No. 04-5045

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

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STATEMENT OF THE ISSUE

Does the U.S. Postal Service's complete ban on soliciting signatures on petitions, polls or surveys on outdoor Postal Service streets, sidewalks and plazas (39 C.F.R. § 232.1 (h)(1)) violate the First Amendment on its face or as applied to the activities of the appellants?

REGULATION INVOLVED

The U.S. Postal Service regulation at issue, 39 C.F.R. § 232.1, is reproduced in its entirety in the Addendum to this brief.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which provides jurisdiction over all final decisions of the district courts of the United States. 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.

STATEMENT OF THE CASE

This case involves a challenge to 39 C.F.R. § 232.1(h)(1), which prohibits "soliciting signatures on petitions, polls, or surveys" on property of the U.S. Postal Service ("Postal Service" or "government"), appellee herein. Appellants, plaintiffs below, are individuals and organizations that have long engaged in the practice of

circulating petitions to place initiatives on state ballots, using sidewalks and other exterior areas on Postal Service property as a principal forum for their expressive activities. On June 1, 2000, appellants filed this action in the district court challenging section 232.1(h)(1) on First Amendment grounds, both on its face and as applied to their specific petitioning activities. *Initiative & Referendum Institute v. U.S. Postal Serv.,* Civ. No. 1:00CV01246 (RWR). In return for plaintiffs' agreement not to pursue a preliminary injunction, the government agreed to suspend operation of the ban pending the district court's decision on expedited cross-motions for summary judgment. The district court, however, denied both 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) (*"IRI I"*). Plaintiffs then filed an Amended Complaint adding facts about specific post offices where they had been prevented from engaging in petitioning activities.

After extensive discovery, including depositions at various locations around the country, the parties renewed their cross motions for summary judgment. Briefing was completed on May 13, 2002, and oral argument followed on September 24, 2002. At oral argument, the government 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 the government had interpreted the rule, in accordance

with its plain language, to prohibit the *solicitation* of signatures on *all* Postal Service property, the government now offered: (1) to permit the solicitation of signatures and prohibit only the actual *collection* of signatures on postal property; and (2) to limit enforcement of the ban to sidewalks which were "easily distinguishable" from non-postal property "by means of some physical feature." *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 297 F. Supp.2d 143, 152-53 (D.D.C. 2003) ("*IRI II*"). The government did not, however, actually promulgate these changes; instead, it offered to make the changes ***if*** doing so would cause the district court to uphold the regulation against constitutional challenge. Following oral argument, the district court allowed appellants to file a supplemental memorandum addressing the proposed change.

On December 31, 2003, the court issued a decision (*IRI II*) ordering the government to adopt and circulate its new interpretation in the *Postal Bulletin*, and sustaining the regulation as so interpreted. This appeal followed.

STATEMENT OF THE FACTS[1]

On June 25, 1998, the Postal Service amended its regulation governing conduct on postal property, 39 C.F.R. § 232.1, to prohibit "soliciting signatures on

[1] Because of the complexity of detail encompassed by the record, parts of this statement provide general characterizations of the facts, with cross-references to sections of this brief in addition to specific record evidence.

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). The regulation applies to "all real property under the charge and control of the Postal Service", *id.*, § 232.1(a), including sidewalks and other exterior areas of Postal Service property. Violators may be punished by fine or imprisonment. *Id.* § 232.1(p)(2).

In its Federal Register notice, the Postal Service justified this prohibition by citing its "experience" that the solicitation of signatures disrupts postal business. 62 Fed. Reg. 61481 (Nov. 18, 1997). The government admitted, however, that at the time it promulgated section 232.1(h)(1) (and, indeed, at the date this action commenced), it had collected no data and conducted no investigation in support of its claimed "experience," and in fact had made no record to demonstrate that the solicitation of signatures on petitions, polls or surveys disrupts postal operations in any manner. *See infra* pages 22-23 and A. 154-59, 269; R.38 at 2.[2] Moreover, despite the fact that it had imposed a sweeping ban on all signature-gathering for petitions, the government also admitted in its district court briefing that, in its view, signature gathering on petitions is only "*at times* disruptive, . . . *occasionally*

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

give the appearance of bias or partiality on the part of the USPS, and . . . *at times* require postal employees to spend too much of their time on nonpostal business." R.67 at 36 (emphasis added). Indeed, the government's only evidence of disruption was collected in support of its second motion for summary judgment, and the documents collected dealt primarily with non-petitioning activities and violations of section 232.1(h)(1) itself, after it went into effect. *See infra* pages 23-26 and A.490-519, 529.

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 below the government explained that, in its conception, voter registrars gather signatures passively, without asking postal patrons to stop, listen to a request, and act upon it. R.71 at 26.

Appellant individuals and organizations have engaged and intend to continue engaging in petitioning activities. Before section 232.1(h)(1) was promulgated, post office sidewalks and other exterior grounds were a principal forum for these activities. Appellants selected post offices because, among other things, they were uniquely suited to assure that patrons would be residents of the local area defined by the zip code, allowing appellants to comply with geographic distribution requirements prevalent under the ballot access laws of most jurisdictions. *See infra* pages 32, 50-51 and A.212-14, 283-84 The record, including the deposition

testimony of the government's own expert, shows that post offices have been used for expression and conduct protected by the First Amendment since colonial times, and also establishes a long history of using postal sidewalks for petitioning activity. *See infra* pages 42-50 and A.71-72, 76-77, 82, 87-91, 125, 142, 352-60, 601, 686, 712. Indeed, the record shows that the specific post offices listed in the Amended Complaint had each served repeatedly as public forums for petitioning and other conduct protected by the First Amendment over the preceding years. *See infra* pages 54-57 and *see generally* A. 200-04, 231-33, 241-52, 265-66, 487-88, 523-29, 535, 546.

Moreover, the record establishes that the configurations of the post offices in the Amended Complaint are such that their use for petitioning activities will not interfere with their use for regular postal business, affording sufficient space for both petitioning and the passage of customers and employees to and from each post office. *See infra* pages 54-57 and R.65, Exh. 22A, 22B, 23A, 24A, 25B; A.428, 442. Photographs and site surveys show that the sidewalks are largely indistinguishable from other sidewalks, sometimes encompassing or straddling both postal and municipal property. *Id.* Further, because of the remote locations of some post offices (e.g., Garden Valley, Idaho), they often provide the only sidewalks available in their local areas for the conduct of First Amendment activity. A.237-38.

However, following promulgation of the ban, appellants found that they were being excluded from all of these forums. Among the post offices from which appellants were excluded were those listed in the Amended Complaint: Allegan, Michigan; Belleville, Michigan; Detroit, Michigan; Garden Valley, Idaho; Georgetown, D.C.; Great Falls, Montana; Halfway, Oregon; Moab, Utah; Oakland Park, Florida; Reno, Nevada; Salem, Oregon; and Tempe, Arizona. Following their exclusion from the postal properties in question, appellants brought the action below.

SUMMARY OF THE ARGUMENT

The district court committed several dispositive errors in rejecting appellants' First Amendment claims.

1. The district court misunderstood and misapplied the concept of a First Amendment facial challenge, while failing to address appellants' as-applied challenge. It is well established in the First Amendment context that, to prevail on a facial challenge, a plaintiff need not prove that a regulation would be invalid in every application; instead, it is sufficient to show that it is substantially overbroad, *i.e.*, that it prohibits a substantial amount of constitutionally protected conduct when judged in relation to the unprotected conduct that it prohibits. Nevertheless, the district court improperly held that, to sustain appellants' facial challenge, itwould have to find section 232.1(h)(1) invalid in *every* application. 297 F.

Supp.2d at 148. The district court erred in applying this incorrect standard to appellants' claims and then compounded its error by failing to address appellants' separate as-applied challenge to the regulation.

2. The district court also misapplied the test applicable to "time, place or manner" restrictions on First Amendment activities in a public forum. First, it held improperly that section 232.1(h)(1) *was* a regulation of time, place and manner, when in fact the measure prohibits signature gathering at *all* times, in *all* parts of the forum, and in *every* manner. Second, it improperly held that the regulation was "narrowly tailored," despite the government's admission that only a portion of the targeted speech even potentially caused problems for the Postal Service. Third, relying on a fundamental reinterpretation of the regulation that the government had proffered but not promulgated, the district court found that the regulation offered ample alternative channels of communication, despite the fact that it continued to bar the circulation of petitions entirely from the forum. Finally, apparently ignoring the fact that the regulation exempts from its prohibition signature gathering for voter registration, and disregarding evidence that the regulation was adopted specifically to avoid "controversy" on postal property, the district court improperly found that the regulation was content neutral. In doing so, the court ignored Supreme Court caselaw holding that rules that generally bar categories of expression while exempting discrete subject matters, or which prohibit expression

to avoid audience hostility, are not content-neutral, and therefore cannot be upheld as regulations of time, place or manner but must be subjected to strict scrutiny.

3. In misapplying the "time, place or manner" test, the district court erroneously concluded that the challenged postal regulation would survive scrutiny even if the property in question were deemed a traditional public forum. It thus avoided deciding what sort of forum it was dealing with, which ultimately is a central issue in the case. The record shows, however, that postal property has been used since colonial times as a traditional public forum for First Amendment activity, that postal sidewalks, including those at the sites identified in the Amended Complaint, continue to be so used today, and that their physical configuration fails to distinguish them from other public forum sidewalks and is consistent with their use as such.

4. Finally, in reaching its decision, the district court relied improperly upon the government's offer to change the plain meaning of the regulation through the publication of an internal bulletin. In the first place, the reinterpretation is ineffective because it failed to comply with the rulemaking requirements of the Administrative Procedure Act, and in any event it does not cure the constitutional infirmities of section 232.1(h)(1) on the merits. Moreover, it was improper for the court to entertain "compromise" proposals from a litigant—even the government—over the objections of its adversary. In doing so here, the district court failed to

address the express language of the regulation before it, and improperly allowed itself to be injected into what amounted to an informal Article I rulemaking process, resulting in the issuance of an advisory opinion on a hypothetical regulation that did not actually exist at the time of the district court's decision, and that still does not exist in the Code of Federal Regulations.

ARGUMENT

INTRODUCTION

This case involves a challenge to a regulation that establishes criminal penalties, including fines and imprisonment, for "soliciting signatures on petitions, polls, or surveys (except as otherwise authorized by Postal Service regulations)" on post office property. 39 C.F.R. § 232.1(h)(1). A central issue—the public forum status of outdoor sidewalks on Postal Service property—has previously divided the Supreme Court on a 4-4 vote. *United States v. Kokinda*, 497 U.S. 720 (1990).

Kokinda involved a separate clause of the same regulation, which banned collecting alms and contributions on postal property. Eight justices divided evenly on whether postal sidewalks are a traditional public forum. Justice Kennedy, the ninth voter, acknowledged the "powerful argument" that postal sidewalks are a public forum, *id.* at 737, but sidestepped the question by holding narrowly that the particular activity at issue was disruptive enough to warrant the restriction under the applicable "time, place or manner" test, whether or not the sidewalks were a

public forum. *Id.* at 738. Justice Kennedy stressed, however, that the rule still allowed wide berth in the forum for other expressive activity—which at that time included petitioning. *Id.* at 738-39. Thus, as the district court observed, *Kokinda* "provides no definitive guidance," leaving the issue to be "determine[d] anew." *IRI I*, 116 F. Supp.2d at 70.

As amended in 1998, the rule now prohibits "soliciting signatures on petitions, polls or surveys." 39 C.F.R. § 232.1(h)(1). The district court attempted to avoid the undecided public forum issue by concluding that, even if postal sidewalks are a public forum, the rule meets the applicable "time, place or manner" test. As we show below, however, the rule does not meet this test. Accordingly, the court should have reached the public forum question and, in doing so, should have ruled in appellants' favor.

I. THE DISTRICT COURT MISUNDERSTOOD AND MISAPPLIED THE TEST APPLICABLE TO APPELLANTS' FIRST AMENDMENT FACIAL CHALLENGE

This appeal presents both a First Amendment facial challenge and an "as-applied" challenge. In rejecting appellants' facial challenge, the district court held that such relief "would require proof that all exterior post office properties are traditional public fora." *IRI II*, 297 F. Supp.2d at 148. Because there are approximately 34,000 post offices, the district court concluded that appellants had not mounted the evidence necessary to support a facial challenge. *Id.* In so

holding, the district court misapprehended and consequently misapplied the test for facial challenges in First Amendment cases.

It is true that, outside the First Amendment context, facial challenges generally are sustained only upon a showing that a law or regulation is unconstitutional in every application. This is so because courts have regarded it as strong medicine to strike a law down on its face when individual redress is possible for unconstitutional applications. Courts recognize, however, that First Amendment rights enjoy a unique place in our jurisprudence, and accordingly allow even litigants whose own rights have not been infringed to obtain judgment based on the infringements visited upon others. *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633-34 (1980).

Consistent with this approach, courts do not require First Amendment plaintiffs to prove that a regulation is unconstitutional in every application. Rather, "[i]f the statute is substantially overbroad—that is, if it abridges protected speech of others in a good number of cases—the statute is unconstitutional." *Ruggiero v. Federal Communications Comm'n*, 317 F.3d 239, 248 (D.C. Cir. 2003) (Randolph, J., concurring). *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 & n.22 (1999) (plurality decision) (successful First Amendment facial challenge to anti-loitering law did not require plaintiff to "establish that no set of circumstances

exists under which the Act would be valid"). In First Amendment cases, it is sufficient to show that a rule directly restricts protected activity without employing means narrowly tailored to serve a compelling government interest. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984); *Schaumburg*, 444 U.S. at 637-39.

Appellants met this standard by showing that the regulation improperly and unnecessarily prohibited a substantial amount of protected speech at a wide cross-section of post offices around the country. The regulation imposes a sweeping and indiscriminate ban on expression protected by the First Amendment and, as the district court recognized, the sheer number of public forums involved makes site-by-site determination impossible. *IRI II*, 297 F. Supp.2d at 148. Contrary to the district court's reasoning, however, this does not compel the conclusion that the offending regulation must be allowed to stand, or that thousands of litigants must be required to flood the courts to chip away at it, one post office at a time. The Supreme Court has fashioned a doctrine that allows courts to strike such statutes down on their face, and the district court ought to have applied it below.

The regulation is also invalid on its face because it is unconstitutionally vague. While the geographic scope of its application, "all real property under the charge and control of the Postal Service" (39 C.F.R. § 232.1(a)) seems quite exact, the metes and bounds of Postal Service property are often unknowable without a

survey map and a transit. As the evidence showed (*see infra* pages 54-55), many postal sidewalks are contiguous with and indistinguishable from municipal sidewalks, a quintessential public forum; nothing shows where municipal property ends and Postal Service property begins. Thus, the regulation fails to give sufficient notice so that "ordinary people" who wish to exercise their First Amendment rights "can understand [where their] conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Marks v. United States*, 430 U.S. 188, 196 (1977) ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values.").[3]

II. THE DISTRICT COURT ERRED IN RULING THAT SECTION 232.1(h)(1) IS A REASONABLE TIME, PLACE OR MANNER RESTRICTION

The district court acknowledged that "[g]athering signatures to place an initiative on a state ballot is core political speech protected by the First Amendment." *IRI I*, 116 F. Supp.2d at 69; *accord Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (petition circulation is "core political speech"). Thus, the starting point for analysis must be a recognition that section 232.1(h)(1) restricts a type of expression for which the protection of the First Amendment is "at its zenith."

[3] The Postal Service attempted to cure this and other defects of the regulation through an "interpretation" that it published only in an internal bulletin. We show below that that interpretation is ineffective and that the district court improperly relied upon it in considering the constitutionality of the regulation.

Meyer, 486 U.S. at 425.

The district court avoided addressing whether post office sidewalks are a public forum by ruling that, even if they are, section 232.1(h)(1) is a reasonable time, place or manner restriction. That judgment was erroneous for two reasons. First, section 232.1(h)(1) bars petition circulation at all times, in all manners, and at all places within the subject forum. Therefore, it cannot be a time, place or manner restriction at all, and may be upheld only on a showing of compelling need. *United States v. Grace*, 461 U.S. 171, 177 (1983). Second, even if the regulation is a time, place or manner restriction, it may be upheld only if it (1) is narrowly tailored to serve a significant government interest; (2) leaves open ample alternative channels for communication; and (3) is content neutral. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). As shown below, the ban fails both constitutional tests.

A. Section 232.1(h)(1) Is Not A Time, Place Or Manner Restriction Because It Completely Bans Petitioning From Postal Sidewalks

The Supreme Court has held that regulations generally may not completely exclude a particular type of expressive activity from a public forum.[4] For example,

[4] *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294-95 (1984) (analyzing as time, place or manner restriction prohibition against sleeping on National Mall because it "neither attempts to ban sleeping generally nor to ban it everywhere in the parks"); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981) (to be valid as a place
Footnote continued on the next page.

in *Grace*, the Court stressed that the total prohibition of a particular expressive activity, such as picketing, constitutes an absolute ban on [such] types of expressive conduct for purposes of determining the proper level of scrutiny. 461 U.S. at 181 & n.10. Therefore, restrictions that completely exclude a form of expressive activity from a forum are not time, place or manner restrictions at all, and must be analyzed under the more stringent "compelling governmental interest" test. *Id*. at 177; *Perry Educ. Ass'n*, 460 U.S. at 45.

Section 232.1(h)(1) does not specify that petition circulators stand 10 feet away from a post office door, or that they not use bullhorns. Rather, it completely excludes circulators from postal property. Therefore, it cannot be a time, place or manner restriction at all, and may be upheld only upon a showing of compelling need. And, as discussed below at pages 21-27, no significant interest, much less a compelling need, has been demonstrated.

B. Even If Section 232.1(h)(1) Is Viewed As A Time, Place Or Manner Restriction, It Fails To Withstand Scrutiny Under The Constitutional Test Applicable To Such Restrictions In A Public Forum

Even if the district court was correct in analyzing section 232.1(h)(1) as a time, place or manner restriction, the regulation cannot be upheld, for it is *neither* narrowly tailored to serve a *significant* government interest, *nor* does it leave open

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and manner restriction, rule must be "shown not to deny access within the forum in
Footnote continued on the next page.

ample alternative channels for communication, *nor* is it content neutral.

1. *Section 232.1(h)(1) Is Not Narrowly Tailored To Serve A Significant Government Interest*

A restriction on expression in a public forum may not be upheld unless it is "narrowly tailored," so that it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Because "[b]road prophylactic rules in the area of free speech are suspect,", *Schaumburg*, 444 U.S. at 637, a restriction may target "no more than the exact 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). As shown below, the district court erred in finding section 232.1(h)(1) narrowly tailored, for the ban targets far more than the "exact evil" it was promulgated to address, the purported evil itself is unsubstantiated in the record, and the government's own current interpretation of its ban fatally undercuts the rationale offered by the government, and accepted by the district court, to justify its imposition. Indeed, the rule is fatally underinclusive and fails the First Amendment "reasonableness" test.

a. The Regulatory Ban Is Not Narrowly Tailored

"The government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

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question").

Unfortunately, the government has violated this tenet here by prohibiting all petition circulation as a means of eliminating a small number of potential "disruptions." By that reasoning all demonstrations in Freedom Plaza could be banned because some might become disruptive. This is the antithesis of narrow tailoring.

The government itself has conceded the narrow scope of the problem which it alleges to exist, and this alleged problem does not even approximately justify an all-encompassing ban on petitioning activity. In briefing the matter below, the government explained:

> The restrictions target precisely the conduct that impinges on the significant government interests sought to be advanced, i.e., signature gathering activities that interfere with customer satisfaction by being, ***at times*** disruptive, that ***occasionally*** give the appearance of bias or partiality on the part of the USPS, and that ***at times*** require postal employees to spend too much of their time on nonpostal business.

R.67 at 36 (emphasis supplied). Thus, the government urges that its ban "narrowly" targets an "occasional" evil, which "at times" involves conduct the Postal Service finds objectionable, by suppressing petitioning on Postal Service property *at all times, in all places, and in all manners*.

While the government need not choose the least restrictive means to advance its interests, a regulation fails the test of narrow tailoring when "a substantial portion of the burden on speech does not serve to advance [the government's] content-neutral goals.'" *American Library Ass'n v. Reno*, 33 F.3d 78, 88 (D.C. Cir.

1994) (*quoting Simon & Schuster Inc. v. New York Crime Victims Bd.*, 502 U.S. 511, n.1 (1991)). In these circumstances, it is difficult to conceive how a rule that wholly bars petitioning from postal premises, without regard to time, place or manner, could be "narrowly tailored." The government has chosen to suppress petitioning entirely, based on problems that it admits are only "occasional." Most importantly, section 232.1(h)(1) targets speech itself, without regard to whether the conduct is in fact disruptive. Ironically, the one thing that it specifically fails to target is disruption. Accordingly, the regulation suppresses far more speech than necessary to meet its legitimate ends.

Lest this overbreadth be thought merely technical, it bears noting that the individual appellants who were removed from postal premises were not alleged to have created a disturbance on post office property. Consistent with the section 232.1(h)(1), they were removed for "soliciting signatures on petitions," not for blocking "ingress or egress" or disturbing postal customers.

It is no answer for the government to contend that plaintiffs remain free to pursue their petitioning activity, albeit elsewhere and at greater expense. Many of the plaintiffs must rely on paid circulators to carry their efforts forward, compensating them on a commission basis. Such circulators do not agree to work where there is little opportunity to reach an audience. Further, the increased expense has forced some proponents to scale back or eliminate their petitioning

activities. Jacob Dep. 80:22-82:16 (A.264-65). But when a regulation imposes special financial burdens on speech, it implicates and often violates the First Amendment rights of the speaker. *United States v. National Treasury Employees Union*, 513 U.S. 454, 468-69 (1995) (*"NTEU"*); *Simon & Schuster*, 502 U.S. at 118 (1991); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227-31 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983); *Murdock v. Pennsylvania*, 319 U.S. 105, 112-15 (1943).

The government has contended that its regulation "target[s] precisely" the conduct that impinges on its interests. R.67 at 36. By its terms, however, the regulation targets *non-disruptive* speech in order to minimize "disruption." Thus, it violates the central tenet enunciated in *Free Speech Coalition*, for it "suppress[es] lawful speech as the means to suppress unlawful speech." 535 U.S. at 255. The district court failed to recognize that this targeting of protected conduct instead of unprotected conduct is not narrow tailoring; it merely conflates the government's ends with the means employed to reach them. By altogether suppressing the circulation of petitions within the forum to address an "occasional" or "potential" problem, the government casts its net far wider than necessary to meet its asserted interests.

b. In Any Event, The Record Does Not Support The Government's Asserted Interests In Banning Petitioning Activity From The Forum

The government asserted various interests to justify its ban on petitioning, but the district court ultimately accepted only the government's asserted interest in "minimiz[ing] the disruption of postal business and . . . provid[ing] unimpeded ingress and egress of customers and employees to and from post offices." *IRI II*, 297 F. Supp.2d at 149, 150 n.1 (citing 62 Fed. Reg. 61481 (Nov. 18, 1997)). In fact, however, far from showing that this regulation is narrowly tailored to address this problem, the record failed to document that such a problem existed at all.

Even before the regulation was amended in 1998 to ban the circulation of petitions, Postal Service regulations already prohibited "[d]isorderly 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 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 [Postal Service] property." 39 C.F.R. § 232.1(e) (1994). When it promulgated the new blanket prohibition on petitions, the government was aware of no evidence showing that petitioning was inherently disruptive or that the existing regulation was insufficient to address instances of disruption. Instead, it merely stated: "It is the Postal

Service's experience that [signature gathering activities] are generally disruptive to postal business." 62 Fed. Reg. 61,481 (Nov. 18, 1997).

In the internal deliberations preceding the ban's promulgation, the government recognized the lack of support for its asserted need. Thus, collecting the comments of agency personnel on the proposed regulation, Postal Service attorney Susan Koetting noted:

> One commenter thought that the rationale for adding the new prohibitions was not very persuasive and suggested that the Postal Service be prepared to substantiate the statements that certain activities are inherently disruptive of postal business. This mirrors the conversation that you and I had about gathering supporting data to use in the face of critical comments or challenges.

Memorandum from S. Koetting to J. Rafferty at 1 (Apr. 28, 1997) (A.124). In her notes (A.141), Ms. Koetting described the draft Federal Register justification that petition circulation was "inherently disruptive" as a "conclusory statement[]" that raised a "yellow flag to [the] reader," which the government "should be prepared to substantiate."[5]

[5] In her memorandum, Ms. Koetting wrote, "[I]t may seem contradictory to the public that, while stating that these activities are inherently disruptive of postal business, we nonetheless carve out an exception for voter registration activities. . . . Contrary to our earlier suggestion, therefore, we have suggested changing the word 'inherently' to 'generally,' wherever it appears, to lessen the inconsistency." Memorandum from S. Koetting to J. Rafferty at 2-3 (Apr. 28, 1997) (A.125-26). As promulgated, the regulation shows that this cosmetic advice was followed.

Notwithstanding its awareness of the need to find support for its self-acknowledged "conclusory statements," *id.*, the government failed to compile such a record. When appellants requested discovery of all documents relating to "disturbances in postal operations resulting from any signature gathering for petitions" or "customer complaints or grievances," the government failed to produce a single document to establish that petitioning activity had caused even one disturbance before the ban was adopted. The government's principal witness, Retail Operations Manager Frederick Hintenach, who led the effort to promulgate the ban, testified that although the Postal Service serves some seven million people a day (Hintenach Dep. 25:17-19 (A.153)) and collects complaint cards from unhappy customers (*id.* at 40:1-15 (A.157)), it had no record of such disturbances or complaints. *Id.* at 29:10-18; 35:15-19; 37:21-38:17 (A.154, 156-57). Mr. Hintenach himself could not recall a single complaint or identify a single person who had ever discussed an individual complaint with him. *Id*. at 27:19-42:13 (A.154-58). For that matter, he had made no inquiry about the number or substance of such complaints before initiating the regulatory machinery. *Id.* at 43:11-46:19 (A.158-59).

Underscoring the complete lack of support for its asserted "need," the government answered a request for admissions by stating that, "after reasonable inquiry, at present USPS has been unable to locate any such written grievance"

(A.269), and opposed a motion to compel production of documents by assuring that it "would not withhold evidence that plaintiffs concede would help support defendant's case." R.38 at 2.

Only upon moving for summary judgment did the government unveil a series of new declarations supported by exhibits that it had not produced in discovery, which allegedly documented disruptions at postal facilities.[6] The district court relied almost entirely on these declarations as the evidence supporting the government's asserted interest. *IRI II*, 297 F. Supp.2d at 149-50. But a critical review of the exhibits—accepting the facts as presented therein—reveals a dearth of support for the government's position.

The declarations recounted instances in which postal workers allegedly had to remove petition circulators from postal property. Many of these instances occurred only after the ban went into effect. With few exceptions, the declarations supply no details from which one could infer that an actual disturbance occurred, as opposed to a violation of the ban itself. The declarants sometimes stated that certain customers complained about the presence of petitioners, sometimes in angry terms, or even that circulators were "pushy" or "aggressive." But the

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[6] While appellants considered seeking exclusion of the exhibits, they ultimately elected not to do so, concluding that the evidence added nothing of substance to the government's arguments, while actually reinforcing appellants'
Footnote continued on the next page.

declarations lack details about the substance of such complaints, making it impossible to determine whether the activity interfered with a customer's ingress or egress, or the customer simply objected to being addressed by strangers in a public place about controversial issues. While noting customer reactions, the government's exhibits failed entirely to indicate *what* the customers actually had complained about.

Where sufficient details about the substance of the complaints do exist, it is often plain that the cited disruptions did not involve petitioning. One declarant cited an incident in which tax protestors attempted to create confusion on tax day by dressing in the same Uncle Sam costume as postal workers who were attempting to collect tax returns on the sidewalk in front of the Reno post office. Czipka Dec. ¶ 8 (A.529). This effort to interrupt the collection of tax returns, not a petition drive, caused the disruption. Another declarant cited a rash of disruptive "petitioning" incidents in 1994-95 which led to a temporary suspension of such activities at the Oakland Park, Florida post office. Sullivan Dec. ¶¶ 4-6 (A.487). Attached to his declaration were some 30 pages of contemporaneous diary entries and memoranda (A.490-519) which documented mostly benign petitioning activity (A.491-501, 512, 514, 518). As to the 1994-95 episode, one entry refers to a

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evidence that each of the post offices has repeatedly served as a forum for a wide range of expressive activity.

solicitor with flyers seeking to sell "$135.00 health tests" (A.511), another to partisan political campaigning (A.505-10), and a third to individuals soliciting membership and contributions to the "National Smokers Alliance" (A.513). None of these people were, in fact, circulating petitions. Their conduct may have violated preexisting regulations against disruptive conduct, but would not have implicated the ban on petitioning. Nevertheless, the district court took no note of the mismatch between the activities described and the ban on petitioning.

In fact, substantial record evidence confirms that petitioners collecting signatures outside post offices *do not* disrupt postal business. A witness for appellant Humane Society testified that circulators were instructed to be "unfailing[ly] polite" and serve as "ambassador[s] for the campaign." Pacelle Dep. 41:11-42:4 (A.232). Other appellant witnesses gave substantially similar statements. Snarey Aff. ¶ 3 (A.270); Ott Aff. ¶ 3 (A.272); Bandyk Aff. ¶ 3 (A.274). Indeed, the postmaster in Great Falls, Montana, who testified about prior petitioning activity, conceded that he had never encountered a customer complaint about petitioning. Farrell Dep. at 38:21-39:2 (A.252-53).

Finally, postmasters of the post offices described in the complaint themselves indicated that any actually disruptive petitioning activity would fall within the ambit of the pre-existing postal regulations. *See, e.g.*, Lents Dep. at

50:9-51:25 (A.244).[7] Letters from various postmasters to prospective petition circulators indicate that petitioning was permitted on postal grounds so long as postal operations were not disrupted. *See* Tempe Letters (A.200-04). This appropriate admonition generally sufficed.

Hence, absent any record establishing that signature gathering outside post offices significantly disrupts postal business, and that such disruptions cannot be adequately addressed under the general prohibition of disorderly, disruptive, or obstructive conduct, there is no basis for the district court's finding that the Postal Service needed a broad prophylactic ban on signature gathering as such.

c. The Government's Reinterpretation Of Its Regulation Eviscerates The Claimed Rationale For Promulgating It In The First Place

If there existed any lingering doubt about the sufficiency of the government's claimed interest in banning petitioning activity to protect "ingress to and egress from" post offices, it should have been resolved by the government's expedient last-minute reinterpretation of section 232.1(h)(1) in the *Postal Bulletin*.

[7] Indeed, in documenting the action taken by the Postal Service in response to such incidents, the government's exhibits establish that preexisting regulations provided appropriate authority to address truly disruptive conduct. If circulators were to harass customers or create disturbances, the Postal Service could remove and prosecute such offenders under the general prohibitions of such conduct then and still now in effect. *See* 39 C.F.R. § 232.1(e) (prohibiting conduct that "impedes or disturbs the general public").

As discussed below (pages 57-62), the district court should not have accepted this change of position, for the government offered it only ***if*** it would cause the court to uphold the rule. Significantly, the government's reinterpretation undermines the government's assertion that it has a significant interest to justify the ban, for the reinterpretation is wholly inconsistent with its analysis of that proffered interest.

As relevant here, the government offered to reinterpret the ban to allow "soliciting" signatures on postal property (for example, by holding signs or distributing leaflets), and to prohibit only *collecting* them there.[8] By adopting this interpretation, the government apparently hoped to avoid constitutional difficulties associated with the lack of ample alternatives within the forum for the restricted activity. In doing so, however, it abandoned the very rationale it had offered earlier for banning petitioning in the first place, for it allowed the purportedly annoying interaction between circulators and postal customers that it previously insisted leads inherently to disruptions.

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[8] This represented a radical departure from the plain meaning of the regulation, as well as the government's previous interpretation, which was that "[t]he amended regulations do not prohibit the taking of surveys, only the *soliciting of signatures* on surveys." Memorandum from S. Koetting to F. Hintenach at 2 (July 7, 1998) (A.624) (emphasis in original). *Accord* Hintenach Dep. 142:4-10 (A.183) ("Q. If [circulators] were allowed to hand out leaflets and say would you like to sign my petition but that was the limit of their speech, would that satisfy your concern? A. No.").

To put a fine point on this, one need only recall the government's earlier insistence that the solicitation of signatures on petitions, unlike voter registration, causes disruption, for although both activities involve the collection of signatures, the latter is "customer passive" and involves no putatively disruptive solicitation. Hintenach Dep. 100:2-105:10 (A.172-73). The voter registrar, at least in the government's theory, sits quietly beside the sidewalk, merely waiting for postal patrons to stop spontaneously and sign voter registration cards. *Id.* By contrast, the government urged, and the district court agreed, that petition circulators create more difficulty because their activity "'involves a signature gatherer stopping passersby entering the post office and confronting them with information *and* a request for a signature.'" *IRI II*, 297 F.Supp. 2d at 151 (quoting *IRI I*, 116 F. Supp.2d at 75).

Ironically, with the government's reinterpretation, none of this difficulty is obviated. The reinterpretation allows petition circulators back onto postal property to engage in solicitation, so long as they do not actually gather signatures there. Circulators may continue "confronting [passersby] with information *and* a request for a signature," except now they are saddled with the additional burden of getting passersby to walk across the street or to some other location to do so. Thus, while circulators apparently may continue to engage in solicitation, they may not—unlike voter registrars—collect signatures. The regulation, as reinterpreted, only succeeds

in discouraging petitioning activity, not in making the activity, when it continues, less intrusive. (Indeed, in adding the burden of persuading prospective petition signers to do so off postal premises, the new interpretation necessarily lengthens the interview and increases the "intrusion.")

Most important here, the reinterpretation removes the very purpose the government claimed it was advancing. Throughout the litigation, the Postal Service stressed that it is advocacy, not signature gathering itself, that creates disturbances. Yet, as the rule is currently "interpreted," it is signature gathering, not advocacy, that the Postal Service has banned from its sidewalks.

d. As Reinterpreted, The Ban Is Fatally Underinclusive And Fails The First Amendment "Reasonableness" Test

In addition, as reinterpreted, the ban is fatally underinclusive, for it bars a substantial amount of expression without meeting the Postal Service's asserted needs. The government urged below that the ban was necessary to (1) create an attractive environment for postal patrons, free from annoying solicitations; (2) avoid the government's identification with unpopular causes advocated on its property; and (3) avoid committing employee time to work other than the conduct of postal business. R.67 at 30-34. Yet, as modified, the rule fails to address any of these needs. It bans expression without removing the purported source of annoyance to patrons, because the actual soliciting continues. By substituting leaflets and placards for oral signature requests, it cements the visual identification

between the post office and the petition-related activity. And, by forcing employees to distinguish between different types of petition-related activity allowed on postal property, it increases the burden on personnel.

Moreover, even if exterior postal property is a non-public forum, the ban fails the First Amendment "reasonableness" test. Under this test, the government must show "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *NTEU,* 513 U.S. at 475. (*quoting Turner Broadcasting Sys. Inc. v. FCC*, 512 U.S. 622, 664 (1994)). Yet, as the foregoing analysis shows, in reinterpreting its rule, the government has abandoned altogether the pretense of addressing the needs it which asserts the ban was "narrowly tailored" to serve. Not only is there no showing that petitioning is inherently disruptive, that the Postal Service has been identified with unpopular causes, or that it has expended significant resources to manage petitioning on its premises,[9] but now the government itself has embraced a reading of the ban that—far from being narrowly tailored—actually fails to meet these asserted needs at all.

[9] Indeed, common sense would seem to indicate that enforcement of a regulation requires more resources than the non-enforcement of a non-regulation.

2. *The Regulation Does Not Leave Open Ample Alternative Channels For Communication*

Section 232.1(h)(1) also fails to pass muster as a reasonable time, place or manner restriction because, even as modified by the Postal Service's amended guidance, it fails to leave open "ample alternative channels for communication." *Burson v. Freeman*, 504 U.S. 191, 197 (1992). Indeed, the regulation leaves open *no* alternative channel for petitioning on postal property.

It is not enough to say, as the district court did, that appellants may circulate their petitions elsewhere. The Supreme Court has made clear that ample alternatives must be offered *within* the public forum. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997). As various witnesses testified below, post offices perform a critical screening function because most post office patrons are registered voters within the zip code in which they do their business, uniquely enabling circulators to collect signatures with a high confidence of compliance with statutory geographic distribution requirements.[10] Additionally, the geography of many post offices makes it impracticable to solicit signatures from postal

[10] Kimball Dep. at 32:13-33:3, 34:14-18, 35:8-36:4 (A.213-14); *see also* Pacelle Decl. ¶¶ 6-7 (A.276-77); Waters Decl. ¶¶ 5-6 (A.283-84); Lincoln Aff. ¶ 3 (A.295); Grant Aff. ¶ 3 (A.296); Hawkins Aff. ¶ 1 (A.298); Crow Aff. ¶ 2 (A.301). Moreover, at least one postmaster testified that there were virtually no other sidewalks in the rural communities served by her post office. Meserth Dep. at 24:12-25:24 (A.237-38).

patrons outside their boundaries. Snarey Aff. ¶ 5 (A.270); Ott Aff. ¶ 5 (A.272); Bandyk Aff. ¶ 5 (A.274). For one thing, the boundaries themselves often are not apparent to the naked eye; this is a source of vagueness which improperly compels circulators to "steer far wider of the unlawful zone"—and thus away from their targeted audience—than if the boundaries in question were clearly marked. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). Further, in some suburban and rural locations, like Garden Valley, Idaho, circulators are reduced to standing in the public road outside the parking lot entrance. Where, as here, the layout of a site makes it infeasible or unsafe to address the public, the courts have held that there are no alternative channels of communication. *See, e.g., National Treasury Employees Union v. King*, 798 F. Supp. 780, 789 (D.D.C. 1992).

As a condition of granting summary judgment, the district court ordered the government to publish in its *Postal Bulletin* guidance modifying its interpretation of the ban, *inter alia*, by allowing solicitation but not the collection of signatures on postal property. This small concession to appellants' First Amendment rights, however, fails to address the problem. Even as modified, the ban entirely excludes the petition itself from the postal property. Thus the ban continues to violate the circulator's right to petition, a distinct right protected by its own clause of the First Amendment, of which the collection of signatures is but a part. *See, e.g., Grant v.*

Meyer, 828 F.2d 1446, 1455 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 414 (1988). It is simply not possible to exercise this right fully without collecting the signatures of like-minded people. In addition, the ban completely prevents anyone on postal property from joining her name to those of others supporting a cause, thereby abridging discrete rights of speech, association, and petition guaranteed by the First Amendment. The government argues that one may cross the street to sign a petition, but this fails to meet the constitutional requirement that the exercise of First Amendment rights be allowed *within the forum*.

Nor can the government argue credibly that the ban should be upheld because it permits other types of communication short of petitioning and signing a petition. The Supreme Court has not sustained bans on First Amendment activity by citing other types of expression that continue to be allowed within a forum. To the contrary, as noted above (pages 15-16), the Court in *Grace* clarified that prohibition of a particular type of expressive activity "constitutes an absolute ban on [such] types of expressive conduct." 461 U.S. at 181 & n.10.[11]

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[11] Thus, in *City of Ladue v. Gilleo*, the Court struck down an ordinance against posting certain signs in residential areas, evidently finding no significance in the rather obvious fact that one could address passers-by in other ways. 512 U.S. 43, 55 (1994). Nor did the Court in *Shad v. Mount Ephraim*, addressing a ban on live entertainment, consider that recorded entertainment could be offered instead. 452 U.S. 61, 74-76 & n.17 (1981). In *Shuttlesworth v. Birmingham*, the Court struck down a ban on public marches, even though such marches obviously constitute but one method of imparting a message. 394 U.S. 147, 158 (1969).

As a practical matter, the restriction does not even offer a viable off-site alternative because, even as modified, the act of circulating a petition necessarily becomes the work of two people instead of one. One person may distribute leaflets and speak with others on postal property, but a second person is necessary to collect the signatures elsewhere. The lone adherent to a cause, if unable to secure the assistance of others, is entirely excluded.

Further, despite doubling the resources committed to a petition drive, the proponent will be hard-pressed to achieve the same results, for he will have the added work of persuading individuals to go across the road or downtown to sign a petition, an act most simply will not take the time and effort to accomplish. Indeed, in some of the remote sites at issue, even *extra-forum* alternatives are miles away.[12] Moreover, circulators generally are granted a short interview with their audience, which does not allow the extended interaction necessary to secure an off-site signature. And, by requiring individuals to leave the forum to sign a petition,

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[12] Indeed, the record shows that, in the wake of the regulation, the expense of First Amendment activity has increased, the success rates declined, and certain organizations have been forced to reconsider their petitioning efforts. *See, e.g.*, Kimball Dep. at 42:4-10 (A.215); *accord* Jacob Dep. 80:22-82:16 (A.264-65) (estimating that the cost of petition gathering increased 15-25 percent, and expressing doubt whether U.S. Term Limits would continue to use initiatives as an engine of change). Appellants' discovery (A.318-20) showed that some petitions have failed altogether since the regulation was enacted.

the ban attaches a stigma to petitioning efforts, suggesting that the activity is somehow unsavory or dishonest. The rule effectively brands the petitioner as anti-establishment, subversive, or worse—all the more so if the petitioner's cause is controversial.

3. *The Regulation Imposes An Invalid Content-Based Restriction On First Amendment Activity*

Section 232.1(h)(1) is also invalid for the distinct reason that it imposes an impermissible content-based restriction on speech. The ban is content-based because it prohibits solicitation (or, as reinterpreted, signature-gathering) only to the extent that it is related to the subject matters of "petitions, polls or surveys," while permitting other types of speech and solicitation (or signature-gathering). In particular, while the regulation prohibits the solicitation (or gathering) of signatures for petitions, it expressly permits the solicitation and gathering of signatures for voter registration.

The district court ruled in *IRI I*, and assumed without further discussion in *IRI II*, that section 232.1(h)(1) is content-neutral. To be sure, the ban discriminates only among subject matters, not viewpoints. That discrimination alone, however, violates established constitutional rules. Professor Gunther observed that "seminal cases . . . in which this scrutiny has been applied, seem more obviously *subject matter-distinctions* than viewpoint distinctions." Gerald Gunther, *Constitutional Law* at 1168 (11th ed. 1985) (emphasis supplied). For example, in *Police*

Department of Chicago v. Mosley, the Supreme Court invalidated an ordinance which prohibited picketing during school hours within 150 feet of a school, excepting only "peaceful labor picketing." 408 U.S. 92, 94 (1972). The Court found that this exception required the officials to discriminate based on content. *Id.* at 95-96. "[A]bove all else," the Court observed, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, *its subject matter*, or its content. . . ." *Id.* at 95 (emphasis supplied); *accord Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (exception for peaceful labor picketing rendered ordinance banning residential picketing impermissibly content-based). Likewise, in *City of Ladue v. Gilleo*, the Eighth Circuit struck down an ordinance against the posting of signs on private property, except "residence identification" and "for sale" signs. 986 F.2d 1180, 1181-82 & n.2 (8th Cir. 1993). The court found that even if the ordinance did not discriminate among viewpoints, it discriminated improperly among subject matters. *Id*. at 1182.[13]

To be sure, section 232.1(h)(1) avoids reference to specific viewpoints. But like the ordinances at issue in *Mosley, Carey* and *Ladue,* it discriminates between a

[13] The Supreme Court chose to affirm the ruling on grounds that the rule was underinclusive, reasoning that an affirmance based on the Court of Appeals' content rationale might allow the city to "remove the defects in its ordinance simply by repealing all of the exemptions." *Ladue*, 512 U.S. at 47, 53. The Court left little doubt, however, that it also thought the regulation impermissibly content-based. *Id.; see also id.* at 59 (O'Connor, J., concurring).

disfavored category of speech—petitioning—and one more favored—voter registration. Indeed, the ban's tortuous interpretive history only sharpens the issue. When promulgated, the rule was interpreted to prohibit only the soliciting of signatures on postal property, not their collection. Thus, the agency's counsel advised that solicitation, not collection, was the disruptive "evil" addressed. Memorandum from S. Koetting to F. Hintenach at 2 (July 7, 1998) (A.624). By contrast, the agency's witnesses explained, the rule allows voter registrars to collect signatures on postal sidewalks because, it was posited, voter registrars to do not engage in disruptive soliciting. Hintenach Aff. ¶ 13 (A.347-48); Hintenach Dep. 100:2–101:7 (A.172).

As reinterpreted following the district court's order, however, the regulation, which in so many words bans "soliciting signatures," is no longer read as banning "soliciting," but only the physical collection of signatures on postal property. Leaving aside (for the moment, but *see infra* pages 58-61) whether this interpretation is reasonable, the rule now bans *collecting* signatures on petitions, while it allows *collecting* signatures for voter registration. It therefore distinguishes between signature collection activities based entirely on the subject matter for which the signatures are being collected.

Moreover, the record shows that the agency's adoption of a subject-matter ban responds to the same content-based concerns as any prohibition on viewpoints.

In his deposition, Mr. Hintenach explained the rationale for the regulation as follows:

> *I don't think our customers or our employees should be subjected to the opinions of someone else if they don't choose to do so.* And referendum and signature collection forces that interaction.

Hintenach Dep. 94:1-5 (A.171) (emphasis supplied). Explaining this, Mr. Hintenach said:

> What if I support a certain cause and someone is trying to get a referendum to take that cause out of the—or try to make that an issue to reverse my exact beliefs? I might say why should I do business with this person, they don't support me, they have an opinion, you're letting this person collect signatures on our property and I don't believe that, I'm going to take my business someplace—I'm going to UPS or I'm going wherever, I'm going to Mailboxes, Etc., I don't have to deal with this down here.

Id. at 92:22-93:10 (A.170). Further, in distinguishing petitioning from voter registration, Mr. Hintenach testified:

> On voter registration, it represents everyone. You can register—if you feel you're at least a Republican, Democrat, Independent, it doesn't matter. There's no beliefs being presented there. . . .

Id. at 101:8-12 (A.172). "The reason we permit voter registration," he elaborated, "is that it serves the entire community and there is nothing controversial about voter registration and there is no reason for the customer to stop. It's their choice." *Id.* at 105:6-10 (A.173); *accord* Farrell Dep. at 40:18-41:1 (A.254-55) (postmaster distinguished petition circulation from voter registration because, "depend[ing] on the issues," petitions can be "controversial").

Mr. Hintenach's testimony shows that the prohibition was adopted, in part, to remove expressive activity to which postal customers might be hostile. It is well settled, however, that a ban on speech cannot be predicated on the unpopularity of the message. *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811 (1985). To allow such a ban is to give a veto to the heckler, in violation of fundamental First Amendment precepts. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134-35 (1992); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia,* 972 F.2d 365, 373 (D.C. Cir. 1992). A ban on "controversial" speech is invalid for the same reason. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1079-80 (9th Cir. 2001).

III. POST OFFICE SIDEWALKS ARE A TRADITIONAL PUBLIC FORUM

Because the district court held erroneously that section 232.1(h)(1) is a reasonable regulation of time, place or manner, it did not decide whether post office sidewalks are a traditional public forum or some other kind of forum. Unless this Court wishes to decide this case on the ground that section 232.1(h)(1) is unreasonable and therefore unconstitutional even in a non-public forum (*see supra* pages 30-31), it must decide the forum status of post office sidewalks.[14]

[14] It is appropriate for this Court to do so. *See, e.g., Doe v. Gates*, 981 F.2d 1316, 1322 (D.C. Cir. 1993) ("In reviewing summary judgment decisions, we decide *de novo* the same question that was before the District Court.").

"Sidewalks are deemed, without more, to be 'public forums.'" *Grace*, 461 U.S. at 177. This rule states a presumption that the government has an affirmative burden to overcome. *Henderson v. Lujan,* 964 F.2d 1179, 1182 (D.C. Cir. 1992). Indeed, sidewalks have been called "quintessential public forums." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 696 (1992) (O'Connor, J. concurring)(citing *Cornelius*, 473 U.S. at 802); *Perry Educ. Ass'n*, 460 U.S. at 45. Far from overcoming this presumption as it applies to post office sidewalks, the government's affirmative evidence below only reinforced it.

Government property may be a traditional or designated public forum, or a nonpublic forum. *Perry Educ. Ass'n*, at 45-46. Traditional public forums are those "which by long tradition or by government fiat have been devoted to assembly and debate." *Id.* 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)); *Frisby*, 487 U.S. at 480.

Traditional public forums occupy a "special position in terms of First Amendment protection." *Grace*, 461 U.S. at 180. As discussed above, regulations that govern the time, place, or manner of speech in a traditional public forum will be upheld only if they (1) are content-neutral, (2) are narrowly tailored to serve a

significant government interest, and (3) leave open ample alternative channels for communication. *Perry Educ. Ass'n*, 460 U.S. at 45. Regulations that entirely exclude a particular type of expression from a forum are not "time, place or manner" restrictions and will be upheld only if they are narrowly tailored to serve a *compelling* government interest. *Grace*, 461 U.S. at 177. Even in nonpublic forums, restrictions on First Amendment activity must be reasonable and viewpoint-neutral. *International Soc'y for Krishna Consciousness*, 505 U.S. at 678-79 (1992); *Perry Educ. Ass'n*, 460 U.S. at 45-46.

The record below establishes that post office sidewalks generally, and specifically those referenced in this appeal, are a traditional public forum. The government's own expert testified that post offices were a central forum for expressive activity going back to colonial times, and continued to be so throughout the period of his expertise.[15] Plaintiffs' expert showed that, over a period of decades, advocacy groups have used post office sidewalks systematically for their petitioning activities. Against this compelling backdrop, the record specifically confirms that the sidewalks surrounding the post offices referenced in this appeal

[15] Some of the evidence—particularly that which concerns the historical use of post offices—also indicates that interior areas of post offices have been used for expressive activities of the kinds protected by the First Amendment. To be clear, however, appellants are seeking a ruling only with respect to exterior sidewalks on post office property.

have been used for petitioning and other expressive activity, and provide appropriate areas for public expression.

A. Post Office Sidewalks Historically Have Been Used As Public Forums

The historical evidence regarding the forum status of post office property is compelling. George Washington observed that "[t]he importance of the post office and post roads . . . is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of government, which, while it contributes to the security of the people, serves also to guard them against the consequences of misrepresentation and misconception." Clyde Kelly, *United States Postal Policy* 156 (1931) (A.77). In the following century, the U.S. Postal Commission specifically stated that the Postal Service "was created . . . to render the citizen worthy, by proper knowledge and enlightenment, of his important privileges as a sovereign constituent of his government . . . ." *Id.* at 56 (A.76).

As the Postal Service itself has acknowledged at various times, it has fulfilled this role, in part, by maintaining post office facilities as a forum open to expressive activity. James Bruns, a postal employee who has served as Director of the Smithsonian Institution's National Postal Museum, has explained that U.S. post offices, housed originally in "'the most frequented coffee-house [or tavern] in the most publick part of town,'" were the "headquarters of life and action, the

pulsating heart of excitement, enterprise, and patriotism." James H. Bruns, *Great American Post Offices* 3 (1998) (A.711). In later years, post offices continued to "function[] much like community social clubs, places to gather and find out what was happening elsewhere in the district." *Id*. at 48 (A.712).[16]

Indeed, the deposition testimony and scholarly publications of the government's own expert witness, Professor Richard John, demonstrate that, from time immemorial, post office facilities have been central forums for public meeting and discourse. In his testimony, Professor John explained 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 36:22-37:1 (A.87). This "created a new kind of informational environment in which ordinary Americans could get access

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[16] The Postal Service has noted 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).

to up-to-date information on commerce and public affairs . . . ." *Id.* at 52:16-53:3 (A.91). In his book, Professor John wrote:

> 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 39:13-40:10 (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 inside 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."[17] Further, citing the

[17] 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).

evident disparity in social standing among the patrons, they wrote that "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.678); *see also* John Dep. at 71:12-72:18 (A.96) (Post Office Act of 1792 set off a communications revolution which was the precondition to the development of both the voluntary association and the mass political party). 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 48:4-12 (A.90) (discussing *Village Tavern*).

Likewise, historian Richard Kielbowicz—whom Professor John cites as one of the "major figures" in postal scholarship (John Dep. 21:1-15 (A.83))—quotes an historical description of "post day," when "half 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 also 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 . . . ." *News In The Mail* at 49 (A.704) (quoting 3 John Lambert, *Travels Through Lower Canada and the United States* 472-74 (1818)).

Numerous published sources and postal records illustrate that post offices have continued to serve this democratic function everywhere up to the promulgation of the challenged regulation. For example, in 1980, residents described the Lemont, Pennsylvania post office as "[a] community center for all ages." Richard J. Margolis, *At the Crossroads: An Inquiry into Rural Post Offices and the Communities They Serve*, U.S. Postal Rate Commission at 16 (1980) (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.* "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 that 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. . . ." *The Sacred Post Offices of Podunk*, Wall St. J. at B1 (June 7, 2001) (A.357). 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). Consistent with these articles, documents produced by the Postal Service show that many post offices continue to 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) ("some p.o.'s have public meeting rooms").

B. Postal Sidewalks Continued To Serve As A Principal Forum For Petitioning Activities Until The Regulation Went Into Effect

Post offices have served not only historically as public forums, but they continue to do so today. In fact, going back at least thirty years before the challenged regulation was promulgated and this suit commenced, post office sidewalks served as a principal public forum for the very kinds of activities—signature gathering on petitions to qualify initiatives and referenda for the ballot—that are at issue here. Indeed, this use of post office sidewalks was previously expressly recognized and sanctioned by Postal Service policy. *See, e.g.*, Postal Bulletin (Apr. 30, 1992) (A.205) (statement of policy permitting petition circulation on postal property).

Significantly, the Postal Service's Manager for Retail Operations, Mr. Frederick Hintenach, conceded this in his deposition testimony below. Referring to a group exhibit consisting of five Postal Service form letters granting permission to various groups to circulate petitions at the Tempe post office (A.200-04), Mr. Hintenach emphasized the number of times petitioning activity occurred at "one geographic location," observing:

> 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.

Id. at 156:21-157:18 (A.186). Mr. Hintenach specifically testified that petition circulating was "a regular thing" on postal property. *Id*. at 157:19-21 (A.186).

Likewise, plaintiffs' expert, Mr. Fred G. Kimball, who as the proprietor of a leading petition management firm has coordinated petition drives since the early 1970s, testified that over the previous 30 years, post office sidewalks were the main venue for petition circulators in the United States. Kimball Dep. 26:16-19, 27:20-28:24 (A.212). Mr. Kimball emphasized that post office sidewalks are the primary location that circulators in his industry are instructed to go when they conduct petition drives:

> 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. . . . There was a primary response to a question, and that would be if they asked a question, ["C]an you give us examples where to circulate[?"], it was almost always right out of your mouth, "[P]ost offices, shopping malls, theaters, and markets[."]
>
> [Q.] And did you say this in any particular order of preference?
>
> A. Depending on where the petition was, then it would generate a preference. If I was in a smaller area on a local issue, if I was in an area that required geographic distribution [of signatures, the] post office was always number one. If I was in a high urban area, it would be used in conjunction with shopping malls, theaters, and markets.

Id. at 27:11-28:24 (A.212) (paragraph breaks altered). This testimony was corroborated by the declarations of petition coordinators at each of the plaintiff organizations. *See*, *e.g.*, Pacelle Dep. 42:15-43:6 (A.232-33) (Humane Society instructs circulators to use post offices, certain stores, and public events where there is a slow, steady stream of pedestrian traffic).

Mr. Kimball explained that circulators conduct petitioning activities especially at post offices because these forums provide a unique screening function, ensuring a higher "validation rate," i.e., that a higher proportion of petition signers are registered voters and residents of the locality, consistent with state qualification and geographic distribution requirements. Kimball Dep. at 32:13-35:14 (A.213-14). These results have been verified through the signature validation process that Mr. Kimball's firm is legally required to perform before submitting completed petitions to election authorities. *Id.* at 35:8-14, 50:11-51:3

(A.214, 217). Moreover, based on experience, Mr. Kimball testified that postal patrons are more likely to be receptive to petitions than patrons of other high-traffic locations, such as local stores and markets. *Id.* at 35:22-36:4 (A.214).

C. The Evidence Demonstrates That The Post Office Sidewalks Listed In The Amended Complaint Are Traditional Public Forums

The evidence below also established that the specific post office sidewalks listed in the Amended Complaint had served as traditional public forums, both for petitioning and other protected activities, and that the configuration of the postal sidewalks was such that their use for petitioning did not interfere with their use for post office business.

There is an extensive record of First Amendment activity at each of the subject post offices. The post office sidewalks described in the Amended Complaint were being used for public forum activities before the regulation was promulgated; indeed, most of them were included in the Amended Complaint precisely because appellants and others recently had attempted to use their sidewalks for petitioning. Moreover, postmasters at most of these post offices testified or provided declarations showing repeated earlier uses of their premises

for petitioning and other expressive activities.[18] The Great Falls postmaster also cited a right-to-life protest and counter-protest, which occurred on the sidewalk in front of the post office, as well as the facing sidewalk across the street. Farrell Dep. 24:15-24 (A.251).

Wayne Pacelle, Senior Vice President of the Humane Society, 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. Pacelle Dep. 39:18-40:7 (A.231). Mr. Pacelle also testified that his organization had been permitted to petition at the Tempe, Arizona post office for an anti-cockfighting measure. *Id.* at 44:23-45:11 (A.232-33). Paul Jacob, National Director of U.S. Term Limits, described his organization's petitioning activity at the Georgetown, Salem and Tempe post offices, among others. Jacob Dep. at 46:1-14, 77:20-79:11 (A.262A, 264). In addition, he testified that he had both distributed and received leaflets from others at the Georgetown post office. *Id.* at 60:15-17 (A.263).

[18] *See* Lents Dep. at 31:4-12, 42:6-23 (A.241, 242) (Allegan postmaster aware of two earlier occasions of petitioning activity); Bechtel Dep. at 51:9-13 (A.246) (Belleville postmaster aware of three earlier occasions of petitioning activity); Farrell Dep. at 21:20-23:20 (A.248-50) (Great Falls postmaster listed nine earlier occasions of petitioning in all); Czipka Decl.¶¶ 6-8 (A.528-29) (Reno); Koch Decl. ¶ 7 (A.535) (Salem); Maguire Decl. ¶ 6 (A.546) (Tempe); Nalder Decl. ¶ 5 (A.523) (Halfway); Noorda Decl. ¶¶ 5, 9-10 (A.525-26) (Moab); Sullivan Decl. ¶¶ 4, 5, 9-11 (A.487-88) (Oakland Park).

The record includes five letters that Tempe, Arizona postmasters issued between 1992 and 1995 (A.200-04) allowing circulators to use of postal sidewalks. As the letters use the same wording, it appears that they were generated from form created in anticipation that such requests would be received and granted routinely. The record also includes a policy statement issued by the North and Central Florida postal district (A.206) in the early 1990s, which allowed petitioning on post office property, and recited that the South Florida postal district, which includes the Oakland Park post office, would issue a similar statement.

There is little doubt that other petitioning and expressive activities occurred on these postal sidewalks which, either because of the postmaster's recent tenure, or the unintrusive nature of the activity itself, have passed unnoticed by postal authorities.[19] In fact, Mr. Jacob of U.S. Term Limits testified that it was likely his organization had circulated petitions at every post office listed in the complaint, because historically U.S. Term Limits had run campaigns that covered virtually *every* post office in each state. Jacob Dep. at 84:12-85:8 (A.265-66).

[19] *See, e.g.,* Sullivan Decl. ¶ 8 (A.488) (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).

Further, the physical configurations of the post offices and their sidewalks were such that the use of postal sidewalks for petitioning activities did not interfere with their use for regular postal business. The numerous surveys, site maps, and photographs presented showed that the subject post offices fell into two categories: "urban" and "suburban or rural." The "urban" post offices—Georgetown (Washington, D.C.), Allegan, Michigan, Detroit, Michigan, and Great Falls, Montana—typically abutted pedestrian sidewalks running parallel to a public right-of-way. They have doorways leading out to the public walkways either directly or via a short walkway or stairs. The "suburban" or "rural" post offices—such as Tempe, Arizona, Oakland Park, Florida, Garden Valley, Idaho, Belleville, Michigan, Reno, Nevada, Halfway, Oregon, Salem, Oregon, and Moab, Utah—typically had sidewalks adjoining (and sometimes surrounding) the post office building, which were widely separated from the public right-of-way by a parking lot and sometimes other facilities.

The exhibits showed that the pedestrian sidewalks at the urban post offices essentially were indistinguishable from the types of public sidewalks that courts have always described as "quintessential public forums." In some cases (e.g., Allegan and Detroit), the sidewalks straddled postal and non-postal property.

R.65, Exh. 23A, 24A.[20] At the other urban post offices (Georgetown and Great Falls), a pedestrian would not have notice whether the sidewalk is postal or municipal property. *Id.*, Exh. 22B, 25B. The survey of the Georgetown Post Office (*id.*, Exh. 22A) shows that, while the sidewalk is entirely within the municipal right-of-way, steps belonging to the post office building—which appear from the street to be Postal Service property, and thus covered by the regulation—cross over into the public right-of-way. Moreover, the Great Falls site plan (*id.*, Exh. 25A) and photos of the Georgetown post office (A.428, 442) show that post office boxes are located on the municipal sidewalk, adding to the public's confusion over ownership and control of the property. Even the sidewalks that run from the entrances of the Great Falls post office to the street (the only such walkways in this case) leave wide berth for ingress and egress (*see* A.447), leaving no doubt that a petition circulator could stand on the walkway without inconveniencing pedestrians passing in either direction. Finally, because all of the sidewalks running parallel to public streets extend along the breadth of the post office structures, it is possible to petition along these sidewalks without impinging on space used for ingress to and egress from the buildings.

[20] Appellants refer here and in the following several district court docket entry citations to oversize exhibits that could not be reproduced practically and legibly as part of the Joint Appendix.

Sidewalks abutting the suburban and rural post offices run the width of the buildings, making it possible to petition along their expanse without inconvenience to patrons alighting from their cars to enter the post office. Moreover, because of their remote locations, these post offices often provide virtually the *only* available sidewalk for First Amendment activity. *See, e.g.*, Meserth Dep. at 24:12-25:23 (A.237-38) (communities served by Garden Valley post office lack public sidewalks). Circulators seeking an alternative "forum" would be compelled to set up shop on public motorways, scores of yards from the nearest building or pedestrian traffic.

In sum, the record amply demonstrates that post office sidewalks historically have been used as traditional public forums for First Amendment activities, and continue to be so used today. Moreover, there is ample evidence that the post offices in the complaint have sidewalks appropriate for such activities, which can be performed without interrupting the normal flow of traffic, and that these post offices have, in fact, been used for such activities in the past. Therefore, post office sidewalks generally, and particularly the sidewalks in the Amended

Complaint, are traditional public forums for these protected First Amendment activities.[21]

IV. THE DISTRICT COURT IMPROPERLY RELIED ON AN INVALID INTERNAL "INTERPRETATION" TO UPHOLD THE BAN

At the hearing on the parties' cross-motions for summary judgment, the government offered to publish in its internal *Postal Bulletin* a new "interpretation" on the interpretation of the regulation, to address the district court's evident concerns. A.637. On the issue of vagueness, the government proposed to alter its interpretation to confine enforcement of the ban to property that was "easily distinguishable" from non-postal property "by means of some physical feature." *IRI II*, 297 F. Supp.2d at 153. On the issue of narrow tailoring, it proposed to limit application of the ban "to efforts to have members of the public provide signatures on Postal Service premises, and not to communications that promote the signing of petitions, polls and surveys somewhere other than on Postal Service premises." (A.640). The proposed *Postal Bulletin* reinterpretation specifically noted that a circulator could "pass[] out informational leaflets, hold up a sign, or both," and "[t]he leaflet or sign could provide relevant information . . . and direct Postal

[21] Even if the Court disagrees that postal sidewalks are a public forum, it should invalidate the regulation because it fails the First Amendment "reasonableness" test. *See supra* pages 30-31.

Service customers to nearby non-Postal Service property . . . where they can sign the petition, poll, or survey, if they so desire." *Id.*[22] The government, however, did not actually promulgate this new interpretation; it merely offered to publish this guidance in exchange for a favorable ruling, and in fact continued to enforce the old interpretation for fifteen months while awaiting the district court's decision.

The new interpretation is wholly inconsistent with both the literal meaning and the government's prior interpretation of the regulation. First, it departs completely from the plain language of the ban on "soliciting signatures" and the government's earlier pronouncements that the mere *solicitation* of signatures was the "evil" to be undone, distinguishing petition circulation from "customer passive" signature gathering activities, like voter registration. It simply is not possible—it is not even coherent—to argue that a ban on "soliciting signatures" simultaneously permits "soliciting signatures" but bans obtaining them.

Second, it departs from the government's earlier requirement that its conduct regulations be enforced on all parts of postal property, without exception. A.620-21. Until moving for summary judgment here, and going back at least as far as its Supreme Court briefing in *Kokinda*, the government adhered to a

[22] The final version of the interpretation published in the *Postal Bulletin*, unchanged from the version the government proposed to the district court, is reproduced at A.672.

"consistent interpretation" of this same provision as "admitting of no uncertainty" that "all real property" means "all real property." Reply Brief for the United States, *United States v. Kokinda*, LEXSEE 1988 U.S. Briefs 2031 (Jan. 26, 1990).

The district judge erred in upholding section 232.1(h)(1) based upon the government's nonsensical and unpromulgated "interpretation." As a matter of administrative law, the "interpretation" has no force because it is fundamentally inconsistent with the regulation itself, as well as with the Postal Service's announced intent at the time the regulation was promulgated. As this Court has explained:

> Whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements, 5 U.S.C. § 553(b)(3)(A), *see Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C.Cir.1993), new rules that work substantive changes in prior regulations are subject to the APA's procedures. Thus, in *National Family Planning & Reproductive Health Ass'n v. Sullivan*, the court described as "a maxim of administrative law" the proposition that, " '[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.' " 979 F.2d 227, 235 (D.C.Cir.1992).

Sprint Corp. v. Federal Communications Comm'n, 315 F.3d 369, 374 (D.C. Cir. 2003) (citations omitted). Thus,

> [t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine [the] APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent

> with ... existing regulations." *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995).

Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997). As the district court should have recognized, the Postal Service's attempt to transform a formal regulation through an interpretation published only in an internal bulletin was unavailing.

Beyond that, the district court erred in allowing the government even to engage in this sort of settlement negotiation with the court. The court should have ruled on the regulation that was before it, not a putatively less onerous version that the government promised to adopt informally only on condition of a favorable ruling. In accepting and then mandating an interpretation other than the one which was already on the books, the court injected itself into what should have been a rulemaking process and sustained a rule that was not then in effect—and is still not in effect. In short, the district court rendered an advisory opinion.

Even if it were valid, however, the reinterpretation would do nothing to erase the regulation's constitutional defects. First, it confounds the meaning of "soliciting" instead of resolving it, for, notwithstanding its plain language, the government now reads the regulation to allow "soliciting signatures," just not *gathering* them on postal property. Adding to the vagueness, the rule is expressly read to allow the use of signs and leaflets, but is silent on whether the solicitation may include oral conversation. The reinterpretation thus makes the regulation

allow what it prohibits in plain language, and criminalize what it does not expressly bar.

Second, the reinterpretation leaves latent ambiguities about the line of demarcation—like the ones that moved the Supreme Court to overturn a similar ban in *Grace*—for handling on a local, case-by-case basis. While it calls for restraint in implementing the ban on sidewalks that are "easily distinguishable" from non-postal sidewalks by a "distinguishing mark" and provides a handful of examples of "marks" that might qualify, ultimately it leaves to the individual postal employee the determination of what qualifies as a "distinguishing mark."

Worst of all, the reinterpretation does all this without notice to those within its criminal sanctions' reach. While the internal *Postal Bulletin* informs postmasters of their duties, unlike the *Federal Register,* it does not inform the public. One wishing to petition near a post office would know only that 39 C.F.R. 232.1(h)(1) imposes fines and imprisonment on those who do so on postal sidewalks. Uncertain where the line lies, he would be "chilled" from exercising his First Amendment rights even on adjacent "public forum" sidewalks. The district court's ruling only multiplies these defects.

CONCLUSION

The Postal Service's total ban on signature gathering on its property is unconstitutional, both on its face and as applied to petitioning activities on the

sidewalks of post offices described in this action. The regulation criminalizes a whole category of political speech in a traditional public forum, and does not qualify as a reasonable time, place or manner restriction on such speech. The district court's acceptance of the government's offer to reinterpret the regulation if it was sustained was improper and only multiplied the defects of the ban. Accordingly, the district court's order upholding the regulation against appellants' First Amendment challenge should be reversed.

Respectfully submitted,

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Dated at Washington, D.C.
October 27, 2004

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellants and one copy of the accompanying Joint Appendix were hand delivered to Marina Utgoff Braswell, Assistant United States Attorney, United States Attorneys Office, 555 4th Street, NW, Washington D.C. 20530 on this 27th day of October 2004.

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