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United States House of Representatives
Committee on Oversight and Reform
Subcommittee on Operations
2157 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman, Ranking Member and Members of the Subcommittee:

We are law professors who write and teach on ethics, and we have regularly co-authored on issues relating to democratic governance and the rule of law. We are also both affiliated with the *Center for Ethics and the Rule of Law* of the University of Pennsylvania Carey School of Law, although we are writing today in our capacities as individual faculty members of our respective universities.

One of us, Richard Painter, submitted written testimony to your Subcommittee for a September 14, 2020 hearing on serious financial conflicts of interest of Postmaster General Louis DeJoy and has been invited to testify to the Subcommittee. The testimony addresses Mr. DeJoy's refusal to divest from a company that has large mail delivery contracts with the United States Postal Service (USPS), as well as alleged federal campaign finance violations by Mr. DeJoy.

This letter follows up on several themes in the Painter testimony to elaborate on broader concerns we share about ongoing efforts to privatize the USPS and to apply a private-sector metric to its operations during Mr. DeJoy's tenure as Postmaster General. This metric is offered as a basis for recent dramatic changes in the operations of USPS that interfere with the ability of the U.S. Post Office to serve its designated public function.

As the Painter testimony pointed out, Mr. DeJoy's financial conflicts of interest underscore an important aspect of his already problematic tenure as Postmaster General of the United States: The

American people cannot trust Mr. DeJoy to act in the best interests of the country, rather than in his own personal financial interest or on behalf of partisan political campaigns. Mr. DeJoy's refusal to separate himself from his conflicted assets, combined with the evidence that he induced employees to make political donations for which he would reimburse them, are of a piece with concerning reports about the operations of USPS under his leadership. These reports include mail being deliberately slowed or, in some cases, dumped,¹ at a critical time for mail services.

Privatization of the USPS

An underlying issue long preceding the Trump Administration has been the drive by politicians as well as USPS competitors in the mail and package delivery industry to privatize the USPS and force it to operate free of government subsidy. This includes pressure on USPS to farm out some of its operations to private companies that claim to be able to perform those operations at lower cost. XPO Logistics, the company in which Mr. DeJoy owns a \$30 to \$70 million stake, is part of this privatization process. Instead of hiring more USPS employees to deliver mail in USPS trucks, USPS spends millions of dollars contracting with XPO Logistics and other companies for trucking of mail and other services. What this means is that some operations of the USPS have already been privatized. Postmaster DeJoy's conflicted ownership interest in an important USPS contractor must be understood in the context of the increasing dependence of the USPS on private industry.

In 2006, Congress passed the Postal Enhancements and Accountability Act, Part VIII of which mandated, among other things, that USPS pre-fund its retiree health benefits for approximately 75 years at a time, at an estimated cost of roughly \$110 billion.² The reason for the change likely has to do with a shift in the way many members of Congress, and perhaps the American public, view the post office: unlike the military, the fire department, the police department, public schools and public universities, the post-office is expected to generate revenue that equals or exceeds the costs of operation, including the federal pensions of its employees. What has captured the imagination is the notion that the post-office should be run as though it were a for-profit business.

Along the road to increased privatization, President Trump issued an executive order in 2018 designed to force the post office to economize and to conduct a full economic review of its operations. Citing the "unsustainable financial path" the USPS was on, the order mentioned the need to put the USPS on a "sustainable business model" and to ensure that the USPS "compete[s]

¹ See Kenneth P. Vogel, Hailey Fuchs and Luke Broadwater, *Postal Service to Tap Republican Lobbyists to Quell Mounting Scrutiny*, New York Times, September 9, 2020 ("The added pressure on Mr. DeJoy came as the Postal Inspection Service, the agency's federal law enforcement and security arm, said it was investigating another concern: reports of mail-dumping in Glendale, Calif. last week. Piles of mail were reportedly dumped in two locations in the city, including one incident in which a rental truck was caught on surveillance video dumping bags of unopened letters and packages in the parking lot of a medical spa."). <https://www.nytimes.com/2020/09/09/us/postal-service-lobbyist.html>.

² See H.R. 6407, which became Public Law No: 109-435. <https://www.congress.gov/bill/109th-congress/house-bill/6407>.

fairly in commercial markets.”³ By “compete fairly” the Executive Order implies that any taxpayer subsidy of USPS is inappropriate.

In furtherance of the end of privatization, and to enhance fiscal discipline, the 2018 executive order also created a Task Force on the post office, designed, *inter alia*, to provide financial oversight of the post office’s operations. Headed by the Secretary of the Treasury, the new Task Force was designed to hasten the process of privatization and to help push through measures that would substantially reduce post office operations. This Executive Order also creates an unusual arrangement where the head of one Executive Branch agency, Treasury, is put in charge of the affairs of another supposedly independent agency, the USPS.

Although debates about the merits of privatizing the USPS have gone on for years, the move towards privatization model has accelerated significantly under the current administration. The appointment of Louis DeJoy is part and parcel of that trend.

We believe this shift toward privatization is misguided. We do not treat the fire department, the police department, or national defense as for-profit businesses. Imagine a police department that refuses to service a poor rural area because the cost of sending the police to that area is higher than the perceived value of the assets (or people) being protected. Imagine an attack on rural Alaska by a hostile foreign power, and because the cost of deploying troops to Alaska was higher than, say, deploying them to downtown Washington, D.C., and the value of the real estate lower, the Pentagon decided the troop deployment was not worth the cost. Or a fire department that was willing to respond to calls in the immediate vicinity of the firehouse but charged residents a “surplus” for locations that were more than a certain distance from the firehouse.

Of course, there are competitors who could replace many of these essential public services. For example, defunding local police departments is an idea advocated by extreme libertarians on the right and by some activists on the left. Defunding the police would create a demand for private law enforcement, requiring businesses and wealthy individuals to pay private security companies to provide armed guards. Americans also would likely resort to self-help guaranteed under the Second Amendment of the Constitution. The firearms business would profit enormously. Yet most communities are continuing to fund their local police departments, despite the recognition that there is much needed reform in policing.

Similarly, the notion of fully privatizing a social service as critical as the post office is anathema to the Founders’ vision. Congress’ power “to establish Post Offices and Post Roads” is specifically

³ See Executive Order on the Task Force of the United States Postal System, Issued April 12, 2018. The order cited financial woes including “(i) the USPS has incurred \$65 billion of cumulative losses since the 2007-2009 recession; (ii) the USPS has been unable to make payments required by law for its retiree health benefit obligations, which totaled more than \$38 billion at the end of fiscal year 2017; and (iii) the Government Accountability Office has had the USPS on its high-risk list since 2009 because of a serious financial situation that puts the USPS mission of providing prompt, reliable, and efficient universal mail services at risk.” <https://www.whitehouse.gov/presidential-actions/executive-order-task-force-united-states-postal-system/>

provided for in Article I, Section 8, Clause 7 of the United States Constitution. Implicit in this mandate is the idea that all Americans should have access to the mails. This critical federal function, constitutionally delegated to Congress, should not be turned over to a private company.

Any for-profit business carrying out the mandate of the USPS would confront a serious challenge to its profitability: the post office serves *every household in the United States*, no matter how remote geographically and hence unprofitable it is to reach that location. Unlike for-profit delivery services like Federal Express, UPS, Amazon or DHL, the USPS cannot simply eliminate routes because the cost of making deliveries in those far flung locations is not worth the cost. Not only should mail services be provided equally to all Americans, the Post Office in turn contributes to equalizing economic and other disparities: It is a lifeline for poor, rural areas, as well as for the elderly, and providing medication, food and other immediate necessities for remote communities and others who are unable to shop for what they need in person. This is even more critical in the present moment: concerns about infection during the pandemic have shuttered many local businesses and required many Americans to shelter at home. Widespread access to mail services for all parts of the country is more critical than ever.

Reduction in USPS Operations and Mail-in Voting

Grave concerns have recently been raised that efficiency of operations is not the only motive behind recent cuts in operation. The post office is also instrumental for mail-in voting, especially important during the current national health emergency. To reduce mail services in the middle of a pandemic, two months prior to a general election, suggests an intentional effort to suppress voter turn-out.

The abuses in the running of USPS that have shocked the nation seemed to reach their most absurd, with recent reports that under Mr. DeJoy's leadership, the USPS has progressed past removing letter boxes and locking them to actually dumping mail to avoid having to deliver it.⁴

David Williams, a former inspector general in five different federal agencies, including USPS, who recently stepped down from the Board of USPS, provided testimony before the House Progressive Caucus about the way USPS is being run under the 2018 Executive Order. In his testimony, he suggested that Treasury Secretary Mnuchin inappropriately sought to control the membership and conduct of the USPS Board. "The Secretary has called over Board members to provide instructions and requests and express his displeasure, which is really striking. I'm not sure I've run into that before, where one department is trying to run another department," said Williams. The removal of mailboxes, Williams suggested, was Mnuchin's idea. "The blue boxes were maybe the most interesting of all.... Those were not part of ongoing plans. To my knowledge, as a matter

⁴ See *Postal Service to Tap Republican Lobbyists to Quell Mounting Scrutiny*, New York Times, September 9, 2020, *supra*.

of fact... Secretary Mnuchin wanted that done. His study of the Postal Service asked that it be done."⁵

The failures in mail delivery under Mr. DeJoy have become so severe that several states are taking USPS to court.⁶ Recent USPS policy changes, including slashed office hours, eliminated overtime, and removed mail processing equipment, were illegal according to Pennsylvania Attorney General Josh Shapiro because Mr. DeJoy made these operational changes without first seeking approval from the Postal Regulatory Commission, an independent federal agency providing transparency and accountability for the USPS.⁷

These changes should be considered against the backdrop of the politicization of the USPS Board, the members of which are appointed by the president. The current Board is comprised mostly of GOP donors and supporters of President Trump.⁸

Defenders of President Trump may argue that the president is not responsible for the recent mismanagement of the USPS, given that the Board bears the responsibility for hiring and supervising the postmaster general. But the president retains the right to fire the members of the Board and appoint replacements. Thus, if a postmaster general displeases the president, the president need only fire the Board and put in place a new board that could carry out the president's wishes.

The Trump Administration has repeatedly invoked "unitary executive theory" in support of removing federal officers, including an FBI Director who was too enthusiastic about pursuing the Russia investigation, at least five inspectors general and the United States Attorney for the Southern District of New York who was in the midst of several criminal investigations of sensitive import to President Trump.⁹ The Trump Administration, however, wants to hide behind the USPS Board, which is stacked with presidential appointees, and claim that the President is not

⁵ See Jake Johnson, "Complete Bombshell": *Former Top USPS Official Reveals "Disturbing" New Details of DeJoy Selection and Mnuchin Sabotage of Mail Service*, Common Dreams, August 21, 2020 (<https://www.commondreams.org/news/2020/08/21/complete-bombshell-former-top-usps-official-reveals-disturbing-new-details-dejoy>).

⁶ See Ellie Rushing and Jonathan Lai, *Pennsylvania leads federal lawsuit against USPS over mail delays as postmaster general signals a reversal*, Philadelphia Inquirer, August 18, 2020 (<https://www.inquirer.com/politics/pennsylvania/pennsylvania-usps-lawsuit-mail-delays-election-20200818.html>).

⁷ Id.

⁸ See Alison Durkee, *Here Are All the Postal Service Leaders' Ties to Trump and the GOP*, Forbes, September 9, 2020 (<https://www.forbes.com/sites/alisondurkee/2020/09/09/postal-service-ties-to-trump-gop-dejoy-duncan-postmaster-general-board-of-governors/#77392d2bd1e5>).

⁹ See Claire O. Finkelstein and Richard W. Painter, *The 'Friday Night Massacre' Spells the Downfall of William Barr*, Newsweek, June 23, 2020. <https://www.newsweek.com/friday-night-massacre-spells-downfall-william-barr-opinion-1512935>

responsible for the mismanagement of the USPS, despite the obvious resonance between the president's attacks on mail-in voting and the current reduction of services at USPS. President Trump thus wants to invoke his "unitary executive" power to protect himself politically but to avoid the responsibility that supposedly comes with it.

USPS and Partisan Politics

Using public office to advance partisan political objectives of anyone – including the president's bid for re-election – is both unethical and an abuse of office. It is also illegal in that it violates the Hatch Act. The willingness to use public office to promote partisan political campaigns is a consistent characteristic of the present administration. We recently filed a Hatch Act complaint against Secretary of State Pompeo because of his broadcast of a political stump speech for Donald Trump while Pompeo was on a diplomatic mission in the Middle East.¹⁰

As we have noted, "Congress' objective [in passing the Hatch Act] was not only to curb the occasional rogue employee but also to prevent the president from using his expansive authority as head of the executive branch to turn agencies under his control into arms of his political campaign. We have seen this with a vengeance with the current administration."¹¹

Indeed, Citizens for Ethics in Washington (CREW) filed a criminal complaint with the F.B.I. against Postmaster General DeJoy alleging his use of the post office to try to interfere with the availability of mail-in ballots to help ensure a November victory for Donald Trump.¹² Just yesterday, Colorado Secretary of State Jena Griswold filed a lawsuit against the USPS after she and officials in California and Washington warned that USPS postcards sent to voters—without state officials' approval—feature incorrect information about states mail-in voting policies.¹³

The USPS has thus illegally joined the State Department, the Justice Department and other executive branch agencies in becoming an arm of the Trump campaign.

In conclusion, we have grave concern about the misguided ideological crusade to privatize an essential public service, the increasing politicization of the USPS and the financial conflicts of

¹⁰ See Claire O. Finkelstein and Richard W. Painter, Pompeo's Unlawful RNC Speech for Trump Should Alarm All Americans, *Newsweek*, September 2, 2020. <https://www.newsweek.com/pompeos-unlawful-rnc-speech-trump-should-alarm-all-americans-opinion-1529264>.

¹¹ *Id.*

¹² See CREW files criminal complaint against Louis DeJoy, August 20, 2020. <https://www.citizensforethics.org/press-release/criminal-complaint-louis-dejoy/>

¹³ Alison Durkee, Colorado Sues USPS As States Warn Postal Service Sending Out Mail-In Voting Misinformation, *Forbes*, September 12, 2020. <https://www.forbes.com/sites/alisdurkee/2020/09/12/colorado-sues-usps-as-states-warn-postal-service-sending-out-mail-in-voting-misinformation-postcards/#613ab4413843>

interest of the postmaster general. We hope that your Committee will confront this egregious breach of public trust.

Respectfully,

A handwritten signature in black ink, appearing to read "Claire O. Finkelstein". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Claire O. Finkelstein

A handwritten signature in black ink, appearing to read "Richard W. Painter". The signature is highly stylized and cursive, with a long horizontal stroke extending to the right.

Richard W. Painter