No. 10-5337

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

INITIATIVE AND REFERENDUM INSTITUTE, et al.,

Plaintiff-Appellants,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, C.A. NO. 00-CV-1246

PLAINTIFFS' OPPOSITION TO
MOTION FOR SUMMARY AFFIRMANCE

This is not the first time in this litigation that Defendant-Appellee, the U.S. Postal Service ("USPS"), has moved this Court to summarily affirm a decision of the District Court. Six years ago, USPS tried the same tactic, unsuccessfully. Later, on remand, the District Court required five years to rule after two rounds of briefing on summary judgment. The case has now produced three reported decisions. The central issue—whether interior sidewalks on post office property constitute a public forum for First Amendment activity—is an important question that has never been resolved in this Circuit and failed to produce a majority when previously presented to the Supreme Court, which divided 4-4-1 in *U.S. v. Kokinda,* 497 U.S. 720 (1990). Ironically, when USPS moved for summary

affirmance in 2004, this Court not only denied the motion, but afterwards unanimously reversed the District Court's ruling—on four separate grounds. The District Court has finally ruled—incorrectly, in Plaintiffs' view—that post office interior sidewalks are not a traditional public forum, and that the forum status of post office perimeter sidewalks is now moot. USPS's second stab at summary affirmance is as ill-conceived as its first, and should be denied.

BACKGROUND

On June 25, 1998, USPS amended an existing regulation regarding conduct on postal property to add that "soliciting signatures on petitions, polls, or surveys . . . are prohibited." 39 C.F.R. § 232.1(h)(1). USPS's Federal Register notice cited only its "experience" that the solicitation of signatures disrupts postal business. 62 Fed. Reg. 61481 (Nov. 18, 1997).

In June 2000, the Plaintiff-Appellants—organizations and individuals who engage in petitioning activities on postal property—filed this action, challenging the rule under the First Amendment on its face and as applied. USPS agreed to suspend operation of the ban and the District Court promptly heard cross motions for summary judgment. Following two oral hearings, the court issued a published decision denying both parties' dispositive motions. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp.2d 65 (D.D.C. 2000) ("*IRI I*").

Following discovery, the parties renewed their cross motions for summary judgment in May 2002. In its briefs, USPS offered for the first time to publish in

its internal *Postal Bulletin* a modification of its prior interpretation of § 232.1(h)(1) to allow solicitation of signatures so long they were not actually collected on postal property, and limit the ban's enforcement to sidewalks that were "easily distinguishable" from non-postal property "by means of some physical feature." R.87, 89[1]; *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 297 F. Supp.2d 143, 152 (D.D.C. 2003) ("*IRI II*"). USPS, however, did not then act on this proposal; rather, it sought to bargain with the District Court, offering the change only in return for a favorable ruling. Fifteen months elapsed between argument and the District Court's December 31, 2003 decision, which sustained § 232.1(h)(1) but ordered USPS to publish its modified interpretation in the *Postal Bulletin*. *IRI II*, 297 F. Supp.2d at 154-55.

This Court reversed the District Court's judgment. It held that the court had applied the wrong test to the First Amendment facial challenge when it required Plaintiffs to prove that the rule was unconstitutional in every application, rather than a "substantial" or "good number" of cases. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1314 (D.C. Cir. 2005) ("*IRI III*"). It ruled that sidewalks at the perimeter of postal property—so-called *Grace* sidewalks—are traditional public forums. *Id.* at 1305-06. Importantly, it held that § 232.1(h)(1) failed the test of narrow tailoring that applies in traditional public forums, because

[1] References to "R.__" are to the document numbers in the District Court record, and references to "Pl. Ex. __" or "Def. Ex. __" are to plaintiffs' or defendant's summary judgment exhibits in the District Court.

it impaired constitutionally-protected speech together with conduct that could legitimately be prohibited. *Id.* at 1312. And it held that the ban failed to leave open ample alternative channels for communication within the forum, as the constitutional test requires. *Id.* The Court therefore remanded to determine whether there are a substantial number of *Grace* sidewalks, in which case it directed that the ban must be struck down on its face. *Id.* at 1314.

On remand, USPS amended the regulation to allow (1) the solicitation, but not the collection, of signatures on all postal sidewalks; and (2) the solicitation and collection of signatures on *Grace* sidewalks. R. 108, Ex. A. The parties cross-moved for summary judgment in February 2006. R. 103, 104, 108, 110, 111. In November 2006, Plaintiffs requested entry of a temporary restraining order because one of the Plaintiff organizations' members, who was attempting to gather signatures for an animal protection measure, was being removed from perimeter sidewalks at post offices in Anchorage, Alaska. R. 122, 123. At the hearing, the District Judge requested that the parties cooperatively find a "creative" way to supplement the record concerning historical use of the sidewalks in question, and suggested that they survey postal managers to develop this information. November 8, 2006 H'rg, at 98-101, Exhibit A. The parties ultimately did so, and submitted the results of such a survey for the court's consideration. They then completed re-briefing on the cross-motions for summary judgment in May 2008. R. 142, 143. The Court held the motions under advisement for more than two years before

ruling in September 2010. R. 157. This appeal followed.

ARGUMENT

Requests for summary affirmance should not be reflexive acts. "A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified" and "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297-98 (D.C. Cir. 1987). In reaching this judgment, this Court is "obligated to view the record and the inferences to be drawn therefrom in the light most favorable to [the party opposing the motion.]" *Id.* at 298 (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

USPS cannot meet this heavy burden, and should not be taxing this Court's resources with a second useless round of preliminary briefing. The ten-year history this case underlines the difficulty of the question presented. This First Amendment issue remains one of first impression in this Court. It has eluded a majority decision in the Supreme Court. Most importantly, the District Court decision is incorrect and, far from requiring summary affirmance, should be reversed.

I. THE IMPORTANCE AND COMPLEXITY OF THE FIRST AMENDMENT QUESTION AT ISSUE, WHICH IS A MATTER OF FIRST IMPRESSION, PRECLUDES SUMMARY AFFIRMANCE

At the heart of this case is a close constitutional question—whether sidewalks within the metes and bounds of post office property constitute a public forum for First Amendment activity. In *Kokinda,* which involved a ban on

collecting alms and contributions on postal property, the Supreme Court could not resolve this question. Four justices found that it was not a public forum and the ban could be upheld. 497 U.S. at 730, 737 (plurality). An equal bloc of four dissenters found that it was a public forum and the ban must be struck down. *Id.* at 740 (Brennan, J. dissenting). The ninth voter, Justice Kennedy, cited the "powerful argument" that the interior postal sidewalk in question was a traditional public forum, and assumed it was for the sake of decision. *Id.* at 737 (Kennedy, J., concurring). But he found that soliciting alms—with the exchange of money in a public place—was disruptive enough to regulate even in a traditional public forum. *Id.* at 738-39. In so ruling, he stressed that the rule still allowed wide berth for other expressive activities—which then included petitioning. *Id.* Thus, as the District Court observed and this Court agreed in this case, *Kokinda* "provides no definitive guidance," leaving the issue to be "determine[d] anew." *IRI I,* 116 F. Supp.2d at 70; *IRI III*, 417 F.3d 1313.

As a matter of first impression for this Court, the issue is inappropriate for summary affirmance. This Court's Handbook warns parties to "avoid requesting summary disposition of issues of first impression . . . ." D.C. Cir. Handbook, Part VIII.G. *See Toolasprashad v. Bureau of Prisons,* 286 F.3d 576, 582 (D.C. Cir. 2002) (denying summary affirmance); *Am. Petroleum Inst. v. EPA,* 72 F.3d 907, 914 (D.C. Cir. 1996) (counsel should have known Court would deny summary

affirmance in matter of first impression).[2]

Finally, the prior history of the case and the District Court's difficulty deciding it are instructive. The first time the case was before it, the District Court twice heard cross motions for summary judgment, ordered additional discovery, and issued two published opinions (noting the lack of Supreme Court guidance). The court required 15 months after oral argument to rule on the second set of cross motions, requiring USPS to reinterpret § 232.1(h)(1) as a condition to ruling in its favor. This Court reversed the District Court's decision on grounds, *inter alia*, that it had applied the wrong test to a First Amendment facial challenge and that the ban failed the test of narrow tailoring if applied in a public forum, and remanded for a determination whether the ban applied in a "substantial number" of public forums, such that it must be invalidated on its face.

As noted, after this Court reversed the District Court's decision, the parties

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[2] Ignoring the lack of binding authority, USPS argues that other circuits have united in holding that postal sidewalks are non-public forums. That is not the case. The Supreme Court mustered only four votes in *Kokinda* to reverse the Fourth Circuit's finding that they are public forums. 866 F.2d 699, 700 (4th Cir. 1989). And the other circuit rulings simply lack the consistency that USPS urges. *See, e.g., U.S. v. Bjerke*, 796 F.2d 643, 648, 650-51 (3d Cir. 1986) (while some postal sidewalks may be public forums, areas adjoining entrances are not); *Paff v. Kaltenbach*, 204 F.3d 425, 433-34 (3d Cir. 2000) (reversing award of damages under 42 U.S.C. § 1983 because of uncertain caselaw; not disturbing district court ruling that protestors had First Amendment right to leaflet on interior postal sidewalks); *Monterey Cnty. Democratic Central Comm. v. USPS*, 812 F.2d 1194, 1198 (9th Cir. 1987) (postal sidewalk was limited public forum for nonpartisan voter registration, but partisan activity could be excluded); *Jacobsen v. U.S.*, 993 F.2d 649, 658 (9th Cir. 1993) (previously injunction against removing newsracks from postal sidewalks was undisturbed, except at three locations the court concluded were not public forums). Notably, several of these cases produced strong dissents as to those areas of postal sidewalks the majority considered to be non-public forums. And all of these decisions involved as-applied challenges, leaving the question on appeal here—whether a "substantial number" of interior postal sidewalks are traditional public forums—entirely open.

cross-moved for summary judgment. USPS amended the regulation itself to try to bring it into compliance with the Court's guidance respecting certain sidewalks. Ten months after dispositive motions were filed, Plaintiffs requested preliminary relief on behalf of one of their organization members, who had been removed from postal property for attempting to solicit signatures. At the hearing, the District Court asked the parties to develop additional information cooperatively, and suggested a survey of postal managers to develop that information. After the survey results were submitted, the District Court held the case under advisement for two years before reaching the decision on appeal.

The effect of all this litigation has been to boil this case down to its core issue: the First Amendment forum status of sidewalks interior to post office property. This is the issue the Supreme Court was unable to resolve in *Kokinda*. Given the arduous history of the rulings in the case, the several published opinions, the reversals, the supplemental "creative" discovery ordered by the District Court and the multiple briefing it required, it is hard to believe that even the District Court would consider summary affirmance appropriate.

II. THE DISTRICT COURT'S DECISION REGARDING THE FORUM STATUS OF THE PROPERTY WAS WRONG ON THE MERITS AND SHOULD BE REVERSED, NOT SUMMARILY AFFIRMED

As USPS acknowledges in its brief, [Doc. 1283746 at 9], this Court's review of the legal questions at issue is *de novo*. *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1134 (D.C. Cir. 2001). In First Amendment cases, an appellate

court has an obligation to make an independent assessment of the record. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11 (1984). Summary affirmance would—to say the least—be in tension with that constitutional obligation. The searching review appropriate in this context will establish that the District Court's ruling was incorrect and should be reversed.

This Court already has held that within a public forum, § 232.1(h)(1) fails the test of narrow tailoring because its infringes constitutionally-protected speech along with any putatively disruptive activity, and fails to leave open ample alternative channels for communication. *IRI III*, 417 F.3d at 1307-13. This Court instructed that if the rule applies in "a substantial number" of public forums, then it must be struck down on its face. *Id.* at 1313. The question now before the Court for *de novo* consideration is whether the ban reaches a substantial number of *Kokinda* sidewalks that qualify as traditional public forums.

A. Interior Post Office Sidewalks, Like Sidewalks Generally, Are A Traditional Public Forum

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

for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Indeed, the status of property as a sidewalk establishes, "without more," that it is a traditional public forum. *U.S. v. Grace*, 461 U.S. 171, 177 (1983).[3]

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

Interior postal sidewalks are a traditional public forum. First, as sidewalks, they are, "without more," traditional public forums. *Id.* at 176. Stepping beyond this operative presumption, Plaintiffs presented comprehensive evidence that interior postal sidewalks, like perimeter postal sidewalks[4] and sidewalks generally, are traditional public forums. An ample record of historical documentation, the factual and expert testimony and declarations on both sides of the case, and the parties joint survey of post office managers, demonstrated that interior postal

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

[4] Earlier in this case, this Court recognized that sidewalks at the perimeter of post office property, indistinguishable from public sidewalks generally, would be governed by *Grace* and are traditional public forums. *IRI III*, 417 F.3d at 1313-14.

sidewalks are a traditional public forum.

The very justifications that USPS has offered for promulgating the ban undercut its insistence that interior postal sidewalks do not have a history of regular use for expressive activity. USPS's Manager for Retail Operations, Frederick Hintenach, testified that the ban was adopted because petition circulation had been "a regular thing" on postal sidewalks. Hintenach Dep. at 157:19-21 (Pl. Ex. 15). Discussing a group exhibit comprising multiple USPS form letters permitting various groups to circulate petitions on sidewalks outside an Arizona post office [Pl. Ex. 16], Mr. Hintenach testified:

> [I]f you look at all of these, there are all in one geographic location, which really highlights the number of times we've had to interact with one postal district where we've had it be intrusive to the customer, in my opinion. One week I'm being asked about border rights. The next week I'm being asked about Proposition 2000. The next week I'm being asked about citizen's right to vote. The next week I'm asking for—so I'm constantly being asked to sign different petitions. . . . [M]y point is this is just the ones you have . . . . So there are others that occur. My point is how often it did occur.

Hintenach Dep. at 156-57 (Pl. Ex. 15) (paragraph breaks altered). Likewise, plaintiffs' expert, Fred G. Kimball, the proprietor of a petition management firm, testified that U.S. Post Office sidewalks have long been *the* primary venue for petition circulators. Kimball Dep. at 26 (Pl. Ex. 19). Mr. Kimball testified that "[t]he first place, especially when it comes to municipal elections or municipal election drives, [the] post office is always number one." *Id.* at 27. He testified that postal patrons are more likely to be receptive to petitions than patrons in other high-traffic locations. *Id.* at 35-36. Likewise, Wayne Pacelle, then Executive Vice

President of Plaintiff Humane Society, testified that his organization instructs petition circulators to use post offices, stores and public events where there is a slow, steady stream of traffic. Pacelle Dep. at 42-43 (Pl. Ex. 21). And Paul Jacob, National Director of Plaintiff U.S. Term Limits, testified that his organization's campaigns had reached virtually *every* post office in each state where term limits measures had been proposed. Jacob Dep. at 84-85 (Pl. Ex. 37).

Plaintiffs cited 12 exemplary post offices in their complaint. The deposition testimony of postal managers at each location and petition circulators who had appeared at a number of the locations showed that the post offices regularly saw petitioning, picketing, leafleting, and other First Amendment activities. *See, e.g.,* Lents Dep. at 31, 42 (Pl. Ex. 34); Bechtel Dep. at 51 (Pl. Ex. 35); Farrell Dep. at 21-23 (Pl. Ex. 36); Pacelle Dep. at 39-40, 44-45 (Pl. Ex. 21); Jacob Dep. at 46, 60.

Nor is the documentation only of recent vintage. To the contrary, the record establishes that postal property has existed "time out of mind" as a forum for expressive activity. Its pedigree is coextensive with that of the Republic itself. A former director of the National Postal Museum, James Bruns, wrote that U.S. post offices, housed originally in "the most frequented coffee-house in the most publick part of town," were a "headquarters of life and action, the pulsating heart of excitement, enterprise, and patriotism." James H. Bruns, *Great American Post Offices* 3 (1998) (Pl. Ex. 2) (internal citation and quotation marks omitted). In later years, he wrote, post offices continued to function as "places to gather and find out

what was happening elsewhere in the district." *Id.* at 48.

USPS's own expert, a historian specializing in the history of the Postal Service, confirmed that from time immemorial, post offices have been central forums for the exchange of information and political debate. Professor Richard John testified that "[t]he post office was in the early republic, a frequented destination for the transaction of postal business. Merchants would, while transacting postal business, discuss the latest news, gossip, and the like." John Dep. at 36-37. Professor John has written:

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

Richard R. John, *Spreading the News* at 161-62 (1995) (footnotes omitted) (Pl. Ex. 4); *accord* John Dep. at 39:13-40:10. Plaintiffs have also placed in the record some of Professor John's other writings supporting this proposition. Pl. Ex. 5, 6. They have cited similar information from other historians and contemporaneous authors. Pl. Ex. 7 at 16-19; Pl. Ex. 12 at 26, 47, and authorities quoted therein. They have cited numerous news articles and USPS records showing the use of post offices as town gathering places. Pl. Ex. 8, 9, 10, 11. And they have quoted USPS's own statement on its website that post offices serve as "valued meeting

places for residents of cities, towns, and villages from coast to coast" and "powerful symbols of our democracy." Pl. Ex. 14.

The District Court's judgment is almost entirely devoid of reference to this considerable record of historical use. Unsatisfied with the record before it, the District Court felt a need for the parties to supplement the record and asked them to collaborate in implementing a survey of postal managers to develop data on the use of postal sidewalks for expressive activity. 11/8/06 H'rg at 98-101, Exhibit A.

Ultimately, in compliance with that request, the parties designed a survey concerning expressive activity that postal managers had observed[5] on three categories of sidewalks within postal property—perimeter, or *Grace* sidewalks; "feeder" sidewalks leading from the street to the front door; and interior sidewalks running alongside the frontage of the postal building but separated from the public right of way by other postal property. R. 131. As Joseph B. Kadane, Leonard Savage University Professor of Statistics, Emeritus at Carnegie Mellon University described in his declaration, the results showed that fully 77.9% of respondents observed at least some expressive activity, and 13.5% of respondents observed it at least three to six times a year. Kadane Decl., ¶ 4.f (P. Ex. 61). Further, a significant number of respondents noted a decline in such activity since 2000,

[5] Of necessity, the survey was limited to what the respondent postal managers had directly observed. Postal managers in this litigation testified, however, that their awareness of such activities is necessarily limited, because they are not stationed where they have a view of sidewalks outside the building, and may not become aware of expressive activity unless it generates a complaint. Sullivan Decl., ¶ 8 (Def. Ex. J); Klosterman Decl. ¶ 6 (Def. Ex. CC); Koch Decl., ¶ 5 (Def. Ex. S).

when the ban became effective. *Id.* at 4.e.

Perhaps most significantly, the data showed that the use of interior sidewalks for expressive activity was indistinguishable from the use of *Grace* sidewalks within the scope of the survey—the same category of postal sidewalks that this Court instructed *are* traditional public forums. *IRI III,* 417 F.3d at 1313-14. As Prof. Kadane put it, "The Postmaster Survey data display remarkable consistency of results across sidewalk types, with approximately the same percentage of respondents reporting approximately the same frequency of expressive activities in [traditional perimeter sidewalks, feeder sidewalks, and sidewalks running alongside a postal building and set apart from the public right of way]." Kadane Decl., ¶ 4.g (R. 61). Prof. Kadane observed: "The results indicate that expressive activity is observed on [these sidewalks] to a similar extent, and that differences in observed expressive activity do not follow a pattern suggesting that the rate of expressive activity is meaningfully different from one defined sidewalk type to another." *Id.*, ¶ 4. In other words, considering the level of usage for expressive activity, interior postal sidewalks were indistinguishable from *Grace* sidewalks.

Having solicited this data, the District Court wrote it off as not "statistically significant," because the survey reached only about 15% of the 34,000 post offices in the country. R. 157 at 19-21. But even if this were the case, "statistical significance" is not the legal standard here. The standard, as this Court directed in remanding, is whether a "substantial" or "good number" of postal sidewalks are

traditional public forums. *IRI III,* 417 F.3d at 1313-14. Besides, declarants for both sides affirmed that the survey data were a useful tool for evaluating the forum status of the property. The extensive use of interior postal sidewalks for expressive activity, and the fact that such use is indistinguishable from the use of perimeter postal sidewalks that concededly *are* traditional public forums, provides substantial evidence that the interior sidewalks—or at least a good number of them—are traditional public forums as well.

The District Court also reasoned that the equivalent results for interior and perimeter sidewalks were not legally significant, finding a comparison between "the frequency of expressive activity" on each "immaterial" because interior postal sidewalks are physically distinguishable from "the classical variety of sidewalks." Order at 22-23. But this holding presupposes the answer to the question before it is even asked. The parties collected data at the District Court's request to establish how often interior sidewalks were used for expressive activity. The core question in public forum analysis, as articulated by the Supreme Court, is whether the forum has "been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45. The data indicates that interior postal sidewalks have been so used, in the same manner and to the same degree, as *Grace* sidewalks within the scope of the survey. While the District Court suggested the survey cannot show activity predating the polled managers' observation, Order at 23, it ignored the extensive historical record

Plaintiffs had already presented at the time the Court asked the parties to conduct a survey. Requiring statistical data from colonial times, when such data were not assembled, imposes an insuperable burden on plaintiffs that is inappropriate in the context of the First Amendment. If data concerning expressive activity during periods within living memory are not relevant, it is difficult to understand why the District Court requested it in the first place.

The foregoing provides only a foretaste of the record to be presented on appeal. As noted, this Court's appellate review is *de novo*. At a minimum, Plaintiffs have assembled a record upon which reasonable minds can differ, not one, as USPS insists, in which the merits "'are so clear that expedited action is justified' and 'no benefit will be gained from further briefing and argument of the issues presented.'" USPS Mot. at 1 (quoting *Taxpayers Watchdog*, 819 F.2d at 297-98). Far from justifying summary affirmance, the record demonstrates that the District Court's judgment should be reversed.

III. THE DISTRICT COURT'S DECISION ON THE QUESTION OF MOOTNESS WAS WRONG ON THE MERITS AND SHOULD ALSO BE REVERSED, NOT SUMMARILY AFFIRMED

On remand in 2005, this Court held that perimeter (*Grace*) postal sidewalks are traditional public forums and that the ban fails the test of narrow tailoring that applies in such places. 417 F.3d at 1314. Therefore, it directed the District Court to determine whether there are a "substantial number" of *Grace* sidewalks, such that the ban is unconstitutional on its face. *Id.* at 1313-14. On remand, USPS

amended the ban, attempting to exclude *Grace* sidewalks from its scope and thus avoid enforcement of this Court's ruling on mootness grounds. R. 108, Ex. A. USPS cites this Court's observation that the question "*may* be pretermitted" by an amendment on remand. USPS Summ. Aff. Mot. at 6-7, *citing IRI III*, 417 F.3d at 1318 (emphasis added).

The amendment did not moot the issue. While implicitly acknowledging that Plaintiffs were entitled to prevail on remand, USPS did not acknowledge that the Constitution, rather than its own grace, entitles them to collect signatures on *Grace* sidewalks; hence it has not accepted that it is legally bound to respect Plaintiffs' rights there. Moreover, without an injunction enforcing this Court's ruling, USPS remains at liberty to violate its own promise with impunity.

"[V]oluntary cessation of allegedly illegal conduct . . . does not make the case moot." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *accord U.S. v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983); *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Where a defendant is not acting under to a court mandate, its abandonment of illegal conduct leaves a dispute to be settled, because he remains "free to return to his old ways." *W.T. Grant*, 345 U.S. at 632.

USPS amended § 231.1(h)(1) at least 14 times in theist first 36 years. The first time around, USPS was willing to amend the rule only to the extent necessary to obtain a favorable ruling from the District Court—a procedure this Court found improper on appeal. *IRI III*, 417 F.3d at 1316-18. USPS's actions reflect its

willingness, for tactical reasons, to change positions merely—and only enough—to make this case go away, which is not sufficient to establish that the case is moot. *See Aladdin's Castle*, 455 U.S. at 288-89 (repeal of unconstitutional ordinance did not moot appeal where city acted "in obvious response to the state court's judgment" and could re-enact the ordinance without a court mandate).

CONCLUSION

This case is exceptionally inapt for summary affirmance. After years of litigation, the core dispute has been distilled to a single unsettled constitutional question: whether interior postal sidewalks (or some subset of them) are traditional public forums. That question is an important one, and it is a question of first impression for this Court. When once previously presented to the Supreme Court, no single viewpoint commanded more than four votes—although the concurring fifth voter, Justice Kennedy, gave strong indications that he believed interior postal sidewalks likely *are* traditional public forums. Likewise, the supposed mootness presented by the District Court's treatment of this Court's earlier ruling is a serious issue warranting full appellate review. At a minimum, such important and demanding issues require this Court's full attention. Appellee's motion for summary affirmance should be denied.

Respectfully submitted,

/s/ David F. Klein

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Dated: January 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011, a true copy of the foregoing Plaintiffs' Opposition To Motion for Summary Affirmance was served upon counsel below as follows:

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE INITIATIVE AND REFERENDUM INSTITUTE, et al.,	)	
Plaintiffs,	)	Civil Action No. 00-1246
v.	)	November 8, 2006 9:30A.M.
UNITED STATES POSTAL SERVICE,	)	
Defendant.	)	Washington, D.C.

TRANSCRIPT OF TRO MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE RICHARD W. ROBERTS
UNITED STATES DISTRICT JUDGE

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Let me invite you, in the zealous representation of your clients, nevertheless, to, now that you've done some great advocacy, step back, take a breath and see what, if any, ways you can just both try to reach a way to think beyond the advocacy to ways to help me reach what I think I might need, and that is a way to supplement the factual record, such that I would be able to more effectively and appropriately and expeditiously dispose of the pending dispositive motions, obviously, and the existing emergency motions as well.

So let me just ask you to do that for me.

MS. BRASWELL: Your Honor, obviously, I need to find out from the Postal Service some of what kind of information they maintain, because that will then depend upon, you know, what we can sort of offer or suggest. So, I need a little bit of time to find out from them what kind of records they maintain that might be of some use.

THE COURT: And it's entirely possible that sort of a noncomplicated and simple communication to the field -- I'm not sure how Postal Service sends out communications to the field. There must be some way, and I'm not sure how that happens.

MS. BRASWELL: They post a bulletin usually, Your Honor.

THE COURT: All right. With some way of having them, in an easily collectible fashion, respond with some kind of data. Could be tabular, could be -- I'm not suggesting it be lots of documents or photographs. But I think there are ways to

brainstorm and be creative about the kinds of data that can be solicited without too much -- without too burdensome expense, cost or time to be able to shed some light on some of the factual issues I would want to have supplemented.

And I would ask you to work together to try to make sure, for example, the plaintiffs are not going into it looking for scorched earth discovery with volumes of documents. That's just going to be a burden and expense to you. But also, that the Postal Service is not resisting --

MR. KLEIN: Your Honor, if I may make a comment at this juncture --

THE COURT: Let me just finish what I was saying when I can get Ms. Braswell's attention again.

-- also in a way that the Postal Service doesn't feel it must resist efforts to just find and produce helpful data.

Okay. What were you going to say?

MR. KLEIN: The only thing I was going to say was that, in the course of discovery the first time, when we deposed Mr. Hintenock of the Postal Service, he indicated the Postal Service did not keep records of how much petitioning activity had occurred or records of complaints; that all they had was sort of anecdotal information, which is the sort of stuff that, you know, we were able to get through depositions and so on.

So, you know, that sort of bears on the type of information that may be readily accessible. And, of course, it

may be difficult, depending on who you ask, what they say and what they take to be within the scope of the question. So, you know, it's just something -- just a comment I make because it will bear on what we get and how we get it.

And we don't want to engage in any kind of scorched earth litigation. This is not a profitable action for us, and we would like to bring it to closure in the most efficient way we can.

THE COURT: Well, you know, on the other half of that factual spectrum, just, for example, if the Postal Service were able to develop a document that could be sent out to the field that has a description of what a *Grace* sidewalk is, a description of what a *Kokinda* sidewalk is, descriptions of what would not fit a *Grace* sidewalk or what would not fit a *Kokinda* sidewalk, and then say, "Now, we've given you this description. We just want a quick yes or no answer that we can tabulate in some numerical form later on. Tell me if your facility has a -- call it what you will -- a *Grace* sidewalk or a series of *Grace* sidewalks. Tell me if your facility has a *Kokinda* sidewalk."

I don't know quite how to suggest ways to accumulate the historical use data that you're talking about, but all I'm doing is generating, as an example, some kind of data that would be helpful, at least in supplementing the record as to some of these assumptions the Court of Appeals was making about, as the example, urban post offices likely having a lot of *Grace* sidewalks. They might be right, but they have no data upon which

to base that assumption, and neither do I.

So that's just an example of ways I would ask you to think about approaching the data gathering that might he useful to supplement the record. I'm not known necessarily as the most imaginative person in the world, so I'll stop with that, but that's just one piece of imaginative approach I hope you would consider, and go well beyond that.

While I have you here, if indeed you file something soon and suggest that you all would want to come back for a further status, are you all available to do that, if necessary, next week or the week after that, before Thanksgiving? Is that a doable thing for you all?

MR. KLEIN: Yes, within constraints, but I'll shift things around as necessary to make that happen.

THE COURT: I'm not saying it's going to have to happen, but I just wanted to do it sooner rather than later, so next week or the week after that is what I'm exploring.

I assume tomorrow is just too soon to file something and come back, so that's why I'm not looking --

MS. BRASWELL: I'm in deposition tomorrow, Your Honor, and witness preparation this afternoon. And I don't, unfortunately, have everything written down. I'm in depositions next week, I have a pre-trial next Thursday and I'm going out of town on the 22nd.

MR. KLEIN: I would suggest that maybe the two of us can