

1 Emily Dodds Powell  
Anna F. Cavnar  
2 CALFO EAKES LLP  
1301 Second Avenue, Suite 2800  
3 Seattle, WA 98101  
Phone: (206) 407-2210  
4 Fax: (206) 407-2224  
Email: [emilyp@calfoeakes.com](mailto:emilyp@calfoeakes.com)  
5 [annac@calfoeakes.com](mailto:annac@calfoeakes.com)

6 Elizabeth B. Wydra (*pro hac vice* pending)  
Brianna J. Gorod (*pro hac vice* pending)  
7 Dayna J. Zolle (*pro hac vice* pending)  
CONSTITUTIONAL ACCOUNTABILITY CENTER  
8 1200 18th Street NW, Suite 501  
Washington, D.C. 20036  
9 (202) 296-6889  
Email: [elizabeth@theusconstitution.org](mailto:elizabeth@theusconstitution.org)  
10 [brianna@theusconstitution.org](mailto:brianna@theusconstitution.org)  
[dayna@theusconstitution.org](mailto:dayna@theusconstitution.org)

11 *Counsel for Amici Curiae Members of Congress*

12  
13 UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON  
14 AT YAKIMA

15 STATE OF WASHINGTON, et al.,

16 *Plaintiffs,*

17 v.

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

19 *Defendants.*

Case No. 1:20-cv-3127-SAB

BRIEF OF MEMBERS OF  
CONGRESS AS *AMICI CURIAE*  
IN SUPPORT OF PLAINTIFFS

1 **TABLE OF CONTENTS**

**Page**

2

3 TABLE OF AUTHORITIES ..... ii

4 INTEREST OF *AMICI CURIAE* ..... 1

5 INTRODUCTION ..... 1

6 ARGUMENT ..... 2

7 I. Reflecting the Importance of the Postal System’s Role, Congress  
8 Has Required the Postal Service to Follow Certain Procedures  
9 Whenever It Seeks to Change the Nature of Postal Services in a  
10 Way That Will Generally Affect Service on a Substantially  
11 Nationwide Basis..... 2

12 II. Congress Adopted the Procedures Under the Postal Reorganization  
13 Act to Protect the Postal Service from Partisan Influence ..... 5

14 III. By Failing to Request an Opinion from the Postal Regulatory  
15 Commission Before Making Its Recent Changes, the Postal Service  
16 Has Violated Federal Law ..... 7

17 CONCLUSION..... 10

18 APPENDIX: LIST OF *AMICI* ..... 1A

19

20

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

**Page(s)**

CASES

*Buchanan v. U.S. Postal Serv.*,  
508 F.2d 259 (5th Cir. 1975)..... 7, 10

*Carlson v. Postal Regulatory Comm’n*,  
938 F.3d 337 (D.C. Cir. 2019) ..... 9

*Govs. of U.S. Postal Serv. v. U.S. Postal Rate Comm’n*,  
654 F.2d 108 (D.C. Cir. 1981) ..... 4

*United Parcel Serv., Inc. v. U.S. Postal Serv.*,  
604 F.2d 1370 (3d Cir. 1979)..... 9, 10

*U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*,  
540 U.S. 736 (2004)..... 5

CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE MATERIALS

H.R. Rep. No. 91-1104 (1970)..... *passim*

Postal Accountability and Enhancement Act of 2006, Pub. L. No. 109-435,  
120 Stat. 3198 (Dec. 20, 2006) (codified at 39 U.S.C. § 3600 *et seq.*) .. 4

Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719  
(Aug. 12, 1970) (codified at 39 U.S.C. § 101 *et seq.*) ..... 3, 4

Postal Service Act of 1792, ch. 7, 1 Stat. 232..... 3

39 U.S.C. § 3601 ..... 4

39 U.S.C. § 3622 ..... 4

39 U.S.C. § 3623 ..... 4

39 U.S.C. § 3624 ..... 4

39 U.S.C. § 3661 ..... 1, 10

**TABLE OF AUTHORITIES – cont’d**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

**Page(s)**

39 U.S.C. § 3661(b) .....	4, 8
U.S. Const. art. 1, § 8 .....	2

**OTHER AUTHORITIES**

Alex Seitz-Wald, <i>How Do You Know Voting by Mail Works? The U.S. Military’s Done It Since the Civil War</i> , NBC News (Apr. 19, 2020), <a href="https://www.nbcnews.com/politics/2020-election/how-do-you-know-voting-mail-works-u-s-military-n1186926">https://www.nbcnews.com/politics/2020-election/how-do-you-know-voting-mail-works-u-s-military-n1186926</a> .....	8
Compl., <i>NAACP v. U.S. Postal Serv.</i> , No. 1:20-cv-2295 (D.D.C. Aug. 20, 2020) .....	2, 8
Compl., <i>New York v. Trump</i> , No. 1:20-cv-2340 (D.D.C. Aug. 25, 2020) .....	<i>passim</i>
Report of the President’s Commission on Postal Organization, <i>Towards Postal Excellence</i> (1968) .....	3, 5
Richard R. John, <i>Spreading the News: The American Postal System from Franklin to Morse</i> (1995) .....	3
Pres. Richard Nixon, Remarks upon Signing the Postal Reorganization Act (Aug. 12, 1970) .....	6

1 **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

2 *Amici* are members of the U.S. Senate, many of whom served when key  
3 components of the nation’s laws governing the U.S. Postal Service (USPS) were  
4 drafted, debated, and passed. *Amici* have a substantial interest in ensuring that this  
5 Court recognizes that when USPS and the Postmaster General failed to follow the  
6 procedures set forth in 39 U.S.C. § 3661—which requires that the Postal Regulatory  
7 Commission and members of the public have the opportunity to weigh in before  
8 USPS implements certain changes—they not only violated the plain text of § 3661  
9 but also acted contrary to Congress’s plan in enacting that legislation.

10 A full listing of *amici* appears in the Appendix.

11 **INTRODUCTION**

12 In June and July 2020, Postmaster General Louis DeJoy instituted several  
13 major changes that have had a significant effect on the nature of postal services  
14 nationwide. According to Plaintiffs in this lawsuit and others, USPS has, under  
15 DeJoy’s instruction, been “(i) eliminating overtime; (ii) instructing carriers to leave  
16 mail behind; (iii) decommissioning sorting machines; (iv) removing mailboxes; (v)

17  
18 <sup>1</sup> *Amici* state that no counsel for a party authored this brief in whole or in  
19 part, and no person other than *amici* or their counsel made a monetary contribution  
20 to the brief’s preparation or submission.

1 reducing operating hours; and (vi) changing how election mail is classified and  
2 charged.” ECF No. 1 at 17. These changes have allegedly “produced serious delays  
3 across the country despite the fact that letter mail volume had decreased during the  
4 [COVID-19] pandemic.” Compl. 3, *New York v. Trump*, No. 1:20-cv-2340 (D.D.C.  
5 Aug. 25, 2020); *see* Compl. 2, *NAACP v. U.S. Postal Serv.*, No. 1:20-cv-2295  
6 (D.D.C. Aug. 20, 2020) (“[T]he Postal Service has made significant changes that  
7 have resulted in unreliable service and widespread delays.”). Particularly troubling,  
8 these changes “will hinder the delivery of mail ballots and ballot applications” across  
9 the country, Compl. 61, *New York*, No. 1:20-cv-2340, just as many states are  
10 “expect[ing] a record-breaking volume of mail-in voting for the November 2020  
11 election,” Compl. 16, *NAACP*, No. 1:20-cv-2295.

12 USPS has imposed these changes in violation of federal laws that Congress  
13 passed to protect USPS from partisan influence and ensure public accountability,  
14 and this Court should hold that the challenged changes are unlawful.

## 15 ARGUMENT

### 16 I. Reflecting the Importance of the Postal System’s Role, Congress Has 17 Required the Postal Service to Follow Certain Procedures Whenever 18 It Seeks to Change the Nature of Postal Services in a Way That Will 19 Generally Affect Service on a Substantially Nationwide Basis.

19 The U.S. Constitution vests Congress with the power to “establish Post Offices  
20 and post Roads,” U.S. Const. art. 1, § 8, and Congress enacted the first substantive

1 federal postal law, Postal Service Act of 1792, ch. 7, 1 Stat. 232, just a few years  
2 after the Constitution’s ratification. The development of the postal system “spurred  
3 a communications revolution that was as profound in its consequences for American  
4 public life as the subsequent revolutions . . . associated with the telegraph, the  
5 telephone, and the computer.” Richard R. John, *Spreading the News: The American  
6 Postal System from Franklin to Morse*, at vii (1995).

7         Reflecting the important role the postal system has long played in our country,  
8 Congress has sought to ensure that the system is properly managed, free from  
9 partisan influence, and accountable to the public. In 1967, President Johnson  
10 assembled the Kappel Commission to investigate whether to reorganize the postal  
11 system in light of the nation’s growing economy and population, *see* Report of the  
12 President’s Commission on Postal Organization, *Towards Postal Excellence* (1968)  
13 at v, and Congress itself devoted significant resources to determine how best to  
14 address the situation. Indeed, as the House Committee on Post Office and Civil  
15 Service remarked, “rarely has any subject received as much careful and intensive  
16 consideration by a committee of the Congress.” H.R. Rep. No. 91-1104, at 3651  
17 (1970).

18         Based on these careful deliberations, Congress passed the Postal  
19 Reorganization Act of 1970 (PRA), 39 U.S.C. § 101 *et seq.* That Act provided,  
20 among other things, that “[w]hen the Postal Service determines that there should be

1 a change in the nature of postal services which will generally affect service on a  
2 nationwide or substantially nationwide basis, it shall submit a proposal, within a  
3 reasonable time prior to the effective date of such proposal, to the Postal Rate  
4 Commission requesting an advisory opinion on the change.” Postal Reorganization  
5 Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, 764 (Aug. 12, 1970) (codified at 39  
6 U.S.C. § 3661(b)).

7 Congress similarly charged the Postal Rate Commission “with the duty of  
8 making recommendations to the Governors of the Postal Service with respect to rate,  
9 fee and classification matters.” *Govs. of USPS*, 654 F.2d at 110 (citing 39 U.S.C.  
10 §§ 3601, 3622–24). “In considering Postal Service requests for recommended  
11 decisions on rates, fees, and classifications . . . [,] the Commission [was] required to  
12 accord to the Postal Service, users of the mails, and an officer of the Commission  
13 representing the public, an opportunity for a hearing,” and then provide a written  
14 recommendation to USPS. *Id.*

15 In 2006, Congress enacted the Postal Accountability and Enhancement Act  
16 (PAEA), Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006) (codified at 39 U.S.C.  
17 § 3600 *et seq.*). As amended by the PAEA, the PRA requires USPS to follow the  
18 same procedures for nationwide changes in the nature of postal services, except that  
19 USPS must now seek a written opinion from the Postal *Regulatory* Commission,  
20 rather than the Postal Rate Commission. 39 U.S.C. § 3661(b).



1       **II. Congress Adopted the Procedures Under the Postal Reorganization**  
2       **Act to Protect the Postal Service from Partisan Influence.**

3       According to the House Committee on Post Office and Civil Service, which  
4       drafted the PRA, Congress’s plan in making these changes was to “convert the Post  
5       Office Department into an independent establishment in the executive branch of the  
6       government freed from direct political pressures.” H.R. Rep. No. 91-1104, *supra*, at  
7       3650. And the Supreme Court has recognized that the Act “was adopted to increase  
8       the efficiency of the Postal Service and reduce political influences on its operations.”  
9       *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 740 (2004).

10       The House Committee drafted the PRA based on the findings of the Kappel  
11       Commission, H.R. Rep. No. 91-1104, *supra*, at 3654, which noted, among other  
12       things, that “[b]ecause postal patronage was once a source of party power, the Post  
13       Office is still burdened with an anachronistic postmaster selection system,” *Towards*  
14       *Postal Excellence*, *supra*, at 47. The Commission explained that “[b]ecause he  
15       presides over what was once a major policy arm of Government, the Postmaster  
16       General is still a member of the President’s Cabinet.” *Id.* According to the  
17       Commission, “[p]ostmaster patronage suggests to many that partisan politics plays  
18       a part in the operation of a post office. Warranted or not, the suspicion undermines  
19       public confidence and employee morale.” *Id.* at 42.

20       Thus, Congress passed the PRA to “[i]nsulate” management of USPS “from

1 partisan politics . . . by having the Postmaster General responsible to the [Postal  
2 Regulatory] Commission, which represents the public interest only, for his conduct  
3 of the affairs of the Postal Service.” H.R. Rep. No. 91-1104, *supra*, at 3660–61. The  
4 House Committee Report explained that the Postal Regulatory Commission in  
5 particular “provides an invaluable buffer between the management of the Postal  
6 Service and the possible influence of partisan politics.” *Id.* at 3660. Indeed, the  
7 Report emphasized that “[i]f the American public is to have the Postal Service that  
8 it expects and deserves, the post office must be taken out of politics and politics out  
9 of the post office. Nineteenth Century customs of political patronage have no place  
10 in a late 20th Century Postal System.” *Id.* at 3654; *see* Pres. Richard Nixon, Remarks  
11 upon Signing the Postal Reorganization Act (Aug. 12, 1970) (“There is no  
12 Republican way or Democratic way to deliver the mail. There is only the right way  
13 and that is what this occasion is all about.”).

14 In describing the portion of the Act establishing “procedures for changes in  
15 postal services,” the Committee Report emphasized that “[t]he Postal Service is—  
16 first, last and always—a public service.” H.R. Rep. No. 91-1104, *supra*, at 3668. The  
17 Report stated that under the Act, USPS must “seek out the needs and desires of its  
18 present and potential customers—the American public,” and that the Act “provides  
19 significant assurance that the postal management will in fact be responsive to the  
20 people to a greater degree than has heretofore been known.” *Id.* The Report described

1 how the Act “contains specific provisions requiring justification and review of  
2 changes in service,” and that those provisions compel USPS, when seeking to make  
3 those changes in service, to “follow[] procedures comparable to those for proposed  
4 rate changes.” *Id.*

5 The Report concluded that those procedures requiring notice and a public  
6 hearing “represent significant innovations that should materially enhance the  
7 responsiveness of the Postal Service to the American public.” *Id.*; see *Buchanan v.*  
8 *U.S. Postal Serv.*, 508 F.2d 259, 263 n.6 (5th Cir. 1975) (“[T]he procedures  
9 mandated by 3661 are sufficiently elaborate to amount to a significant impediment  
10 in the path of the decision making process of the Postal Service.”).

11 **III. By Failing to Request an Opinion from the Postal Regulatory**  
12 **Commission Before Making Its Recent Changes, the Postal Service**  
13 **Has Violated Federal Law.**

14 USPS’s recent changes are unlawful because they were made without  
15 complying with these important requirements that Congress put in place to ensure  
16 proper management of the nation’s mail delivery. For example, without seeking  
17 input on the matter, USPS “prohibited postal workers from making the extra trips  
18 necessary to ensure that no mail is left sitting in postal facilities at the end of the  
19 day.” Compl. 23, *New York*, No. 1:20-cv-2340. Likewise, USPS “prohibited network,  
20 plant, and delivery workers from making late trips—i.e., from embarking on their  
trip any later than the scheduled time.” *Id.* In addition, “671 machines used by the

1 Postal Service to organize and sort letters or other pieces of mail have been or will  
2 be removed from dozens of cities across America[,] . . . effectively  
3 decommission[ing] 10 percent of the Postal Service’s sorting machines.” ECF No. 1  
4 at 18-19. These changes and others to USPS’s central operations have allegedly  
5 “resulted in unreliable service and widespread delays,” Compl. 2, *NAACP*, No. 1:20-  
6 cv-2295, and “there have been widespread reports of mail piling up in regional  
7 distribution centers and post offices around the country, and of customers  
8 experiencing substantial delays and disruptions in mail service,” *id.* at 19.

9       If these changes continue to cause widespread delays, they could threaten the  
10 reliability of mail-in voting, Compl. 61, *New York*, No. 1:20-cv-2340—an option  
11 that at least some Americans have used to cast their ballots since the American  
12 Revolution, see Alex Seitz-Wald, *How Do You Know Voting by Mail Works? The*  
13 *U.S. Military’s Done It Since the Civil War*, NBC News (Apr. 19, 2020),  
14 [https://www.nbcnews.com/politics/2020-election/how-do-you-know-voting-mail-](https://www.nbcnews.com/politics/2020-election/how-do-you-know-voting-mail-works-u-s-military-n1186926)  
15 [works-u-s-military-n1186926](https://www.nbcnews.com/politics/2020-election/how-do-you-know-voting-mail-works-u-s-military-n1186926)—with enormous implications for our country and the  
16 integrity of our democracy.

17       These changes thus have already affected and will continue to “generally  
18 affect service on a nationwide or substantially nationwide basis,” 39 U.S.C.  
19 § 3661(b). Yet USPS made them without so much as notifying the Postal Regulatory  
20 Commission—much less having received a written opinion from the Commission

1 following the completion of a public hearing as required.

2       The government may argue that such changes are not sufficiently significant  
3 to require public comment. That is plainly wrong. Because Congress was seeking to  
4 ensure that there would be public accountability with regard to management of USPS,  
5 it required that these procedures be followed with respect to *any* changes that  
6 “generally affect service on a nationwide or substantially nationwide basis,” as these  
7 changes certainly do.

8       Significantly, Congress required USPS to follow comparable procedures for  
9 even seemingly minor changes in postal rates or mailing classifications. *See* H.R.  
10 Rep. No. 91-1104, *supra*, at 3668 (under the PRA, “[f]ollowing procedures  
11 *comparable to* those for proposed rate changes, operating management would  
12 submit proposals relating to changes in service to the rate board with public notice  
13 and opportunity for public comment” (emphasis added)); *see, e.g., United Parcel*  
14 *Serv., Inc. v. U.S. Postal Serv.*, 604 F.2d 1370, 1380 (3d Cir. 1979). Indeed, the D.C.  
15 Circuit has held that USPS needed to submit a proposed 5-cent increase for the price  
16 of stamps to the Postal Regulatory Commission before it could lawfully implement  
17 that change, recognizing that “Congress directed the Commission to serve as more  
18 than just a rubber stamp of the Postal Service’s proposed rate increases.” *Carlson v.*  
19 *Postal Regulatory Comm’n*, 938 F.3d 337, 351 (D.C. Cir. 2019); *see id.* (“The PAEA  
20 establishes a robust rulemaking process for the Commission, subjecting rate-change

1 proposals to the deliberative and participatory process of notice-and-comment  
2 rulemaking under the APA.”). Likewise, the Third Circuit has emphasized that “any  
3 proposal which would effect a change in mail classification or a rate . . . must be  
4 submitted to the Rate Commission, *no matter how experimental, temporary, or*  
5 *limited in scope the change.*” *U.S. Postal Serv.*, 604 F.2d at 1380 (emphasis added).

6 To be sure, the Fifth Circuit has suggested that § 3661 applies only when  
7 USPS seeks to make “changes of significance” that will have a “meaningful impact”  
8 on postal services. *See Buchanan*, 508 F.2d at 262–63. That notion is contrary to  
9 § 3661’s plain text, but in any event, the postal changes at issue in this case satisfy  
10 even the Fifth Circuit’s heightened standard: They are significant, and they have had,  
11 and will continue to have, a meaningful impact on postal services on a substantially  
12 nationwide basis. As discussed above, USPS’s changes have *already* had a major  
13 impact on the delivery of the mail with consequences for people throughout the  
14 country. Moreover, the changes allegedly “will hinder the delivery of mail ballots  
15 and ballot applications” for the November election. Compl. 61, *New York*, No. 1:20-  
16 cv-2340. Changes of this magnitude plainly cannot be made without input from the  
17 public and without following the requirements set out in federal law.

## 18 CONCLUSION

19 For the foregoing reasons, this Court should grant Plaintiffs’ motion for a  
20 preliminary injunction.

1 Dated: September 11, 2020.

2 Respectfully submitted,

3 CALFO EAKES LLP

4 By /s/ Emily Dodds Powell  
5 Emily Dodds Powell, WSBA# 49351  
6 Anna F. Cavnar, WSBA# 54413  
7 1301 Second Avenue, Suite 2800  
8 Seattle, WA 98101  
9 Phone: (206) 407-2210  
10 Fax: (206) 407-2224  
11 Email: [emilyp@calfoeakes.com](mailto:emilyp@calfoeakes.com)  
12 [annac@calfoeakes.com](mailto:annac@calfoeakes.com)

13 CONSTITUTIONAL ACCOUNTABILITY  
14 CENTER

15 By /s/ Brianne J. Gorod  
16 Elizabeth B. Wydra (DC Bar No. 483298)  
17 (*pro hac vice* pending)  
18 Brianne J. Gorod (DC Bar No. 982075)  
19 (*pro hac vice* pending)  
20 Dayna J. Zolle (DC Bar No. 1672633)  
(*pro hac vice* pending)  
1200 18th Street NW, Suite 501  
Washington, D.C. 20036  
Phone: (202) 296-6889  
Email: [elizabeth@theusconstitution.org](mailto:elizabeth@theusconstitution.org)  
[brianne@theusconstitution.org](mailto:brianne@theusconstitution.org)  
[dayna@theusconstitution.org](mailto:dayna@theusconstitution.org)

*Counsel for Amici Curiae Members of Congress*

1 **APPENDIX**

2 LIST OF *AMICI*

3 Blumenthal, Richard  
4 Senator of Connecticut

5 Baldwin, Tammy  
6 Senator of Wisconsin

7 Bennet, Michael F.  
8 Senator of Colorado

9 Booker, Cory A.  
10 Senator of New Jersey

11 Brown, Sherrod  
12 Senator of Ohio

13 Cardin, Benjamin L.  
14 Senator of Maryland

15 Carper, Thomas R.  
16 Senator of Delaware

17 Cortez Masto, Catherine  
18 Senator of Nevada

19 Duckworth, Tammy  
20 Senator of Illinois

Durbin, Richard J.  
Senator of Illinois

Gillibrand, Kirsten  
Senator of New York

Hirono, Mazie K.  
Senator of Hawaii



LIST OF *AMICI* – cont'd

- 1
- 2 Klobuchar, Amy  
Senator of Minnesota
- 3
- 4 Leahy, Patrick  
Senator of Vermont
- 5
- 6 Markey, Edward J.  
Senator of Massachusetts
- 7
- 8 Merkley, Jeffrey A.  
Senator of Oregon
- 9
- 10 Reed, Jack  
Senator of Rhode Island
- 11
- 12 Rosen, Jacky  
Senator of Nevada
- 13
- 14 Sanders, Bernard  
Senator of Vermont
- 15
- 16 Shaheen, Jeanne  
Senator of New Hampshire
- 17
- 18 Smith, Tina  
Senator of Minnesota
- 19
- 20 Van Hollen, Chris  
Senator of Maryland
- 21
- 22 Warren, Elizabeth  
Senator of Massachusetts
- 23
- 24 Whitehouse, Sheldon  
Senator of Rhode Island
- 25
- 26 Wyden, Ron  
Senator of Oregon

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 11, 2020, the foregoing document was filed  
3 with the Clerk of the Court, using the CM/ECF system, causing it to be served on all  
4 counsel of record.

5 DATED: September 11, 2020.

6 */s/ Erica Knerr*

7 Erica Knerr

8

9

10

11

12

13

14

15

16

17

18

19

20