No. 10-5337

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

INITIATIVE AND REFERENDUM INSTITUTE, et al.,
APPELLANTS,

v.

UNITED STATES POSTAL SERVICE,
APPELLEE.

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

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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STATEMENT BY COUNSEL PURSUANT TO FRAP 35(b)(1)

This case involves constitutional questions of exceptional importance, both legal and practical. Plaintiff-appellants claim the right to collect signatures on ballot-measure petitions on sidewalks on Post Office property that are open to the public. As the panel acknowledged, "It is hard to imagine many activities more central to the purpose of the First Amendment . . . ." Op. at 5. And, as the record shows, the ability to use post office sidewalks to collect signatures on ballot petitions is crucial for two reasons: First, post offices serve a critical screening function, for most users are registered voters in the local community, enabling petition circulators to communicate with individuals qualified to sign their petitions. Second, in some communities, post office sidewalks are the only public sidewalks where pedestrians can be found, as "downtowns" have been replaced by privately owned shopping centers. *See infra* note 1 and accompanying text.

This appeal addresses whether the imposition of criminal penalties for such signature gathering under 39 C.F.R. § 232.1(h)(1) survives the First Amendment "reasonableness test," a question not previously addressed by this Court or the Supreme Court. It also considers, as a matter of first impression in this Circuit, whether such sidewalks are "traditional public forums," such that prohibitions on speech must be narrowly tailored to meet a significant governmental interest. In *United States v. Kokinda*, 497 U.S. 720 (1990), the Supreme Court was unable to

resolve the latter question, with four Justices concluding that such sidewalks were traditional public forums, four Justices concluding that they were not, and Justice Kennedy, providing the deciding vote, citing the "powerful argument" that postal sidewalks were public forums, *id.* at 737, but concluding that the particular activity in question, "personal solicitations . . . for the immediate payment of money," *id.* at 738, was sufficiently intrusive that a narrowly tailored prohibition of that activity would withstand constitutional scrutiny even if such sidewalks are public forums. *Id.* at 739.

The matter also merits rehearing because the panel's reasoning uncovers an inconsistency in the law of this Circuit. Plaintiffs relied on the established presumption that a public sidewalk is a public forum. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988); *United States v. Grace*, 461 U.S. 171,177 (1983); *Oberwetter v. Hilliard*, 639 F.3d 545, 552 (D.C. Cir. 2011); *Lederman v. United States*, 291 F.3d 36, 42 (D.C. Cir. 2002); *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992). The panel decision accorded no weight to that presumption, holding instead that "'[t]he dispositive question is not what the forum is *called*, but what *purpose* it serves, either by tradition or specific designation.'" Op. at 7-8 (quoting *Boardley v. U.S. Dept. of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010)) (emphasis in original). With respect, to the extent the panel's analysis departs

from the presumption that public sidewalks are traditional public forums, it fails to follow binding Supreme Court and Circuit law.

ARGUMENT

For generations, post office sidewalks have served as public forums for collecting signatures on ballot petitions, as well as for other First Amendment activity. Plaintiffs presented evidence that they have long served as the "number one" forum for such activities, for good reasons. First, post offices serve a critical screening function because postal patrons are usually local registered voters, ensuring that those who sign petitions are legally qualified to do so. Second, in many non-urban communities across the nation, the displacement of the old downtown by private shopping malls means that post office sidewalks are the only public sidewalks where pedestrians can still be found.[1] These realities render the questions presented to this Court exceptionally important.

I. The Court Should Hold That The Postal Service Ban on Collecting Petition Signatures on Public Sidewalks Fails The First Amendment "Reasonableness Test"

As the panel acknowledged, even in a non-public forum, restrictions on speech survive constitutional scrutiny only if they are "reasonable," that is, if they

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[1] *See, e.g.,* Kimball Dep. at 32-36 (J.A. 213-14); *see also* Pacelle Decl. ¶¶ 6-7 (J.A. 276-77); Waters Decl. ¶¶ 5-6 (J.A. 283-84); Lincoln Aff. ¶ 3 (J.A. 295); Grant Aff. ¶ 3 (J.A. 296); Hawkins Aff. ¶ 1 (J.A. 298); Crow Aff. ¶ 2 (J.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 24-25 (J.A. 237-38).

reasonably further the government's legitimate interest in maintaining property for its dedicated use. Op. at 11 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). On a previous appeal of this case, a panel of this Court found that an earlier version of the ban was not reasonable because it absolutely prohibited a spoken request, or "pure solicitation," for signatures on postal property. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1314-17 (2005) ("*IRI I*"). The panel in *IRI I* observed that a blanket ban on pure solicitation swept too far, because—in criminalizing not only the actual collection of signatures, but even the spoken request—it banned far more speech than necessary to meet the government's legitimate ends. *Id.* The panel cited a concurring opinion by Justice Kennedy that distinguished between bans on pure solicitation, which are disfavored, and what Justice Kennedy viewed as a permissible ban on soliciting for the immediate receipt of money. *Id.* at 1316 (citing *ISKCON v. Lee*, 505 U.S. 672, 693, 703-05 (1992) (Kennedy, J., concurring)). On remand, the Postal Service amended its regulation to permit the pure solicitation of signatures—but not their collection—on postal property.[2]

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[2] It is significant that, in the same concurrence, Justice Kennedy concluded that the corridors of an airport terminal were a traditional public forum. *Id.* at 693-703. Nevertheless, he concluded that requests for the immediate receipt of money could be excluded from that forum because of the non-speech element of conduct contained in the exchange of funds. *Id.* at 703-05. In this respect, Justice Kennedy's concurrence in *ISKCON* echoed his concurrence in *Kokinda*, where he acknowledged the "powerful argument" that postal sidewalks are traditional public

On this appeal, Plaintiffs argued that, even as amended, the regulation contains an irreconcilable contradiction and is thus unreasonable. The Postal Service asserted, and the panel accepted, that the ban is reasonable because it is more disruptive to *collect* signatures than merely to *solicit* them. But this proposition is contradicted by an exception in the regulation itself. For while the regulation allows the solicitation but not the collection of signatures on petitions, it expressly permits the collection of signatures on postal sidewalks in voter registration drives. Directly contradicting the argument it presented to this Court, the Postal Service justifies the *collection* of signatures for voter registration on the ground that the alleged absence of any verbal *solicitation* during voter registration renders that activity non-disruptive. *See* Gov't's Br. at 45 ("the customer is not directly approached by an individual"). In short, the Postal Service has given diametrically conflicting justifications for the rule and its exception.[3]

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forums but concluded that requests for the immediate exchange of money could be banned. But the panel's analogy to *ISKCON* is unlikely to be one that Justice Kennedy would endorse here. Requests for signatures on petitions do not involve a non-speech element of conduct. Unlike exchanges of money, the act of signing a referendum petition—the act requested—is itself political expression entitled to First Amendment protection. *Doe v. Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2817 (2010).

[3] The Postal Service notes that voter registration "usually takes place at a table," and "the customer is free to walk past the table." *Id.* at 44-45. Of course, petition gathering could also take place at a table, which the customer would be equally free to walk past—except that the challenged regulation bans such activity.

The panel failed to address this inconsistency. It observed that because the *IRI I* court had suggested that it would be permissible to limit the ban to pure solicitation, "[t]he Postal Service is simply following our lead." Op. at 12. The panel felt that this earlier pronouncement in *IRI I* was controlling. *Id.* at 13.

Judge Brown's concurring opinion spotlights the problem. She agreed that the disposition was controlled by *IRI I*, but remarked that "this half-a-loaf solution seems more persnickety than practical. The harms about which the Postal Service is concerned—the impeding of traffic and the appearance of Postal Service endorsement, Majority Op. at 11-12—and, indeed, all of the harms I can imagine, accrue in the initial, permitted phase of a signature-gathering encounter: the solicitation." Conc. at 1.

> As I imagine an encounter under the current set of regulations, a postal patron will approach the door to a post office. The patron will then be approached by a signature-gatherer and asked to sign a petition, at which point, one of two things will happen: the patron may ignore the signature-gatherer, giving him the brush-off and walking right into the post office, or seek to sign the petition. All of these interactions are permitted. Once the patron expresses an interest in signing the petition, however, the signature-gatherer will have to explain that postal regulations prohibit collecting signatures in this location, and invite the patron to move to the nearest *Grace* sidewalk to affix his signature.[4]

Id. at 1-2. Judge Brown observed that "the disruption is only increased by the awkward two-step required by the regulations," which does nothing to "dissipate concern about the Postal Service's apparent endorsement of the message of

[4] And as noted earlier, in many places "the nearest *Grace* sidewalk" is miles away.

signature-gatherers." *Id.* at 2. Thus, the ban is not calculated to solve the problem the Postal Service claims to exist; if anything, it exacerbates that harm. Judge Brown urged the Postal Service to rescind its ban voluntarily. *Id.* at 3. Neither the majority nor the concurrence evinced much enthusiasm for the reasonableness of the current ban, but both were reluctant to punish the Postal Service when it was merely "following [the Court's] lead."

The earlier panel, however, was never asked to rule on the reasonableness of a ban on signature collection only. Rather, it held that the regulation before it unconstitutionally prohibited "pure solicitation." Because the present ban was not before it, any suggestion in *IRI I* that a ban on "collection only" would be reasonable is not the law of the case; it is dicta, and the current panel is free to reconsider it now that the question is squarely presented. More importantly, as Judge Brown's concurrence explains, it is not reasonable.

The panel opinion suggests that the ban on signature collection could be sustained as reasonable based on indications in the *Kokinda* plurality opinion and Justice Kennedy's concurrence. Op. at 12-13. But there are no such indications. *Kokinda* focused only on solicitations for immediate transfers of cash, which both the prevailing opinion and Justice Kennedy believed were distinctively intrusive. The prevailing opinion cited "confrontation by a person asking for money" as a uniquely disruptive and intrusive form of communication. 497 U.S. at 734.

Likewise, Justice Kennedy voted to uphold the regulation at issue in *Kokinda* because it went "no further than to prohibit personal solicitations on postal property for the immediate payment of money." *Id.* at 738.

Here, the ban on signature gathering is unreasonable because it burdens core protected expression without advancing the government's stated interests *at all*. Far from preventing intrusion upon the postal patron, it prolongs it. It cannot dissipate hypothetical customer perceptions that the post office endorses a speaker's viewpoint, for the speech remains on postal premises. And the Postal Service's suggestion that signature collection is more intrusive than solicitation is belied by its contrary insistence that, in voter registration, actual signature collection is benign precisely because it does *not* involve solicitation. In fact, it is the *solicitation* that the Postal Service dislikes, but this Court would not allow it to ban outright.

To the extent the panel was correct in believing that *IRI I* tied its hands, the en banc court has the power to loosen the bonds. The current version of the ban is unreasonable and thus unconstitutional. The panel or the full court should so hold.

II. The Court Should Hold That Interior Postal Sidewalks Are Traditional Public Forums

The main purpose of any sidewalk is to allow pedestrians to walk from one place to another. The sidewalks at issue here generally exist to allow pedestrians to walk to and from a post office. Contrary to the panel's opinion, this does not

render them non-public forums. *See ISKCON*, 505 U.S. 672, 693, 696-97 (Kennedy, J., concurring) ("The notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction. . . . It would seem apparent that the principal purposes of streets and sidewalks, like airports, is to facilitate transportation, not public discourse . . . .").

Notwithstanding their general dedication to this facilitative use, it is firmly established that a public sidewalk is also a quintessential public forum, in which free speech and debate are to be permitted and have been permitted from "time out of mind." *Hague v. CIO*, 307 U.S. 496, 515 (1939). The hallmark of traditional public forums is the tradition that dedicates them to this public use. *Perry*, 460 U.S. at 45. Thus, the Supreme Court and this Court have held on many occasions that sidewalks normally are "considered, without more, to be 'public forums'" in which regulations on speech must be narrowly tailored to a significant governmental interest, *Grace*, 461 U.S. at 177, and that, "[o]rdinarily, a determination of the nature of the forum would follow automatically from this identification" as a street or sidewalk. *Frisby*, 487 U.S. at 480-81.

Hence, there is a "working presumption that sidewalks, streets, and parks are normally to be considered public forums." *Oberwetter*, 639 F.3d at 552; *accord Lederman*, 291 F.3d at 42 (citing government's burden "to convince us the sidewalk is not a public forum"); *Henderson*, 964 F.2d at 1182 (citing "working

presumption" that sidewalks are public forums). It was this Court, in *Henderson*, that added italics to the Supreme Court's finding in *Grace* that sidewalks "'are considered, *without more*, to be public forums.'" 964 F.2d at 1182.

There is no dispute here that this case involves speech on sidewalks. Nor is it disputed that post offices are public places, and that no member of the public is excluded from the sidewalks at issue. Consistent with *Grace*, the starting point for analysis is a presumption that these sidewalks are public forums, which the Postal Service has the affirmative burden to overcome. Indeed, the first assignment of error in Plaintiffs' brief was that the District Court had erred in placing the burden on Plaintiffs' shoulders to prove that these sidewalks were public forums. Appellants' Br. at 1, 19-26. The Postal Service had proffered virtually no evidence concerning the forum status of the sidewalks, except the testimony of an expert who overwhelmingly conceded the use of postal property for public speech and debate going back to the days of the early Republic. *Id.* at 31-33. It therefore failed to carry the burden imposed on it by *Lederman, Henderson* and *Oberwetter*.

The panel opinion, however, did not decide the question Plaintiffs raised regarding the burden of proof, except to observe that "'[t]he dispositive question is not what the forum is *called*, but what *purpose* it serves, either by tradition or specific designation.'" Op. at 7-8 (quoting *Boardley* , 615 F.3d at 515 (emphasis in original)). The panel then reasoned that the location of the sidewalks within

postal property distinguished them from "'ordinary sidewalks used for the full gamut of urban walking,'" Op. at 8 (quoting *Henderson*, 964 F.2d at 1182), and that they "have a different purpose than ordinary sidewalks, which are generally open for 'the free exchange of ideas.'" Op. at 8-9 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)).

But the suggestion that the mere placement of a sidewalk within government property that is accessible to the public, rather than along a roadside, shifts the operative presumption is at odds with other decisions of this Circuit. *See, e.g., Lederman*, 291 F.3d at 43 (sidewalk within Capitol grounds was a public forum despite its interior location); *Henderson*, 964 F.2d at 1182 (sidewalk on Vietnam Memorial grounds, separated from street by a service road, was a public forum despite its interior location). Likewise, the fact that the sidewalk is used by postal patrons does not mean it has a different purpose than ordinary sidewalks; neither type exists primarily for the purpose of encouraging a free exchange of ideas—there is merely a long tradition of allowing it.

The panel stated that five other courts of appeals have held that postal sidewalks are not public forums. Op. at 7. This reflects the Postal Service's reading of the caselaw. However, it mischaracterizes the law of at least two circuits. In *Paff v. Kaltenbach*, 204 F.3d 425 (3d Cir. 2000), the Third Circuit made no finding regarding the forum status of the postal sidewalk. At issue was

plaintiffs' suit for damages under 42 U.S.C. § 1983 against a police officer who, at a postmaster's behest, had arrested them for criminal trespass when they were distributing leaflets on a postal sidewalk. The district court had *upheld* plaintiffs' First Amendment right to leaflet on the postal sidewalk—a ruling that was not appealed. 204 F.3d at 431. The only question before the Third Circuit was whether that right was sufficiently settled to overcome the officer's qualified immunity from damages, which the court answered in the negative over the dissent of its Chief Judge. *Id.* at 432-33.

Likewise, *Jacobsen v. U.S. Postal Service*, 993 F.2d 649 (9th Cir. 1993), was decided in the aftermath of an earlier decision in which the Ninth Circuit had directed issuance of a preliminary injunction *against* removing newsracks from postal sidewalks in a particular district. *Jacobsen v. U.S. Postal Serv.*, 812 F.2d 1151, 1154 (9th Cir. 1987). On the second appeal, the court upheld its earlier injunction, 993 F.2d at 658, allowing the removal of newsracks from just three specific locations. *Id.* at 657. To the extent the panel thought either case, or any of the others cited, establishes that postal sidewalks are non-public forums, or that no significant number of postal sidewalks are public forums, it was mistaken. *See* Appellants' Reply Br. at 18-21 (discussing the other Circuits' cases).

Placing the burden of proof where it belongs, Appellants should not have been required to come forward with evidence that interior postal sidewalks are

public forums. However, they did. The panel rejected much of that evidence on the basis that post offices were not freestanding buildings in colonial times, so that evidence of their earlier history is irrelevant. It analogized post offices to airport terminals, of too recent provenance to have a "traditional" use. Op. at 9-10. But even assuming post offices were not freestanding buildings in colonial times, their existence as freestanding buildings predates the existence of airports by many generations. And the history of use Plaintiffs provided was not limited to literature from the early Republic, but included both expert and fact testimony and literature from later periods, as well as data collected at the District Court's request in a survey of postmasters. Appellants' Br. at 26-40.

The postmaster survey showed that, notwithstanding the ban, the observed use of interior postal sidewalks and *Grace* sidewalks for expressive activity has been indistinguishable. *Id.* at 37-38. Notwithstanding the ban, *Kokinda* sidewalks host expressive activity to the same extent as *Grace* sidewalks, which the panel in *IRI I* held to be traditional public forums. *IRI I*, 417 F.3d at 1313-14. The *IRI II* panel commented that only about 7% of postmasters had observed people using either *Grace or* interior postal sidewalks for expressive activity. Op. at 10. But some 300 of the survey respondents also reported a decline after the regulation became effective, making the regulation a self-fulfilling prophecy. Kadane Decl. ¶ 4.e [J.A. 812, 814-15, 854.] And of the hundreds of postmasters who had observed

expressive activity on postal sidewalks, some 13.5% had observed such activity *at least* three to six times a year. *Id.*, ¶ 4.f [J.A. 814-15].[5]

The panel in *IRI I* thought that the question was whether postal sidewalks were being used as public forums in a "good number of cases," because that would establish whether a "substantial" amount of speech was being improperly infringed. *IRI I*, 417 F.3d at 1313-14. The survey evidence shows that postmasters observed hundreds of such cases over the eight years after the ban's effective date, at facilities comprising just 13.78% of the full cohort of post offices. It follows that thousands of instances of speech have been silenced throughout the system. This emphatically suggests that the test set out by the *IRI I* panel has been met.

To be sure, not every sidewalk is a public forum, but traditionally the burden has been placed on the government to demonstrate why special circumstances, such as inclusion within a non-public enclave like a military base or prison, overcomes the usual presumption. *See, e.g., Greer v. Spock*, 424 U.S. 828, 839 (1976); *Adderley v. Florida*, 385 U.S. 39, 41 (1966). The Postal Service has not made such a demonstration here, and it cannot do so when the distribution of literature and the solicitation of signatures (as well as the collection of signatures

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[5] Because the survey was limited to activity that the responding postmasters personally observed, it described only a fraction of the activity that had occurred. Viewed in this light, the postmasters' observations are more consistent with Plaintiffs' own testimony that postal sidewalks are (or were, before the ban) the best and most frequently used forums for collecting signatures on ballot petitions.

on voter registration forms) takes place on these same sidewalks without interference with postal business. Accordingly, it has not met its burden to negate the presumptive forum status of these public sidewalks.

CONCLUSION

In *Kokinda*, four Justices concluded that an interior postal sidewalk was not a public forum, four others concluded that it was a public forum, and Justice Kennedy, concurring, concluded that there was "a powerful argument" that it was a public forum, but thought the regulation at issue was permissible in any event. The question, therefore, was one that not only closely divided the Court, nor only one that it failed to resolve definitively, but in fact one in which a majority of Justices indicated that they would either certainly or probably have sided with Plaintiffs in this case. It is therefore a question singularly appropriate for this Court to reconsider, either as a panel, or en banc.

Respectfully submitted,

/s/ David F. Klein

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Petition For Panel Rehearing Or Rehearing En Banc, were hand delivered to Marina Utgoff Braswell, Assistant United States Attorney, United States Attorney's Office, 555 4th Street, NW, Washington D.C. 20530 on this 27th Day of August 2012.

/s/ David F. Klein

DAVID F. KLEIN

ADDENDUM

CERTIFICATE AS TO PARTIES, AMICI AND RELATED CASES

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

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

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

3. The amici who have appeared before this court are: Newspaper Association of America; A.H. Belo Corp.; Gannett Company, Inc.; Journal Sentinel, Inc.; Lee Enterprises, Incorporated; The McClatchy Company; The New York Times Company; The E.W. Scripps Company, and Stephens Media LLC.

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

The ruling under review is the Memorandum Opinion of the United States District Court for the District of Columbia in *Initiative and Referendum Institute, et*

al., v. United States Postal Service, Civ. No. 00-1246 (RWR) (September 8, 2010). This decision is reported at 741 F. Supp. 2d 27 (D.D.C. 2010) and can be found at page 984 of the Joint Appendix.

C. *Related Cases.*

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

/s/ David F. Klein
David F. Klein
Attorney for Appellants

Dated at Washington, D.C.
this 27th day of August, 2012.

CORPORATE DISCLOSURE STATEMENT

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

/s/ David F. Klein
David F. Klein
Attorney for Appellants

Dated at Washington, D.C.
this 27th day of August, 2012.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 9, 2011 Decided July 13, 2012

No. 10-5337

INITIATIVE AND REFERENDUM INSTITUTE, ET AL.,
APPELLANTS

v.

UNITED STATES POSTAL SERVICE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:00-cv-01246)

David F. Klein argued the cause for appellants. With him on the briefs were *Mark S. Davies*, *Matthew G. Jeweler*, and *Arthur B. Spitzer*.

Alice Neff Lucan and *René P. Milam* were on the brief for *amici curiae* Newspaper Association of America, et al. in support of appellants.

Marina Utgoff Braswell, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Ronald C. Machen, Jr.*, U.S. Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney.

Before: HENDERSON, BROWN, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Concurring opinion filed by *Circuit Judge* BROWN.

GRIFFITH, *Circuit Judge*: This appeal is the latest step in a long-running controversy over the use of post office sidewalks to gather signatures on petitions. Originally a dispute over a ban on soliciting signatures on all post office property, the issues in the case have changed in response to a decision of ours and subsequent revisions to Postal Service regulations. Before us now is a facial challenge to a ban on collecting signatures on post office sidewalks that do not run along public streets. We agree with the district court that the ban does not violate the First Amendment.

I

In 1998, the Postal Service banned "soliciting signatures on petitions" on "all real property under the charge and control of the Postal Service." 39 C.F.R. § 232.1(a), (h)(1) (2002). Violations are punishable by a criminal fine and imprisonment. *Id.* § 232.1(p)(2).

The appellants use sidewalks on postal property to circulate petitions aimed at placing initiatives and referenda on state and local election ballots. In 2000, they brought a facial challenge to the 1998 ban, arguing it violated the First Amendment. Following discovery, both parties moved for summary judgment. At a hearing on those dueling motions, the Postal Service announced that the ban would not extend to sidewalks that form the perimeter of post office property and

are indistinguishable from adjacent public sidewalks,[1] and that the regulation would be enforced only against the collecting of signatures, not the mere asking for them. *See* Mots. Hr'g Tr. 29, 32-34, Sept. 24, 2002. The Postal Service also said it would "issue a bulletin to its postmasters directing them to adhere to this changed position." *Initiative & Referendum Inst. v. U.S. Postal Serv.*, No. 00-1246, Order at 1 (D.D.C. Sept. 26, 2002).

The district court granted summary judgment for the Postal Service, holding that the regulation, as narrowed by the newly announced enforcement policy, was a reasonable time, place, or manner restriction that would pass constitutional muster even on sidewalks that were public forums. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 297 F. Supp. 2d 143, 154 (D.D.C. 2003). Reaching that conclusion, the district court did not need to decide if they were.

We reversed the district court, holding that the ban would be an impermissible restriction on expressive activity if postal sidewalks were public forums because it was not narrowly tailored to target disruptive activity and did not allow for petitioning anywhere on postal property. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1306-07 (D.C. Cir. 2005). We remanded the case for the district court to determine whether the ban reached "a substantial number"

[1] We refer to these as *Grace* sidewalks. In *United States v. Grace*, 461 U.S. 171 (1983), the Supreme Court held that the "sidewalks forming the perimeter of the Supreme Court grounds" are traditional public forums, places where expressive activity is lightly regulated, because they are "indistinguishable from any other sidewalks in Washington, D.C." *Id.* at 179-80.

of public forums.[2] *Id.* at 1313. To guide the district court, we noted that interior postal sidewalks "may be hard to categorize" but that *Grace* sidewalks are surely public forums where the regulation may not be enforced. *Id.* at 1313-14. Contrary to the argument of the Postal Service that its new enforcement policy corrected the regulation's defect as to *Grace* sidewalks, we held that placing them beyond its reach was not a plausible construction of a regulation whose express terms still applied to *all* postal property. *Id.* at 1317-18. We also identified a different problem with the regulation: Even in nonpublic forums restrictions must be reasonable, and a ban on merely asking for signatures would not be. *Id.* at 1314-16. The Postal Service's new enforcement policy, however, remedied that infirmity by plausibly construing the ban to bar only the actual collection of signatures. *Id.* at 1317.

While the matter was before the district court on remand, the Postal Service amended its regulations to account for our discussion of the new enforcement policy. The 2010 regulations prohibit "collecting" signatures, but not "soliciting" them, on all postal property other than *Grace* sidewalks. 39 C.F.R. § 232.1(a), (h)(1) (2010) (prohibiting "collecting signatures on petitions" on all postal property except "sidewalks along the street frontage of postal property . . . that are not physically distinguishable from adjacent municipal or other public sidewalks").

Which brings us to the present controversy: The appellants argue that § 232.1(h)(1) is still unconstitutional on

[2] We explained that the appellants could sustain their facial challenge to the regulation by showing that it restricts "a substantial amount of protected free speech, judged in relation to [its] plainly legitimate sweep." *Initiative & Referendum Inst.*, 417 F.3d at 1312 (quoting *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (citation and internal quotation marks omitted)).

its face because the sidewalks to which it applies are public forums. In response to the district court's request for a more complete factual record, the parties sent a questionnaire to selected postmasters asking about the nature and frequency of expressive activity on various types of postal sidewalks. The appellants argued that the survey results showed that many interior sidewalks at post offices are public forums and moved for summary judgment on that ground. And even if they were not, the appellants claim the regulation still violates the First Amendment because it is unreasonable. The appellants also asked the district court to enjoin enforcement of the regulation on *Grace* sidewalks. The Postal Service countered with its own motion for summary judgment, arguing that the regulated sidewalks are not public forums and the regulation is reasonable. The district court sided with the Postal Service and also held that the express exemption of *Grace* sidewalks from the regulation mooted the request for injunctive relief. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 741 F. Supp. 2d 27, 35, 41 (D.D.C. 2010). This appeal followed. We exercise jurisdiction pursuant to 28 U.S.C. § 1291.

II

The first question we must decide is whether interior postal sidewalks are public forums. It is hard to imagine many activities more central to the purpose of the First Amendment than collecting signatures on a petition with the goal of placing an issue before the electorate. Yet even such a worthwhile endeavor is not altogether free of government regulation when it takes place on government property dedicated to other types of public business.

We analyze restrictions on expressive activity on government property for compliance with the First Amendment under the public forum doctrine. This approach

divides government property into three categories, and the category determines what types of restrictions will be permissible. The "traditional public forum" category consists of property that has "by long tradition or by government fiat . . . been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Quintessential examples are streets and parks, which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)) (internal quotation marks omitted). In such a forum we subject content-based restrictions on speech to strict scrutiny, but use the less demanding time, place, or manner test to assess content-neutral restrictions. *Id.* A "designated public forum" is property that "the State has opened for use by the public as a place for expressive activity." *Id.* Expressive activity there may be restricted to particular groups or subjects. *Id.* at 46 n.7. A "nonpublic forum" is "not by tradition or designation a forum for public communication." *Id.* at 46. In these places the government may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

In *United States v. Kokinda*, 497 U.S. 720 (1990), the Supreme Court addressed but did not resolve the question before us: whether interior sidewalks at post offices are public forums. At issue was a Postal Service regulation that prohibited "[s]oliciting alms and contributions" on a sidewalk that led from the parking lot to the front door of the post office building. *Id.* at 722-23 (plurality opinion). Writing for a plurality, Justice O'Connor explained that the forum analysis

turns on more than whether the government property is a sidewalk: "the location and purpose of a publicly owned sidewalk" are key. *Id.* at 727-29. The plurality concluded that this sidewalk was not a public forum because "it [led] only from the parking area to the front door of the post office" and "was constructed solely to provide for the passage of individuals engaged in postal business." *Id.* at 727. Unlike other sidewalks, it was not a "public passageway" meant "to facilitate the daily commerce and life of the neighborhood or city." *Id.* at 727-28. Justice Kennedy concurred in the judgment upholding the regulation but would not join the plurality's conclusion that the sidewalk was not a public forum. Noting there was "a powerful argument" that the sidewalk was "more than a nonpublic forum," he nevertheless found no need to reach that issue because the regulation was in his view a valid time, place, or manner restriction. *Id.* at 737-38 (Kennedy, J., concurring in the judgment).

Five courts of appeals have addressed the status of interior postal sidewalks under the public forum doctrine and all have agreed with the plurality that they are not public forums. *See Del Gallo v. Parent*, 557 F.3d 58 (1st Cir. 2009); *Paff v. Kaltenbach*, 204 F.3d 425 (3d Cir. 2000); *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649 (9th Cir. 1992); *Longo v. U.S. Postal Serv.*, 983 F.2d 9 (2d Cir. 1992); *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986). We join their ranks. No court of appeals has held otherwise, except the Fourth Circuit which was reversed by the Supreme Court in *Kokinda*. *United States v. Kokinda*, 866 F.2d 699 (4th Cir. 1989), *rev'd*, 497 U.S. 720.

Like the *Kokinda* plurality, we recognize that "[t]he dispositive question is not what the forum is *called*, but what *purpose* it serves, either by tradition or specific designation." *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C.

Cir. 2010). We agree with Justice O'Connor that it is not enough to know that the regulated property is a sidewalk. True, we start "at a very high level of generality" where there is "a working presumption that sidewalks, streets and parks are normally to be considered public forums." *Oberwetter v. Hilliard*, 639 F.3d 545, 552 (D.C. Cir. 2011) (quoting *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992)) (internal quotation marks omitted). But then we must "examine the history and characteristics of the particular property at issue, mindful 'that when government has dedicated property to a use inconsistent with conventional public assembly and debate . . . then the inconsistency precludes classification as a public forum.'" *Id.* (quoting *Henderson*, 964 F.2d at 1182). In this case, the location, purpose, and history of interior postal sidewalks combine to show that they are not public forums.

Their location distinguishes them from "ordinary sidewalks used for the full gamut of urban walking." *Henderson*, 964 F.2d at 1182; *see also Grace*, 461 U.S. at 179. Most lead only to the front door of the post office building, *see Kokinda*, 497 U.S. at 727 (plurality opinion), and a person stepping onto one would generally be aware that he was not on an ordinary sidewalk that runs along a public street, *see Del Gallo*, 557 F.3d at 71. That physical separation from ordinary sidewalks suggests they are subject to greater regulation. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee* (*ISKCON*), 505 U.S. 672, 680 (1992) (explaining that "separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction").

Interior postal sidewalks also have a different purpose than ordinary sidewalks, which are generally open for "the free exchange of ideas." *See Cornelius v. NAACP Legal Def.*

& Educ. Fund, Inc., 473 U.S. 788, 800 (1985). Like streets, ordinary sidewalks are "not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981). By contrast, interior postal sidewalks are not meant to serve as forums for free expression. They are neither public thoroughfares nor gathering places, *see Kokinda*, 497 U.S. at 727 (plurality opinion), but are typically used only by customers and employees of the post office and are built solely to provide efficient access to the post office, *see id.* at 728; Hintenach Decl. in Supp. of Def.'s Mot. for Summ. J. ¶ 12.

There is no venerable tradition of using these sidewalks for expressive activities. It is no doubt true, as the appellants explain, that in the early days of the Republic post offices were "a favorite gathering place" among townsmen who congregated to discuss the news of the day and gossip. Appellants' Br. 31-36 (quoting RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 161 (1995)); *see also* John Dep. 36:20-37:10, Jan. 4, 2002. But post offices then were not quite the same as post offices now. Historically, a post office consisted of a desk or counter in a store, tavern, or coffeehouse. *See* John Dep. 42:6-43:6; JAMES H. BRUNS, GREAT AMERICAN POST OFFICES 3 (1998); JOHN, *supra*, at 113. "[P]ost offices were rarely located in a freestanding building," and "[a]lmost none were owned by the government outright." JOHN, *supra*, at 113. The history the appellants cite tells us little about interior postal sidewalks, which are a comparatively recent development. *Cf. ISKCON*, 505 U.S. at 680-81 (explaining that the lateness with which the modern air terminal made its appearance

precludes a finding that it has been used for expressive activity "time out of mind").

The appellants argue that interior postal sidewalks are public forums because they are widely used for expressive activity. They contend that the results of the postmaster survey show that much public discourse takes place on postal sidewalks and there is no significant difference between what takes place on *Grace* sidewalks and what takes place on interior postal sidewalks. Appellants' Br. 36-40; *see also* Kadane Decl. 4-5, Mar. 28, 2008. In fact, the survey results show that only about 7% of the postmasters who responded had ever observed people using *Grace* or interior sidewalks for expressive activity. Kadane Decl. Ex. 2 (358 postmasters said that exterior spaces have been used for expressive activities and 4,736 said they have not). Even if all the observed activity occurred on interior sidewalks, we are hard pressed to agree with the appellants that it is a substantial amount. These results do not show that a substantial number of these sidewalks have been used for political activity and expression with "sufficient historical regularity" to make them traditional public forums. *Initiative & Referendum Inst.*, 741 F. Supp. 2d at 37; *see also Del Gallo*, 557 F.3d at 71 (finding that "the Pittsfield Post Office sidewalk has not consistently, historically 'been used for public assembly and debate,' nor was it intended to be used as such" (citation omitted)). Further, "comparing the frequency of expressive activity within the recent past on the two types of sidewalks sheds little, if any, light on the forum status of [interior] sidewalks." *Initiative & Referendum Inst.*, 741 F. Supp. 2d at 38. The relevant inquiry is whether these sidewalks have *historically* been used for public discourse. *Id.* And *Grace* sidewalks are public forums because they are indistinguishable from ordinary sidewalks, not because of the

quantum of expression that happens on them. *Grace*, 461 U.S. at 179.

Nor does the survey show that interior postal sidewalks are designated public forums. That the Postal Service has allowed certain expressive activities on them does not transform them into designated public forums because "[t]he government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Kokinda*, 497 U.S. at 730 (plurality opinion) (quoting *Cornelius*, 473 U.S. at 802) (internal quotation marks and emphasis omitted). There is no evidence in this case that the Postal Service intended to make sidewalks used primarily by customers and employees to get into the post office "generally available" for expressive activity. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Because interior postal sidewalks are neither traditional nor designated public forums, we review the regulation's application to them for its reasonableness. *Kokinda*, 497 U.S. at 730 (plurality opinion).

III

The appellants argue that even if they are nonpublic forums, banning the collection of signatures on interior postal sidewalks is still unconstitutional because it is unreasonable. *Perry*, 460 U.S. at 46 (holding that restrictions on speech in nonpublic forums must be reasonable). A regulation is reasonable if it is consistent with the government's legitimate interest in maintaining the property for its dedicated use. *Id.* at 50-51. And the restriction "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. According to the Postal Service, its customers and employees have complained that collecting signatures on postal sidewalks blocks the flow of traffic into

and out of the post office building. The Postal Service also seeks to avoid the appearance of endorsing the group collecting signatures.

The appellants respond that there is no reasonable fit between those interests and the regulation. They think the ban unnecessary because "[d]isorderly conduct" and "imped[ing] ingress . . . or egress" are already proscribed. *See* 39 C.F.R. § 232.1(e). But certainly the Postal Service is free to adopt multiple means to ensure that customers visiting the post office can transact their business unimpeded. *See Initiative & Referendum Inst.*, 417 F.3d at 1309 ("Of course, the availability of other means of accomplishing a governmental objective does not foreclose the government's ability to pursue its chosen course."). In a nonpublic forum the government need not adopt the most narrowly tailored means available. *Cornelius*, 473 U.S. at 809.

The appellants also argue that it is unreasonable to distinguish between soliciting signatures and collecting them because both are equally disruptive. But we previously made that very distinction, looking askance at a ban on pure solicitation, but concluding that a ban on collection would be permissible. *See Initiative & Referendum Inst.*, 417 F.3d at 1314-17. The Postal Service is simply following our lead. Tracking the analysis of the plurality and Justice Kennedy in *Kokinda*, we observed that different consequences are likely to follow from merely asking postal customers for their signatures and actually collecting them. *Id.* at 1317. Collecting contributions involves the type of immediate response the *Kokinda* plurality thought could be reasonably banned because it would cause postal customers to stop, transact the business requested, and thus disrupt the flow of traffic at the post office. *Kokinda*, 497 U.S. at 733-34 (plurality opinion). By contrast, the plurality thought that

distributing a leaflet that merely asked postal patrons for their help posed no such risk and could not reasonably be banned. *Id.* at 734. Justice Kennedy made a similar point when he concluded it would be reasonable to ban a request that naturally leads to an immediate response that would disrupt customer traffic at the post office. *Id.* at 738-39 (Kennedy, J., concurring in the judgment). That distinction, we have already determined, is meaningful, and while a ban on pure solicitation is unreasonable, a ban on collection is not. *Initiative & Referendum Inst.*, 417 F.3d at 1317. That discussion, which the Postal Service followed in crafting the regulation before us, controls our disposition.

IV

We said before that § 232.1(h)(1) could not be enforced on *Grace* sidewalks. They are public forums, and the ban on collecting signatures there is not a reasonable time, place, or manner restriction. *Id.* at 1313-14 (citing *Grace*, 461 U.S. at 180). Although it seemed likely that many post offices had *Grace* sidewalks, making this restraint on protected speech "substantial," we remanded the case for the district court to make that determination. *Id.* at 1314. We also noted that this part of the appellants' challenge "may be pretermitted if the Postal Service amends the regulation to exclude [*Grace*] sidewalks from the prohibition against solicitation." *Id.* at 1318. Based on our decision, the appellants sought to enjoin enforcement of § 232.1(h)(1) on *Grace* sidewalks, but the Postal Service beat them to the punch by amending the regulation to exempt *Grace* sidewalks. The district court ruled, therefore, that the appellants' request was moot. *Initiative & Referendum Inst.*, 741 F. Supp. 2d at 34-35. We agree.

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). "Even where litigation poses a live controversy when filed," a federal court must "refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 645 (D.C. Cir. 2011). The intervening event here is of the Postal Service's own doing. "[G]enerally voluntary cessation of challenged activity does not moot a case," unless "the party urging mootness demonstrates that (1) 'there is no reasonable expectation that the alleged violation will recur' and (2) 'interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.'" *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

A challenge to a superseded law is rendered moot unless "there [is] evidence indicating that the challenged law likely will be reenacted." *Id.* The case primarily relied upon by the appellants had just such evidence. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.11 (1982) (noting that the city had announced its intent to reenact the challenged ordinance). There is no evidence in this case to suggest the Postal Service has anything like that in mind. "[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists." *Nat'l Black Police Ass'n*, 108 F.3d at 349. It is implausible that the Postal Service would have gone through the cumbersome process of amending its regulation to exempt *Grace* sidewalks only to re-amend the regulation after this case is resolved to once again cover them, especially

when we have already said that it would be unconstitutional to do so.

Because the challenged regulation no longer applies to *Grace* sidewalks, the amendment "completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 350. At this point, "declaratory and injunctive relief would no longer be appropriate." *Id.*

V

The judgment of the district court is

Affirmed.

BROWN, *Circuit Judge*, concurring: I join the Court's public forum analysis in full, and given our holding in *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1314–17 (D.C. Cir. 2005), I join my colleagues in acknowledging the Postal Service's scheme of banning signature-collection while permitting signature-solicitation is one we previously approved. After all, as the Court explains, the Postal Service is merely "following our lead" from that case, Majority Op. at 12, since we suggested there that banning only same-place signature-collecting would "cure the problem" posed by an outright ban on solicitation of signatures. 417 F.3d at 1317.

But this half-a-loaf solution seems more persnickety than practical. The harms about which the Postal Service is concerned—the impeding of traffic and the appearance of Postal Service endorsement, Majority Op. at 11–12—and, indeed, all of the harms I can imagine,[1] accrue in the initial, permitted phase of a signature-gathering encounter: the solicitation.

As I imagine an encounter under the current set of regulations, a postal patron will approach the door to a post office. The patron will then be approached by a signature-gatherer and asked to sign a petition, at which point, one of two things will happen: the patron may ignore the signature-

[1] For example, Frederick Hintenach, a Postal Service official involved in writing the regulation, testified that "what drove the intrusiveness was the fact that [postal patrons] were *being approached as they were trying to get in and out of the building*." Hintenach Dep. at 85 (emphasis added). This remains permitted. Hintenach went on to say, "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." *Id.* at 94. The permitted solicitation "forces" that same interaction.

gatherer, giving him the brush-off and walking right into the post office, or seek to sign the petition. All of these interactions are permitted. Once the patron expresses an interest in signing the petition, however, the signature-gatherer will have to explain that postal regulations prohibit collecting signatures in this location, and invite the patron to move to the nearest *Grace* sidewalk to affix his signature.[2]

From the perspective of the uninterested patron, the disruption is the same, collection or no collection. But from the perspective of the interested patron, the disruption is only increased by the awkward two-step required by the regulations—*that* patron must further deviate from her postal business in order to complete her interaction with a signature-gatherer. Whatever doorway impedance is alleviated by moving signature-collection offsite is surely netted out by the necessarily lengthier explanations of the convoluted rules.

Nor does this arrangement dissipate concern about the Postal Service's apparent endorsement of the message of signature-gatherers. Postal patrons are unlikely to make any useful distinction on this score between soliciting signatures and collecting them.

When the Supreme Court has evaluated similar speech restrictions, it has only encountered bans on solicitation, not bans on *collection* where solicitation remains permitted. *Compare Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*,

[2] Of the 24 states that allow citizen initiatives, 18 require petition circulators to personally witness each signature and to sign an affidavit to that effect. Nat'l Conf. of State Legis., *Laws Governing Petition Circulators*, http://www.ncsl.org/legislatures-elections/elections/laws-governing-petition-circulators.aspx (last accessed June 25, 2012). Asking a supporter to mail in a signature at a later date is thus out of the question for at least these efforts.

505 U.S. 672, 676, 683–85 (1992) (upholding ban on in-person solicitation of money); *United States v. Kokinda*, 497 U.S. 720, 724, 733 (1990) ("[T]he single issue before us [is whether] the Government's prohibition of *solicitation* on postal sidewalks [is] *unreasonable*?"). Thus, while we can only commend the Postal Service for so assiduously following our directions, the Service may conclude, on further reflection, that the present compromise causes more confusion and disruption than it abates. In that case, the Service may decide to do what is sensible and permit the entire signature-gathering encounter—for that would surely not be unreasonable.