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

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

USPS errs in arguing that Plaintiffs have the burden of proving that 39 C.F.R. § 232.1(h)(1) is unconstitutionally overbroad. This Court already has held that the regulation is unconstitutionally overbroad if it applies to a substantial number of public forum sidewalks. *IRI v. U.S. Postal Serv.*, 417 F.3d 1299, 1310-12 (D.C. Cir. 2005) ("*IRI III*"). And as the Supreme Court and this Court have repeatedly held, there is a rebuttable presumption that sidewalks, without more, are traditional public forums. Thus, the burden necessarily lies with the party seeking to defeat forum status. Here, USPS fails to offer any evidence that a postal sidewalk loses its status as a public forum merely because it does not happen to run directly alongside a road. This lack of evidence may explain why USPS labors so mightily to shift the burden. To the contrary, the historical evidence, expert and fact witnesses, and statistical evidence that Plaintiffs presented demonstrate that *Kokinda* sidewalks, no less than *Grace* sidewalks, are traditional public forums.

USPS is also wrong in arguing that Plaintiffs' request for an injunction enforcing this Court's prior ruling is moot. No court has enjoined USPS from preventing signature-gathering on *Grace* sidewalks, and USPS remains at liberty to do so—and has done so—without legal consequence. Where, as here, USPS amended the ban only to avoid entry of a judgment against it, and *still* has failed to

acknowledge the ban's unconstitutionality, an injunction is warranted to ensure that this Court's instruction is followed.

ARGUMENT

I. USPS Must Overcome The Presumption That Sidewalks, Without More, Are Traditional Public Forums

The parties agree that this Court must resolve, on *de novo* review of the District Court's summary judgment, whether "a substantial number" of *Kokinda* sidewalks are traditional public forums. [USPS Br. at 21.] If they are, as Plaintiffs demonstrate, then Section 232.1(h)'s ban on signature-gathering must be struck down as an unconstitutional imposition of criminal penalties on speech protected by the First Amendment.

"'[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.'" *United States v. Grace*, 461 U.S. 171, 177 (1983) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)). As this Court has recognized repeatedly, this is a presumption that USPS has an affirmative burden to overcome. *See, e.g., Oberwetter v. Hilliard*, 639 F.3d 545, 552 (D.C. Cir. 2011) (citing "working presumption that sidewalks, streets and parks are normally to be considered public forums"); *Lederman v. United States*, 291 F.3d 36, 42 (D.C. Cir. 2002) (citing government's burden "to convince us the sidewalk is not a public forum"); *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992)

(citing "working presumption" that sidewalks are public forums). In *Henderson*, this Court added italics to the Supreme Court's finding in *Grace* that sidewalks "'are considered, *without more*, to be public forums,'" 964 F.2d at 1182 (emphasis in *Henderson*), and then quoted *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988), for the proposition that "'[o]rdinarily, a determination of the nature of the forum would follow automatically from this identification [as a street or sidewalk].'" 964 F.2d at 1182 (latter brackets in *Henderson*).

USPS largely disregards these authorities in its brief. Indeed, although it cites *Oberwetter* and *Lederman* for other points, it does not come to grips at all with their teaching that sidewalks are presumptively traditional public forums. With respect to *Grace*, USPS argues that the case turned on the fact that the sidewalks at issue were "indistinguishable from any other sidewalks in Washington, D.C."—and that much is true—but this was only the point that cinched the decision after the Court stressed that sidewalks, "without more," are presumed to be traditional public forums. *Grace*, 461 U.S. at 179. Plaintiffs make no claim that such a presumption is irrebuttable—it can be rebutted—but USPS has come forward with no evidence to meet the burden that lies squarely on its shoulders.

Moreover, USPS's allusion to "modifying references" in *Grace*, to the effect that sidewalks are only "quintessential public forums" when they are "public

places" that are "historically associated with the free exercise of expressive activities," [USPS Br. at 16], turns both the language and reasoning of *Grace* on its head. The point of *Grace* is that sidewalks (and streets and parks) are, *by definition*, public places historically associated with the free exercise of expressive activities. *See Grace*, 461 U.S. at 179; *see also Hague v. CIO,* 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). That fundamental constitutional principle does not come with a footnote saying, "except post office sidewalks." USPS points to no case interpreting *Grace* in any other manner, and nothing in this Court's recent decision in *Mahoney v. Doe*, 2011 WL 2451014 at *3—which did not purport to parse *Grace* and which observed "little dispute" that the sidewalk in question was a traditional public forum, yields a different interpretation.

Indeed, as Judge Roberts framed it himself in *Lederman,* USPS must show a "compelling reason to depart from the well-founded presumption" that sidewalks are public forums. *Lederman v. United States,* 89 F. Supp. 2d 29, 37 (D.D.C. 2000), *aff'd in relevant part*, 291 F.3d 36 (D.C. Cir. 2002). Thus, on appeal in

Lederman, when this Court found that a sidewalk on the U.S. Capitol grounds was a public forum notwithstanding its "interior" location, it cited the government's failure to show that the sidewalk's use for expressive activity was incompatible with its ordinary use. 291 F.3d at 43. *Accord Henderson*, 964 F.2d at 1182; *see also Lederman v. United States*, 131 F. Supp. 2d 46, 51 (D.D.C. 2001) (noting that the fact that a sidewalk lies within some "enclave" is not dispositive, but only a factor to consider). The "crucial question," the Supreme Court has indicated, "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). Nothing about *Kokinda* sidewalks makes them incompatible with collecting signatures on petitions—an activity for which they were peacefully used since time out of mind.

USPS cites this Court's recent decision in *Boardley v. Dep't of Interior*, 615 F.3d 508 (D.C. Cir. 2010), for a contrary proposition. At most, USPS finds dicta. USPS's brief fails to disclose this Court's actual holding in *Boardley* that the regulation in question—requiring plaintiff to obtain a permit before engaging in expressive activities in national parks—was unconstitutional. *Id.* at 524. To be sure, this Court acknowledged that not all national park grounds are necessarily traditional public forums—a statement in no way inconsistent with the rebuttable

presumption that parks generally are public forums. *Id.* at 515. But the Court concluded that it did not need to decide the forum status of all 391 national parks—and therefore the Court had no occasion to apply presumptions one way or another—because it found the ban unconstitutionally overbroad within *designated* public forums the Park Service admittedly had established within those venues. *Id.* at 521-22. This Court nowhere suggested it was revising its earlier holdings in *Henderson* and *Lederman*, much less questioning the Supreme Court's guidance in *Grace* and a host of earlier decisions. If the Park Service promulgated a regulation banning petition-signing in Lafayette Park, plaintiffs challenging that ban would not have the burden of showing that Lafayette Park is a traditional public forum.

II. USPS Offers Nothing To Rebut The Presumption, And The Only Record Evidence Reinforces The Conclusion, That *Kokinda* Sidewalks, Like Other Sidewalks, Are Traditional Public Forums

Plaintiffs offered ample, unrebutted evidence that post offices have served, both historically and recently, as a public forum for expressive activity, and that *Kokinda* sidewalks are compatible with and have been used pervasively for such activity. USPS ignores the bulk of this evidence, and offers only unsubstantiated statements to suggest that signature-gathering is incompatible with the normal use of postal sidewalks.

A. The Record Evidence Establishes That *Kokinda* Sidewalks Have Been Used Pervasively For Expressive Activity

USPS does not dispute Plaintiffs' contention that signature-gathering has been pervasive and longstanding on post office sidewalks in general, but argues that Plaintiffs' evidence does not address the extent to which signature-gathering occurred specifically on *Kokinda* sidewalks. [USPS Br. at 21-22.] Because perimeter and non-perimeter sidewalks are part of a single postal "forum," it is specious to argue that petitioning in one part of the forum is irrelevant to the forum status of the entire site. *See IRI III*, 417 F.3d at 1310 (treating postal property as single forum for purposes of assessing whether Section 232.1(h)(1) allows an "intra-forum" alternative for speech). USPS is again trying to shift the burden by requiring Plaintiffs to prove that a particular "subpart" of a traditional public forum is itself a public forum. But the presumption is that it is, and the burden is on USPS to prove otherwise. The fact that Plaintiffs have presented the only evidence on the question shows just how far USPS is from meeting its burden.

At any rate, USPS's contention is simply incorrect. While the record was created while USPS was still contesting the forum status of *Grace* sidewalks, it specifically includes extensive evidence regarding the use of *Kokinda* sidewalks for expressive activity. Indeed, some of the exemplary sites in the Complaint (*e.g.*, Belleville, Garden Valley) have ***only*** *Kokinda* sidewalks. And the record is clear that petitioning at other sites also took place on *Kokinda* sidewalks. [*See, e.g.*,

Snarey Aff. ¶ 3 (A. 270) (petitioner stood on sidewalks leading from parking lot to the Ann Arbor post office doors); Bandyk Aff. ¶ 3 (A. 274) (similar, Grand Rapids); Hawkins Aff. ¶3 (A. 298) (similar, Reno).] Not least, the postmaster survey shows that *Kokinda* sidewalks have been used at post offices to the same extent as *Grace* sidewalks for First Amendment activity. *See infra* pages 13-14.

Indeed, Declarant Pacelle, President of the Humane Society of the United States, explained that petition circulators *need* to use *Kokinda* sidewalks—not *Grace* sidewalks far from the postal building—because visitors alighting from their cars in internal parking lots to approach the post office will seldom deviate from their paths at a stranger's call. [Pacelle Decl. ¶ 11 (A. 278-79).] This is exactly why this litigation continues, despite USPS's largely cosmetic amendment allowing petition circulation on *Grace* sidewalks—an amendment that has no real meaning at post offices that are not located downtown.

USPS grossly mischaracterizes Plaintiffs' evidence in arguing that they "merely point to testimony concerning one post office in Tempe, Arizona." [USPS Br. at 32.] The testimony about "Tempe, Arizona" was from USPS's nationwide Manager of Retail Operations, Frederick Hintenack, who cited a string of exhibits involving the Tempe post office to exemplify the extensive volume of petitioning *at all post offices*. [A. 186.] Hintenach testified that the record references to petition circulation represent just a fraction of the activity throughout postal

property. [*Id.*] Far from discussing a mere local phenomenon, he stressed that petitioning was "a regular thing" on postal sidewalks, and cited its pervasiveness as the very *raison d'etre* for the ban. [*Id.*]

This testimony was corroborated by witnesses Kimball, Pacelle and Jacob, who all cited post office sidewalks as a primary nationwide venue for petition circulators, because post office sidewalks—necessarily including *Kokinda* sidewalks—are the best places to gather signatures on petitions for initiatives because post office patrons usually live in the districts where the signatures are needed. [Kimball Dep. 26-28 (A. 212); Pacelle Dep. 42-43 (A. 232); Jacob Dep. 84-85 (A. 265-66).] This uncontradicted and mutually consistent evidence shows that petitioning was indeed a "regular thing" at most post offices nationwide.

USPS also suggests that the many other examples Plaintiffs cite "do not mention postal sidewalks, *Kokinda* or otherwise." [USPS Br. at 25.] This represents a peculiar kind of blindness. The depositions and affidavits of postmasters and petition circulators in this case, cited in Plaintiffs' opening brief at 27-30 & nn.9-10, specifically concerned postal sidewalks—not courthouse sidewalks, not military base sidewalks, not sidewalks in national parks. All those exercising their First Amendment rights in the examples given selected *post office sidewalks* as the situs for their expression.

Finally, USPS's reliance on *Marlin v. D.C. Board of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001), does not further its argument. USPS implies that, under *Marlin*, property may not be characterized as a traditional public forum unless it has "been [held] available for general public discourse of any sort." [USPS Br. at 25.] But *Marlin* did not find that *restrictions* "of any sort" precluded property from being a public forum; it held, quite the contrary, that a location which had been *closed* to *any sort* of general public discourse—a polling station—was not a public forum for electioneering. 236 F.3d at 719 ("It is not available for general public discourse of any sort."). And, unlike the forum in *Marlin*, post office sidewalks have *not* traditionally been closed to public discourse of any sort.

B. The Postmaster Survey Confirms That "A Substantial Number" Of *Kokinda* Sidewalks Are Traditional Public Forums

The survey of postal managers confirmed the extensive use of postal sidewalks for expressive activity. USPS's contrary contention ignores some of the data and mischaracterizes the rest. USPS claims—wrongly—that only 4% of the survey responses indicated expressive activity of any kind on postal sidewalks. [USPS Br. at 34.] There is irony in that contention. Having promulgated Section 232.1(h)(1) because signature solicitation was such a "regular thing" on its property, USPS now reads the survey as suggesting that such solicitation was hardly present at all.

At any rate, USPS's contention is ill-founded and its basis difficult to discern. Evidently, USPS counted all postal managers who failed to answer that question as if they had answered "No." But, as Professor Kadane explained, "it would be erroneous to interpret a failure to provide any response as equivalent to either of these responses [Yes or No]." [Kadane Decl. at ¶ 5.] Had these non-respondents wished to check "No" on the survey, there was a space for them to do so—but they did not. Some 94% of respondents felt unable to answer this question, perhaps because they worked in back offices or windowless spaces.[1] Of those who did answer the relevant question (Question 6), 77.9%—*three-quarters*—had observed at least some expressive activity on postal sidewalks. [Kadane Decl. ¶ 4.f (A. 814-15).] Some 13.5% observed such activity *at least* three to six times a year. And, as the following table shows and Professor Kadane attested, the data were not meaningfully distinguishable between *Kokinda* and *Grace* sidewalks:

[1] Respondents could only respond about what they observed. Multiple postal managers testified that they would not normally learn of such activity because they lacked a vantage point (*i.e.*, a window) from which to observe postal sidewalks, and would hear about such activity only if it generated complaints. [*See* IRI Opening Br. at 30 n.10.]

Observed Frequency	**Sidewalk A** (*Grace* sidewalk)	**Sidewalk B** (Interior "feeder" sidewalk")	**Sidewalk C** (Interior sidewalk running alongside postal building)
Several times a month	1.4%	1.1%	1.3%
About monthly	4.7%	5.9%	2.6%
Three to six times a year	8.9%	5.9%	9.5%

[*Id.* ¶ 4.g (A. 815).][2]

In claiming that only 4% of the responses indicated some kind of expressive activity on non-*Grace* sidewalks, USPS does not identify the questions or numbers it relies on. It appears USPS divided the number of positive responses to Question 6 by the number of individuals who responded to any part of the survey at all. But it is treacherous at best to combine responses to different questions, as if they were the numerator and denominator of a single fraction. They are not. [Kadane Decl. ¶ 5 (A. 816).] USPS's single-minded focus on stating the smallest possible

[2] These statistics are particularly impressive considering that most of the respondents' answers reflected only conduct observed once the ban became effective. [*See id.*, Ex. 2 (A. 854) (showing that, of 3,561 respondents who answered the question, only 1,938—54.6%—were not yet even managing a facility in 2000—the year the regulation became effective).]

percentages results only in a distortion of the data. The Court should not be misled by such result-oriented numerology.

Next, USPS seeks to distract the Court from the fact that expressive activity is observed on "a substantial number" of *Kokinda* sidewalks by asserting that some of that expressive activity was unauthorized. [USPS. Br. at 36.] But the fact that postmasters may have stopped activity pursuant to the challenged ban does not change the fact that it occurred. USPS "may not by its own *ipse dixit* destroy the public forum status" of property simply by banning expressive activity there. *U.S. Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981). If anything, the extent to which expressive activity has occurred *despite* the ban indicates its persistence within the forum. Certainly, it is implausible to think expressive activity *increased* after the ban went into effect, yet most of the responses reflected observations *after* the ban's effective date. *See supra* note 2.

Indeed, USPS ignores the question that was designed to measure the regulation's actual effect on expressive activity. The survey's Question 7 asked respondents who had managed a facility in 2000 to state whether they had noticed a decline in expressive activities on postal property sidewalks after the regulation was in place. [Kadane Decl., ¶ 4.e.] Nearly 300 postmasters indicated that they *had* noticed such a decline, and approximately one-third of these described that

decline as significant. [*Id.*] This data directly supports the conclusion that this overbroad ban has silenced a *substantial* amount of protected speech.

Finally, USPS errs in contending that the expressive activity on *Grace* sidewalks is irrelevant because USPS is no longer enforcing its regulation on those sidewalks. Far from irrelevant, evidence regarding expressive activity on *Grace* sidewalks is central to resolution of the forum issue, because it provides a yardstick against which to measure the level of expressive activity occurring on *Kokinda* sidewalks. Plaintiffs are not aware of any prior instance in which the use of ordinary (*Grace*) sidewalks for expressive activity has actually been measured. While USPS would like to argue—without any point of reference—that the use of *Kokinda* sidewalks for expressive activity has been merely occasional, it is also true that even the use of *Grace* sidewalks for expressive activity has been—in nearly all cases—only occasional. It is unsurprising that such use is sporadic on *Kokinda* ***or*** *Grace* sidewalks; people commonly solicit signatures only during election seasons, when signatures are needed to place initiatives on the ballot. Common sense and everyday observation suggest that most public sidewalks are rarely used for First Amendment activity. They are used for walking. Yet they unquestionably remain traditional public forums.

Thus, to the extent that the frequency of use for expressive activity is relevant to forum status, the question is not whether that use is frequent or

infrequent as measured against some indeterminate standard, but how it compares with the frequency of such use in *acknowledged* traditional public forums. Common sense and Plaintiffs' declarations show that post office sidewalks of every kind are used more often for expressive activity than the average sidewalk. But the postmaster survey adds objective data on that very point. And comparing the objective data concerning *Kokinda* sidewalks and *Grace* sidewalks—which are the acknowledged public forums in the survey—shows convincingly that the use of *Kokinda* sidewalks has been indistinguishable.

C. Historical Evidence Regarding Use Of Postal Property Reinforces That A Substantial Number Of *Kokinda* Sidewalks Are Traditional Public Forums

USPS expends immense effort trying to create an impression that post offices occupy special enclaves that are divorced from their civic environment, enclaves only for the conduct of a specialized business, not public places, such that the sidewalks within—like the sidewalks inside military installations or within prison walls—are wholly unlike those that they join at the property line. In fact, the opposite is true. This Court has recognized that the location of sidewalks within certain kinds of property may *reinforce* their status as traditional public forums. Thus, in *Lederman*, the public forum status of sidewalks well within the Capitol grounds was reinforced by that location and enhanced by their proximity to the nation's legislative heart. *Lederman*, 291 F.3d at 42-43. Here, likewise, the location of sidewalks on post office property, which has a long history of attracting

public discourse and which USPS itself has extolled as a "powerful symbol[] of our democracy," [IRI Opening Br. at 35-36], cannot diminish, but rather, reinforces their status as traditional public forums.

Strikingly, USPS seeks to distinguish away (rather than cite) its own expert's testimony, urging that Professor John addressed only postal *service*, not postal *space*. If so, it is hard to see why USPS proffered this expert at all. In fact, it was Professor John who wrote that, in the early Republic, the post office "was a favorite gathering place . . . . the best place to feel the political pulse of the country . . . the place where, as one postal clerk aptly put it, the leading men of the day 'most do congregate.'" [A. 355-56.] It was Professor John who saw significance in a painting displaying the post office as a place where "ordinary Americans talked loudly and often acrimoniously about current events," contributing to the growth of democracy. [A. 674-677.] While USPS seeks to distract from this evidence by quoting other extracts from Professor John's writings which, it argues, relate to mail delivery, it cannot so easily avoid *these* statements, which plainly describe postal *property*, not postal *service*. Likewise, USPS's claim that Professor John's testimony addresses a postal "space" other than physical space makes no sense. Professor John is not an expert on taverns. His evidence shows that, however configured and wherever located, *post offices* were forums for expressive activity.

USPS's attempts to distinguish Plaintiffs' other sources are also unavailing. Citing Richard Margolis' book, *At the Crossroads,* USPS tries to distract from the author's heavily documented thesis that post offices are "community centers" by selectively repeating his quotation of one postmaster, who said, "I still got the stove but I ain't got the people." [USPS Br. at 31 (citing A. 610).] Yet, Margolis continues, "But if the pace of modern rural life has shoved aside the pot-belly stove, it has nonetheless continued to make room for the post office as a stoker of social interchange." [A. 610.] Likewise, USPS's observation that a *Wall Street Journal* article confirming this assessment is "not in accord with" USPS's views, [USPS Br. at 31], is no more than a backhanded acknowledgment that the article contradicts USPS's position. Nor does USPS's selective quotation from Richard Kielbowicz's book, *News In The Mail* [USPS Br. at 30], nullify his documentation of the historical use of postal property as a center for the sharing of news and opinions. [*See* IRI Opening Br. at 33-34.]

The character of Plaintiffs' evidence cannot be erased by selective quotation. And most significantly, USPS offers no affirmative, countervailing evidence to meet *its* burden, to overcome the operative presumption that a sidewalk—especially one within property that is open to the public and that *attracts* public discourse—is a traditional public forum.

D. The Caselaw Of Other Circuits Does Not Support A Finding That *Kokinda* Sidewalks Are Non-Public Forums

USPS asserts that Plaintiffs' position conflicts with the caselaw of five circuits. While several circuit courts have upheld limited restrictions on other activities on individual postal sidewalks, the caselaw is quite different from what USPS would have the Court believe. Most of USPS's authorities involved distinct areas of particular post offices; did not involve petitioning; were not decided as facial challenges; often indicated that particular postal sidewalks *were* public forums; did not address the historical use of postal property for expressive activity; and were decided on their particular facts, often expressly stating that different configurations would compel a different outcome. In fact, USPS's cases often provide significant support for the *Plaintiffs'* arguments here.

Contrary to USPS's contention, [USPS Br. at 41], Plaintiffs do not seek to distinguish *United States v. Bjerke*, 796 F.2d 643 (3d Cir. 1986), based on the type of solicitation at issue. In *Bjerke*, the Third Circuit considered a political committee's solicitation of contributions at three Pennsylvania post offices. Over Judge Higginbotham's dissent, the court upheld the rule, not as applied to "postal premises generally," but only to plaintiffs' activities in "entrance areas"—defined as portions of postal sidewalks lying within 10 feet of the entrance of one post office and within one foot of the other—because of the asserted need to protect physical access to the buildings. *Id.* at 650. The court expressly *declined* to reach

the facial constitutionality of the ban. *Id.* at 648. The court noted that the post offices had "interior" paved areas up to 30 feet from the entrances, and that its holding would not reach sidewalks at such "great distances" from the entrances. *Id.* This logic suggests that the Third Circuit would protect expressive activity on most of the postal sidewalk areas at issue in this case.

In *Paff v. Kaltenbach,* 204 F.3d 425 (3d Cir. 2000), two individuals were passing out leaflets on a New Jersey post office sidewalk. At the postmaster's behest, a police officer arrested the activists for criminal trespass, but they were later released and sued for damages under 42 U.S.C. § 1983. Significantly, applying *Kokinda* and *Bjerke*, the district court *upheld* plaintiffs' First Amendment right to leaflet on the postal sidewalk—a ruling that was not appealed. 204 F.3d at 431. The only question before the Third Circuit was whether their right was sufficiently settled to overcome the police officer's qualified immunity from damages, which the court answered in the negative. *Id.* at 432-33.[3]

In *Monterey County Democratic Central Committee v. U.S. Postal Service*, 812 F.2d 1194 (9th Cir. 1987), the Ninth Circuit addressed an as-applied challenge to a ban on voter registration by a partisan political group. At issue was a "covered

[3] Even this holding was controversial. In dissent, Judge Cowan argued that the police officer was not justified, under settled law, in relying on the postmaster's fear of "potential obstruction" of access to postal property as a basis for the arrest, and therefore was not even entitled to qualified immunity from liability under section 1983. *Id.* at 438-40 (Cowan, J., dissenting).

walkway" within postal property. *Id.* at 1195. The court noted that plaintiffs had not contended that they lacked alternative channels for communication, *id.* at 1199 n.3, and concluded that the rationale of avoiding entanglements with partisan groups provided a sufficient basis for exclusion. *Id.* at 1199. Concurring, Judge Tang emphasized that the result turned on the particular placement of the covered walkway, and that different results would be mandated at other post offices. *Id.* at 1200 (Tang, J., concurring).

USPS gives short shrift to *Jacobsen v. United States*, a post-*Kokinda* decision involving a publisher's as-applied challenge to the exclusion of newsracks from three post office sidewalks. 993 F.2d 649, 653 (9th Cir. 1993). The court of appeals had already directed issuance of a preliminary injunction against removing any newsrack "which [did] not obstruct access or endanger pedestrians and which [was] placed on any perimeter sidewalk owned by USPS adjacent to a post office." *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151, 1154 (9th Cir. 1987). Significantly, it upheld that injunction when the case returned to the court. 993 F.2d at 658. Citing *Monterey*, however, a majority permitted the removal of newsracks that obstructed access on just three sidewalks—although the court observed that its holding respecting one of them was "a very close call." *Id.* at 657.

USPS acknowledges that *National Anti-Drug Coalition v. Bolger*, 737 F.2d 717 (7th Cir. 1984), provides no support for its view. [USPS Br. at 43.] While the *Bolger* court never reached the forum status of a sidewalk, it observed that the property appeared to be a designated public forum. 737 F.2d at 722-23. Next, as USPS only hints, *American Postal Workers Union v. U.S. Postal Service*, 764 F.2d 858 (D.C. Cir. 1985), is wholly irrelevant. It involved the interior of a post office building. *Id.* Far from "not differ[ing] in any material respect" from sidewalks outside a building, it differs in a *quintessential* respect. It is not a sidewalk. And, unlike the interior of a post office, a sidewalk is not a place where postal business is actually conducted. Indeed, USPS regulations recognize this functional difference by drawing distinctions between the uses of interior and exterior postal space. *See* 39 C.F.R. § 232.1(h)(3).

As to the remaining decisions USPS cites, they too, are only as-applied challenges, based on the particular physical spaces and factual circumstances of the claims, with limited value for addressing this facial challenge to USPS's sweeping, nationwide ban on signature-gathering. *Del Gallo v. Parent*, 557 F.3d 58 (1st Cir. 2009); *Longo v. U.S. Postal Serv.*, 983 F.2d 9 (2d Cir. 1992); *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986). Moreover, those courts evidently were not presented with robust historical information or statistical data like that presented here. *See generally id.*

Apart from the limited holdings of these cases, an important fact can be gleaned from their sheer number. If there have been this many reported appellate decisions, there have been many more unreported incidents, and scores of people who wished to exercise First Amendment rights on post office sidewalks but were deterred or chased away. USPS's claim that post office sidewalks are not a traditional locus for expressive activity loses more credibility every time USPS has to repeat the argument.

III. The Ban Fails The First Amendment Reasonableness Test

Even if *Kokinda* sidewalks were not public forums, USPS's ban on signature-gathering would have to be invalidated because it is not reasonably calculated to advance USPS's regulatory interests. In response to Plaintiffs' argument that there is no reasonable fit between USPS's stated interest in preventing disruption of postal business and its blanket ban on signature collection, USPS seeks to show that its exception for voter registration is not inconsistent with its claim that signature collection for petitions is disruptive. [USPS Br. at 44-47.] It suggests that gathering signatures for voter registration is "customer passive" whereas, to gather signatures for petitions, "the customer must be approached about a particular issue, must listen to a synopsis of why he or she is being asked to sign, read any materials, decide whether to sign, and then sign his or her name." [*Id.* at 45.] USPS posits that this activity is "often viewed as intimidating or

intrusive, especially because initiatives or referenda may address controversial issues that inflame the public." [*Id.*]

First, as a practical matter, this explanation does nothing to show a reasonable fit between the regulation and the interest USPS asserts. The regulation ***still*** allows "the customer [to] be approached about a particular issue, . . . listen to a synopsis of why her or she is being asked to sign, read any materials, [and] decide whether to sign . . . ." 39 C.F.R. § 232.1(h)(1). It allows these supposedly intimidating acts, and prohibits only the supposedly *benign* act of signing—the very same act permitted for voter registration. Indeed, it forces the circulator to persuade the customer to go off-premises to complete this benign act.[4]

Second, as a constitutional matter, USPS's suggestion that "initiatives and referenda may address controversial issues that inflame the public," [USPS Br. at

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[4] USPS has provided no evidence that an offer to discuss a public issue on a sidewalk is actually disruptive to postal business. To the contrary, in response for a request for admissions, it conceded none existed. [A. 269.] Indeed, the author of the ban admitted that he was aware of no record of actual complaints about signature-gathering on postal property. [A. 153-59.] The minuscule number of "complaints" USPS now cites did not even involve gathering signatures on petitions. [A. 505-11, 513.] And most of the instances USPS cites that did involve petitioning evidently excited no complaint, although USPS evidently interrupted the activity for violating the regulatory ban. [A. 491-501, 512, 514, 518.] As USPS notes, "with 34,000 postal facilities a violation of the USPS's regulation may occur." [USPS Br. at 58-59.] Likewise, with the exercise of First Amendment rights at 34,000 postal facilities, a few complaints will be expected. An occasional aggressive advocate is no more reason to shut down a public forum than an occasional failure to enforce only within the limits of the regulation is a reason to strike it down.

45], is nothing more than a restatement of the heckler's veto, whose only constitutional pedigree is its history of dogged rejection by the Supreme Court. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811 (1985); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971). Thus, neither USPS's method nor its stated rationale establishes a basis for sustaining the constitutionality of the regulation.

IV. Plaintiffs Are Entitled To An Order Formalizing This Court's Ruling That The Ban on Signature-Gathering On *Grace* Sidewalks Is Unconstitutional

In opposing as moot the entry of an order effectuating this Court's prior judgment, USPS seeks to rewrite history. USPS's claim that its amendment to the ban to exclude *Grace* sidewalks simply reflected a clarification or "change in format," rather than a change in its interpretation or meaning, is belied by the circumstances surrounding the amendment. As this Court noted:

> At a hearing on [the parties' cross-motion for summary judgment], the Postal Service "*announced . . . in open court that it ha[d] changed its articulated position* from the one it took early in this litigation to one more favorable to plaintiffs on whether certain alternative channels of communication on exterior postal properties would violate 39 C.F.R. § 232.1(h)(1)." * * * The Postal Service said that ... it would not apply § 232.1(h)(1) to public perimeter sidewalks that are indistinguishable from their non-postal counterparts . . . .

IRI III, 417 F.3d at 1304 (emphasis added). As the record reflects, individuals were, in fact, prevented from circulating petitions on perimeter postal sidewalks

under the authority of Section 232.1(h)(1). *See, e.g.*, Lincoln Aff., 2d para. (A. 295) ("On the south side I was petitioning on the public sidewalk."). Far from merely codifying an unwritten understanding of Section 232.1(h)(1), USPS's "changed . . . articulated position," and its subsequent codification in late 2005, effectuated a major change in its meaning.

This is not a case where USPS amended its regulation at an early stage in the litigation, before a substantive decision was reached. Rather, it amended the regulation only after, five years into this lawsuit, this Court found it unconstitutionally overbroad, but before that judgment could be reduced to a mandate on remand. If that is all an agency need do to escape an injunction at this Court's direction, few of this Court's decisions will ever be enforceable on remand.

Further, this Court's holdings regarding the regulation's failure to pass the "time, place and manner test" that applies in a public forum are not dicta; the Court reached that question specifically because it understood that the regulation *in fact* extended to perimeter sidewalks. This is why the Court suggested that, if USPS *amended* the regulation to exclude *Grace* sidewalks, the question of the ban's facial invalidity "*may* be pretermitted." *IRI III*, 417 F.3d at 1318 (emphasis added). As we have shown, however, because USPS has not acknowledged that the Constitution (as opposed to its own grace) gives petitioners the right to collect

signatures on postal sidewalks, the question is not moot, and an order formalizing this Court's ruling is needed.

In suggesting that the question of facial overbreadth on *Grace* sidewalks "may be pretermitted" if USPS narrowed the scope of its ban to exclude them, this Court advisedly refrained from holding that such an amendment necessarily *would* pretermit the dispute. In fact, as Plaintiffs have shown, the doctrine of mootness requires something more than a voluntary cessation of illegal activity. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see* cases cited in IRI Opening Br. at 48-50 & n.14. Where a defendant is not acting pursuant to a court's mandate, its voluntary abandonment of illegal conduct leaves a controversy to be settled, because "[t]he defendant is free to return to his old ways." *Id.* at 632. As the Court observed in *United States v. Generix Drug Corp.*, "The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness." 460 U.S. 453, 456 n.6 (1983).

Thus, USPS misstates the holding in *W.T. Grant* when it asserts that "the Supreme Court upheld a finding that the case was moot." [USPS Br. at 53.] In fact, the Court held that "although the actions were *not* moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief." *W.T. Grant*, 345 U.S. at 635-36 (emphasis added). Here, where the District Court believed erroneously that it was bound by the mootness doctrine, it

never had occasion to consider entry of an injunction based on its discretionary judgment.

Notably, even when given yet another opportunity to admit that its prior conduct was unconstitutional in responding to Plaintiffs' opening brief—and thereby seal the argument that the question is moot—USPS declined the invitation. USPS's "refusal to admit the illegality of its past conduct heightens the probability that the agency will once again fail [to comply with legal mandates]." *In re Center for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (refusing to hold case moot when government agency changed its conduct). In the absence of a court mandate, USPS remains free, at a later date, to amend its regulation to ban petition circulation, or an even broader range of expressive activity, throughout its property, including *Grace* sidewalks.[5]

In this respect, this case resembles *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 287 (1982). There, the Supreme Court considered whether a city ordinance that barred persons "connected with criminal elements" from gaining licenses to operate coin-operated amusement establishments was unconstitutionally vague. 455 U.S. 283 (1982). While the case was pending before the Fifth Circuit,

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[5] Indeed, USPS's arguments suggest that it is trying to narrow the meaning of *Grace* and thus limit this Court's prior holding regarding *Grace* sidewalks. [*See, e.g.,* USPS Br. at 15-16.] Given that this is apparently USPS's position, the danger is real that it will revert to form without an injunction.

the city amended its ordinance to remove the challenged language. *Id.* at 288. The Supreme Court later held that the case had not become moot because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289.

Critical in *Aladdin's Castle* was the defendant's demonstrated willingness to change the terms of its ordinance to escape entry of an adverse judgment. "The city followed that course with respect to the age restriction, which was first reduced for Aladdin from 17 to 7 and then, in obvious response to the state court's judgment, the exemption was eliminated." *Id.* USPS suggests that the *Aladdin* Court's holding is distinguishable because the Court mentioned that the defendant had expressed an intention to re-enact the same provision that was invalidated. [USPS Br. at 56.] But the *Aladdin* Court relegated this observation to a footnote, only to reinforce its main observation that the City had abandoned its rule only to escape a judgment, and remained free to reenact it. 455 U.S. at 289 n.11.

Here, likewise, USPS changed its interpretation "in open court" at a summary judgment hearing, offering first to publish a *Postal Bulletin* revising its interpretation, but not following through until the District Court, more than a year later, ordered it to do so. *IRI III*, 417 F.3d at 1304; R. 98, 99. It was only after this Court found *that* remedy insufficient that USPS revised the regulation itself on

remand. Thus, what USPS characterizes as a mere "change in format" was in fact a change in the substance of the rule, begrudgingly offered to the court only to avoid an adverse judgment.

If this Court does not order entry of an injunction, USPS will be entirely at liberty to amend its regulation again, forcing Plaintiffs to litigate again to protect their First Amendment rights. Indeed, there is no sanction now for disregarding this Court's judgment. Even after this Court's decision and USPS's amendment, such interference has continued on *Grace* sidewalks. [*See, e.g.*, R. 122, 123 (circulator ordered to desist from soliciting signatures on *Grace* sidewalk, notwithstanding prior amendment to ban).] Plaintiffs have already litigated this case for over ten years, at considerable expense and with an extended infringement of their constitutional rights. USPS has not shown the slightest change of heart, but simply a tactical willingness to do the minimum necessary to make the case go away. That is not sufficient. Plaintiffs are entitled to the entry of an enforceable order.

CONCLUSION

USPS has failed to meet its burden to overcome the presumption that "a substantial number" of non-*Grace* postal sidewalks are traditional public forums, and therefore the judgment of the District Court should be reversed and the case remanded with instructions to enter judgment granting Plaintiffs' cross-motion for

summary judgment. The remand should also direct the District Court to enter an injunction enforcing this Court's 2005 judgment.

Respectfully submitted,

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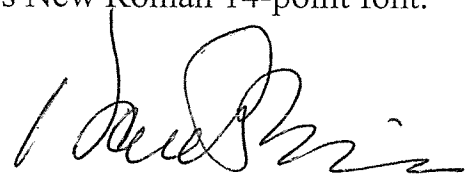

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I hereby certify that on July 19, 2011, I electronically filed the foregoing Reply Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Copies were also sent by U.S. mail, first class postage prepaid, to the following:

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