ORAL ARGUMENT NOT YET SCHEDULED

No. 10-5337

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INITIATIVE AND REFERENDUM INSTITUTE, et al.,
APPELLANTS,

v.

UNITED STATES POSTAL SERVICE,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

DAVID F. KLEIN
MARK S. DAVIES
MATTHEW G. JEWELER
(Application for D.C. Circuit admission pending)
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(T)(202) 339-8400
(F)(202) 339-8500
Counsel for Appellants

MARINA UTGOFF BRASWELL
R. CRAIG LAWRENCE
Assistant U.S. Attorney
United States Attorney's Office
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 514-7159

Of Counsel: ARTHUR B. SPITZER
American Civil Liberties Union
of the Nations Capital
1400 20th Street, N.W. #119
Washington, D.C. 20036
(202) 457-0800

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. ***Parties and Amici.***

1. The parties originally appearing before the District Court were: (a) Plaintiffs Initiative and Referendum Institute; Americans for Medical Rights; Citizens for Limited Taxation; Humane Society of the United States; Nebraskans for Limited Terms; Oregonians for Fair Elections; U.S. Term Limits; Barbara C. Anderson; Andrew J. Bandyk; Amy Ehrlich; Lynn Fritchman; Bart Grant; Tracy Lincoln; David Morris; Gloria Robinson; and William Westermeyer; and (b) Defendant United States Postal Service.

2. The parties appearing in this Court are: (a) Appellants Initiative and Referendum Institute; Citizens for Limited Taxation; Humane Society of the United States; U.S. Term Limits; Barbara C. Anderson; Andrew J. Bandyk; Bart Grant; and Gloria Robinson; and (b) Appellee United States Postal Service.

B. ***Ruling Under Review.***

The ruling under review is the Memorandum Opinion of the United States District Court for the District of Columbia in *Initiative and Referendum Institute, et al., v. United States Postal Service*, Civ. No. 00-1246 (RWR) (September 8, 2010). This decision is reported at 741 F. Supp. 2d 27 (D.D.C. 2010) and can be found at page 984 of the Joint Appendix.

C. *Related Cases.*

The case on review was previously before this Court as *Initiative and Referendum Institute, et al. v. United States Postal Service*, No. 04-5045, and a reported decision is published at 417 F.3d 1299 (D.C. Cir. 2005). The case on review has not previously been before any other court, except the United States District Court for the District of Columbia. Appellants are not aware of any other related cases.

David F. Klein
Attorney for Appellants

Dated at Washington, D.C.
this 2nd day of June, 2011.

CORPORATE DISCLOSURE STATEMENT

Appellants, Initiative and Referendum Institute, Citizens for Limited Taxation, Humane Society of the United States, and U.S. Term Limits submit this Corporate Disclosure Statement as required by Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1. Each of the listed appellants' is a not-for-profit organization that engages in political speech and activity related to issues important to the organization and its individual members. None of these organizations has a parent company and no publicly held company has a 10% or greater ownership interest in any of the organizations.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

*Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

DISTRICT OF COLUMBIA CASES

STATUTES

REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
IRI	Initiative and Referendum Institute (an appellant herein)
IRI I	*Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp.2d 65 (D.D.C. 2000)
IRI II	*Initiative & Referendum Inst. v. U.S. Postal Serv.*, 297 F. Supp.2d 143 (D.D.C. 2003)
IRI III	*Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005)
IRI IV	*Initiative & Referendum Inst. v. U.S. Postal Serv.*, 741 F. Supp. 2d 27 (D.D.C. 2010) (the ruling on review)
USPS	United States Postal Service (appellee herein)

STATEMENT OF THE ISSUES

In 2005, this Court held that a U.S. Postal Service ("USPS") regulation banning the solicitation of signatures on petitions on all USPS property (39 C.F.R. § 232.1(h)(1)) "cannot be upheld as a time place or manner restriction of speech if applied in a public forum." *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1312 (D.C. Cir. 2005). The Court also held that sidewalks "comprising the outer boundaries" of postal property that run adjacent to public streets are traditional public forums. *Id.* at 1313-14. The regulation has now been amended to exclude boundary sidewalks, but continues to apply to all other sidewalks on postal property.

1. Did the District Court err in holding on summary judgment that Plaintiffs had failed to meet a burden of proving that a substantial number of public post office sidewalks to which the regulation continues to apply are public forums, and in concluding that the regulation is not unconstitutionally overbroad?

2. Did the District Court err in holding that the need for an injunction on remand to enforce this Court's 2005 holding regarding the forum status of "perimeter" sidewalks was moot, even though USPS never acknowledged that its regulation was unlawful, never promised not to re-implement it, and remains free to return to its former policy at any time?

REGULATION INVOLVED

The current and prior (1998) versions of the U.S. Postal Service regulation at issue, 39 C.F.R. § 232.1, are reproduced in an Addendum to this brief.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because this is an appeal of a final decision of The United States District Court. The District Court's jurisdiction was predicated on 28 U.S.C. § 1331, which provides jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. This appeal was filed on October 8, 2010.

STATEMENT OF THE CASE

Plaintiffs, appellants here, are individuals and organizations that have long used sidewalks on USPS property as a principal forum for circulating petitions to place initiatives and referenda on state and local election ballots. On June 1, 2000, Plaintiffs filed this First Amendment challenge to 39 C.F.R. § 232.1(h)(1)—a USPS regulation that prohibited "soliciting signatures on petitions, polls, or surveys" on USPS property. Plaintiffs challenged the regulation both on its face and as applied to their petitioning activities.

To avoid a motion for a preliminary injunction, USPS agreed to suspend the ban pending the District Court's decision on expedited cross-motions for summary judgment. The District Court, however, denied the cross-motions for lack of

sufficient evidence to render a judgment. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp. 2d 65 (D.D.C. 2000) (Roberts, J.) ("*IRI I*"). Plaintiffs then amended their complaint with facts about specific post offices where they had been prevented from engaging in petitioning activities.

Following discovery, the parties completed briefing on renewed cross-motions for summary judgment in September 2002. At argument, USPS offered to adopt a narrower interpretation of the ban if the District Court would uphold its constitutionality—but USPS did not implement any change while awaiting decision. Fifteen months later, on December 31, 2003, the District Court issued a decision ordering USPS to adopt its proffered new interpretation and circulate it internally, and sustaining the regulation as so interpreted. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 297 F. Supp. 2d 143, 152-53 (D.D.C. 2003) ("*IRI II*"). Plaintiffs appealed.

On August 9, 2005, this Court reversed the District Court. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005) ("*IRI III*"). This Court held that the USPS regulation "cannot be upheld as a time, place or manner restriction of speech if applied in a public forum." *Id*. at 1312. The Court held that Section 232.1(h)(1) is not narrowly tailored and does not leave open ample alternative channels for communication within the forum. *Id.* at 1307-12. It also found that the District Court had erred in allowing USPS to change its interpretation of the regulation only through a notice published in an internal

bulletin for postal managers, without distribution to the public in the *Federal Register*, an act that was failed to remove the regulation's express prohibition against "soliciting" signatures on "all postal property," and did nothing to remove the chilling effect of those plain words on First Amendment activity. *Id.* at 1316-18. This Court also reversed the District Court's holding that Plaintiffs could sustain their facial challenge only by proving that the ban was unconstitutional in every application. *Id.* at 1312. Instead, this Court held that the ban would be unconstitutional on its face if it encompassed a "substantial" or "good number" of postal sidewalks constituting traditional public forums; instructed that, at a minimum, sidewalks running alongside public streets must be considered traditional public forums; and therefore remanded to the District Court to determine whether the number of traditional public forums within the scope of the ban is "substantial." *Id.* at 1313-14.[1]

Upon issuance of the mandate, on November 22, 2005, Plaintiffs moved for summary judgment consistent with this Court's opinion on the existing record. [R. 103.[2]] USPS thereupon amended the regulation, *inter alia*, to remove perimeter sidewalks from the scope of the ban and, thereafter, filed an opposition and cross-

---

[1] This Court noted, however, that the question regarding sidewalks running alongside public streets "*may* be pretermitted" by amendment of the regulation. *Id.* at 1318 (emphasis added).

[2] "R.__" refers to the District Court docket entry assigned to the cited document. "A.__" refers to the cited page of the Joint Appendix.

motion contending that Plaintiffs' challenge to the regulation had been rendered moot. [R. 108.] Plaintiffs opposed the cross-motion regarding mootness, [R. 112], and moved alternatively for summary judgment based only on the public forum status of *non*-perimeter post office sidewalks, which was not even arguably mooted by the amendment to the regulation. [R. 110.]

The District Court never scheduled oral argument. On October 30, 2006, Plaintiffs requested a temporary restraining order or preliminary injunction because at least one of their members was being threatened with arrest for attempting to solicit signatures on non-perimeter sidewalks. [R. 122.] At the hearing, Judge Roberts indicated a desire to augment the record and suggested a survey of postal managers to that end, meanwhile taking Plaintiffs' motion for preliminary relief under advisement. [A. 956-67.] Obtaining no ruling over the next seven months, Plaintiffs withdrew their motion for preliminary relief as moot on June 14, 2007. [R. 130.] On July 31, 2007, Judge Roberts, *sua sponte*, denied the 2005 cross-motions for summary judgment without prejudice.

After negotiating and implementing a survey as Judge Roberts requested, the parties renewed their cross-motions for summary judgment on April 15, 2008. [R. 142, 143.] The District Court did not schedule argument on the cross-motions. Fourteen months later, on June 4, 2009, Plaintiffs filed a formal request that the District Court enter judgment. [R. 155.] After another fifteen months, on September 8, 2010, the District Court finally granted summary judgment in

USPS's favor. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 741 F. Supp. 2d 27 (D.D.C. 2010) ("*IRI IV*"). This appeal followed.

STATEMENT OF THE FACTS

A. The USPS Regulation

On June 25, 1998, USPS amended its regulation governing conduct on postal property, 39 C.F.R. § 232.1, to prohibit "soliciting signatures on petitions, polls, or surveys (except as otherwise authorized by Postal Service regulations), and impeding ingress to or egress from post offices . . . ." *Id.*, § 232.1(h)(1). As promulgated in 1998, the regulation applied to "all real property under the charge and control of the Postal Service", *id.*, § 232.1(a), including sidewalks on USPS property. Violators were subject to punishment by fine or imprisonment. *Id.* § 232.1(p)(2).

USPS justified this prohibition by citing its "experience" that the solicitation of signatures disrupts postal business. 62 Fed. Reg. 61481 (Nov. 18, 1997). It admitted in litigation, however, that it had conducted no investigation and had no record to show that such solicitation disrupts postal operations. [A. 154-59, 269; R. 38 at 2.] Moreover, although it had imposed a sweeping ban on *all* signature-gathering for petitions, USPS stated in its District Court briefing that, in its view, signature gathering on petitions is only "*at times* disruptive, . . . *occasionally* give[s] the appearance of bias or partiality on the part of the USPS, and . . . at times

require[s] postal employees to spend too much of their time on nonpostal business." [R. 67 at 36 (emphasis added).]

Section 232.1(h)(1) specifically exempts voter registration drives from its prohibition. Although the basis for this exemption was not stated in the *Federal Register* notice, in its briefing USPS explained that, in its view, voter registrars gather signatures "passively," without asking postal patrons to stop, listen to a request, and act upon it. [R. 71 at 26.] But USPS offered no evidence to suggest that its supposition was accurate.[3]

B. Plaintiffs' Protected Interest

Plaintiff individuals and organizations have engaged and intend to continue engaging in petitioning activities. Before Section 232.1(h)(1) was promulgated, post office sidewalks were a principal forum for these activities. Plaintiffs have used post offices because, among other things, they are uniquely suited to assuring that patrons reside within the local area defined by the zip code, allowing Plaintiffs to comply with residency and geographic distribution requirements prevalent under most states' ballot access laws. [A. 212-14, 283-84.] The record, including the deposition testimony of USPS's own expert, shows that post offices have been

[3] Although USPS defended the exception for voter registration on the ground that the mere collection of signatures was inoffensive because postal patrons were not subjected to supposedly annoying solicitations, [R. 71 at 26], upon amending the regulation, USPS eliminated the basis for this distinction, ironically allowing petition advocates to *solicit* but not passively *collect* signatures—the very act that voter registrars may still perform.

used for expression protected by the First Amendment since colonial times. [*See infra* pages 31-36 and A. 71-72, 76-77, 83, 87-91, 125, 142, 352-60, 601, 606a.] Post offices listed in the Amended Complaint had served repeatedly as public forums for petitioning and other conduct protected by the First Amendment over the preceding years, [*see infra* pages 26-31 and *see generally* A. 200-04, 231-33, 241-52, 265-66, 487-88, 523-29, 535, 546], and their configurations are sufficient to accommodate petitioning without impeding their use for regular postal business. [*See* R. 65, Exh. 22A, 22B, 23A, 24A, 25B; A. 428, 442.] Further, many post offices, because of their rural locations, provide the only local sidewalks available for First Amendment activity. [A. 237-38.] However, the ban excluded Plaintiffs from all of these forums, leading them to file this lawsuit.

C. The Proceedings Pertinent To This Appeal

Following the District Court's denial of the parties' original cross-motions for summary judgment, *IRI I*, 116 F. Supp. 2d 65, the parties conducted extensive discovery to develop an undisputed factual record sufficient to permit summary judgment by the District Court. In its briefing papers, USPS offered for the first time to publish in its *Postal Bulletin*, an internal publication relaying guidance to postal employees, a twofold modification of its previous interpretation of the challenged rule. Whereas previously USPS had interpreted the rule—consistent with its plain and express language—to prohibit *asking* for signatures on *all* post office property, USPS now offered: (1) to prohibit only the actual *collection* of

signatures; and (2) to limit enforcement of the ban to sidewalks which were "easily distinguishable" from non-postal property "by means of some physical feature." *IRI II*, 297 F. Supp. 2d at 152-53. But USPS did not actually adopt these changes; instead, it offered to make them ***if*** doing so would cause the District Court to uphold the regulation against constitutional challenge. As noted, after extended deliberations Judge Roberts ordered USPS to adopt and circulate its proffered new interpretation in the *Postal Bulletin*, and sustained the regulation as so interpreted. He held, among other things, that Plaintiffs' First Amendment facial challenge could not be sustained because Plaintiffs could not adduce evidence that the prohibition was unconstitutional in every application at all 34,000 post offices nationwide, and that because the ban would be a reasonable time, place and manner restriction even in a public forum, it was unnecessary to reach the forum status of the sidewalks within the scope of the regulation.

After this Court reversed the District Court on each of these points and remanded for a determination whether a substantial number of "perimeter" sidewalks were within the scope of the ban, *IRI III*, 417 F.3d at 1312-14, Plaintiffs moved for summary judgment on remand. [R. 103.] USPS thereupon amended the rule, and argued in its opposition and cross-motion that Plaintiffs' challenge was now moot. [R. 108, 114.] As amended, the ban now excludes sidewalks running alongside public streets at the perimeter of post office property, 39 C.F.R. § 232.1(e), and no longer prohibits "soliciting" signatures on postal sidewalks,

although it continues to impose criminal sanctions for "collecting" signatures there. *Id.* § 232.1(h)(1).

At argument on Plaintiffs' October 30, 2006 motion for a temporary restraining order or preliminary injunction, the District Court continued to express concern about enjoining the regulation on its face without developing a factual record reaching all post offices, [A. 894-98], notwithstanding this Court's instructions in *IRI III* that the ban must be struck down as overbroad if it infringed constitutionally protected speech in a "substantial" or "good number" of cases. As noted, Judge Roberts encouraged the parties to cooperate to develop a "creative" solution to augment the record of expressive conduct on all postal sidewalks, and suggested a survey of postmasters to develop such a record. [A. 956-67.]

Over the ensuing months, the parties negotiated the terms of a survey of postal managers. On August 3, 2007, they reported to the District Court regarding the terms and protocols for an agreed survey to be sent to all postal managers. [R. 131.] The survey requested postal managers to describe the relative frequency of expressive activity, including the circulation of petitions, on four categories of sidewalks within postal property: (1) traditional perimeter sidewalks running alongside the street frontage of post office property; (2) "access sidewalks" perpendicular to the public street and leading to the front entrance of the post office; (3) sidewalks running along the side of the postal building and set apart from the public thoroughfare; and (4) any other sidewalk. [*Id.*]

Thereafter, USPS attempted to implement the survey, but discovered that it was impracticable to survey all postal managers nationwide. Therefore, USPS requested the Plaintiffs' agreement that the protocols be modified to allow polling of a representative subset of the entire population. The parties negotiated protocols to allow distribution of the survey to a representative subset constituting 13.78% of all postal managers. They reported the new protocols to the District Court. [R. 132.]

The parties reported the survey results to the District Court on February 22, 2008. [R. 138.] They renewed their cross-motions for summary judgment on April 15, 2008. [R. 142, 143.] In its September 8, 2010 ruling, the District Court held, on the basis of undisputed material facts, that Plaintiffs had not met the burden of showing that non-perimeter post office sidewalks were traditional public forums, the survey results were not "statistically significant," and Plaintiffs' request for an injunction regarding "perimeter" post office sidewalks was moot. Accordingly, the court granted summary judgment in USPS's favor. *IRI IV*, 741 F. Supp. 2d 27.

SUMMARY OF THE ARGUMENT

Even as amended, Section 232.1(h)(1) continues to impose a severe and unjustified burden on the exercise of core First Amendment rights in thousands of traditional public forums across the nation.

1. Because the undisputed evidence shows that interior post office sidewalks are generally traditional public forums, this Court should reverse the District Court's contrary decision and strike the regulation down as facially overbroad. This Court already has held that, because Section 232.1(h)(1) is not narrowly tailored and does not leave open ample alternative channels for communication, it is facially unconstitutional if it applies to a substantial number of postal sidewalks constituting public forums. *IRI III*, 417 F. 3d at 1312. Whether non-perimeter post office sidewalks are traditional public forums is a question that the Supreme Court explicitly left open in *United States v. Kokinda,* 497 U.S. 720 (1990), and that this Circuit has not yet answered.

In the decision on remand, the District Court improperly disregarded the established First Amendment presumption that public "sidewalks, without more," are quintessential public forums, and therefore erroneously placed the burden of proof on Plaintiffs to show that they are public forums, rather than requiring USPS to bear the burden of proving that postal sidewalks are an exception to the rule.

The District Court held as a matter of law that the sidewalks to which the amended regulation applies are outside the presumption simply because they do not

run alongside public streets and are therefore "distinct" from "classical variety" sidewalks. But no such exception—or terminology—exists in First Amendment jurisprudence, and such an exception is contrary to both Supreme Court and D.C. Circuit precedent.

2. Even if there were no constitutional presumption in Plaintiffs' favor, the undisputed evidence established that non-perimeter postal sidewalks are traditional public forums. Traditional public forums are those "which by long tradition or by government fiat have been devoted to assembly and debate," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). As USPS has admitted, the very reason the ban exists is the agency's perception that signature gathering has long been a pervasive activity on post office sidewalks. Moreover, an ample record of historical documentation, the fact and expert testimony and declarations on both sides of the case, and the parties' joint survey of post office managers, all demonstrated that interior post office sidewalks are traditional public forums. Significantly, the record contains no evidence whatsoever to suggest that post office sidewalks are *not* public forums. Indeed, USPS's own expert, Professor Richard John, offered testimony consistent with the conclusion that sidewalks on postal property generally are public forums. This Court's caselaw belies USPS's contention that the mere separation of sidewalks from public thoroughfares is enough to defeat their public forum status.

Even if interior postal sidewalks were not public forums, the regulation fails

the First Amendment reasonableness test. There is no "reasonable fit" between the purported ends of the regulation and the sweeping means adopted to achieve them. Indeed, those ends are more adequately met by other existing USPS regulations.

3. The District Court also erred in ruling that Plaintiffs' request for an injunction enforcing this Court's 2005 ruling was mooted by USPS's subsequent amendment of the regulation. The Supreme Court has warned that voluntary cessation of illegal conduct does not render a case moot. To obtain a finding of mootness, a heavy burden of proof lies on USPS to demonstrate that there is no reasonable expectation that the wrong will be repeated. Where, as here, USPS never conceded that its ban was unconstitutional, did not amend its regulation until after this Court's rulings indicated that amendment was the only way to avoid an adverse judgment, and has never stated that it will not reimpose the ban, such evidence of the agency's willingness, for tactical reasons, to change positions merely—and only enough—to make this case go away is not sufficient to establish that the challenge is moot. Moreover, Plaintiffs retain an important interest in entry of an injunction so that USPS will take effective measures to enforce its mandate at all 34,000 post offices, and the issue will not have to be litigated all over again in a few years simply because institutional memory has faded.

STANDARD OF REVIEW

As USPS already has acknowledged, [Doc. 1283746 at 9], this Court's review of the legal questions at issue is *de novo*. *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1134 (D.C. Cir. 2001). In First Amendment cases, an appellate court has an obligation to make an independent assessment of the record. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11 (1984).

ARGUMENT

INTRODUCTION

At the heart of this case is an unresolved constitutional question—whether public sidewalks on post office property that do not run alongside a public street constitute public forums for First Amendment activity. A USPS regulation subjects individuals to criminal penalties for engaging, on such sidewalks, in the core First Amendment activity of "collecting signatures on petitions, polls, or surveys." 39 C.F.R. § 232.1(h)(1). The plaintiff organizations and individuals, representing a diverse array of causes, have for many years circulated petitions for signature by interested persons on sidewalks that are open to the general public but lie within USPS property lines.

This is the second time this case has come before this Court. In August 2005, this Court determined that the challenged regulation "cannot be upheld as a time place or manner restriction of speech if applied in a public forum." *IRI III*,

417 F.3d at 1312. "There is no question," this Court emphasized, "that 'the solicitation of signatures for a petition involves protected speech'" which "'is at the core of our electoral process and of the First Amendment freedoms—an area of public policy where protection of robust discussion is at its zenith.'" *Id.* at 1305 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 n.5, 425 (1988)). The Court held that Section 232.1(h)(1) is not narrowly tailored, *id.* at 1307-10, and that it does not leave open ample alternative channels for communication within the forum. *Id.* at 1310-12. Therefore, it held that the ban would be unconstitutional on its face if it encompassed a substantial number of postal sidewalks constituting traditional public forums; instructed that, at a minimum, sidewalks within post office property running along the street frontage (*Grace* sidewalks) must be considered traditional public forums[4]; and remanded to the District Court to determine whether the number of public forums within the scope of the ban is "substantial." *Id.* at 1313.

After Plaintiffs had filed a new motion for summary judgment on remand, USPS amended its regulation to exclude *Grace* sidewalks from the scope of the prohibition. But that amendment did not resolve Plaintiffs' challenge, for the current version of Section 232.1(h)(1) continues to ban signature gathering on all

[4] The Supreme Court held that such perimeter sidewalks are traditional public forums in *United States v. Grace*, 461 U.S. 171 (1983). In *United States v. Kokinda*, the Supreme Court considered, but did not resolve, whether a post office sidewalk that is neither at the perimeter of the property nor adjacent to the public roadway was a traditional public forum. 497 U.S. 720 (1990). For convenience, we sometimes refer hereafter to perimeter sidewalks as *Grace* sidewalks and non-perimeter sidewalks as *Kokinda* sidewalks.

post office sidewalks that do not run along the street frontage, such as those leading to door or along the front of the building, which are also traditional public forums. Often these are the only sidewalks on the property, or nearby.

The forum status of non-perimeter post office sidewalks remains an open constitutional question. In *United States v. Kokinda*, which involved a ban on collecting alms and contributions on postal property, the Supreme Court did not resolve this question. Four Justices were of the view that an interior sidewalk at the post office in Bowie, Maryland was not a public forum and the ban could be upheld on that ground. 497 U.S. at 730, 737. An equal bloc of four Justices were of the view that this interior postal sidewalk *was* a public forum and the ban must be struck down. *Id.* at 740. The ninth voter, Justice Kennedy, cited the "powerful argument" that the sidewalk in question was a traditional public forum, and assumed it was for the sake of decision. *Id.* at 737 (Kennedy, J., concurring). But he thought a personal solicitation to engage in an immediate exchange of money in a public place was disruptive enough to survive the applicable "time, place or manner" test even in a traditional public forum. *Id.* at 738-39. That is the only holding of the case. *See Marks v. United States*, 430 U.S. 188, 193 (1977). In so ruling, Justice Kennedy stressed that the regulation still allowed wide berth for other expressive activities—which then included the signature collecting subsequently banned by the regulation at issue here. *Kokinda*, 497 U.S. at 738-39. Thus, as the District Court observed and this Court agreed, *Kokinda* "provides no

definitive guidance," leaving the issue to be "determine[d] anew." *IRI I*, 116 F. Supp. 2d at 70; *IRI III*, 417 F.3d at 1313.

The undisputed material facts—including extensive historical literature, the deposition testimony and affidavits of USPS officials and employees, petition circulators, experts on both sides, and the results of a postmaster survey that was conducted at the District Court's suggestion—confirms that at least a substantial number of *Kokinda* sidewalks, like *Grace* sidewalks, are traditional public forums. Section 232.1(h)(1)'s ban on signature gathering, therefore, should be struck down because of the facial overbreadth that this Court already has identified.

I. THE POST OFFICE SIDEWALKS AT ISSUE IN THIS CASE ARE TRADITIONAL PUBLIC FORUMS

For purposes of First Amendment analysis, government property may be considered a traditional public forum, a designated public forum, or a nonpublic forum. *IRI III*, 417 F.3d at 1305-06. Public forums are those "which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Public parks, streets, and sidewalks are "prototypical" public forums because they have "'immemorially been held in trust for the use of the public, and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Indeed, the status of public property as a sidewalk establishes,

"without more," that it is a traditional public forum. *Grace*, 461 U.S. at 177.[5]

Thus, decisions that make as-applied exceptions to this rule are properly understood as situations in which the government has overcome the operative presumption by reference to the specific characteristics of the property in question, such as its inclusion in an "enclave" clearly demarcated as an area where First Amendment activity may be excluded. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (enclosed military installation could properly exclude First Amendment activity from sidewalks within enclave).

Traditional public forums occupy a "special position in terms of First Amendment protection." *Grace*, 461 U.S. at 180. Rules limiting the time, place or manner of speech on such property will be upheld only if they are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *Perry*, 460 U.S. at 45.

As we show below, the District Court improperly disregarded the operative First Amendment presumption by holding, based on no special showing by USPS, that *Kokinda* sidewalks are a traditional public forum. Moreover, even if the presumption were to the contrary, the undisputed material facts show that *Kokinda*

---

[5] Indeed, even privately-owned sidewalks that are open to the public may be public forums for First Amendment purposes. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (sidewalk fronting post office in company-owned town); *United Church of Christ v. Gateway Economic Dev. Corp.*, 383 F.3d 449 (6th Cir. 2004); *Venetian Casino Resort L.L.C. v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937 (9th Cir. 2001).

sidewalks are traditional public forums.

A. Non-Perimeter Public Sidewalks, Like All Other Sidewalks, Are Presumptively Traditional Public Forums

The Supreme Court has established a presumption that public sidewalks are public forums. *See Grace*, 461 U.S. at 177; *accord Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) (there is a "working presumption that sidewalks, streets and parks are normally to be considered public forums"); *Oberwetter v. Hilliard*, No. 10-5078, slip op. at 9 (D.C. Cir. May 17, 2011) (same). Quoting *Grace*, this Court again noted that presumption in *IRI III*: "'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, *without more*, to be 'public forums.'" 417 F.3d at 1305 (quoting *Grace*, 461 U.S. at 177) (emphasis added; brackets in original). Indeed, this Court stated that "[s]idewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, *generally without further inquiry*, to be public forum property." *Id.* at 1313 (quoting *Grace*, 461 U.S. at 179) (emphasis added); *accord Frisby v. Schultz*, 487 U.S. 474, 480 (1988) ("'Time out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum."). Thus, under *Grace* and the law of this case, all public sidewalks—including those on post office property—are presumptively public

forums.

The government may adduce evidence regarding the special characteristics of a particular sidewalk to overcome this presumption. To put it in the Supreme Court's words, such evidence would be the "further inquiry" that may remove the operative presumption that a sidewalk, street, or park is a public forum. *Grace*, 461 U.S. at 177, 179. But "without more," all sidewalks are presumptively public forums in the first instance. *Id.* And to prevail on summary judgment, USPS would have to show that the undisputed material facts in the record supported the conclusion that postal sidewalks are an exception to the rule.

But the District Court applied the wrong rule of law here, creating and applying its own exception to the presumption confirmed in *Grace*. After initially stating—correctly—that "[a] sidewalk is generally presumed to be a public forum because, like streets and parks, it has historically been a setting for free speech," 741 F. Supp. 2d at 33, it held that "the sidewalks to which the regulation still applies—which are by definition physically distinct from 'classical variety' sidewalks—are not subject to the presumption that they are public forums." *Id.* at 36. In denying that the presumption applies to all sidewalks, the District Court reasoned that "the government bears the burden of showing that sidewalks are not public forums only for sidewalks of the 'classic variety,' which *Kokinda* sidewalks are not, since they are physically distinguishable from public sidewalks." *Id.* at 33

n.8 (internal citation omitted).[6] In sum, Judge Roberts created the following exception to the presumption pronounced by the Supreme Court in *Grace*: A sidewalk that is physically distinguishable from a "classic variety" sidewalk is not presumed—in the first instance—to be a public forum.

No such exception exists in First Amendment jurisprudence. Such an exception is, in fact, contrary to both Supreme Court and D.C. Circuit precedent. In carving out its exception, the District Court relied solely on *Henderson v. Lujan*, *see id.* at 33 n.8, 36, but *Henderson* lends no support. In *Henderson*, this Court held that two sidewalks *within* the boundaries of the Vietnam Veterans Memorial *were* public forums. 964 F.2d at 1183. In fact, this Court held that one of the sidewalks was a public forum notwithstanding that it was (1) interior to another perimeter sidewalk, and (2) set apart from the boundary line of the Memorial (the south curb of Constitution Avenue) by a 13-foot wide service road. *Id.* at 1181-82. Far from recognizing the exception divined by the District Court, the *Henderson* court applied the constitutional presumption to the interior sidewalk, reasoning, *inter alia*, that "[g]enerally, because of their historical association with the exercise of free speech, streets, parks, and sidewalks are often viewed as quintessential examples [of public forums]." *Id.*

In holding that the presumption did not apply in this case, the District Court

[6] In so holding, the District Court made the incorrect assumption that post office sidewalks are not "public sidewalks." Of course, they are open to every member of the public, without exception.

relied solely on its misreading of a single sentence in *Henderson*: "the sidewalks' apparent similarity to ones of the classic variety at a minimum put the burden on the government to show that the use was overwhelmingly specialized." *Id*. (cited in 741 F. Supp. 2d at 33 n.8). The District Court appears to have read that sentence to mean that *only* sidewalks of the "classic variety" are presumptively public forums. But that reading fails on its own terms. The sentence expressly recognizes that the "similarity" of sidewalks that do not abut streets to "classic variety" can make it appropriate to place the burden on the government to show the absence of a public forum. The District Court overlooked this obvious holding in looking for a subtext. Moreover, a full reading of *Henderson* and *Grace* cures the District Court's misinterpretation.

The *Henderson* court's support for the sentence that formed the basis for the District Court's opinion was *Grace*, in which the Supreme Court held—without citing any limitation or exception—that "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, *without more*, to be 'public forums.'" *Henderson*, 964 F.2d at 1182 (quoting *Grace*, 461 U.S. at 177) (emphasis added in *Henderson*). Tellingly, the *Henderson* court later repeated that presumption without limitation or exception: "[T]radition operates at a very high level of generality, establishing a *working presumption* that sidewalks, streets and parks are normally to be considered public forums." *Id.* (emphasis added). The court noted that only "when government has

dedicated property to a use inconsistent with conventional public assembly and debate" can the property be removed from its presumptive classification as a public forum. *Id.; accord Oberwetter*, slip op. at 10 (commemorative purpose of Jefferson Memorial rotunda "incompatible" with its use as a public forum). Thus, *Henderson*—like *Grace*—provides that sidewalks of any type (like streets and parks of any type) are presumptively public forums in the first instance.

The District Court's misinterpretation alters that presumption drastically. Again, the *Grace* Court held that "'public places' historically associated with *the free exercise of expressive activities*, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" 461 U.S. at 177 (emphasis added). The District Court effectively changed that presumption to: public places historically associated with *the passage of persons through a thoroughfare that borders a street* are considered, without more, public forums. That is not what the Supreme Court held in *Grace*, nor is it consistent with the First Amendment and existing case law, including *IRI III*. Indeed, if, as the District Court held, the presumption applied only to "classic variety" sidewalks, the presumption would be a nullity, since "classic variety" sidewalks already are public forums *as a matter of law*. *See Grace*, 461 U.S. at 177-80.

The District Court's error was not harmless; it was dispositive. The District Court did *not* conclude that undisputed physical characteristics of non-*Grace* sidewalks on USPS property removed their presumptive status as public forums.

Rather, it relied on those physical characteristics to hold that there is no presumption of public forum status in the first place. *IRI IV*, 741 F. Supp. 2d at 33 n.8, 36. As a result, the District Court improperly shifted the burden to Plaintiffs to prove that sidewalks *are* a public forum, and ultimately held that Plaintiffs failed to meet that burden.[7] Thus, the evidentiary deficiencies the District Court believed existed (*e.g.*, that conclusions could not be drawn from evidence that did not distinguish between *Grace* and non-*Grace* sidewalks) should have been held against USPS, *not* Plaintiffs, as USPS bears the burden to overcome the presumption that sidewalks are public forums.[8]

---

[7] *See id*. at 29 ("plaintiffs have not shown that the interior sidewalks . . . are public forums"), *id.* at 36-37 (plaintiffs must "demonstrate that a substantial number of these sidewalks are public forums by pointing to their past usage as gathering places to promote 'the free exchange of ideas'"), *id.* at 39 ("plaintiffs have not shown that a substantial number of *Kokinda* sidewalks are public forums"), *id*. at 41 (plaintiffs have not "carried their burden" to demonstrate "that a substantial number of *Kokinda* sidewalks are public forums").

[8] *See id*. at 37 ("Because the surveyed post offices do not provide a statistically valid sample of post offices nationwide, it is impossible to extrapolate from the data conclusions about the frequency of expressive activity on the entire population of *Kokinda* postal sidewalks"); *id.* (lack of dates of expressive activity in survey responses "prevent[s] a determination that any of the various properties has been a site of expressive activity of sufficient historical regularity to be considered a public forum"); *id.* ("the plaintiffs cannot rule out the possibility that any decline in expressive activity took place largely—or even solely—on *Grace* sidewalks"), *id*. at 38 n.11 ("With respect to the exemplary post offices, most of the evidence the plaintiffs cite similarly fails to distinguish between expressive activity that took place on *Grace* sidewalks and expressive activity that took place on *Kokinda* sidewalks."), *id*. at 38 n.14 ("While the plaintiffs point to other anecdotal evidence in the record . . . none of this evidence distinguishes between *Grace* and *Kokinda* sidewalks," and because "plaintiffs cannot demonstrate with reasonable

Placing the burden on USPS comports with the Supreme Court's frequent observation that "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010) (internal citations and quotation marks omitted). "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007). Accordingly, where, as here, the material facts were undisputed, any remaining uncertainty regarding the status of these public sidewalks should have resulted in a ruling that USPS failed to overcome the presumption that they are, without more, public forums.

B. The Record Evidence Reinforces That *Kokinda* Sidewalks, Like Sidewalks Generally, Are Traditional Public Forums

Even if there were no constitutional presumption in Plaintiffs' favor, the undisputed evidence established that non-perimeter postal sidewalks are traditional public forums. Plaintiffs presented comprehensive, wholly undisputed evidence that such sidewalks, like sidewalks generally, are traditional public forums. An ample, uncontroverted historical record, the fact and expert testimony and declarations on both sides of the case, and the parties' joint survey of post office managers, all demonstrated that *Kokinda* sidewalks are traditional public forums.

---

certainty that individuals have not confined their expressive activities on postal properties exclusively or even largely to *Grace* sidewalks, this evidence is insufficient to demonstrate that *Kokinda* sidewalks are public forums").

1. Overwhelming And Undisputed Testimonial Evidence Demonstrates That *Kokinda* Sidewalks Are Widely Used For Expressive Activity

It is significant that the very reason the ban exists is USPS's perception that signature gathering had been pervasive and longstanding at post offices. Plaintiffs offered voluminous evidence that post offices and postal sidewalks are traditional public forums. Neither the documentary and testimonial evidence obtained from USPS nor the historical record provides any indication that expressive activities have traditionally occurred only on *Grace* sidewalks, or that *Kokinda* sidewalks have ever been viewed as areas where speech is off-limits. To the contrary, the evidence establishes that, when it comes to speech, postal sidewalks are public sidewalks, whether or not they happen to run alongside a street.

At deposition, the official responsible for promulgating the ban, USPS Manager for Retail Operations Frederick Hintenach, testified that it was adopted because petition circulation was such "a regular thing" on postal sidewalks. [Hintenach Dep. at 157 (A. 186).] Discussing a group exhibit comprising multiple USPS form letters permitting various groups to circulate petitions on sidewalks outside an Arizona post office, [A. 200-04], Hintenach testified:

> [I]f you look at all of these, these are all in one geographic location, which really highlights the number of times we've had to interact with one postal district where we've had it be intrusive to the customer, in my opinion.
>
> One week I'm being asked about border rights. The next week I'm being asked about Proposition 2000. The next week I'm being

> asked about citizen's right to vote. The next week I'm asking for—so I'm constantly being asked to sign different petitions.
>
> Q. Recognizing that, in fact, this is a period of five and a half years covered by these six letters—
>
> A. *Yeah, but my point is this is just the ones you have. . . . So there are others that occur. My point is it shows you how often it did occur.*

[Hintenach Dep. at 156-57 (A. 186) (emphasis added).]

Likewise, Plaintiffs' expert, Fred G. Kimball, the proprietor of a petition management firm, testified that USPS sidewalks had been *the* primary venue for petition circulators for at least 30 years preceding the regulatory ban. [Kimball Dep. at 26-28 (A. 212).] Kimball testified: "Through my experience in training people, the first place, especially when it comes to municipal elections or municipal election drives, [the] post office is always number one." [*Id.* at 27 (A. 212).] He testified that postal patrons are more likely to be receptive to petitions than patrons in other high-traffic locations. [*Id.* at 35-36 (A. 214).] And he explained that circulators focus on post offices because they provide a unique screening function, ensuring that a higher proportion of petition signers are registered voters and residents of the locality, consistent with state qualification and geographic distribution requirements. [*Id*. at 32-35, 50-51 (A. 213-14, 217).]

Likewise, Wayne Pacelle, then Executive Vice President (now President) of Plaintiff Humane Society of the United States, testified that his organization instructs petition circulators to use post offices, certain stores and public events

where there is a slow, steady stream of pedestrian traffic. [Pacelle Dep. at 42-43 (A. 232-33).] Among the exemplary post offices listed in the complaint, Mr. Pacelle testified that his organization had petitioned at the Salem, Oregon post office on previous occasions before the incident in which its circulator was asked to leave. [*Id*. at 39-40 (A. 231).] Mr. Pacelle also testified that his organization petitioned at the Tempe, Arizona post office for an anti-cockfighting measure. [*Id.* at 44-45 (A. 232-33).]

And Paul Jacob, then National Director of Plaintiff U.S. Term Limits, testified that he had supervised and participated in petitioning activity at the Georgetown post office in 1994. [Jacob Dep. at 46 (A. 262A).] In addition, he testified that he had both distributed and received leaflets from others there. [*Id.* at 60 (A. 263).] Indeed, he testified that his organization's campaigns had reached virtually *every* post office in each state where term limits measures had been proposed. [*Id.* at 84-85 (A. 265-66).]

Plaintiffs cited 12 exemplary post offices in their complaint. The deposition testimony of postal managers at each location and petition circulators who had appeared at a number of the locations showed that the post offices regularly experienced a wide variety of petitioning, picketing, leafleting, and other First Amendment activities.[9] There is little doubt that this testimony represented only a

[9] *See*, *e.g.*, Lents Dep. at 31, 42 (A. 241-42) (two separate previous occasions of petitioning known to the Allegan postmaster); Bechtel Dep. at 51 (A.

fraction of the total, and other expressive activities occurred on sidewalks surrounding these post office properties which, because of the generally unintrusive nature of the activity, have passed unnoticed by postal authorities.[10]

As noted, the record includes copies of five letters that Tempe, Arizona postmasters issued between 1992 and 1995, granting permission to individuals requesting the use of postal sidewalks for petitioning activities. [A. 200-04.] Significantly, the letters follow the same wording and general format, suggesting that they were generated from a form, created in anticipation that such requests would be received and granted on a routine basis. The record also includes a formal policy statement issued by the North and Central Florida postal district from the early 1990s, which allowed petitioning on post office property, and recited that a similar statement would be issued by the South Florida postal district which, on information and belief, includes the Oakland Park post office. [A. 206.]

---

246) (three previous occasions of petitioning known to the Belleville postmaster); Farrell Dep. at 21-23 (A. 248-50) (nine previous occasions of petitioning, in all, known to Great Falls postmaster).] The postmaster in Great Falls also cited a right-to-life protest and counter-protest, which occurred in front of the post office and on the facing sidewalk across the street. [Farrell Dep. at 24 (A. 251).]

[10] *See, e.g.*, Sullivan Decl. ¶ 8 (A. 248) (because declarant cannot see sidewalks he learns of petitioning only when told); Klosterman Decl. ¶ 6 (A. 583-84) ("From my office, I cannot see what is going on outside of the building, so I am not aware of the presence of signature gatherers until a customer complains . . . ."); Koch Decl. ¶ 4 (A. 534) (similar).

2. There Is Extensive Evidence Of The Pervasive Historical Use Of Post Office Sidewalks For Expressive Activity

Nor is the documentation only of recent vintage. Rather, there is an extensive and remarkably consistent historical record, which establishes that postal property has existed "time out of mind" as a forum for expressive activity.

A former director of the National Postal Museum, James Bruns, wrote that U.S. post offices, housed originally in "the most frequented coffee-house in the most publick part of town," were a "headquarters of life and action, the pulsating heart of excitement, enterprise, and patriotism." [James H. Bruns, *Great American Post Offices* 3 (1998) (A. 711) (internal citation and quotation marks omitted).] In later years, he wrote, post offices continued to function as "places to gather and find out what was happening elsewhere in the district." [*Id.* at 48 (A. 712).]

USPS's own expert, an historian specializing in the history of the Postal Service, confirmed that post offices have been central forums for the exchange of information and political debate from the beginnings of the Republic. Professor Richard John testified that "[t]he post office was in the early republic, a frequented destination for the transaction of postal business. Merchants would, while transacting postal business, discuss the latest news, gossip, and the like." [John Dep. at 36-37 (A. 87).] The government, through postal policy, "created a new kind of informational environment in which ordinary Americans could get access to up-to-date information on commerce and public affairs . . . ." [*Id.* at 52-53 (A.

91).] As Professor John's testimony makes clear, this "informational environment" extends well beyond the transmittal of correspondence. Professor John has written:

> Throughout the United States, the local post office was far more than the place where you went to pick up your mail. It was a favorite gathering place for merchants, tradesmen, and other men of affairs . . . . In rural localities like Concord, Massachusetts, it was one of the "vitals of the village," as Thoreau observed. In state capitals, it was invariably the best place to feel the political pulse of the country. "The post office was thronged for an hour" before the arrival of the mail, reported one New York public figure in 1820, and "everyone stood on tip toe" to hear the latest news. And in the major commercial centers, it was the place where, as one postal clerk aptly put it, the leading men of the day "most do congregate."

[Richard R. John, *Spreading the News* at 161-62 (1995) (footnotes omitted) (A. 355-56); *accord* John Dep. at 39-40 (A. 88) (affirming statement).]

Professor John found it instructive to analyze a contemporaneous painting depicting a scene in an early post office, John Krimmel's *Village Tavern* (A. 352-53). The painting depicts postal patrons reading newspapers received through the mail and engaged in discussion at a stage-house tavern and post office. Professor John and a co-author wrote, "In post offices throughout the country, as Krimmel so vividly suggests, ordinary Americans talked loudly and often acrimoniously about current events. Sometimes, like the elderly taverngoer at the right corner of the table, they even read the news aloud." [R. John and T. Leonard, *The Illusion of the Ordinary: John Lewis Krimmel's* Village Tavern *and the Democratization of Public Life in the Early Republic*, 65 Pennsylvania History 87, 90 (Winter 1998) (A. 674, 677).] Further, citing the evident disparity in social standing among the

patrons, they wrote, "With the recent expansion in the means of communication, even humble artisans now had access to the latest broadcasts from the seats of power. No longer would access to information remain a monopoly of the favored few." [*Id.* at 91 (A. 96).] The theme is extended in Professor John's deposition testimony:

> Q. And [when] you say breaking down the hierarchy, you mean the information revolution was bringing—creating political participants out of those who had not earlier been political participants?
>
> A. Creating a realm in which large numbers of Americans can get access to information, yes.
>
> Q. And thus participate.
>
> A. And thus participate, in some way, yes.

[John Dep. at 48 (A. 90) (discussing *Village Tavern*).] At his deposition, Professor John agreed that the Postal Service was an agent of this change. [John Dep. at 60-61 (A. 93).]

Professor John cited historian Richard Kielbowicz as one of the "major figures" in postal scholarship. [*Id.* at 21 (A. 83).] In his account of the history of post offices, Professor Kielbowicz quotes a contemporaneous description of "post day":

> [H]alf the village assembled to be present at the distribution of the mail . . . . Then, as the townsmen press around . . . to make arrangement for borrowing the "newsprint" or to hear the contents of it read aloud by the minister or landlord, the postman was carried home.

[Richard B. Kielbowicz, *News In The Mail*, at 26 (1989) (quoting 1 John B. McMaster, *History of the People of the United States* at 42 (1883-1913)) (A. 697).] Kielbowicz cites an English traveler, who wrote:

> [I]t was entertaining to see the eagerness of the people on our arrival, to get a sight of the last newspaper from Boston. They flocked to the postoffice [sic] and the inn, and formed a variety of groups round those who were fortunate to possess themselves of a paper . . . .

[*Id.* at 49 (A. 704) (quoting 3 John Lambert, *Travels Through Lower Canada and the United States* 472-74 (1818)).]

The record includes extensive literature demonstrating that post offices continue to serve these democratic functions. Thus, when the U.S. Postal Rate Commission in 1980 published a study by Richard Margolis on rural post offices, it noted that they served as a center of community discourse, and that the sidewalks were a focal point of such activity. [Richard J. Margolis, *At the Crossroads: An Inquiry into Rural Post Offices and the Communities They Serve*, U.S. Postal Rate Commission at 16-19 (1980) (A. 690-92).] Margolis noted, for example, that residents described the Lemont, Pennsylvania post office as "[a] community center for all ages." *Id.* at 16 (A. 690). Observers "discovered that people stayed in the building . . . much longer than their postal business would have seemed to require. And on the sidewalk in front, . . . 'little knots of people kept forming, even in the coldest weather. Everyone stopped to chat.'" [*Id.* (emphasis added).] "The village post office is a medium for a variety of messages, from political news to local

gossip." [*Id*. at 19 (A. 692).]

Similarly, the Wall Street Journal reported in 2001 that the Postal Service was keeping some 20,000 unprofitable post offices open because, as then Postal Service spokesman Gary Fry commented, "Americans' sense of community identification is wrapped up with their post offices." [*The Sacred Post Offices of Podunk*, Wall St. J. at B1 (June 7, 2001) (A. 357).] When the Postal Service tried to close the office in Muddy, Illinois, there were town meetings and citizens wrote their congressmen, arguing "that the office provided a gathering place for older folks. . . ." [*Id.*] According to the article, "[d]emand for physical post offices is expected to decline, but that is no sure thing given the offices' community-center function." [*Id.* at B4 (A. 358).]

The agency's own records reinforce this reality. Documents produced by USPS show that many post offices maintain public meeting space for "town meeting" events. [Memorandum from R. Jensen to C. Kappler at 1-2 (Oct. 23, 1996) (A. 359-60); Memorandum from S. Koetting to J. Rafferty at 2 (Apr. 28, 1997) (A. 125); Notes of S. Koetting (undated) (A. 142).]

Even after promulgating the regulation challenged here, the Postal Service itself stressed the post office's historical role as a public forum in promoting its "Great American Post Office" award competition:

> What is it about post offices? Is it the fact that they are—far and away— the most common presence in thousands of communities all across the nation? Is it the fact that they serve as valued meeting

> places for residents of cities, towns, and villages from coast to coast? . . . Whatever it is, one fact is clear: Our post offices—new or old, big or small—are great. They're powerful symbols of our democracy.

[*2nd Annual "Great American Post Office" Award Competition*, (visited June 14, 2000) <http://new.usps.com> (A. 146).]

Obviously, people going to post offices to attend community meetings or activities are using *Kokinda* sidewalks for the same reason people use sidewalks everywhere—to reach a destination on foot. Thus, the USPS's theory that people using sidewalks outside post offices only want an uninterrupted beeline to the stamp window is untrue. There is simply nothing about these pedestrians that makes them a less appropriate audience for peaceful First Amendment communication than people using other public sidewalks.

3. The Results Of The Postmaster Survey Requested By The District Court Only Reinforce The Public Forum Status Of *Kokinda* Sidewalks

While the cumulative impact of this historical evidence is substantial, the District Court gave it scarce mention in its opinion. Instead, apparently unsatisfied with the record before it, the District Court asked the parties to supplement the record by collaborating in implementing a survey of postal managers to develop data on the use of postal sidewalks for expressive activity. [A. 964-67.] In compliance with that request, the parties designed a survey concerning expressive activity that postal managers had observed mainly on three categories of sidewalks within postal property—perimeter, or *Grace* sidewalks; "feeder" sidewalks leading

from the street to the front door; and other interior sidewalks running alongside the frontage of the postal building but separated from the public right of way by other postal property. [R. 131.] The resulting data corroborated that at least a significant number of interior postal sidewalks are public forums.

The data were analyzed by Joseph Kadane, the Leonard Savage University Professor of Statistics, Emeritus at Carnegie Mellon University. As he noted, the survey showed that 77.9% of respondents had observed at least some expressive activity, and 13.5% of respondents had observed it at least three to six times a year.[11] [Kadane Decl. ¶ 4.f (A. 814-15).]

Most significantly, the data showed that the use of interior sidewalks for expressive activity was indistinguishable from the use of *Grace* sidewalks—which this Court instructed *are* traditional public forums in *IRI III*, 417 F.3d at 1313-14. As Professor Kadane put it:

> The Postmaster Survey data display remarkable consistency of results across sidewalk types, with approximately the same percentage of respondents reporting approximately the same frequency of expressive activities in [perimeter sidewalks, feeder sidewalks, and sidewalks running alongside a postal building and set apart from the public right of way].

[Kadane Decl. ¶ 4.g (A. 815).] Professor Kadane observed: "The results indicate

[11] Significantly, the survey was inherently limited to expressive activity that the responding postal managers had directly observed, and thus it described only the lower limit of expressive activity that had occurred on postal property under their management. *See supra* note 10.

that expressive activity is observed on [these sidewalks] to a similar extent, and that differences in observed expressive activity do not follow a pattern suggesting that the rate of expressive activity is meaningfully different from one defined sidewalk type to another." [*Id.* ¶ 4 (A. 815-16).] Thus, considering the level of usage for expressive activity, *Kokinda* sidewalks were indistinguishable from *Grace* sidewalks.

Having solicited this data—which the parties took considerable time and expense to assemble—the District Court wrote it off as not "statistically significant," noting that the survey reached only 13.78% of the nation's 34,000 post offices. *IRI IV*, 741 F. Supp. 2d at 37. But even if this were the case, "statistical significance" is not the applicable standard. The standard, as this Court directed in remanding the case to the District Court, is whether a "substantial" or "good number" of postal sidewalks are traditional public forums. *IRI III*, 417 F.3d at 1313-14. Even within a subset representing 13.78% of post offices, the data show hundreds of instances supporting precisely that conclusion. [A. 814-15, 854.] Among all post offices, there have to be thousands. This surely is a "good number."

Moreover, declarants for both sides affirmed that the survey data was a useful tool for evaluating the forum status of the property. Gregory Whiteman, the USPS official responsible for managing the survey, declared that in creating the sample, USPS chose the postal districts within the survey to be "reflective of

urban, suburban and rural locales, office size and a geographic spread throughout the contiguous United States." [Declaration of Gregory M. Whiteman ¶ 3 (A. 855).] Some 4,513 offices were included. [*Id.* ¶ 5 (A. 855).] Whiteman declared that the survey was "broadly reflective of post offices throughout the United States," and while it did not "provide data which can be tested statistically, it [did] provide useful data on the extent of expressive activity at postal facilities throughout the United States." [*Id.* ¶ 24 (A. 858).] In a declaration filed the same day, Professor Kadane agreed that the survey provided "useful data" concerning postal managers' observation of expressive activity, [Kadane Decl. ¶¶ 4.a, b & c (A. 813-14)], and "sufficient information to make judgments regarding the likely extent of expressive activities on post office sidewalks generally." [*Id.* (A. 814)]

The extensive use of *Kokinda* sidewalks for expressive activity, and the fact that such use is indistinguishable from the use of perimeter postal sidewalks that concededly *are* traditional public forums, reinforces that *Kokinda* sidewalks—or at least a good number of them, which this Court directed was the proper standard—are traditional public forums, as well.

The District Court also thought that the equivalent results for *Kokinda* and *Grace* sidewalks were not legally significant, finding a comparison between "the frequency of expressive activity" on each category of sidewalk "immaterial" because *Kokinda* postal sidewalks are physically distinguishable from "the classical variety of sidewalks." *IRI IV*, 741 F. Supp. 2d at 38. But that

presupposes the answer to the question before it is even asked. A core question in public forum analysis, as articulated by the Supreme Court, is whether the forum has "been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45. The parties collected data at the District Court's request to establish how often non-perimeter sidewalks were used for expressive activity. Thus, whether interior postal sidewalks are "*physically* distinguishable" from "classical variety" sidewalks is beside the point. What matters is that such sidewalks are *in*distinguishable from the "classical variety" of sidewalk in terms of the speech activities for which they have traditionally been used.

The data indicates that *Kokinda* sidewalks have been so used, in the same manner and to the same degree, as *Grace* sidewalks within the scope of the survey. While the District Court noted that the survey did not show activity predating the polled managers' observation, *IRI IV*, 741 F. Supp. 2d at 38, it almost entirely ignored the extensive historical record Plaintiffs already had presented at the time the Court asked the parties to conduct a survey. Requiring statistical data from colonial times, when such data were not assembled, imposes an insuperable burden on Plaintiffs that is inappropriate in the context of the First Amendment. If data concerning expressive activity during periods within living memory is irrelevant, it is difficult to understand why the District Court requested it in the first place.

4. USPS Pointed To No Material Evidence To Overcome Either The Constitutional Presumption Or The Evidence Plaintiffs Placed Before The Court

The District Court decision makes clear that court's discomfort with deciding the forum status of the postal sidewalks at issue on a facial basis, notwithstanding this Court's instruction that it do so and the roadmap this Court provided to guide that analysis. Before the prior appeal of this case, the District Court rejected Plaintiffs' request that it strike the USPS ban on its face, holding, erroneously, that to do so it would have to conclude that "all exterior post office properties [were] traditional public forums." *IRI II*, 297 F. Supp. 2d at 148. On appeal, this Court instructed that facial invalidation under the First Amendment does not require Plaintiffs to prove that all applications of the regulation are unconstitutional; it ruled on these facts that Plaintiffs need only demonstrate that it would be unconstitutional as applied to a "substantial amount of protected free speech," a test that would be met if the Court concluded that "a substantial number of exterior postal properties constitute public forums." *IRI III*, 417 F.3d at 1312-13. The District Court's discomfort with this instruction became manifest in its request that the parties fashion a survey to collect more data on post office sidewalks notwithstanding the substantial evidence already before it, [A. 964-67]; its later rejection of the data because it covered only 13.78% of post office facilities rather than every single one of them, *IRI IV*, 741 F. Supp. 2d at 37; and its placing

the burden on Plaintiffs to overcome a supposed presumption that these sidewalks were *not* public forums.

As we have shown, the District Court misplaced on the Plaintiffs the burden regarding the forum status of postal sidewalks. At any rate, Plaintiffs have adduced overwhelming, undisputed evidence to reinforce the operative presumption that these postal sidewalks *are* public forums. Significantly, USPS has not offered a shred of evidence to the contrary. Although USPS engaged an expert witness, Professor Richard John, to help make its case, ironically only Plaintiffs found it useful in the briefing below to rely on Professor John's affirmative testimony.

The only evidence USPS and the District Court cited to the contrary is the bare fact that the sidewalks remaining at issue do not follow the "street frontage" of post office property, and therefore are "distinct" from "classical variety" sidewalks running alongside public thoroughfares. *IRI IV*, 741 F. Supp. 2d at 36. That is a true fact, but it is not material under the governing case law. Nor is there any evidence to support the curious proposition that access sidewalks, such as, *e.g.*, the sidewalk leading to the door of City Hall, are any less "classical" than a sidewalk along a street.

More than once before, this Court has found that sidewalks interior to government property, even when clearly separated from municipal sidewalks running along a public right of way, are traditional public forums. For example, in

Henderson, the Court found that a sidewalk within the grounds of the Vietnam Veterans' Memorial, running thirteen feet behind an internal service road that separated it from the municipal sidewalk and public right of way, was a traditional public forum. 964 F.2d at 1183. As shown earlier, the District Court appears to have misapprehended the nature of this sidewalk in citing *Henderson* as support for allocating the burden of proof to the Plaintiffs. [*See supra* page 22-24.] Likewise, in *Lederman v. United States*, this Court declared unconstitutional a ban on demonstrations on the sidewalk adjoining the East Front of the U.S. Capitol, at the foot of the Capitol steps, hundreds of feet within the perimeter of the Capitol grounds. 291 F.3d 36, 39, 44 (D.C. Cir. 2002). This Court described the relevant test as whether the sidewalk in question "ha[s] traditionally been open to the public, and [its] intended use is consistent with public expression." *Id.* at 41. While the District Court suggested at oral argument that *Lederman* might be distinguishable based on the public nature of the Capitol itself, [A. 888-89], as we have shown, post offices also have a long and well-documented history as distinct forums for First Amendment activity and are, in USPS's own words, "powerful symbols of our democracy." [*See supra* pages 31-36.]

USPS argued in the District Court that other circuits have upheld particular prohibitions against expressive activities on post office sidewalks. This tells only a fraction of the story. Many of those as-applied challenges involved only distinct areas of particular post office sidewalks, and affirmatively acknowledged the rights

of individuals to engage in expressive activities elsewhere within the forum.[12] Commonly, they involved a concern about protecting physical access to building entrances, and reserved judgment about sidewalks further removed from post office doors.[13] Moreover, there is no indication that those other courts were provided the

---

[12] *See, e.g., U.S. v. Bjerke,* 796 F.2d 643, 650 (3d Cir. 1986) (upholding regulation only as applied to soliciting political contributions in "entrance areas" within 10 feet one post office entrance and one foot of another, citing need to protect access and stressing that holding did not apply to walkways at greater distances from the entrances); *and see id.* at 653 (Higginbotham, J., dissenting on the ground that the regulation violated the First Amendment); *Paff v. Kaltenbach,* 204 F.3d 425 (3d Cir. 2000) (where two Libertarian Party activists filed § 1983 claims against police officer who arrested them for distributing leaflets on interior postal sidewalk and district court held that plaintiffs had a First Amendment right to leaflet there, appellate court concluded only that constitutional right was not sufficiently settled to overcome officer's qualified immunity for damages), *and see id.* at 438 (Cowan, C.J., dissenting on the ground that the right to distribute leaflets on non-perimeter postal sidewalks was clearly established); *Monterrey County Democratic Cent. Comm. v. U.S. Postal Serv.,* 812 F.2d 1194, 1195-98 (9th Cir. 1987) (upholding restriction of partisan political activities where government overcame presumption that covered walkway was traditional public forum and alternative channels for communication were available), *and see id.* at 1200 (Tang, J., concurring) (as-applied result turned on placement of covered walkway, and different results would be mandated at other post offices); *Jacobsen v. United States*, 993 F.2d 649, 653, 656-57 (9th Cir. 1993) (in newspaper publisher's as-applied challenge to exclusion of newsracks from sidewalks at three post offices, court lifted blanket injunction it had previously directed to be issued against the removal of most newsracks (*Jacobsen v. U.S. Postal Serv.,* 812 F.2d 1151, 1154 (9th Cir. 1987)) to permit removal of only three newsracks at discrete locations where they were an impediment to safety), *and see id.* at 663 (Wisdom, J., dissenting in part) (rejecting court's holding as to one location distinguished only by a crack in the sidewalk and a difference in the texture of the concrete.).

[13] *E.g. Bjerke*, 796 F.2d at 650. Regulations limiting expressive activity within a small distance around doorways and other pedestrian bottlenecks represent a reasonable accommodation between First Amendment rights and public safety and convenience, and are rarely challenged. *See, e.g.*, D.C. Code § 22-2302 (c)

rich historical record that has been presented here. Because the issue on this facial challenge is whether a *substantial number* of interior sidewalks are public forums, these decisions offer no answer to the question before this Court.

To be sure, the Supreme Court has recognized that the presumptive forum status of a sidewalk may be overcome when it lies within some "special type of enclave," such as a military installation or areas of government buildings that are not generally open to the public. *See, e.g.*, *Greer*, 424 U.S. at 839 (political campaigning on sidewalk within military base inconsistent with avoidance of U.S. military entanglement with partisan politics); *Adderley v. Florida*, 385 U.S. 39, 41 (1966) (sit-down demonstration within grounds of county jail interfered with use of facility not open to the public). Such cases turn on the important limits of public access to the forum and the incompatibility of First Amendment activity with its primary use. *See Perry*, 460 U.S. at 49 (refusing to find a public forum where the nature of the regulated property is inconsistent with free speech activity). But there is nothing in the record to suggest that this is such a case. It is undisputed that the sidewalks at issue are open to all members of the public, without exception. Only a category of speech is excluded from this forum. And such speech is excluded even

---

("No person may ask, beg, or solicit alms within 10 feet of any automatic teller machine"); Washington Metro. Area Transit Auth. Reg. § 100.10 ("All free speech activities are to take place at a distance greater than fifteen (15) feet from any escalator, stairwell, fare gate, mezzanine gate, kiosk, or fare card machine") (quoted in *McFarlin v. District of Columbia*, 681 A.2d 440, 445 n.4, 446 (D.C. 1996)).

when there is *no* danger of obstructing building access, *no* harassment of postal patrons, and no available alternative place or time for people to express themselves. In short, USPS is relying wholly on a distinction without a difference. USPS has not overcome the presumption that post office sidewalks are a public forum.

C. Even If *Kokinda* Sidewalks Were Not Public Forums, The Regulation Fails The First Amendment Reasonableness Test

Even if *Kokinda* sidewalks were non-public forums, the ban would fail the First Amendment "reasonableness test" applicable there. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985). USPS justifies its rule as preventing disruption and ensuring unimpeded access to post offices. *IRI III*, 417 F.3d at 1307. But there is no reasonable fit between this interest and USPS's blanket ban. *See, e.g.*, *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50 (D.D.C. 2000) (rule barring protests inside U.S. Capitol, a non-public forum, was not reasonable despite significant interest in preventing disruption, because it swept in non-disruptive behavior).

First, collecting a signature is no more disruptive than soliciting it. Indeed, the rule's exception for non-partisan voter registration, 39 C.F.R. § 232.1(o), is tacit acknowledgment that mere signing is not disruptive at all. *See supra* note 3. If anything, the amended rule clashes with USPS's stated interest by forcing the circulator to convince a patron to leave the premises to sign a petition—surely

more lengthy and "disruptive" act than producing the petition to be signed.

Second, the rule already includes a separate prohibition against disruptive conduct or impeding ingress or egress. *Id.* § 232.1(e). As this Court previously noted, a circulator who harasses or obstructs "can readily be dealt with under those provisions." *IRI III*, 417 F.3d at 1309. Just as sidewalk leafleting cannot be banned to prevent litter, peaceful petitioning cannot be banned to prevent disruption. *See Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.").

II. THE DISTRICT COURT ERRED IN FINDING MOOT THE PLAINTIFFS' REQUEST FOR AN INJUNCTION ENFORCING THIS COURT'S DECISION CONCERNING THE STATUS OF PERIMETER SIDEWALKS

After holding in 2005 that *Grace* postal sidewalks are traditional public forums and that Section 232.1(h)(1) fails the test of narrow tailoring that applies in such forums, this Court directed the District Court to determine whether there are a "substantial number" of *Grace* sidewalks, such that Section 232.1(h)(1) is unconstitutional on its face. *IRI III*, 417 F.3d at 1313-14. On remand, however, USPS amended its regulation, excluding *Grace* sidewalks from its scope and thus attempting to avoid enforcement of this Court's ruling on mootness grounds. [R. 108, Ex. A.] USPS cited this Court's observation that the question "*may* be pretermitted" by amendment. [R. 108 at 7 (*citing IRI III*, 417 F.3d at 1318)

(emphasis added).] The District Court agreed and entered summary judgment in USPS's favor on Plaintiffs' request for an injunction enforcing this Court's decision.

But the amendment did not moot the issue. USPS has not acknowledged that the Constitution, rather than its own grace, entitles Plaintiffs to collect signatures on *Grace* sidewalks; hence USPS has not accepted that it is legally bound to respect Plaintiffs' rights. Without an injunction enforcing this Court's ruling, USPS remains at liberty to change its position yet again.

It has long been established that "[v]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *accord Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221-22 (2000); *Friends of the Earth v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Where no court order issues, a defendant's abandonment of illegal conduct leaves the dispute unresolved, because he remains "free to return to his old ways." *W.T. Grant*, 345 U.S. at 632.

To obtain a finding of mootness, a heavy burden of proof lies on the USPS to demonstrate that "there is no reasonable expectation that the wrong will be repeated." *Id.* at 633 (quoting *U.S. v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945) (Learned Hand, J.)). As the Supreme Court emphasized in *Adarand*:

> Voluntary cessation of challenged conduct moots a case . . . only if it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (emphasis added). And the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Friends of Earth, supra*, at 189 (emphasis added) (quoting *Concentrated Phosphate Export Assn., Inc., supra*, at 203).

528 U.S. at 221-22. It is significant that the Supreme Court added the italics in the quoted text. *See also Friends of the Earth*, 528 U.S. at 189 (defendant's burden of proving wrong will not be repeated is "stringent").

Adarand, like the present case, arose in the context of claims that had been litigated up and down the appellate ladder more than once. 528 U.S. at 224. Plaintiff challenged governmental agencies' administration of a minority set-aside program, because plaintiff had been excluded from its benefits. *Id.* at 218-19. In the course of the lawsuit, one of the government agencies accorded plaintiff the disadvantaged business status it sought; the Tenth Circuit then disposed of that claim on mootness grounds, reasoning that plaintiff now lacked a legally protected interest and its claims of potential resumption were speculative. *Id.* at 220-21, 224. In reversing that judgment, the Supreme Court remarked, "It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection it sought." 528 U.S. at 224. *See also*

Friends of the Earth, 528 U.S. at 191-92 ("[B]y the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.").

Similarly, in *W.T. Grant*, which involved enforcement of the Clayton Act's stricture against interlocking corporate directorships, the Supreme Court ruled as a matter of law that the offending director's resignation from overlapping directorships and promise not to resume them did not moot the case; at most, it should be considered in addressing the merits of the request for an injunction against the practice. 345 U.S. at 633.[14] The Supreme Court ultimately deferred to the district court's discretion as to whether an injunction should be granted, observing that the director had sworn an affidavit promising not to resume the illegal directorships. *Id*. at 635. Even such a promise, however—which is more than USPS has ever offered here—is not sufficient to avoid entry of an order to protect constitutional rights. *Cf. United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute because the Government promised to use it responsibly.").

Here, it is significant that USPS has never admitted the illegality of its

[14] *See also id.* at 638 (Douglas, J., dissenting) (noting that district court "disposed of the case on the basis of mootness, a ruling now conceded to be erroneous"); *Doe v. Harris*, 696 F.2d 109, 112 (D.C. Cir. 1982) ("whether injunctive relief should be granted is a question distinct from mootness" (citing *W.T. Grant*)).

conduct, nor has it promised that it will not be repeated. Having fought such a finding for five years, it said only that it "would [not] blatantly ignore" this Court's decision, although it insistently opposes reduction of that decision to an order. [R. 126 at 16.] As this Court has underscored, "[W]hen a complaint identifies official conduct as wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition, albeit in a different setting, and involving different official actors." *Harris*, 696 F.2d at 113 (rejecting assertion of mootness). "Defendant-appellees' insistence . . . that their conduct was lawful indicates a risk we cannot dismiss as negligible that Doe may encounter repetition of the official conduct that gave rise to this suit." *Id.* In arguing mootness here, USPS has never acknowledged that the prior scope of its regulation was unconstitutional; moreover, while USPS asserted that it "would not" engage in conduct inconsistent with this Court's holdings (as it interprets them), it did not promise that it "*will not*" enforce a ban on petitioning on *Grace* sidewalks.

It is also important that USPS did not amend its rule until *after* this Court indicated that its application to *Grace* sidewalks would render it facially invalid. Indeed, the first indication that USPS might even consider amending the regulation came only at oral argument on Plaintiffs' motion for the summary judgment that ultimately became *IRI II*, 297 F. Supp. 2d 143 (D.D.C. 2003). There, USPS offered to abandon its previously unfailing interpretation of the ban as prohibiting "solicitation" and extending to *Grace* sidewalks, but only in exchange for a

favorable ruling from the District Court. Even then, USPS did not actually amend the regulation; it merely circulated a "clarification" to postal managers—a procedure this Court found inadequate to address Plaintiffs' constitutional objections, likening USPS's purported "reinterpretation" of the ban's scope to "disingenuous evasion." *IRI III*, 417 F.3d at 1317-18 (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)). On remand, USPS finally modified the regulation only after Plaintiffs had filed a new motion for summary judgment. [*See* R. 112.] This was the fourteenth time USPS had amended Section 232.1(h)(1) in the previous 36 years, and it is unlikely to be the last. In short, USPS's actions reflect its willingness, for tactical reasons, to change positions merely—and only enough—to try to make this case go away.

Such efforts by a party to evade an order counsel in favor of its entry, and against a judgment of mootness. *See Aladdin's Castle*, 455 U.S. at 288-89 (repeal of unconstitutional ordinance did not moot appeal where city acted "in obvious response to the state court's judgment" and without an order remained at liberty to re-enact the ordinance); *accord Aluminum Co. of Am.*, 148 F.2d at 447 (in refusing to moot case where defendant already had desisted from illegal business combination for 12 years, court noted that where defendant abandoned challenged practice "only after if became aware that it was under investigation, it is in no position now to complain of whatever stigma there may be in an injunction. . . . [I]t is impossible to say that the same practice may not commend itself in the future

to those who may come into control; and at any rate there can be no injustice in making assurance doubly sure.").[15]

Here, as Plaintiffs argued in the District Court, [A. 881-85], they retain an important interest in entry of an injunction. Without an injunction there will be nothing to prevent a change in policy several years hence, when institutional memory dims. The record already reflects that postmasters have prohibited circulators from even soliciting signatures on *Kokinda* sidewalks, notwithstanding this Court's opinion and even after Section 232.1(h)(1) was amended to permit that activity. [R. 122, 123.] This is not entirely surprising in an organization with some 34,000 outposts. Nevertheless, in the absence of an enforcing injunction, and the threat of sanction implicit in its entry, it is also to be expected that USPS will

[15] This Court's recent decision in *American Bar Ass'n v. FTC*, 636 F.3d 641 (D.C. Cir. 2011), is not to the contrary. There, the Court ruled that a challenge to a rule requiring "creditors" to establish internal procedures to prevent identity theft was mooted by legislation clarifying that plaintiffs were not "creditors" within the rule's scope. Importantly, the court relied on a rule that new *legislation* altering the posture of a pending case requires its dismissal as moot. *Id.* at 633-34 (citing *Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986)). Thus, the court stressed that the FTC's abandonment of the challenged rule was not *voluntary* cessation of challenged conduct, because the FTC "most assuredly did not alter its definition of 'creditor' in order to avoid litigation," but only to comply with intervening legislation. *Id.* at 648. *See also Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (voluntary cessation doctrine not applicable to acts of Congress); *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 452 (1st Cir. 2009) ("All circuits to address this issue have held that such legislation is generally considered an intervening, independent event and not voluntary action, particularly when the governmental entity taking the appeal, as here, is not part of the legislative branch."); *Chem. Producers & Dist. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (voluntary cessation doctrine applicable to agency repeal or amendment but not to statutory revision).

invest little effort in ensuring that its far-flung managers adhere to a court ruling with which it disagrees. To avoid repeated lapses, and the chilling effects on free speech that must inevitably follow, it is necessary to reduce this Court's judgment to an order, securing maximum compliance in accordance with the liberal policy underlying the First Amendment.

CONCLUSION

After more than a decade of litigation, during which thousands of citizen-activists have been prevented from using the most advantageous venue for their vital First Amendment activity, this dispute has been distilled to a single constitutional question: whether *Kokinda* sidewalks (or a "good number" of them) are traditional public forums. That question is one of first impression in this Court. When the Supreme Court previously addressed this question as applied to a non-perimeter sidewalk, no single viewpoint commanded more than four votes—although the concurring fifth voter, Justice Kennedy, gave strong indications that he believed *Kokinda* sidewalks likely *are* traditional public forums. This Court should now resolve that question in Plaintiffs' favor.

Further, the Court should find that Plaintiffs' claim regarding *Grace* sidewalks within post office property, which the Court previously determined were traditional public forums, is not moot, and should direct the District Court to enter an order enforcing this Court's earlier ruling.

Respectfully submitted,

/s/ David F. Klein

David F. Klein (D.C. Bar No. 425068)
Mark S. Davies (D.C. Bar No. 454051)
Matthew G. Jeweler (D.C. Bar No. 989336)
(application for D.C. Circuit admission pending)
ORRICK, HERRINGTON & SUTCLIFFE, LLP
1152 Fifteenth Street, N.W.
Washington, DC 20005-1706
Telephone: (202) 339-8400
Facsimile: (202) 339-8500
Email: dklein@orrick.com

OF COUNSEL:

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
1400 20th Street, N.W.
Washington, D.C. 20036
Telephone: (202) 457-0800
Facsimile: (202) 452-1868
Email: artspitzer@gmail.com

Attorneys for Plaintiff-Appellants

Dated: June 2, 2011

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,951 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2007 word processing program in Times New 14-point Roman font.

David F. Klein

Attorney for Appellants Initiative and Referendum Institute, et al.

Dated: June 2, 2011

ADDENDUM

CURRENT

Effective: December 17, 2010

Code of Federal Regulations Currentness
Title 39. Postal Service
Chapter I. United States Postal Service
Subchapter D. Organization and Administration
Inspection Service Requirements
Part 232. Conduct on Postal Property (Refs & Annos)
§ 232.1 Conduct on postal property.

(a) Applicability. This section applies to all real property under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering in or on such property. This section shall be posted and kept posted at a conspicuous place on all such property. This section shall not apply to--

(i) Any portions of real property, owned or leased by the Postal Service, that are leased or subleased by the Postal Service to private tenants for their exclusive use;

(ii) With respect to sections 232.1(h)(1) and 232.1(o), sidewalks along the street frontage of postal property falling within the property lines of the Postal Service that are not physically distinguishable from adjacent municipal or other public sidewalks, and any paved areas adjacent to such sidewalks that are not physically distinguishable from such sidewalks.

(b) Inspection, recording presence.

(1) Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. However, items brought directly to a postal facility's customer mailing acceptance area and deposited in the mail are not subject to inspection, except as provided by section 274 of the Administrative Support Manual. A person arrested for violation of this section may be searched incident to that arrest.

(2) Vehicles and their contents brought into, while on, or being removed from restricted nonpublic areas are subject to inspection. A prominently displayed sign shall advise in advance that vehicles and their contents are subject to inspection when entering the restricted nonpublic area, while in the confines of the area, or when leaving the area. Persons entering these areas who object and refuse to consent to the inspection of the vehicle, its contents, or both, may be denied entry; after entering the area without objection, consent shall be implied. A full search of a person and any vehicle driven or occupied by the person may accompany an arrest.

(3) Except as otherwise ordered, properties must be closed to the public after normal business hours. Properties also may be closed to the public in emergency situations and at such other times as may be necessary for the orderly conduct of business. Admission to properties during periods when such properties are closed to the public may be limited to authorized individuals who may be required to sign the register and display identification documents when requested by security force personnel or other authorized individuals.

(c) Preservation of property. Improperly disposing of rubbish, spitting, creating any hazard to persons or things, throwing articles of any kind from a building, climbing upon the roof or any part of a building, or willfully destroying, damaging, or re-

moving any property or any part thereof, is prohibited.

(d) Conformity with signs and directions. All persons in and on property shall comply with official signs of a prohibitory or directory nature, and with the directors of security force personnel or other authorized individuals.

(e) Disturbances. Disorderly conduct, or conduct which creates loud and unusual noise, or which impedes ingress to or egress from post offices, or otherwise obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

(f) Gambling. Participating in games for money or other personal property, the operation of gambling devices, the conduct of a lottery or pool, or the selling or purchasing of lottery tickets, is prohibited on postal premises. In accordance with 20 U.S.C. 107a(a)(5), this prohibition does not apply to the vending or exchange of State Lottery tickets at vending facilities operated by licensed blind persons where such lotteries are authorized by state law.

(g) Alcoholic beverages, drugs, and smoking.

(1) A person under the influence of an alcoholic beverage or any drug that has been defined as a "controlled substance" may not enter postal property or operate a motor vehicle on postal property. The possession, sale, or use of any "controlled substance" (except when permitted by law) or the sale or use of any alcoholic beverage (except as authorized by the Postmaster General or designee) on postal premises is prohibited. The term "controlled substance" is defined in section 802 of title 21 U.S.C.

(2) Smoking (defined as having a lighted cigar, cigarette, pipe, or other smoking material) is prohibited in all postal buildings and office space, including public lobbies.

(h) Soliciting, electioneering, collecting debts, vending, and advertising.

(1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, soliciting and vending for commercial purposes (including, but not limited to, the vending of newspapers and other publications), displaying or distributing commercial advertising, collecting signatures on petitions, polls, or surveys (except as otherwise authorized by Postal Service regulations), are prohibited. These prohibitions do not apply to:

(i) Commercial or nonprofit activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;

(ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;

(iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized under Executive Order 12353, of March 23, 1982.

(2) Solicitations and other actions which are prohibited by paragraph (h)(1) of this section when conducted on Postal Service property should not be directed by mail or telephone to

postal employees on Postal Service property. The Postal Service will not accept or distribute mail or accept telephone calls directed to its employees which are believed to be contrary to paragraph (h)(1) of this section.

(3) Leafleting, distributing literature, picketing, and demonstrating by members of the public are prohibited in lobbies and other interior areas of postal buildings open to the public. Public assembly and public address, except when conducted or sponsored by the Postal Service, are also prohibited in lobbies and other interior areas of postal building open to the public.

(4) Voter registration. Voter registration may be conducted on postal premises only with the approval of the postmaster or installation head provided that all of the following conditions are met:

(i) The registration must be conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate or political party for any public office.

(ii) Absolutely no partisan or political literature may be available, displayed, or distributed. This includes photographs, cartoons, and other likenesses of elected officials and candidates for public office.

(iii) The registration is permitted only in those areas of the postal premises regularly open to the public.

(iv) The registration must not interfere with the conduct of postal business, postal customers, or postal operations.

(v) The organization conducting the voter registration must provide and be responsible for any equipment and supplies.

(vi) Contributions may not be solicited.

(vii) Access to the workroom floor is prohibited.

(viii) The registration activities are limited to an appropriate period before an election.

(5) Except as part of postal activities or activities associated with those permitted under paragraph (h)(4) of this section, no tables, chairs, freestanding signs or posters, structures, or furniture of any type may be placed in postal lobbies or on postal walkways, steps, plazas, lawns or landscaped areas, driveways, parking lots, or other exterior spaces.

(i) Photographs for news, advertising, or commercial purposes. Except as prohibited by official signs or the directions of security force personnel or other authorized personnel, or a Federal court order or rule, photographs for news purposes may be taken in entrances, lobbies, foyers, corridors, or auditoriums when used for public meetings. Other photographs may be taken only with the permission of the local postmaster or installation head.

(j) Dogs and other animals. Dogs and other animals, except those used to assist persons with disabilities, must not be brought upon postal property for other than official purposes.

(k) Vehicular and pedestrian traffic.

(1) Drivers of all vehicles in or on property shall be in possession of a current and valid state or territory issued driver's license and vehicle registration, and the vehicle shall display all current and valid tags and licenses required by the jurisdiction in which it is registered.

(2) Drivers who have had their privilege or license to drive suspended or revoked by any state or territory shall not drive any vehicle in or on property during such period of suspension or revocation.

(3) Drivers of all vehicles in or on property shall drive in a careful and safe manner at all times and shall comply with the signals and directions of security force personnel, other authorized individuals, and all posted traffic signs.

(4) The blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on property is prohibited.

(5) Parking without authority, parking in unauthorized locations or in locations reserved for other persons, or continuously in excess of 18 hours without permission, or contrary to the direction of posted signs is prohibited. This section may be supplemented by the postmaster or installation head from time to time by the issuance and posting of specific traffic directives as may be required. When so issued and posted such directives shall have the same force and effect as if made a part hereof.

(l) Weapons and explosives. Notwithstanding the provisions of any other law, rule or regulation, no person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes.

(m) Nondiscrimination. There must be no discrimination by segregation or otherwise against any person or persons because of race, color, religion, national origin, sex, or disability, in furnishing, or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided on postal property.

(n) Conduct with regard to meetings of the Board of Governors.

(1) Without the permission of the chairman no person may participate in, film, televise, or broadcast any portion of any meeting of the Board or any subdivision or committee of the Board. Any person may electronically record or photograph a meeting, as long as that action does not tend to impede or disturb the members of the Board in the performance of their duties, or members of the public while attempting to attend or observe a meeting.

(2) Disorderly conduct, or conduct which creates loud or unusual noise, obstructs the ordinary use of entrances, foyers, corridors, offices, meeting rooms, elevators, stairways, or parking lots, or otherwise tends to impede or disturb the members of the Board in the performance of their duties, or members of the public while attempting to attend or observe a meeting of the Board or of any subdivision, or committee of the Board, is prohibited.

(3) Any person who violates paragraph (n) (1) or (2) of this section may, in addition to being subject to the penalties prescribed in paragraph (p) of this section, be removed from and barred from reentering postal property during the meeting with respect to which the violation oc-

curred.

(4) A copy of the rules of this section governing conduct on postal property, including the rules of this paragraph appropriately highlighted, shall be posted in prominent locations at the public entrances to postal property and outside the meeting room at any meeting of the Board of Governors or of any subdivision or committee of the Board.

(o) Depositing literature. Depositing or posting handbills, flyers, pamphlets, signs, poster, placards, or other literature, except official postal and other Governmental notices and announcements, on the grounds, walks, driveways, parking and maneuvering areas, exteriors of buildings and other structures, or on the floors, walls, stairs, racks, counters, desks, writing tables, window-ledges, or furnishings in interior public areas on postal premises, is prohibited. This prohibition does not apply to:

(1) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;

(2) Interior space assigned to tenants for their exclusive use;

(3) Posting of notices by U.S. Government-related organizations, such as the Inaugural Committee as defined in 36 U.S.C. 501.

(p) Penalties and other law.

(1) Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a Federal district court or by a Federal magistrate in accordance with applicable court rules. Questions regarding such rules should be directed to the regional counsel for the region involved.

(2) Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to a fine as provided in 18 U.S.C. 3571 or imprisonment of not more than 30 days, or both. Nothing contained in these rules and regulations shall be construed to abrogate any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated.

(q) Enforcement.

(1) Members of the U.S. Postal Service security force shall exercise the powers provided by 18 U.S.C. 3061(c)(2) and shall be responsible for enforcing the regulations in this section in a manner that will protect Postal Service property and persons thereon.

(2) Local postmasters and installation heads may, pursuant to 40 U.S.C. 1315(d)(3) and with the approval of the chief postal inspector or his designee, enter into agreements with State and local enforcement agencies to insure that these rules and regulations are enforced in a manner that will protect Postal Service property.

(3) Postal Inspectors, Office of Inspector General Criminal Investigators, and other persons designated by the Chief Postal Inspector may likewise enforce regulations in this section.

[37 FR 24346, Nov. 16, 1972, as amended at 38 FR 27824, Oct. 9, 1973; 41 FR 23955, June 14, 1976; 42 FR 17443, April 1, 1977; 43 FR 38825, Aug. 31, 1978; 46 FR 898, Jan. 5, 1981. Redesignated and amended at 46 FR 34330, July 1, 1981. Further amended at 47 FR 32113, July 26, 1982; 53 FR 126 , Jan. 5, 1988; 53 FR 29460, Aug. 5, 1988; 54 FR

20527, May 12, 1989; 57 FR 36903, Aug. 17, 1992; 57 FR 38443, Aug. 25, 1992; 63 FR 34600, June 25, 1998; 70 FR 72078, Dec. 1, 2005; 71 FR 11161, March 6, 2006; 72 FR 11288, March 13, 2007; 72 FR 12565, March 16, 2007; 72 FR 49195, Aug. 28, 2007; 75 FR 4273, Jan. 27, 2010; 75 FR 28205, May 20, 2010; 75 FR 78916, Dec. 17, 2010]

SOURCE: 53 FR 126, Jan. 5, 1988; 53 FR 39087, Oct. 5, 1988; 54 FR 20527, May 12, 1989; 54 FR 47678, Nov. 16, 1989; 56 FR 1112, Jan. 11, 1991; 57 FR 36903, Aug. 17, 1992; 63 FR 34600, June 25, 1998; 70 FR 72078, Dec. 1, 2005; 71 FR 11161, March 6, 2006; 72 FR 11288, March 13, 2007; 75 FR 78916, Dec. 17, 2010, unless otherwise noted.

AUTHORITY: 18 U.S.C. 13, 3061, 3571; 21 U.S.C. 802, 844; 39 U.S.C. 401, 403(b)(3), 404(a)(7), 1201(2).

39 C. F. R. § 232.1, 39 CFR § 232.1

Current through May 19, 2011; 76 FR 29129

END OF DOCUMENT

ORIGINAL (1998)

Westlaw.

39 CFR § 232.1
39 C.F.R. § 232.1

C

CODE OF FEDERAL REGULATIONS
TITLE 39--POSTAL SERVICE
CHAPTER I--UNITED STATES POSTAL SERVICE
SUBCHAPTER D--ORGANIZATION AND ADMINISTRATION
INSPECTION SERVICE REQUIREMENTS
PART 232--CONDUCT ON POSTAL PROPERTY

Current through October 20, 2004; 69 FR 61724

§ 232.1 Conduct on postal property.

(a) Applicability. This section applies to all real property under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering in or on such property. This section shall be posted and kept posted at a conspicuous place on all such property.

(b) Inspection, recording presence.

(1) Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. However, items brought directly to a postal facility's customer mailing acceptance area and deposited in the mail are not subject to inspection, except as provided by section 274 of the Administrative Support Manual. A person arrested for violation of this section may be searched incident to that arrest.

(2) Vehicles and their contents brought into, while on, or being removed from restricted nonpublic areas are subject to inspection. A prominently displayed sign shall advise in advance that vehicles and their contents are subject to inspection when entering the restricted nonpublic area, while in the confines of the area, or when leaving the area. Persons entering these areas who object and refuse to consent to the inspection of the vehicle, its contents, or both, may be denied entry; after entering the area without objection, consent shall be implied. A full search of a person and any vehicle driven or occupied by the person may accompany an arrest.

(3) Except as otherwise ordered, properties must be closed to the public after normal business hours. Properties also may be closed to the public in emergency situations and at such other times as may be necessary for the orderly conduct of business. Admission to properties during periods when such properties are closed to the public may be limited to authorized individuals who may be required to sign the register and display identification documents when requested by security force personnel or other authorized individuals.

(c) Preservation of property. Improperly disposing of rubbish, spitting, creating any hazard to persons or things, throwing articles of any kind from a building, climbing upon the roof or any part of a building, or willfully destroying, damaging, or removing any property or any part thereof, is prohibited.

(d) Conformity with signs and directions. All persons in and on property shall comply with official signs of a prohibitory or directory nature, and with the directors of security force personnel or other authorized individuals.

(e) Disturbances. Disorderly conduct, or conduct which creates loud and unusual noise, or which obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

(f) Gambling. Participating in games for money or other personal property, the operation of gambling devices, the conduct of a lottery or pool, or the selling or purchasing of lottery tickets, is prohibited on postal premises. This prohibition does not apply to the vending or exchange of State Lottery tickets at vending facilities operated by licensed blind persons where such lotteries are authorized by state law. (See Domestic Mail Manual 123.351 and 123.42; Administrative Support Manual 221.42; Regional Instructions, Part 782, section IV G 2c.)

(g)(1) Alcoholic beverages, drugs, and smoking. A person under the influence of an alcoholic beverage or any drug that has been defined as a "controlled substance" may not enter postal property or operate a motor vehicle on postal property. The possession, sale, or use of any "controlled substance" (except when permitted by law) or the sale or use of any alcoholic beverage (except as authorized by the Postmaster General or designee) on postal premises is prohibited. The term "controlled substance" is defined in section 802 of title 21 U.S.C.

(2) Smoking (defined as having a lighted cigar, cigarette, pipe, or other smoking material) is prohibited in all postal buildings and office space, including public lobbies.

(h) Soliciting, Electioneering, Collecting Debts, Vending, and Advertising.

(1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, soliciting and vending for commercial purposes (including, but not limited to, the vending of newspapers and other publications), displaying or distributing commercial advertising, soliciting signatures on petitions, polls, or surveys (except as otherwise authorized by Postal Service regulations), and impeding ingress to or egress from post offices are prohibited. These prohibitions do not apply to:

(i) Commercial or nonprofit activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;

(ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;

(iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by the Manual on Fund Raising Within the the Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961.

(2) Solicitations and other actions which are prohibited by paragraph (h)(1) of this section when conducted on Postal Service property should not be directed by mail or telephone to postal employees on Postal Service property. The Postal Service will not accept or distribute mail or accept telephone calls directed to its employees which are believed to be contrary to paragraph (h)(1) of this section.

(3) Leafleting, distributing literature, picketing, and demonstrating by members of the public are prohibited in lobbies and other interior areas of postal buildings open to the public. Public assembly and public address, except when conducted or sponsored by the Postal Service, are also prohibited in lobbies and other interior areas of postal building open to the public.

(4) Voter registration. Voter registration may be conducted on postal premises only with the approval of the postmaster or installation head provided that all of the following conditions are met:

(i) The registration must be conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate or political party for any public office.

(ii) Absolutely no partisan or political literature may be available, displayed, or distributed. This includes photographs, cartoons, and other likenesses of elected officials and candidates for public office.

(iii) The registration is permitted only in those areas of the postal premises regularly open to the public.

(iv) The registration must not interfere with the conduct of postal business, postal customers, or postal operations.

(v) The organization conducting the voter registration must provide and be responsible for any equipment and supplies.

(vi) Contributions may not be solicited.

(vii) Access to the workroom floor is prohibited.

(viii) The registration activities are limited to an appropriate period before an election.

(5) Except as part of postal activities or activities associated with those permitted under paragraph (h)(4) of this section, no tables, chairs, freestanding

signs or posters, structures, or furniture of any type may be placed in postal lobbies or on postal walkways, steps, plazas, lawns or landscaped areas, driveways, parking lots, or other exterior spaces.

(i) Photographs for news, advertising, or commercial purposes. Except as prohibited by official signs or the directions of security force personnel or other authorized personnel, or a Federal court order or rule, photographs for news purposes may be taken in entrances, lobbies, foyers, corridors, or auditoriums when used for public meetings. Other photographs may be taken only with the permission of the local postmaster or installation head.

(j) Dogs and other animals. Dogs and other animals, except those used to assist persons with disabilities, must not be brought upon postal property for other than official purposes.

(k) Vehicular and pedestrian traffic.

(1) Drivers of all vehicles in or on property shall be in possession of a current and valid state or territory issued driver's license and vehicle registration, and the vehicle shall display all current and valid tags and licenses required by the jurisdiction in which it is registered.

(2) Drivers who have had their privilege or license to drive suspended or revoked by any state or territory shall not drive any vehicle in or on property during such period of suspension or revocation.

(3) Drivers of all vehicles in or on property shall drive in a careful and safe manner at all times and shall comply with the signals and directions of security force personnel, other authorized individuals, and all posted traffic signs.

(4) The blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on property is prohibited.

(5) Parking without authority, parking in unauthorized locations or in locations reserved for other persons, or continuously in excess of 18 hours without permission, or contrary to the direction of posted signs is prohibited. This section may be supplemented by the postmaster or installation head from time to time by the issuance and posting of specific traffic directives as may be required. When so issued and posted such directives shall have the same force and effect as if made a part hereof.

(l) Weapons and explosives. No person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes.

(m) Nondiscrimination. There must be no discrimination by segregation or otherwise against any person or persons because of race, color, religion, national origin, sex, age (persons 40 years of age or older are protected), reprisal (discrimination against a person for having filed or for having participated in the processing of an EEO complaint--29 CFR 1613.261-262), or physical or mental handicap, in furnishing, or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided on postal property.

(n) Conduct with regard to Meetings of the Board of Governors.

(1) Without the permission of the chairman no person may participate in, film, televise, or broadcast any portion of any meeting of the Board or any subdivision or committee of the Board. Any person may electronically record or photograph a meeting, as long as that action does not tend to impede or disturb the members of the Board in the performance of their duties, or members of the public while attempting to attend or observe a meeting.

(2) Disorderly conduct, or conduct which creates loud or unusual noise, obstructs the ordinary use of entrances, foyers, corridors, offices, meeting rooms, elevators, stairways, or parking lots, or otherwise tends to impede or disturb the members of the Board in the performance of their duties, or members of the public while attempting to attend or observe a meeting of the Board or of any subdivision, or committee of the Board, is prohibited.

(3) Any person who violates paragraph (n) (1) or (2) of this section may, in addition to being subject

to the penalties prescribed in paragraph (p) of this section, be removed from and barred from reentering postal property during the meeting with respect to which the violation occurred.

(4) A copy of the rules of this section governing conduct on postal property, including the rules of this paragraph appropriately highlighted, shall be posted in prominent locations at the public entrances to postal property and outside the meeting room at any meeting of the Board of Governors or of any subdivision or committee of the Board.

(o) Depositing literature. Depositing or posting handbills, flyers, pamphlets, signs, poster, placards, or other literature, except official postal and other Governmental notices and announcements, on the grounds, walks, driveways, parking and maneuvering areas, exteriors of buildings and other structures, or on the floors, walls, stairs, racks, counters, desks, writing tables, window-ledges, or furnishings in interior public areas on postal premises, is prohibited. This prohibition does not apply to:

(1) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;

(2) Interior space assigned to tenants for their exclusive use;

(3) Posting of notices by U.S. Government-related organizations such as the Inaugural Committee as defined in 36 U.S.C. 721.

(p) Penalties and other law.

(1) Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a Federal district court or by a Federal magistrate in accordance with applicable court rules. Questions regarding such rules should be directed to the regional counsel for the region involved.

(2) Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to fine of not more than $50 or imprisonment of not more than 30 days, or both. Nothing contained in these rules and regulations shall be construed to abrogate any other Federal laws or regulations of any State and local laws and regulations applicable to any area in which the property is situated.

(q) Enforcement.

(1) Members of the U.S. Postal Service security force shall exercise the powers of special policemen provided by 40 U.S.C. 318 and shall be responsible for enforcing the regulations in this section in a manner that will protect Postal Service property.

(2) Local postmasters and installation heads may, pursuant to 40 U.S.C. 318b and with the approval of the chief postal inspector or his designee, enter into agreements with State and local enforcement agencies to insure that these rules and regulations are enforced in a manner that will protect Postal Service property.

(3) Postal Inspectors, Office of Inspector General Criminal Investigators, and other persons designated by the Chief Postal Inspector may likewise enforce regulations in this section.

[37 FR 24346, Nov. 16, 1972, as amended at 38 FR 27824, Oct. 9, 1973; 41 FR 23955, June 14, 1976; 42 FR 17443, April 1, 1977; 43 FR 38825, Aug. 31, 1978; 46 FR 898, Jan. 5, 1981. Redesignated and amended at 46 FR 34330, July 1, 1981. Further amended at 47 FR 32113, July 26, 1982; 53 FR 126, Jan. 5, 1988; 53 FR 29460, Aug. 5, 1988; 54 FR 20527, May 12, 1989; 57 FR 36903, Aug. 17, 1992; 57 FR 38443, Aug. 25, 1992; 63 FR 34600, June 25, 1998]

<General Materials (GM) - References, Annotations, or Tables>

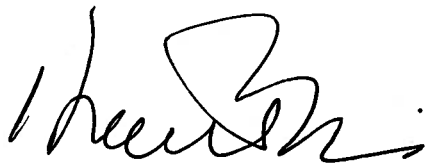
39 C. F. R. § 232.1

39 CFR § 232.1

END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2011, I electronically filed the foregoing Brief of Appellants and the accompanying Joint Appendix Volumes I and II with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.



DAVID F. KLEIN