

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-24069-CV-SCOLA

1199SEIU UNITED HEALTHCARE  
WORKERS EAST,

Miami, Florida

Plaintiff(s),

October 22, 2020

vs.

Louis Dejoy, Postmaster General  
and Chief Executive Officer of the  
United States Postal Service; and  
the UNITED STATES POSTAL SERVICE,

Defendant(s).

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MOTION HEARING  
BEFORE THE HONORABLE ROBERT N. SCOLA, JR.  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 The following proceedings began at 11:01 a.m.:

2 THE COURT: We are here for the case of United  
3 Healthcare Workers East versus Louis Dejoy and the United  
4 States Postal Service.

5 What I would like to do is to have one attorney for  
6 the plaintiffs identify themselves, and then they can identify  
7 all the other people that are going to be appearing today and  
8 also identify which attorney or attorneys are actually going to  
9 be speaking. Whenever anybody speaks, please identify  
10 yourself. Even if you have spoken ten other times, identify  
11 yourself before you start.

12 Who is the lawyer that is going to take the lead and  
13 introduce themselves and the other attorneys?

14 MR. BRADFORD: Good morning, Your Honor. This is  
15 David Bradford from Jenner & Block on behalf of the plaintiffs.  
16 If I might introduce other members of our team, Mr. Igor  
17 Hernandez, Jonthan Manes, Daniel Weiss, Ashley Schumacher,  
18 Nayiri Pilikyan, and with us our client representatives  
19 including Mr. Dale Ewart, executive vice president and Florida  
20 regional director for the plaintiffs. Thank you so much, Your  
21 Honor.

22 THE COURT: Can you spell the name of the  
23 representative.

24 MR. BRADFORD: Yes, sir. It's Dale Ewart, E-W-A-R-T.  
25 He is a gentleman who has also submitted a declaration in

1 connection with our motion.

2 THE COURT: Thank you.

3 Who is here on behalf of the defendants?

4 MR. BORSON: Good morning, Your Honor. Joseph Borson  
5 from the U.S. Department of Justice on behalf of all of the  
6 defendants.

7 THE COURT: Good morning.

8 So this is set for a hearing on the plaintiff's  
9 request, emergency request, for an injunction.

10 Mr. Bradford, are you going to take the lead in making  
11 the argument?

12 MR. BRADFORD: Yes, I am, Your Honor. I apologize. I  
13 failed to introduce an important member of our team which is  
14 Mr. Steve Art.

15 THE COURT: Okay. Thank you.

16 All right. Just as a starting point, I would like you  
17 to address some of the concerns that I have. Some of them were  
18 later pointed out by the government in its response. It seems,  
19 based upon your complaint, it's generally based upon actions  
20 allegedly taken by Postmaster General Dejoy that would  
21 interfere with the ability of ballots to be timely counted.

22 Subsequent to those acts being publicized, many  
23 lawsuits were filed and several different federal judges have  
24 entered nationwide injunctions. And as far as I understand,  
25 none of those have been appealed. No stays have been

1 requested. In fact, the teams like the government and the post  
2 office are trying to work in unison to comply with those  
3 injunctions.

4 I know there are a lot of jokes about whether Florida  
5 is part of the United States, but legally it is part of the  
6 United States.

7 So my two concerns initially are, number one, those  
8 prior injunctions have already enjoined Postmaster DeJoy and  
9 the postal service from taking actions that would interfere  
10 with the ballots being timely counted. And if there are  
11 already injunctions in place that apply to Florida, if there is  
12 some tweaking -- and I know some or all of the judges have  
13 required the parties to submit ongoing reports of the status  
14 and there have been clarifications and modifications slightly  
15 of those orders.

16 So if there's something about Florida, okay, that  
17 isn't covered or isn't quite covered, why are we starting a new  
18 litigation? Why aren't we going back to one of those judges to  
19 say, Judge, here is something that is going on in Florida that  
20 we would like you to specifically address?

21 MR. BRADFORD: Thank you, Your Honor.

22 To respond to the Court's question, our focus is, the  
23 question appreciates, is the application of these nationwide  
24 injunctions to the unique circumstances of Florida. We were  
25 very pleased to see the extraordinary procedure memorandum

1 which issued on October 20 after our motion. And it did  
2 address a number of concerns. But as Your Honor can  
3 appreciate, the response to these nationwide injunctions have  
4 been nationwide responses. There are some circumstances in  
5 Florida, particularly with the willingness of two counties but  
6 apparently not others, to implement procedures that are not  
7 burdensome and that would go a long way toward assuring that  
8 ballots will count and that there will not be  
9 disenfranchisement.

10 And we are focused, if I might address it, on some of  
11 the unique circumstances in Florida. And we are particularly  
12 concerned that several of the procedures which have been  
13 authorized to take place if a local official deems it  
14 appropriate are purely discretionary and, in fact, have been  
15 adopted in at least two counties, and that is Broward and Palm  
16 Beach, but not in other counties so as to create a real  
17 patchwork in Florida where your geography can be very  
18 determinative whether your ballot makes it there on time even  
19 though you have deposited it in the mail well in advance of the  
20 deadline and completely in compliance with state law.

21 To back up to the problems that create the  
22 circumstances we find ourselves in today, among the many steps  
23 taken by Mr. Dejoy illegally upon his appointment in May of  
24 2020 was that promptly in June of this year he started  
25 directing the illegal removal of sorting machines, high speed

1     sorting machines.

2             As Exhibit 1 reflects, there were 59 sorting machines  
3     removed from Florida, more than any state in the country other  
4     than California. That has not been remedied. That has not  
5     been repaired.

6             And, in fact, we have in Exhibit 21 an acknowledgment  
7     by the postal service that they disassembled these sorting  
8     machines, they took them apart, and so they can't put them back  
9     in place.

10            And what has happened in Florida specifically to first  
11     class mail is a dramatic decline in service standards. The  
12     service standard for first class mail is supposed to be  
13     96.5 percent of that mail gets there on time per the post  
14     office standard. And through May 2 of this year, if I just  
15     take the Southern Florida Postal District which is one of the  
16     three large postal districts in Florida, there was always  
17     90 percent and above compliance with that standard.

18            Within a month of the removal of those sorting  
19     machines, that dropped to 85.21 percent on July 11. And this  
20     is all contained in Exhibit 27, Your Honor. By July 18, it  
21     went down to 77.95 percent.

22            Then we had these commitments to various courts around  
23     the country that on a national basis they would begin to try to  
24     remedy the situation. But the most recent information we have,  
25     which is from October 3, is that first class mail in the

1 Southern District of Florida is still only meeting the standard  
2 less than 83 percent of the time. It had never been below  
3 90 percent prior to the removal of these sorting machines.

4 So we believe we still have a problem in Florida that  
5 is a Florida problem. And it's compounded by the fact that  
6 Florida is one of only a number of states that has a hard  
7 election deadline where it doesn't matter when you are  
8 postmarked, but if it doesn't get in the hands of the election  
9 officials by 7:00 p.m. on November 3, regardless if it was  
10 postmarked three days earlier, it's not going to count and that  
11 voter will be disenfranchised.

12 We have already requested in Florida over 5.8 million  
13 ballots. The deadline is in 48 hours. It could be as much as  
14 6 million ballots requested. That will certainly be more than  
15 50 percent of the votes cast in Florida given that there were  
16 approximately 9 million plus votes cast in 2016.

17 And we know from the August primary, after these  
18 machines were removed, that there was a significant level of  
19 disenfranchisement and that it was an uneven level of  
20 disenfranchisement based upon late delivery.

21 For example, 25 percent of the late ballots in the  
22 primary, the August primary, came from Miami-Dade even though  
23 it was only approximately 11 percent of the vote. We had one  
24 county where there were 1,500 votes that were in postal  
25 authorities' hands apparently for days that were just never



1 handed off.

2 That's one of the concerns we have with our motion,  
3 Your Honor, is the handoff. Given the high unprecedented level  
4 of vote by mail in Florida with an elderly population that  
5 understandably does not want to risk their health in order to  
6 exercise their most vital First Amendment right, it is critical  
7 that there be specific focus on remedying this issue in  
8 Florida.

9 And that's why we have come to Your Honor as opposed  
10 to a Court in Washington state or elsewhere, because these are  
11 unique local circumstances that we would ask Your Honor to help  
12 us address.

13 And I think our ask is very simple because it's based  
14 upon what has already been agreed upon in two major counties,  
15 Broward and Palm Beach. Those are two of the three largest  
16 voting counties. For whatever reason, Miami-Dade has not been  
17 willing to implement those safety procedures.

18 If I might just simply explain what the procedures are  
19 so that it's apparent, they are simply not burdensome. And I  
20 want to articulate these in a slightly different way than we  
21 did in our order because I appreciate the affidavit that was  
22 filed last night by the postal service took issue with the  
23 practicality of certain of our requests. I believe a lot of  
24 that is just semantics.

25 So, for example, we requested that the post office

1 most proximate to the election office in each county have a  
2 plan.

3 THE COURT: Which paragraph number are you talking  
4 about in your order?

5 MR. BRADFORD: Certainly, Your Honor. So this would  
6 be paragraph 1. I apologize for not flagging that.

7 In paragraph 1 of our proposed order, we ask  
8 essentially that the most proximate post office to an election  
9 office make a plan with that election office either for dropoff  
10 or pickup. In some counties thankfully the election officials  
11 are willing to pick it up from the post office. That obviously  
12 creates extra time. But however they arrange to do that, that  
13 we not have a situation as we did in Volusia where the ballots  
14 are sitting there and it's, to use the expression Alphonse and  
15 Gaston, where one is waiting on the other to essentially come  
16 get them or to drop them off and it never happens.

17 We use the phrase most proximate to the election  
18 office. It's been pointed out appropriately that there are  
19 situations where a neighboring county's postal system might be  
20 more proximate to another county's election office. We didn't  
21 mean that literally. I understand the appropriate phrase is  
22 the servicing center.

23 In other words, for every election office, there is a  
24 specific post office that always is the last stop before the  
25 mail or ballots are delivered to that election office. That's

1 referred to as the servicing office for that election office.

2 And so the servicing postal facility or whomever they  
3 designate simply ought to have a coordinated plan. And that  
4 ought to be reported back to the Court that they have, in fact,  
5 spoken -- and the affidavit that was submitted said they have  
6 spoken, but then it says they intend to make plans.

7 So I think there is an intentionality to do this. We  
8 just want to make sure that it actually happens and that there  
9 is no misunderstanding, that they actually make a plan for the  
10 handoff.

11 The other critical feature, two other critical  
12 features that we have asked for, and I believe these come up in  
13 the context of paragraphs 3 and 5 -- and we are happy to  
14 resubmit the order, Your Honor, to reflect some of the points  
15 or concerns that were raised in last evening's opposition, so  
16 I'm just attempting to explain these conceptually.

17 When we get down to that weekend before election  
18 Tuesday, there comes a point in time where, if a ballot is  
19 already in Orlando, let's say, and it needs to be delivered  
20 within Orlando, if it gets sent to a processing center in  
21 Apalucha (phonetic), for example, or elsewhere, that's hundreds  
22 of miles away to be sorted and redistributed, it's not going to  
23 get back in time.

24 The new procedures recognize this because they make  
25 arrangements for what's called a hub and spoke type of

1 delivery. And it's very simple. Ballots are easily extracted  
2 from the mail. They are readily identifiable. All that needs  
3 to happen is, in the larger counties, they set up perhaps four  
4 or five hubs, and every postal facility in that county, when  
5 they start getting election mail that Saturday, instead of  
6 sending it hundreds of miles away to come back into the county,  
7 simply send it to a hub which collects a sufficient volume and  
8 then they take it to the servicing facility that makes the  
9 final handoff to the post office. It just keeps the delivery  
10 local.

11 And how they actually go about implementing that local  
12 delivery is not a concern to us, just that it be done. Again,  
13 as we understand it, Palm Beach has committed to do this.  
14 Broward has committed to do this. Maybe in certain counties  
15 they would say it's unnecessary because they are so small they  
16 do it naturally. But there ought to be a plan that ballots not  
17 get sent out of a county that is already the destination county  
18 only to be returned back into that county because that can take  
19 precious days at a point in time when a critical portion of the  
20 mail is at risk.

21 I should note just in terms of the numbers here that  
22 we expect if there are over 6 million ballots or 6 million  
23 ballots requested, at least 80 percent of those may be returned  
24 by mail. That's 4.8 million ballots. I believe in the last  
25 go-round, the last primary, 9 percent of those came in on

1 election day or the day before. If we had even 8 percent on  
2 election day or the day before, that's over 300,000 ballots  
3 that are at risk if we lose a single day here. It's an  
4 enormous amount of voters who could be disenfranchised by the  
5 lost of a single day.

6 So this local delivery process, and we defer to the  
7 expertise of the post office on how you specifically implement  
8 that in this county or a different county, but there should be  
9 a plan in place in each county to ensure that that local  
10 delivery happens.

11 The final ask was what was referred to as -- early  
12 sortation was the phrase we used because one of the  
13 postmasters, I believe, in Broward used that phrase, were told  
14 in the affidavit last night that that should really be called  
15 early collection -- or early sweep, rather. We are happy to  
16 use the phrase early sweep. I think we are all saying the same  
17 thing, which is, first thing in the morning on election day,  
18 all these postal facilities should sweep their own facilities  
19 and make sure they have every last ballot in hand because  
20 that's the critical day for the handoff.

21 Those are the three specific requests that we've made  
22 with reference to Florida, and we make them in light of the  
23 very unique and challenging circumstances we find ourselves in  
24 with very dramatic decline in delivery standards in Florida,  
25 the removal of more sorting machines than anywhere in the

1 country but California, and the overwhelming number of citizens  
2 in Florida who rightfully have come to depend upon in this  
3 pandemic will rely upon the U.S. Post Office to make their vote  
4 count.

5 I hope that's responsive to Your Honor's question.

6 THE COURT: It is.

7 MR. BRADFORD: Thank you. I am happy to address other  
8 questions or to address other parts of the merits.

9 So I don't forget, we did reach a stipulation with  
10 counsel for the post office that, with respect to the 30  
11 exhibits we have identified, and we said we would do the same  
12 with their exhibits, that we have stipulated to the foundation  
13 for each of those exhibits, that they may be made part of the  
14 hearing record, subject, of course, to argument and objection  
15 with respect to their relevancy or weight that Your Honor may  
16 choose to give them.

17 But on the basis of that stipulation, I would like to  
18 move our Exhibits 1 through 30 into evidence.

19 THE COURT: All right. Mr. Borson, let's take up  
20 that issue first. Do you have any objection to their exhibits?

21 MR. BORSON: No, Your Honor.

22 THE COURT: Mr. Bradford?

23 MR. BRADFORD: Similarly, Your Honor, we reached an  
24 agreement that with respect to both of the substantive  
25 declarants with Mr. Ewart, who I indicated is present here

1 today, and also Professor Dan Smith, who is the chair of the  
2 political science department at University of Florida and has  
3 provided an expert affidavit, that if each of them were called  
4 to testify, they would testify as set forth in their  
5 affidavits. And on that basis, we would request that their  
6 affidavits be considered as part of the evidentiary record for  
7 purposes of this proceeding.

8 THE COURT: Mr. Borson, any objection to that?

9 MR. BORSON: No objection, Your Honor.

10 THE COURT: Mr. Bradford, do you have any other  
11 objections to the government's exhibits?

12 MR. BRADFORD: We do not, Your Honor.

13 THE COURT: Okay. So all those exhibits then will be  
14 received in evidence for the purpose of this hearing only, as  
15 well as the affidavits of Professor Smith and Mr. Ewart.

16 Let me hear from Mr. Borson.

17 MR. BORSON: Thank you, Your Honor.

18 THE COURT: And why is there a problem with Miami-Dade  
19 County relative to Broward and Palm Beach in terms of agreeing  
20 to some method to facilitate the ballots?

21 MR. BORSON: Good morning, Your Honor.

22 So I think the short answer is that the extraordinary  
23 resources memorandum that was issued on Monday addresses pretty  
24 much everything that the plaintiffs are seeking and addresses  
25 it recognizing there are some local discretion issues.

1           In terms of Miami-Dade specifically, I am not aware of  
2 any specific context about that. So the declaration from  
3 Mr. Costello does indicate that there's been communication  
4 between the election coordinators and the individual county  
5 executives.

6           I think one of the issues that was expressed to me  
7 when we were putting this together is that counties have  
8 different structures in terms of how the mail facilities are  
9 physically located. My understanding is that some of the  
10 facilities where the local postmasters have made these  
11 arrangements are facilities where processing plants and post  
12 offices are geographically co-located in such an area that some  
13 of these measures may make sense while in other counties for  
14 physical or structural reasons facilities are located in  
15 different places, you know, trucks are in different locations,  
16 sorting machines are in different locations, that there is not  
17 an all size fits all approach that would make any sense.

18           The Costello declaration explains this in some detail,  
19 why the local supervisors need to have at least some discretion  
20 to work with the individual state and local officials to figure  
21 out what specific measure makes sense to expedite as many  
22 ballots as possible in the last 48 and 72 hours.

23           THE COURT: Okay. And it seems that in these other  
24 cases involving the other injunctions that the government, the  
25 postal service, has been working in good faith to try and



1 comply with the injunction, to try and make sure that every  
2 ballot is counted, which they can reasonably do so.

3           So what are the specific requests -- forget the legal  
4 issue of whether there is irreparable harm. That's a big one.  
5 I'm just putting that aside for now. But if there were going  
6 to be some measures that were implemented that don't exist at  
7 11:22 today, what are they suggesting that needs to be done  
8 that is not reasonable or practical to make sure that every  
9 ballot counts?

10           MR. BORSON: So we laid this out a bit in our brief,  
11 which I understand was filed late at night. I will confess, it  
12 sounds like they are changing a little bit the scope of relief  
13 they are talking about, so if I can address the specific things  
14 I think they are now focusing on if my notes are correct.

15           So the first thing I understand them focusing on is  
16 having some sort of plan involved between the election -- the  
17 United States Postal Service election coordinators or the  
18 postmasters, whichever sort of unit makes the most sense in a  
19 particular county or jurisdiction, to talk with the state and  
20 local election coordinators to figure out some sort of a plan  
21 in place.

22           So the extraordinary resources memorandum mandates  
23 this, that this has happened. And as we put in the  
24 declaration, these conversations have either happened or are  
25 already ongoing. It's an ongoing dialogue to figure out what

1 makes the most sense based on who has the most resources, who  
2 can pick up, who can drop off, those types of things.

3           So that is already going on. And I think if this  
4 Court was to issue something different than what is going on,  
5 it would risk confusion, it would risk restarting those  
6 conversations and having confusion over what exactly these  
7 individuals are supposed to be discussing.

8           So they are already required to be having these  
9 conversations so we think the postal service is already doing  
10 exactly what the plaintiffs want them to do. And having the  
11 plaintiffs micromanage exactly how that process works, we  
12 believe, would ultimately be counterproductive because it would  
13 just risk a great deal of confusion in the last few days before  
14 the election.

15           The second thing that they now seem to be focusing on  
16 is what I am going to call the last 48-hour, 72-hour  
17 transportation process. So right now the way that most mail in  
18 general, and there's 150 million pieces of mail per week in  
19 Florida, are transferred is they would be collected at a local  
20 post office -- or actually, stepping back, they would be  
21 collected at a blue collection box or an office location to the  
22 extent that mail is still being mailed in offices. They would  
23 then be brought to a central location. They would be brought  
24 to (inaudible) mail machines, mail sortation machines, that can  
25 do the high speed processing, and then they are sent out at a

1 consolidated level out to delivery points.

2           So the entire system depends on that automated  
3 structure. And to the extent that plaintiffs are suggesting,  
4 and I think they still are, that the postal service basically  
5 scrap this existing system and, for lack of a better term,  
6 MacGyver a mandatory system of having individuals sort of  
7 drive -- sort ballots at post offices where they are not  
8 equipped to do that type of mass sortation, bring them to other  
9 post offices that are not necessarily equipped to do that sort  
10 of sortation, and then bring them to individual localities that  
11 may not be equipped to receive them en masse doesn't work on a  
12 holistic level.

13           There may be some situations where, because of the  
14 individual logistics or the individual geography, that does  
15 make sense, and the extraordinary resources memorandum makes  
16 clear that that type of activity is absolutely authorized, but  
17 to mandate it in the way that the plaintiffs are suggesting,  
18 particularly, you know, in the last few days before the  
19 election, would be both problematic from an implementation  
20 perspective, and it would also potentially be problematic even  
21 from a ballot security perspective because right now there are  
22 existing processes that I think the second page makes clear to  
23 make sure that there are sort of checks in terms of making sure  
24 that these ballots have custody and are moving forward.

25           If the postal service is trying to scramble a system

1 in the entire state or in almost all of the state to basically  
2 rely on ballots being put in the back of cars and moving  
3 around, there is no way to have that type of quality control,  
4 which is why we think that the mandatory -- the extraordinary  
5 resources memorandum which authorizes and instructs  
6 extraordinary resources to be used but recognizes there might  
7 be some differences in different jurisdictions based purely on  
8 infrastructure or processing needs makes the most sense.

9           And then the last thing that I think they are focusing  
10 on now is this early sortation which -- or early sweeping. So  
11 there's a couple of -- it's not entirely clear what exactly  
12 they are referring to, but there's basically one of two things.  
13 So first is that the mail processing machines, the way it  
14 generally works is they usually run in the mid to late  
15 afternoon into the evening. So the mail is collected in the  
16 morning, it's brought to those facilities and plants, and then  
17 it's sorted. And then in the afternoon and evening, it's then  
18 put into basically the outgoing mail channel. So it's brought  
19 to transportation to be moved to wherever the mail needs to be  
20 moved to.

21           What the postal service has already committed to in  
22 the September 25 memorandum -- I know there's lots of  
23 memorandums, but this one was also partially in response to  
24 some of the injunctions and partially the postal service's  
25 commitment to make the mail move is it authorized these

1     sortation machines to start running earlier on. So the  
2     machines -- the window for the machines to be open is already  
3     able to be moved up.

4             And then there's also processes for sweeping the  
5     facilities to have -- make sure all the ballots are processed.  
6     There's what's called an all clear process where there is  
7     checklists that postal service employees do to ensure that they  
8     are tracking all of these ballots and moving them through.  
9     There are ballot monitors and ballot ambassadors who are  
10    physically located in these plants to track these facilities.

11            So to the extent they are suggesting, the plaintiffs  
12    are suggesting, that those types of things are required, they  
13    already are required, sometimes by mandate of injunctions or  
14    settlement agreements that are subject to court supervision and  
15    sometimes simply as a matter of the commitment that the postal  
16    service has made affirmatively, publicly, and repeatedly.

17            So most of what I think they are trying to do is  
18    already being done and it's already subject to court  
19    jurisdiction. And the things they are trying to add on to this  
20    would have the effect of really making significant changes to  
21    the postal service's processing transportation or operations  
22    right at the exact worst time when the postal service should be  
23    focused on executing its existing plan, not creating the new  
24    plans.

25            So I know you mentioned sort of not wanting to focus

1 on irreparable harm and the balance of the equities, but at  
2 least on that last point about developing these new procedures,  
3 that is exactly the types of changes to voting systems that the  
4 Supreme Court and the Eleventh Circuit and courts throughout  
5 the country repeatedly instruct should not be done right before  
6 an election.

7           And so I think it is important also to mention that  
8 this would be a mandatory injunction that is very different  
9 from how many of the other injunctions have worked. Those  
10 injunctions have said, okay, the postal service, we think we  
11 are likely to -- we, the court, think that we are likely to  
12 find that this particular policy change is illegal, it's either  
13 unconstitutional or it violates the statute, and, therefore, we  
14 are going to enjoin this change. We think you should  
15 (inaudible) latent extra trips; therefore, we are enjoining a  
16 policy of latent extra trips. And the postal service has put  
17 in place guidance to do that. It said, no, latent extra trips  
18 are okay. And, in fact, there were, I think, 2,000 latent  
19 extra trips in some days last week.

20           But what the plaintiffs are seeking to do here is  
21 affirmatively put in place a new structure for processing mail  
22 not just enjoined in the illegal change.

23           And to the point that Your Honor made earlier, all of  
24 the changes that I think they are actually complaining about  
25 are all things that have been enjoined by other federal

1 district courts. We have not sought to stay them. We have not  
2 sought to appeal them. In fact, we have had several agreements  
3 where we have affirmatively agreed that we will follow these  
4 mandates through November 30, through the last date that  
5 ballots are processed.

6 So these injunctions, to be clear, will be in place  
7 through the election. There is no dispute about that. But  
8 they are seeking an entirely new type of injunction that would  
9 go into effect immediately in the last days of the election  
10 that would have significant operational consequences.

11 So just to sort of sum up where I think we are, the  
12 plaintiffs are either asking the United States Postal Service  
13 to do things it's already committed to do and, in fact, in some  
14 cases is already mandated to do, or it's trying to require the  
15 postal service to do new significant operational changes in the  
16 last few days before the election.

17 And the first one is unnecessary and risks confusion.  
18 And, for that matter, there is no injury because this relief is  
19 already in place so there's no addressability.

20 And the last ones could be catastrophic for the postal  
21 service, particularly depending on what the plaintiffs are  
22 actually seeking, which I admit is a little unclear here.

23 But to the extent they are requesting operational  
24 changes, as the Costello declaration goes in and details, those  
25 could have significant difficulties because they don't work

1 within the framework of what the postal service does in its  
2 existing transportation network. That's why the existing  
3 injunctions are sufficient and why the injunction they are  
4 seeking would be affirmatively harmful.

5 THE COURT: Thank you.

6 Let me go back to Mr. Bradford because we kind of  
7 skipped over the legal aspects to get into some of the  
8 practical aspects.

9 Look, again, I am a strong believer that every vote  
10 should count, and I'm perfectly willing to enter any order that  
11 I am legally authorized to do to make sure that that happens.  
12 I have some limitations, which is, number one, when you are  
13 asking for injunction, you know, there has to be irreparable  
14 harm. And I'm still trying to figure out -- there are all  
15 these injunctions that are already in place. There's  
16 apparently a good faith effort on behalf of the postal service  
17 to work to comply with these injunctions and go beyond that.  
18 So how is there irreparable harm to have me enter an additional  
19 order?

20 MR. BRADFORD: Certainly, Your Honor.

21 The irreparable harm obviously is the potential  
22 disenfranchisement of the, let's call it 350,000 ballots that  
23 we would expect based on Mr. Smith's declaration, Professor  
24 Smith's declaration, to be on the cusp of making it there on  
25 time but as to which a one-day loss of time would make all the



1 difference in whether that ballot counts.

2 That's the circumstance that we have experienced on a  
3 percentage basis here in Florida already in connection with the  
4 primary. We have seen the impact of the removal of the sorting  
5 machines in Florida. It's particularly acute. And there is a  
6 modest set of procedures that we believe would supplement that  
7 which has been requested.

8 At page 10 of our brief, we explained that other  
9 courts have specifically mandated extraordinary measures  
10 because to return to a status quo that existed prior to the  
11 illegal removal of those machines, it does take certain  
12 extraordinary measures to try to put the delivery system back  
13 to where it should be.

14 That's why we have an extraordinary measure memorandum  
15 is because the post office was compelled by order to develop  
16 extraordinary measures.

17 As those extraordinary measures relate to Florida  
18 specifically, there is an agreement in them that there should  
19 be a conversation, and that's what we heard again this morning,  
20 a conversation between election officials and the postal  
21 authorities. But there's no requirement in those procedures  
22 that they actually agree upon a concrete plan for the handoff.

23 So all we have asked for is, if they are going to have  
24 that conversation, it ought to end in some specific plan for  
25 the handoff that gets certified to the court or sent to us or

1 somebody else who can be assured that the handoff is actually  
2 going to take place.

3 There's virtually no burden in making that happen, but  
4 what they have proposed so far doesn't go far enough, at least  
5 as far as Florida is concerned.

6 Second, the affidavit submitted last night  
7 acknowledges that on November 2 and 3, that all the offices are  
8 authorized to make this separate hub and spoke delivery process  
9 to implement it. There is a recognition that that will be  
10 necessary on those two days, that if ballots leave a county on  
11 those two days, they are not going to return on time. But,  
12 again, the extraordinary measures simply authorizes that. It  
13 doesn't require it.

14 We would ask that it either be required or required at  
15 least in the large volume counties. We understand that part of  
16 the practical pushback is there may be small counties where  
17 that's impractical.

18 But we have approximately ten counties, and I could  
19 identify them, where we have at present roughly a hundred  
20 thousand undelivered ballots that are kind of hanging in the  
21 balance here. And at least as to those large counties, there  
22 ought to be a hub and spoke option that's available, not just  
23 discretionary or authorized, but required to the extent it's  
24 reasonably feasible. And if the post office determines in its  
25 judgment that it's not feasible, we will respect that judgment.

1 But there ought to be some presumption that they are going to  
2 go ahead and have a plan on the 2nd and 3rd that allows the  
3 ballots to actually be delivered.

4 THE COURT: What are those ten counties?

5 MR. BRADFORD: Those ten counties would be Miami-Dade.  
6 Broward has already agreed to this as we understand it. Palm  
7 Beach has agreed. Hillsborough, Pinellas, Orange, Duval,  
8 Brevard --

9 THE COURT: Hold on. Hold on. Slow down.

10 MR. BRADFORD: I'm sorry, Your Honor.

11 THE COURT: Miami-Dade, Broward, Palm Beach,  
12 Hillsborough.

13 MR. BRADFORD: Pinellas, Orange, Duval, Brevard if I  
14 am pronouncing that correctly, and Lee all, as of last night,  
15 had 96,000 or more undelivered ballots. Seminole would be next  
16 with 89,000, and then there's a dropoff to 75,000 or less with  
17 the remaining counties. Those are sizeable counties where  
18 having a plan in place particularly for November 2 and 3 --  
19 because, again, we expect that 8 to 10 percent of all of these  
20 ballots are going to wind up being delivered on those two  
21 dates, and we have seen in every instance that ballots wind up  
22 getting delivered one day too late.

23 So the post office has agreed this hub and spoke  
24 process makes sense. I have talked to people who have retired  
25 and done this work, and they say it's exactly how it should be

1 done. Ballots are easily identified. When they see a ballot,  
2 it ought to get sent to the appropriate facility in that  
3 county. However they choose to do that, we are respectful of.  
4 We don't want to be micromanaging. We just want to make sure  
5 that we don't have two major counties in Broward and Palm Beach  
6 that are getting their ballots there because they are engaged  
7 in these processes, they are demonstrating these processes are  
8 feasible, they implemented them very recently, but because some  
9 voter lives in a different county, they are not going to get  
10 their ballot there on time because this very same process has  
11 not been implemented.

12 And that's the limits of our request, Your Honor. We  
13 believe it's a very modest injunction apropos of Your Honor's  
14 comments at the outset really tweaking or localizing what has  
15 been required elsewhere to the unique circumstances of Florida  
16 where we do have perhaps more absentee ballots on a percentage  
17 basis than we are going to see -- or mail-in ballots, I should  
18 say, on a percentage basis than we will see virtually anywhere  
19 in the country and where the impact of the sorting machine  
20 removal has been most acute relative to other jurisdictions in  
21 the country.

22 And I know we are trying not to approach this with a  
23 one size fits all response, but at the same time, the post  
24 office response to these injunctions has been a national  
25 response. And we understand that's why they say you may do

1 this or you have authority to do it, it's not required. These  
2 are the circumstances where it should be required. It's very  
3 doable. It's very feasible. These are the circumstances where  
4 it should be mandatory, and that's why we are here.

5 THE COURT: All right. Mr. Borson, what is your  
6 response to having some kind of hub and spoke collection  
7 delivery system for the last few days in those, I guess, ten  
8 counties?

9 MR. BORSON: So a couple of points, Your Honor. First  
10 of all, just to be clear, the extraordinary resources  
11 memorandum, and this is at the top -- the two bullets on the  
12 top of page 3, already makes clear that this is authorized, and  
13 the memorandum generally makes clear that these procedures are  
14 authorized and expected to be used if it's something that's  
15 feasible.

16 So I don't know the specific context of those ten  
17 counties well enough to address each of them specifically, but  
18 I think this is a situation where it makes sense to trust the  
19 judgment of the operators on the field to determine when and  
20 how these things make sense.

21 I think the premise of Your Honor's original statement  
22 is that the postal service is working in good faith to comply  
23 with these injunctions and to ensure that election mail is  
24 expeditiously delivered. And that is the postal service's top  
25 priority right now.

1           So in this context, given that the postal service has  
2 authorized these types of measures and expected measures to be  
3 used whenever they are feasible, I think this is a situation  
4 where it makes sense to defer to the specific technical  
5 judgment of postal service operators and managers on the ground  
6 about precisely how this makes sense.

7           And I think that is exactly what this memorandum does.  
8 It's not a way of saying, oh, it's discretionary; therefore,  
9 you don't have to do it, we don't really expect you to do it.  
10 The postal service is committed to election mail and has made  
11 that commitment repeatedly clear. The only reason that these  
12 measures are not mandatory in all circumstances is simply  
13 because all circumstances don't allow it. And when you are  
14 issuing this type of guidance even within a state, it makes  
15 sense to recognize that there may be local situations in some  
16 context where other things are actually more expeditious in  
17 delivering the mail.

18           And I wanted to make a couple of other points, if I  
19 may, in response to --

20           THE COURT: Let me just finish my thoughts about this.

21           So that part of the relief that they are seeking is  
22 not really going to kick in until the 31st and 1st, 2nd, and  
23 3rd, those last few days. So why can't you all, limited to ten  
24 counties, those ten major counties, why can't you all, sometime  
25 between like now and Tuesday, figure out how those ten counties

1 are actually going to do it, not whether they are authorized to  
2 do it or may do it. Let's figure out how they are actually  
3 going to do it, and let the plaintiffs know this is how it's  
4 going to be done, and either it's going to be done the same way  
5 in all ten or it's being done differently in these two or three  
6 counties because it's not feasible for the following reasons.

7 And if they agree to that, there is no reason for me  
8 to intervene. But if they don't agree and they think that's  
9 still going to be a problem, I still have time to enter an  
10 order as to at least that aspect of it that can hopefully be  
11 implemented during the last few days. Why isn't that something  
12 that can be done?

13 MR. BORSON: So obviously if the Court orders the  
14 postal service to go out and document that, we, of course,  
15 will. I would note that it is burdensome to impose these types  
16 of reporting requirements. And I say that not to avoid  
17 reporting to the Court because we have been doing a number of  
18 reporting to the Court, but simply that these are election  
19 coordinators who are focused on doing their job. And to the  
20 extent they are responding to requests from headquarters or  
21 from lawyers, that does take them away from them.

22 But obviously if that is something that the Court  
23 orders, we can reach out to figure out what the specific plans  
24 in those counties are.

25 Even regardless, I think we can document that, but I

1 would urge Your Honor that the reason for the plans and the  
2 reason that they would be making those decisions are based on  
3 local contacts and local mechanics and local logistics, and  
4 those really are determinations that we believe that this Court  
5 ought to be sensitive to because these are the people who best  
6 understand the infrastructure that they have out there.

7 THE COURT: Okay. As a starting point, yes. Okay.  
8 But I also -- you know, there are human beings involved in this  
9 process. Okay. And sometimes people let their personal views  
10 interfere with their professional obligations. I hope that is  
11 not going to happen. So that's why I don't understand. So if  
12 somebody says, oh, we can't do that or we won't do that, okay,  
13 I think the plaintiff has the right to know and you have the  
14 right to know whether they are doing that because it's not  
15 feasible or because they just won't do it because they have  
16 some personal reason for not doing it.

17 So, I mean, I just think all of us agree, right, that  
18 all of us and everybody in the postal service should do  
19 everything we can to make sure that every vote counts? So all  
20 I am asking you to do is meet informally. I'm saying you all.  
21 You reach out to your people in those ten counties and figure  
22 out, you know, with them how they can best make sure that those  
23 ballots are delivered on the last few days, and then you can  
24 report back to Mr. Bradford.

25 And if they are satisfied with that, then you can just



1 file a notice to me saying, okay, we have agreed that it's been  
2 resolved.

3 If there are two counties or ten that the plaintiffs  
4 don't believe are in good faith trying to accomplish our goal  
5 of every vote counting, then we can meet here again on Tuesday,  
6 and then there's time to have a hearing and decide whether this  
7 is really not feasible, whether there is somebody who is  
8 putting some impediment to people's constitutional rights.  
9 That's all. So I'm trying not to order you to do it, but I'm  
10 just trying to move it --

11 MR. BORSON: We can do that, Your Honor.

12 THE COURT: Okay. So as to that aspect of it, I am  
13 going to tentatively reset this for a hearing on October 28 at  
14 9:00, and that is to address the issue of the last few days of  
15 delivery at that point.

16 One of the reasons I feel handcuffed -- and I will go  
17 back to Mr. Bradford. I know that you said you want to make  
18 some other arguments, Mr. Borson, but while I have that in my  
19 pea brain of a head here, let me ask Mr. Bradford.

20 So all of these or most of these other cases were  
21 filed many weeks ago. Your complaint was filed October 6  
22 later, but your emergency motion wasn't filed until the 16th.  
23 So how is it that the government is not correct that  
24 implementing all these changes at the last minute is going to  
25 cause more mayhem and more disruption and is something that

1 shouldn't be done based upon Eleventh Circuit and Supreme Court  
2 precedent? How is it putting me in a position to say on  
3 October 22 you got to make these changes tomorrow literally  
4 because I think Saturday is the last day that ballots can be  
5 mailed out in Florida, and November 3rd is the last day they  
6 can be received. You are basically giving ten days for a whole  
7 new system to be implemented, training people, and you have  
8 other memos that have already been produced and procedures that  
9 have been implemented based upon these other injunctions. Why  
10 legally -- forget practically now because we have been talking  
11 a lot about practically -- why legally isn't the government  
12 right that these kind of disruptions on the eve of the election  
13 shouldn't be done?

14 MR. BRADFORD: Your Honor, we accept the premise there  
15 should be no disruptions on the eve of the election and for  
16 that reason attempted to limit the relief we were seeking to  
17 that which the government has already agreed it's either  
18 intending to do but yet hasn't actually done or has authorized  
19 and said is feasible.

20 And to back up to the timing of why it took us this  
21 long to request this hearing, we did start discussions with  
22 Mr. Borson before we even filed the complaint to try to obtain  
23 information. We did not want to create a new lawsuit if it was  
24 not necessary. We have been carefully monitoring what has and  
25 hasn't been done. We were extremely encouraged when two major

1 counties agreed to implement very specific procedures and put  
2 that in writing, and we were hopeful and requested that this  
3 simply be extended to other counties.

4 And it was only at that point -- I believe it was  
5 October 6 we filed our suit. It was only when we determined  
6 that, yes, this is very feasible because you have got two of  
7 the three biggest counties committed and actually doing it but  
8 it's not going to be done elsewhere that it became apparent we  
9 are going to have a patchwork here.

10 And Miami-Dade does seem to be a problem area in terms  
11 of what happened in the primary. It's one of the places where  
12 this hasn't happened yet. And that was the reason we thought  
13 we had better come in before all ballot deadlines have passed,  
14 that is to make a decision to request or not, and to come in  
15 and request this emergency hearing under those circumstances.

16 So we tried to calibrate as best we could in terms of  
17 imposing upon the judicial system as to whether or not that was  
18 necessary and we have tried to calibrate very carefully the  
19 limited relief that we are seeking. The last thing we want to  
20 do is get in anybody's way when they are trying to do their job  
21 and get the mail delivered.

22 We believe Your Honor's suggestion as to letting us  
23 know what the plan is for those ten counties and to the extent  
24 we have a specific problem where we believe the evidence will  
25 show it's very feasible, it's just a lack of will or whether

1 it's personal, political, or other reasons to implement that  
2 which is very doable, that that is appropriately brought to  
3 Your Honor's attention, and we would do that next week.

4 But our strong hope and expectation is that these  
5 plans will be reasonable. I think today's hearing has been  
6 helpful in that respect.

7 The only other relief that we would ask for at this  
8 point is a similar report that simply certifies that as to each  
9 of the counties there has been an agreement or plan reached  
10 with the election board as to what will happen on election day.  
11 Who is coming to who. Is the mail supposed to get picked up by  
12 the election officials or dropped off.

13 There's already been a commitment in a representation  
14 that they have had conversations, a statement that there is an  
15 intention to make a plan. I think we are at that point in time  
16 less than two weeks from the election where there should  
17 actually be a plan.

18 And, again, we are not asking you or anyone else to  
19 say what that plan should be, simply a certification that, in  
20 fact, there has been a communication and a plan put in place.

21 Again, I hope that's responsive, Your Honor.

22 THE COURT: And are the plans that have been agreed to  
23 by Broward and Palm Beach identical to each other?

24 MR. BRADFORD: They are not if I understand it  
25 correctly. I believe in Broward the election officials are

1 going to come to the postal facility, the servicing facility,  
2 to pick up the mail. And I will be corrected if that's wrong.  
3 I don't believe that's necessarily the case in Palm Beach. But  
4 that's why it's important to have that understanding, because  
5 it does vary from county to county, that we not have a  
6 misunderstanding for each side waiting for the other, if you  
7 will, to come get the mail.

8 THE COURT: One of the problems is I -- one of the  
9 parties is not or are not the supervisors of elections of each  
10 county. I can't order them to do anything because they are not  
11 part of this case. All I can do is order the plaintiffs and/or  
12 the defendants to do something. I guess that's an issue for  
13 another day if they are not cooperating.

14 Okay. So, Mr. Borson, you said that you had other  
15 arguments to make, and I told you to hold off on those. I will  
16 give you a chance to make those now.

17 MR. BORSON: Thank you, Your Honor. Just a couple of  
18 points in response to Mr. Bradford.

19 First of all, he's mentioned sorting machine removal a  
20 couple of times. I just wanted to briefly highlight that  
21 because that is addressed by one of the other injunctions. In  
22 the Eastern District of Washington, the court ordered that if  
23 machines were -- if processing machines were removed and their  
24 return to service was necessary to process election mail in  
25 accordance with first class standards, that those machines were

1 to be put back in place. And area vice presidents were  
2 authorized to do that.

3 Some of that happened back in September when the court  
4 issued its order. There is an existing process for plant  
5 managers to request that and for the Eastern District of  
6 Washington court to supervise that if that's happening.

7 So while machines have been removed, to the extent  
8 they have not been returned to service, that's because the  
9 people on the ground have determined -- who would be best  
10 suited to know whether that is necessary, have determined that  
11 those are not necessary for election mail purposes. So I just  
12 wanted to make that clear right there.

13 And then the only other issues I would make, I think  
14 we have addressed the issue of sort of the hub and spoke, and  
15 we will go back and get additional information on that.

16 In terms of the requiring contact, I mean, this is  
17 something that is mandated by the extraordinary measures  
18 memorandum, the first two bullets under postmaster action on  
19 page 3. So this is not something that is optional. This is  
20 something that is being required by the postal service.

21 And while I certainly take your point that there may  
22 be individuals who may have their own motivations, I think in  
23 this context the postal service really is working with good  
24 faith and is focused on making that plan, and there is the  
25 contact there so I think that is also important.

1           And then just sort of the final stages, I mean, we  
2 haven't really talked about the merits here today and I think  
3 we have appropriately focused on the practicalities and the  
4 irreparable injury, but I just would want to note that the  
5 injuries they are complaining about as the legal basis for  
6 their claims are, as best as we understand them, all things  
7 that have been enjoined and have been enjoined for months.

8           So while I take their point that, you know, maybe not  
9 all service is back entirely, back to where it was, and there  
10 is a number of reasons for that that, for example, the Southern  
11 District of New York court has addressed, that are not all  
12 related to these types of issues, some are weather, some are  
13 COVID, there are a number of reasons, that the actual injuries  
14 that they are complaining about as the basis for this relief  
15 are things that have been addressed and will be addressed  
16 through the election.

17           So in that sense, there's not a lot of foundation for  
18 the legal claims here, though we certainly do appreciate their  
19 practical concerns, and the postal service shares those, which  
20 is why it has done all of these steps in order to ensure that  
21 election mail is delivered expeditiously, which is something I  
22 think all parties here certainly agree on.

23           THE COURT: Okay. So I am going to reset this hearing  
24 until Wednesday, the 28th at 9:00. I am going to ask the  
25 parties to work together to resolve as many of these issues

1 voluntarily as they can since it's all of our desire that every  
2 vote get counted. And if there are any remaining disputes, we  
3 will take those up on Wednesday, the 28th at 9:00.

4 If it is not resolved, then I want each party to  
5 submit a memorandum to me by, let's say, 3:00 p.m. on the 27th  
6 of what issues have been agreed to, what issues are in dispute,  
7 and how they suggest that we should resolve those on the 28th.

8 If you agree to everything, just send me a memo, a  
9 notice, on the 27th, and we will cancel the hearing on the  
10 28th. Okay?

11 MR. BRADFORD: Very good. Thank you so much, Your  
12 Honor. And, again, thank you for accommodating us on an  
13 emergency basis. We greatly appreciate it.

14 THE COURT: Thank you all. We will be in recess on  
15 this matter. Thank you.

16 (The hearing concluded at 11:59 a.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

Please note: This hearing occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of reporting remotely.

10/22/20

s/ Tammy Nestor  
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