's compensation checks and paychecks.⁵³ Baltimore County, Maryland, residents who had not received mail in two weeks waited in line for hours at the post office to try and collect their mail. Those residents reported that they were still unable to pick up their most important mail, including checks and an unemployment benefit debit card needed to pay their bills.⁵⁴ Similarly, in Southeast Washington, DC, hundreds of residents went two weeks without receiving any mail.⁵⁵ Likewise, mail has been arriving late across Western New York: the president of a local chapter of the American Postal Workers Union reported that, as a result of the changes in service, "we've had entire towns that didn't get their mail that day," including "some of the bigger ones—East Aurora, Lancaster."⁵⁶ Similar delays have occurred across central Alabama.⁵⁷ In Maine, postal workers reported leaving 80,000 letters behind because they were not permitted

⁵³ Ellie Rushing, *Mail delays are frustrating Philly residents, and a short-staffed Postal Service is struggling to keep up*, Philadelphia Inquirer (Aug. 2, 2020), <https://www.inquirer.com/news/philadelphia/usps-tracking-in-transit-late-mail-delivery-philadelphia-packages-postal-service-20200802.html>.

⁵⁴ Kim Dacey, *People who haven't received mail in weeks line up at post office*, WBALTV (Aug. 6, 2020), <https://www.wbal.com/article/baltimore-mail-delays-continue-no-mail-in-weeks/33535355>.

⁵⁵ Kolbie Satterfield, *Southwest DC residents go weeks without mail being delivered*, WUSA9 (Aug. 13, 2020), <https://www.wusa9.com/article/news/local/dc/two-weeks-no-mail-in-southeast-dc-neighborhood/65-31535798-3c83-45f8-b0e4-775ce6d6e8f8>.

⁵⁶ See Jerry Zremski, *Mail delays, days with no delivery prompt rising concern in WNY*, Buffalo Times (Aug. 13, 2020), https://buffalonews.com/news/national/govt-and-politics/mail-delays-days-with-no-delivery-prompt-rising-concern-in-wny/article_d9944036-dd92-11ea-8f15-778f24015679.html.

⁵⁷ See Lauren Walsh, *Central Alabama experiences some mail, package delays as USPS, UPS feel COVID-19 impact*, ABC33/40 News (Aug. 12, 2020), <https://abc3340.com/news/local/central-alabama-experiences-some-mail-package-delays-as-usps-ups-feel-covid-19-impact>.

to wait 10 minutes for them to be processed.⁵⁸ There have been similar reports of delays in mail service in states throughout the country.⁵⁹

These disruptions and delays in postal service have caused Americans to go without their life sustaining medication and medical supplies, including medications to treat diabetes, asthma, hypertension, among other serious chronic conditions.⁶⁰ In the last week, almost one in five Americans got medication through the mail; “[o]ne in four of these (5% of all Americans) experienced a delay or non-delivery.”⁶¹ Online pharmacy Honeybee Health said about 20 percent of patients who order delivery via first-class mail have experienced delays so far: “The situation is fluid but it’s clear from our customer service team that an usually high number of patients are receiving their medication far later than expected—and in some cases, not receiving it at all. These delays are troubling for everyone, but for patients who rely on medication to live, it’s especially dangerous.”⁶²

⁵⁸ See Alison Durkee, *Postmaster General Acknowledges ‘Unintended Consequences’ of USPS Changes Causing Mail Delays*, Forbes (Aug. 14, 2020), <https://www.forbes.com/sites/alisondurkee/2020/08/14/postmaster-general-louis-dejoy-acknowledges-unintended-consequences-of-usps-postal-service-changes-mail-delays/#764bdfd46052>.

⁵⁹ See, e.g., Andrew Brown & Andrew Miller, *Some SC businesses say they are experiencing delays because of US Postal Service changes*, The Post and Courier, (Aug. 14, 2020), https://www.postandcourier.com/business/some-sc-businesses-say-they-are-experiencing-delays-because-of-us-postal-service-changes/article_e8716d38-dd6d-11ea-9c9e-a79f1c82a446.html; Ron Trevino, *USPS delivery delays leave 82-year-old Texas man without heart medication for a week*, WBNS (Aug. 17, 2020), <https://www.10tv.com/article/news/nation-world/usps-delays-leave-humble-man-without-heart-medication/285-49815193-bf3d-4b45-a1a5-b0afe16236f7>; Ginna Roe, *Utah diabetic waiting for more than a week for supplies by mail*, KUTV, (Aug. 17, 2020), <https://kutv.com/news/local/utah-diabetic-waiting-more-than-a-week-for-supplies-by-mail>.

⁶⁰ Rosalind Adams, et al., *USPS Delays Are Causing People to Get their Prescriptions Late*, *supra* note 23.

⁶¹ *Between Democratic and Republican conventions, Americans more likely to trust Biden on COVID-19 than Trump*, Ipsos, *supra* note 52.

⁶² Christina Farr, *Patients say post office slowdown is delaying delivery of life-saving medications*, *supra* note 22.

Veterans, who overwhelmingly receive their medications through the mail, have reported delays of weeks to receive medication.⁶³ Veterans have also reported that delayed bills and payments have caused them to incur late fees.⁶⁴

* * *

Put simply, Defendants changes to postal service have had an undeniably substantial impact on the delivery of mail and packages throughout the country. Section 3661(b) exists specifically to provide an opportunity for public input on such changes. Defendants violated the statutory mandate of section 3661 by failing to submit the changes as a proposal to the Postal Regulatory Commission.

2. Action arbitrary, capricious, and contrary to 39 U.S.C. § 101(e)

Defendants instituted changes for processing and delivery of mail during a global pandemic that is occurring during an election year. At the time he directed the changes, Postmaster General DeJoy had held his position for only a few weeks. Yet without analysis of the effects of the changes on the customers he is intended to serve—apparently without analysis of the effect of the changes on delivery of medications, checks, bills, ballots, and other important mail—the brand-new Postmaster General announced changes affecting service throughout the country.⁶⁵ These changes “are causing major delays,” according to postal workers, as “buckets of

⁶³ See Letter from 31 Senators to Louis DeJoy (Aug. 13, 2020), <https://bit.ly/345AaDj>; James Clark, *How the battle over the US Postal Service is costing veterans dearly*, Task & Purpose (Aug. 18, 2020), <https://taskandpurpose.com/news/postal-service-veteran-medication-delays>.

⁶⁴ Letter from Senator Gary Peters to Hal. J. Roesch II (Aug. 13, 2020), <https://bit.ly/311tQe5>.

⁶⁵ DeJoy House testimony, *supra* note 39, at approximately 1:45 (declining to answer whether he had analyzed effect of changes on delivery of prescription drugs).

mail” are left “sitting” and workers are “being forced to come into work later and return earlier.”⁶⁶

The decision to implement these changes in the midst of the COVID-19 pandemic, when reliable mail service has taken on particular importance, including because of primary elections and the upcoming general election (*see supra* pages 9–10), reflects a failure to consider and address “important aspect[s] of the problem”—the hallmark of arbitrary and capricious decisionmaking. *Gresham v. Azar*, 950 F.3d 93, 99 (D.C. Cir. 2020) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Indeed, there is no evidence that Postmaster General DeJoy considered how the Pivot would affect the basic policy objectives of the Postal Service as established by Congress, including the Postal Service’s obligation to “provide prompt, reliable, and efficient services to patrons in all areas and [to] render postal services to all communities.” 39 U.S.C. § 101(a). Perhaps most striking, Defendants failed to consider their duty “[i]n determining all policies for postal services,” to “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).

Defendants’ failure to consider the Pivot’s impact on key statutory directives, as the new Postmaster rushed to make changes, requires that its action be set aside. *See Gresham*, 950 F.3d at 102 (agency action arbitrary and capricious where the Secretary failed to “account for loss of [health care] coverage, which is a matter of importance under the statute”); *Am. Wild Horse Pres. Campaign*, 873 F.3d at 932 (arbitrary and capricious where agency “failed ... to consider or to adequately analyze the environmental consequences of [its] changes”); *Love v. Thomas*, 858 F.2d

⁶⁶ Michael Sainato, *Postmaster general’s changes causing mail delays, USPS workers say*, *The Guardian* (Aug. 16, 2020), <https://www.theguardian.com/business/2020/aug/16/usps-mail-delays-postmaster-general-changes-workers>.

1347, 1358 (9th Cir. 1988) (agency action arbitrary and capricious where its “evaluation of the relevant factors under [the statute] was incomplete and rushed”).

In short, to adopt the Pivot, which had an immediate impact in slowing delivery mail, in the face of the increase in mailed medication and other mailed packages, as well as the well-publicized increase in mailed ballots that will continue through early November, was arbitrary, capricious, and contrary to the mandate of section 101(e).

II. Absent preliminary injunctive relief, Plaintiff is likely to suffer irreparable harm.

Absent preliminary relief, Defendants’ violation of section 3661 and the changes adopted pursuant to the Pivot will cause irreparable harm to plaintiff NAACP and its members. The likely harm is “certain and great”; it is “actual and not theoretical”; and it is “of such imminence that there is a clear and present need for equitable relief to prevent [it].” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ((internal quotations omitted; citing *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)); see also *League of Women Voters of U.S.*, 838 F.3d at 7–8. Additionally, the injury will be “beyond remediation” in the absence of preliminary relief. *Chaplaincy*, 454 F.3d at 297. And importantly, Postmaster DeJoy has stated that he will not reverse the changes at issue. See DeJoy House testimony, *supra* note 39, at 5:19:04 (answering “No” to the question “Will you commit to reversing these changes?”).

First, a party experiences actionable harm when “depriv[ed] of a procedural protection to which he is entitled,” such as notice and an opportunity to comment. *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002). If such were not the case, the APA’s requirement for notice-and-comment rulemaking “would be a dead letter.” *Id.* at 95. Thus, if Defendants have violated Plaintiff’s right to notice and an opportunity to comment, “then, there is no question that [it] will be injured by the implementation of the” recent changes.

N. Mariana Islands v. United States, 686 F. Supp. 2d 7, 17 (D.D.C. 2009). Indeed, as another court has observed when considering a challenge to the Postal Service’s failure to comply with section 3661, “[t]he denial of . . . a [section 3661] hearing, should one be required, is sufficient irreparable injury to support interlocutory injunctive relief, for it is clear that no hearing will be conducted and that the changes will continue unless enjoined.” *Buchanan v. U.S. Postal Service*, 375 F. Supp. 1014, 1022 (N.D. Ga. 1974); *aff’d in relevant part*, 508 F.2d at 266 (stating the district court “was correct in its determinations that plaintiffs had properly established that there was a substantial threat of irreparable injury” as necessary to warrant preliminary injunctive relief).

Second, the changes that USPS implemented without following the required section 3661 process have caused delays that harm, and will continue to harm, NAACP members. For example, NAACP member Earl Graham is a 62-year-old disabled veteran who relies on the Postal Service for the delivery of important mail, including mail-order medications to treat backpain, headaches, arthritis, sciatica, and cholesterol. *See* Graham Decl. ¶¶ 1–5. In the past, Mr. Graham’s medications ordinarily arrived a few days after his doctor approved his prescription. *Id.* ¶ 6. However, since mid-July, Mr. Graham’s prescriptions have taken much longer to arrive, including a week or longer. *Id.* Approximately two weeks ago, Mr. Graham reached out to the U.S. Department of Veterans Affairs to inquire about these delays. *Id.* After a Veterans Affairs representative spoke with his prescription provider, the representative informed Mr. Graham that the delays in the delivery of his prescriptions were due to mail service delays. *Id.* Mr. Graham is also voting by mail for the first time in the November 2020 elections because he is concerned about exposure to COVID-19, especially as he is at higher risk for severe illness. *Id.* ¶ 7. He is concerned that his ballot may not arrive on time due to mail delays. *Id.* The delays

that Mr. Graham is experiencing in mail service as a result of Pivot, and his well-founded fear that his ballot will not arrive in time to be counted, constitute irreparable injury warranting injunctive relief. *See, e.g., Buchanan*, 375 F. Supp. at 1022 (irreparable injury from changes that would have a likely impact on postal services, which would “continue unless enjoined”).

Third, the delays caused by the Postal Service’s changes have harmed, and continue to harm, the NAACP itself by frustrating its mission and requiring it to divert resources to counteract the effect of USPS’s action. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (“*Havens* makes clear . . . that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.”). An organization’s diversion of resources in response to agency action that perceptibly impairs its mission creates a “risk of irreparable injury sufficient to warrant a preliminary injunction.” *Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148, 177 (D.D.C. 2017).

The mission of the NAACP, which is the nation’s largest and oldest civil rights grassroots organization, is to ensure the political, educational, social, and economic equality of all persons and to eliminate race-based discrimination. Watkins Decl. ¶ 2. As part of its mission, the NAACP has established a civic engagement program designed to encourage citizens to be fully engaged in the democratic process and to raise awareness for political, educational, social, and economic equality for communities of color in the electoral and legislative process. *Id.* ¶ 6. Drawing upon the resources of the NAACP’s branches across the country, the civic engagement program seeks to increase turnout among Black voters in federal, state, and local elections. *Id.*

The widespread delays in postal service since mid-July have required the NAACP, and will continue to require the NAACP, to divert resources that it would have otherwise expended

on other aspects of its civic engagement program. For example, because of numerous reports of those mail delays, the Florida State Conference (which is part of the NAACP), and volunteers it recruited as part of the civic engagement program, disseminated information and organized transportation for voters to drop off their absentee ballots at local supervisors of elections in advance of Florida's August 18, 2020 primary election. *Id.* ¶ 8. The Florida State Conference is planning to conduct similar activities in preparation for the November 2020 election as a result of continuing concerns about delays in mail services. *Id.* Similarly, due to concerns about delays in mail delivery, both the Georgia State Conference and Ohio State Conference, both parts of the NAACP, plan to conduct similar activities in preparation for the November 2020 election, including disseminating information, and organization events and transportation for voters to drop off their absentee ballots at drop boxes. *Id.* ¶¶ 9–10.

Absent the widespread mail delays this summer, the Florida, Georgia, and Ohio State Conferences would instead devote the resources spent on these activities to the regular activities of the NAACP's civic engagement program, such as registering voters, contacting registered voters to ensure they have accurate voting information and encouraging them to vote, organizing events to get out the vote, and conducting voter protection activities during early voting. *Id.* ¶ 11. For example, because of the mail delays, the Florida State Conference will have fewer members and volunteers available to conduct remote and in-person poll monitoring during early voting for the November 2020. *Id.* ¶ 12. The Conference will divert members and volunteers to assist with disseminating information about dropping off absentee ballots, organizing transportation, and transporting voters to drop off absentee ballots. *Id.*

In sum, delays in mail delivery pose obstacles that make it more difficult for the NAACP to accomplish its mission of registering voters, encouraging voters to vote and organizing events

to get out the vote, and engaging in voter protection activities. The delays thus create a likelihood of irreparable harm warranting preliminary injunctive relief. *See League of Women Voters of U.S.*, 838 F.3d at 9 (agency action making it more difficult for non-profit organization to accomplish its mission of registering voters constitutes likelihood of irreparable injury to justify preliminary injunction); *see also Open Communities Alliance*, 286 F. Supp. 3d at 178 (enjoining agency action taken without required procedures where that action made work of the plaintiff non-profit organization and caused it to change its activities). Indeed, as to this aspect of the ongoing harm, after the election, “there can be no do over and no redress.” *League of Women Voters*, 838 F.3d at 9 (citation omitted).

III. The balance of equities and the public interest support Plaintiff’s request for preliminary relief.

Finally, a preliminary injunction is in the public interest where, as here, the equities for granting one easily outweigh those against. In evaluating whether to issue a preliminary injunction, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal citation and quotation marks omitted). In addition to evaluating the relative effect of the injunction on each party, the Court must also consider whether the requested relief would serve the public interest.

As discussed above, without an injunction, the NAACP and its members will suffer serious and immediate harms that could not be sufficiently remedied later. By contrast, the Postal Service would not be harmed by an order requiring it to follow the law, and the public interest is served when administrative agencies comply with their statutory obligations. *See Central United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015) (“Forcing federal agencies to comply with the law is undoubtedly in the public interest[.]”). This point applies fully to

procedural obligations imposed by statute. *See Gulf Coast Mar. Supply, Inc. v. United States*, 218 F. Supp. 3d 92, 101 (D.D.C. 2016) (“The public interest is served both by ensuring that government agencies conform to the requirements of the APA and their own regulations.”); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (“Public interest is served when administrative agencies comply with their obligations under the APA.”); *Patriot, Inc. v. Dep’t of Hous. and Urban Dev.*, 963 F. Supp. 1, 6 (D.D.C. 1997) (stating that “the public interest is best served by having federal agencies comply with the requirements of federal law, particularly the notice and comment requirements of the APA.”); *see also Creosote Council v. Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008) (there is a “general public interest in open and accountable agency decision-making”).

Put simply, “[t]here is generally no public interest in the perpetuation of unlawful agency action.” *League of Women Voters*, 838 F.3d at 12 (D.C. Cir. 2016) (citing *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 511–12 (D.D.C. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). And the public would not be harmed (to the contrary) by the restoration of reliable postal service, providing the timely delivery of medicines and checks and other important mail.

CONCLUSION

For the foregoing reasons, Plaintiff’s motion for a preliminary injunction should be granted.

Dated: September 1, 2020

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