

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

DEMOCRATIC PARTY OF VIRGINIA,

Plaintiff,

v.

FRANK VEAL, in his official capacity as the South Atlantic Division Manager for the United States Postal Service, GERALD ROANE, in his official capacity as Virginia District Manager of the United States Postal Service,

Defendants.

Civil Case No. 3:21-cv-671

**PLAINTIFF’S REPLY IN SUPPORT OF EMERGENCY MOTION
FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

There are serious, concerning issues with delivery of mail ballots in the Commonwealth. These include not only the data that shows alarming high rates of unscanned ballots in Albemarle County and the City of Portsmouth, but also credible news reports and untold numbers of personal accounts from voters across the Commonwealth who have been waiting for extended periods of time for ballots they requested to arrive. Yet, USPS’s response is effectively, “there is nothing to see here.” In telling that story, USPS carefully avoids mentioning the myriad recent reports of significant issues, including those that led Virginia’s U.S. Senators to send a letter to Virginia District Manager Gerald Roane, a named Defendant in this action. The letter specifically advised Roane of extensive reports of severe mail delays—including in Albemarle County specifically—where Virginians were reporting they were not receiving “any mail for days or weeks at a time.”

Ex. A (emphasis added).¹ Reports from voters in the past several weeks indicate these issues have continued. And while USPS says that DPVA's data does not "match" their data, they noticeably fail to proffer any of *their* data with their response. In fact, USPS affirmatively asserts that they are not scanning a number of ballots by design. Their explanation, which contends that ballots are "h[e]ld out" on *return* "to registrars" in order to expedite them, Opp. at 5, does not explain why thousands of ballots would not have been scanned at all, including on *entry* to USPS's system.

USPS's response also confirms that DPVA has good reason to be concerned about voters whose ballots are now or will soon be in the mail on their way back to their general registrars: if USPS is not scanning these ballots in transit, voters will have no way of knowing whether their ballot is on track to arrive in time to be counted. Virginia's ballot tracking system explicitly "relies upon USPS scanning the ballot envelope at each stage of the delivery process." Ex. B at 2. And if voters' ballots arrive after November 2, but were not properly postmarked by USPS when they entered the mail (as has been the experience of some voters), then the lack of that scan data will disenfranchise those voters. *See* 1 Va. Admin. Code 20-70-20(F)(3) ("If there is no evidence from the Intelligent Mail barcode that the ballot was mailed after the close of polls for the relevant election and if the return envelope has a missing postmark, the ballot shall be rendered invalid.").

In this way (and several others) USPS's response is not comforting. DPVA credits USPS's assertion that there is not *now* a backlog of unprocessed ballots in Albemarle County and the City

¹ In a less urgent and expedited matter, DPVA would not normally attach exhibits to a reply brief or would seek leave of Court before doing so. However, given the extraordinary urgency of this matter, and the speed at which issues are developing, DPVA submits evidence rebutting USPS's claim that they were unaware of these issues, as well as additional evidence that demonstrates that the issues are widespread and having severe impact on Virginia voters, so that the Court is able to consider that evidence in considering whether (and if so, how) to craft relief. DPVA notes that USPS will have witnesses at the hearing that presumably will be able to respond to and address these issues, minimizing any potential prejudice to Defendants of the Court's accepting and considering this additional evidence.

of Portsmouth. But considering the ample evidence of ongoing and significant delays of election mail in Virginia, DPVA has serious continuing concerns about mail delays more broadly. It is reasonable to require USPS to promptly deliver—and scan—mail ballots in these, final days, before the culmination of a major election. In fact, the three-day delivery window that DPVA requested USPS be required to abide by in their motion was USPS’s standard for *all* first-class mail before October 1. *See* Revised Service Standards for Market Dominant Mail Products, 86 Fed. Reg. 43941 (Aug. 11, 2021) (to be codified at 39 C.F.R. Pt. 121).

A. The public record belies USPS’s claim that all is well with election mail in the Commonwealth.

USPS’s response to the DPVA’s motion is perhaps most notable for what it omits. It does not mention, for example, the letter that Senators Mark Warner and Tim Kaine sent to Defendant Virginia District Manager Roane in late August, in which they advised Mr. Roane that they had “heard from hundreds of constituents, specifically in the Central Virginia region,” reporting “severe delivery delays.” Ex. A. This included many in Albemarle County and its surrounding jurisdictions specifically, where constituents were “reporting that they had not received any mail for days or weeks at a time.” *Id.* The letter further noted that, “despite numerous requests, USPS officials have not provided relevant and updated data and mail delivery times.” *Id.* They urged Roane to develop a contingency plan and posed a list of questions to him about USPS’s operations that they asked him to answer by September 3. *Id.*²

² Virginia’s Senators were not the only officials to complain directly to the USPS: The Hanover County Board of Supervisors sent a formal letter to USPS in September letting them know how bad local service was. John Reid Blackwell, *Richmond-area residents express frustration with postal service delivery delays and service problems. Politicians urge reform*, Richmond Times-Dispatch (Oct. 8, 2021), https://richmond.com/business/richmond-area-residents-express-frustration-with-postal-service-delivery-delays-and-service-problems-politicians-urge/article_0aaf7633-fcc1-5dd8-9b5e-05c91c88f7cc.html.

If Mr. Roane responded to that letter, his response does not appear to be publicly available. However, approximately a month later over the October 2, 2021 weekend, USPS brought in extra mail carriers from elsewhere in Virginia—55 on Saturday and over 60 on Sunday—and had multiple deliveries a day to clear through the back log in Charlottesville and Albemarle.³ While some Virginians reported receiving all kinds of extremely overdue mail during the surge, others reported not seeing any change, receiving only old junk mail, or not receiving important overdue mail they were expecting, including absentee ballots.⁴ And virtually everyone agreed that this one temporary “surge” wouldn’t fix the long-term problems in Albemarle in particular, where the USPS offices are seemingly significantly understaffed, down apparently 16 carriers.⁵ A few days later, Senator Warner said that USPS management in the region assured him a “contingency force” will be brought in to help continue to “beef up and fill in the gaps” on mail delivery, and that his next step would be contacting Louis DeJoy directly. *Id.*

DPVA hoped that these issues would be addressed, but the reports from voters continued to alarm. In fact, on October 7, 2021, Senator Warner was quoted as saying that the issues were

³ Riley Wyant, *Weekend postal surge leads to multiple mail deliveries a day in Charlottesville and Albemarle*, nbc29.com (Oct. 4, 2021), <https://www.nbc29.com/2021/10/04/weekend-postal-surge-leads-multiple-mail-deliveries-day-charlottesville-albemarle/>; see also Emma North, *Sen. Warner addresses ‘enormous problems’ with mail in Charlottesville*, abc8news.com (Oct. 5, 2021), <https://www.wric.com/news/politics/sen-warner-addresses-enormous-problems-with-mail-in-charlottesville/>.

⁴Allison Wrabel, “*It’s just inexcusable: Sen. Warner says he’ll keep pressuring USPS*,” The Daily Progress (Oct. 5, 2021), https://dailyprogress.com/news/local/its-just-inexcusable-sen-warner-says-hell-keep-pressuring-usps/article_890abf0a-25fd-11ec-b9d8-0b91257df832.html; see also Allison Wrabel, *After mail ‘surge’ in Charlottesville, many worry about the long-term issues*, The News & Advance (Oct. 5, 2021), https://newsadvance.com/news/state-and-regional/after-mail-surge-in-charlottesville-many-worry-about-the-long-term-issues/article_8e44af08-3882-54a1-95bc-4f2ab0cdae30.html.

⁵ See *supra* Wrabel “mail ‘surge’” Article n.5.

starting to spread to other areas of the state.⁶ Voters in Henrico and Chesterfield County began complaining that they are not receiving absentee ballots weeks after requesting them.⁷ Some residents reported that their incoming mail was being returned to sender with a note incorrectly stating their address was vacant.⁸ Others reported mail being misdelivered, or not being delivered at all. *Id.* First-hand accounts of voters on social media continue to confirm serious issues with deliveries of absentee ballots in particular.⁹ The troubling ballot scan data that DPVA received set of significant additional alarms, and DPVA investigated that data, inquiring multiple times with state and local elections officials to ensure that the issue was with USPS, and not the registrars. Ex. F to PI Mot., Whitley Decl. ¶ 5. As the election grew closer, it was clear both that something was seriously wrong, that the public pleas from the Commonwealth's U.S. Senators to fix the issue had not been heeded by USPS, and that the voting rights of Virginians were at stake.

Since filing its original motion, DPVA has been able to obtain declarations from some impacted voters, and have attached those declarations to this filing. They include Alden Barson, who waited several weeks for the first ballot he requested in mid-September to arrive, and when it never did, requested another that took ten days to reach him. Ex. C, Decl. of Alden Barson ¶¶ 2-4. He is deeply concerned that his ballot will not reach his general registrar in time to be counted. *Id.* ¶ 5. David Maughan requested his absentee ballot in Richmond City on September 23, but as of

⁶ Isabel Cleary, *Senator says mail delivery issues spreading across Virginia*, NBC29.com (Oct. 7, 2021), <https://www.nbc29.com/2021/10/07/senator-says-mail-delivery-issues-spreading-across-virginia/>.

⁷ Kerri O'Brien, *Postal delays make Virginians nervous about mail-in ballots, department of elections says no need for panic yet*, abc8News.com (Oct. 7, 2021), <https://www.wric.com/news/politics/local-election-hq/postal-delays-make-virginians-nervous-about-mail-in-ballots-department-of-elections-says-no-need-for-panic-yet/>.

⁸ *See supra* Blackwell Article n.3.

⁹ *See* Ex. B (compiling sample of tweets from voters missing requested ballots).

today, it still has not arrived. Ex. D, Decl. of David Maughan ¶¶ 3-6. Pauline Feldman similarly waited for a month for a requested ballot to arrive in Albemarle County, before giving up and voting in person. Ex. E, Decl. of Pauline Feldman ¶¶ 3-5. Although she requested her ballot in late September, as of this morning, it still has not arrived. *Id.* ¶ 6. Also in Albemarle County, University of Virginia professor Larry Sabato publicly complained for weeks about waiting for his missing ballot. Ex. F, Decl. of Larry Sabato ¶ 4. The general registrar confirmed the issue was with USPS, and told Professor Sabato that he would have to wait 10 days for it to arrive due to mail delays. *Id.* ¶ 3. It took far longer. *See id.* ¶¶ 4-7. The issue, he was told, was his mail carrier quit due to abuse by a supervisor, but was not replaced and, as a result, no mail was being delivered on his route. *Id.* ¶ 6.¹⁰ After requesting her ballot in late August, Rebekah Kusterbeck voted in person because her ballot never arrived at her home. Ex. G, Decl. of Rebekah Kusterbeck ¶¶ 2-4. Her ballot finally arrived on October 12, nearly a month after it had been delivered to USPS by the Chesterfield County General Registrar. *Id.* ¶ 6. Other voters who were reached by DPVA or counsel were concerned that, in the current climate, filing a declaration would make them subject to harassment, and declined.

This is no simple misunderstanding. It is a serious issue that USPS must be required to address. Notably, former mail carriers who have left the service claim that the ongoing issues are due to chronic understaffing, insufficient training, and poor management.¹¹ They contend, among

¹⁰ Many of the reported issues seem to concentrate around Albemarle County. Notably, in its response, the USPS states that the Richmond plant has been “all-clear” of election mail every day, but only that Albemarle and Portsmouth were clear “as of October 25”—three days after DPVA filed the complaint in this action. Opp. at 5.

¹¹ Allison Wrabel, *Former mail carriers say understaffing, management to blame for delays*, The Daily Progress (Oct. 11, 2021), https://dailyprogress.com/news/local/former-mail-carriers-say-understaffing-management-to-blame-for-delays/article_f5e6be5e-2935-11ec-b78c-bb813f06080f.html.

other things, that inspectors are underestimating the number of routes and staff needed in an effort to please higher ups. *Id.* And they claim that, when Senator Warner visited Virginia mail facilities in August, local USPS hid large numbers of undelivered packages and mail from the Senator. *Id.* People who are monitoring USPS's official data, such as Steve Hutkins, a retired NYU professor who runs savethepostoffice.com, claim that USPS's quarterly statistics for Virginia do not accurately reflect the poor mail performance they are seeing, suggesting that something may be seriously wrong with USPS's data, as well. *Id.*

B. This Court has extensive powers to protect the voting rights of Virginians and ensure that they are not disenfranchised as a result of continued USPS issues.

As of today, election day is less than a week away, and the final deadline to cure any issues with mail ballots (and the last day by which the registrars may receive them to count them under Virginia law) is just nine days away. Yet, USPS claims there are no issues, or that, if there are, this Court cannot remedy them and USPS cannot possibly be required to solve them. This is not consistent with publicly available information, nor does it properly reflect the law or this Court's broad equitable powers.

DPVA's request that USPS deliver all election-related mail within Virginia no later than three days after its entry into USPS's system is not too much to ask. In fact, prior to the October 1 slowdown, USPS's standard delivery for all first-class mail was three days. *See Revised Service Standards*, 86 Fed. Reg. at 43941. But USPS's response raises another deeply concerning issue which, if not remedied and fast, will threaten to disenfranchise voters. Specifically, USPS now affirmatively asserts that they are *not* scanning a number of ballots from voters on purpose. Opp. at 5. They contend this is in order to expedite them, but if ballots are not being scanned it will make it impossible for voters to make decisions about whether to abandon their voted mail ballot and attempt to vote in person instead, if it appears that it will not make it back to elections officials

in time. It will make it similarly impossible for DPVA to help voters ensure that their ballots are counted—including by advising them whether they should now go and vote in person. And for ballots that arrive after November 2, but before the final cutoff of November 5, postmarks and scans are both important ways to prove that the ballot was mailed by the voter by election day. Without that information, those ballots will be rejected and not counted. 1 Va. Admin. Code 20-70-20(F)(3). This is a serious issue that USPS can and should be required to address in the final days leading up to the election and the November 5 cutoff.

The Court has broad and extensive powers to fashion relief and, as the cases cited in DPVA's original motion establish, federal courts have previously directed very specific relief to USPS in order to address election mail issues specifically. *See, e.g., Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 132 (D.D.C. 2020); Ex. H (listing *Vote Forward* minute orders clarifying injunction an ensuring compliance); *Jones v. U.S. Postal Serv.*, 488 F. Supp. 3d 103, 141 (S.D.N.Y. 2020), order clarified, 20 CIV. 6516 (VM), 2020 WL 6554904 (S.D.N.Y. Sept. 29, 2020), and 20 CIV. 6516 (VM), 2020 WL 5983112 (S.D.N.Y. Oct. 8, 2020). USPS's contention that DPVA is unlikely to succeed on its claims rests almost entirely on its contention that nothing is wrong. But as the materials now before the Court demonstrate, this is far from the case. Prompt and emergency relief is necessary to avoid otherwise wholly irreparable harm, and is clearly in the public interest.

CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court enjoin Defendants, together with their officers, agents, and employees, to expedite the delivery of election-related mail within Virginia, and ensure that election mail is being scanned, so that voters are not disenfranchised as a result. DPVA appreciates the efforts that USPS has made to work with DPVA and the Virginia Department of Elections to try to understand the data surrounding the unscanned ballots, but serious issues about delays persist and must be promptly and meaningfully addressed.

Respectfully submitted, this 27th day of October, 2021.

/s/ Jeffrey Breit

Jeffrey Breit, VA Bar No. 18876

BREIT CANTOR

Towne Pavilion Center II

600 22nd Street, Suite 402

Virginia Beach, VA 23451

jeffrey@breitcantor.com

Elisabeth Frost*

David R. Fox, VA Bar No. 83894*

Henry J. Brewster*

ELIAS LAW GROUP LLP

10 G St., N.E., Suite 600

Washington, D.C. 20002

Telephone: (202) 968-4490

Facsimile: (202) 968-4498

efrost@elias.law

dfox@elias.law

hbrewster@elias.law

Counsel for Plaintiff

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

In addition to filing this pleading via CM/ECF, I will arrange to have a copy of the foregoing motion and all exhibits sent immediately via e-mail to counsel of record for all defendants.

Dated: October 27, 2021

/s/ Jeffrey Breit
Jeffrey Breit
Counsel for Plaintiff

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