

November 16, 2010

The Honorable John E. Potter Postmaster General & CEO U.S. Postal Service 475 L'Enfant Plaza, SW Washington, DC 20260-0010	William J. Brown, Vice President Southeastern Area Operations United States Postal Service
Mary Anne Gibbons, General Counsel U.S. Postal Service 475 L'Enfant Plaza, SW Washington, DC 20260-1100 VIA FAX# 202-268-6981 and U.S. Mail	Terrena D. Moore, Postmaster Oakland Post Office 14695 Highway 194 OAKLAND, TN 38060-9998
Christy Noel, Esp. Corporate Law United States Postal Service	

Re: Violation of Free Speech Outside of Oakland, TN Post Office

Dear Mr. Potter, Mr. Brown, Ms. Noel, and Ms. Moore:

Michael Choate contacted the Alliance Defense Fund (ADF) regarding his desire to distribute religious literature on a sidewalk outside the United States post office in Oakland, Tennessee. Mr. Choate is a citizen who desires to express his religious beliefs by handing out tracts in that public area.

On August 6, 2010, Mr. Choate went to a sidewalk outside the Oakland, Tennessee post office (14695 Highway 194, Oakland TN, 38060) to distribute religious tracts. This sidewalk is located on post office property in front of the post office. A flag pole is located on this sidewalk approximately 20 yards from the post office entrance. A picture of the post office and the flagpole is attached to this letter as Exhibit 1. Choate stood near this flagpole and, as persons passed, he would ask them if they would like a religious tract. If they refused, Choate simply let them go without following or harassing them. He never attempted to enter inside the post office to distribute literature. At no time did Choate solicit or ask for donations or ask for signatures for any petition. Nor did Choate attempt to post or deposit or place his literature on any postal property. Finally, Choate never impeded or obstructed anyone's movement along the sidewalk or towards the entrance into the post office. Nor did he ever impede or hinder anyone from engaging in their activities. Choate simply handed tracts to passersby in a peaceful, non-obstructing manner.

After a few minutes, a postal worker (Postmaster Terrena D. Moore) came out of the post office and ordered Choate to leave or he would be arrested because he

was not allowed to hand out literature to post office customers, and he was trespassing.

Despite the directive from Ms. Moore, Choate refused to leave because he was simply engaging in peaceful expression. Eventually, the Oakland police came and also ordered Choate to leave because Ms. Moore requested him to do so. But Choate again refused and was arrested for criminal trespass. These charges were later dismissed by the criminal court judge.

Several weeks later, Mr. Choate returned to the post office to ask Ms. Moore for the legal basis for preventing him from passing out literature on post office grounds. Ms. Moore directed Choate to a poster that contained post office regulations. According to Ms. Moore, Choate was violating the provision against "Depositing Literature." Ms. Moore also told Choate that he may not pass out literature anywhere on postal property because some customers are annoyed by it.

The policy used to silence Choate's expression is contained in 39 C.F.R. § 232.1(o):

Depositing or posting handbills, flyers, pamphlets, signs, poster, placards, or other literature, except official postal and other Governmental notices and announcements, on the grounds, walks, driveways, parking and maneuvering areas, exteriors of buildings and other structures, or on the floors, walls, stairs, racks, counters, desks, writing tables, window-ledges, or furnishings in interior public areas on postal premises, is prohibited.

As a result of his interaction with Ms. Moore and the events on August 6, Choate has stopped distributing literature at the post office sidewalk in Oakland and will not do so in the future for fear of arrest.

LEGAL ANALYSIS

THE FIRST AMENDMENT PROTECTS MR. CHOATE'S DESIRED SPEECH

Mr. Choate desires to convey his religious beliefs by peacefully handing out religious literature to those who wish to take it. Such distribution of religious literature is protected by the First Amendment:

This form of religious activity [distribution of religious literature] occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

INDIVIDUALS HAVE THE RIGHT TO FREELY EXPRESS THEMSELVES IN TRADITIONAL PUBLIC FORA SUCH AS PUBLIC SIDEWALKS

The government's ability to regulate speech on public property depends "on the character of the property at issue." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (citation omitted). Choate desires to distribute literature on the public sidewalk near the entrance of the to the Oakland post office. The United States Supreme Court has consistently characterized such places—public streets and sidewalks—as "quintessential" public fora for speech. *See, e.g., United States v. Grace*, 461 U.S. 171, 179 (1983) (sidewalk in front of Supreme Court). Public streets, sidewalks, and ways are the "prototypical example of a traditional public forum." *Schenk v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357, 377 (1997). According to *Frisby*, "no particular inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." 487 U.S. at 481. Indeed, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public...for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (emphasis added).

These principles even apply on postal property. For example, in *United States v. Kokinda*, the Supreme Court confronted an anti-solicitation rule that applied on a sidewalk on postal property. 497 U.S. 720, 726 (1990). A four-Justice plurality found the postal sidewalk to be a non-public forum, and a four-Justice dissent found the sidewalk to be a traditional public forum. *See Id.* at 727 (plurality opinion); 752 (Brennan, J., dissenting). Therefore, the deciding and authoritative opinion is that of Justice Kennedy's concurrence. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that "[m]embers who concurred in the judgments on the narrowest grounds" should be viewed as authoritative opinion in plurality situation). And Justice Kennedy noted that there was a "powerful argument" that the postal sidewalk in question was "more than a nonpublic forum." *Kokinda*, 497 U.S. at 737. Indeed, Justice Kennedy applied the time, place, manner test to the anti-solicitation rule, a test only applicable in a traditional public forum. *Id.* Therefore, in light of Justice Kennedy's language and logic, it is most likely that the sidewalk in question here is a traditional public forum.

And this categorization is significant because speech in a traditional public forum deserves the highest level of protection, and any infringement of speech activity there must overcome high scrutiny. *Kokinda*, 497 U.S. at 726. In order to meet this high standard, the government must prove that its regulation is 1) content-neutral 2) narrowly tailored to serve a significant government interest and 3) leaves open ample means of alternate communication. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

THE BAN ON LITERATURE DISTRIBUTION IS NOT NARROWLY TAILORED OR EVEN REASONABLE

As discussed *supra*, a regulation on Choate's literature distribution must be narrowly tailored to serve a significant government interest. To be narrowly tailored, a regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). A restriction is "narrowly tailored" only if it eliminates no more evil than it seeks to remedy. *Frisby*, 487 U.S. at 485. And, while not dispositive, availability of less burdensome alternatives signals a lack of tailoring. See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

The regulation imposed here cannot satisfy this test because the government has completely banned all literature distribution in a traditional public forum. Such a broad ban cannot hope to be narrowly tailored. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 157-64 (1939) (invalidating ban on literature distribution occurring on public sidewalks).¹

Kokinda is not to the contrary. *Kokinda* upheld a rule against soliciting on postal property. 497 U.S. at 737. But both the plurality and the controlling concurrence limited the holding to solicitation rather than to pure literature distribution because the former is much more disruptive. See, e.g., *Id.* at 734 ("One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation."); *Id.* at 738-39 ("The regulation, in its only part challenged here, goes no further than to prohibit personal solicitations on postal property for the immediate payment of money. The regulation, as the United States concedes, expressly permits the respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support,

¹ It should also be noted that the regulation imposed upon Choate here --- 39 C.F.R. § 232.1(o) --- on its face does not even prohibit Choate's expression. While the text of 39 C.F.R. § 232.1(o) regulates "posting" and "depositing," Choate merely wants to hand his tracts to passersby without posting, depositing, or leaving them anywhere on postal property. But, by applying a regulation that clearly does not regulate Choate's actions, the Postal Service makes it impossible for Choate to know how to comply with the law. Not only that, the Postal Service also retains discretion to apply the regulation in *ad hoc* and discriminatory ways by ignoring the regulation's text. In so doing, the Postal Service violates Choate's right to due process. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (explaining that a regulation violates the Constitution by failing (1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct; and by failing (2) to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner).

including money contributions, provided there is no in-person solicitation for payments on the premises.”).

This distinction is so important that, though the government may ban solicitation in a nonpublic forum, it may not ban literature distribution in a nonpublic forum. *See Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680-683 (1992) (invalidating ban on literature distribution in nonpublic forum airport terminal but allowing ban on solicitation because “we have expressly noted that leafletting does not entail the same kinds of problems presented by face-to-face solicitation.”); *Norfolk v. Cobo Hall Conference and Exhibition Ctr.*, 543 F.Supp.2d 701, 712 (E.D.Mich. 2008) (invalidating ban on leafletting in nonpublic forum, city convention center).²

In light of this reasoning, courts have allowed the Postal Service to ban solicitation on its property, but courts have prohibited the Postal Service from banning other forms of expression, such as seeking petition signatures. *See, e.g., Initiative & Referendum Institute v. U.S. Postal Service*, 417 F.3d 1299, 1307-09 (D.C.Cir. 2005) (invalidating ban on seeking signatures for petitions on postal property for lack of narrow tailoring).³

These cases lead to two clear conclusions. First, if the government cannot ban literature distribution in a nonpublic forum where First Amendment scrutiny is minimal, it certainly cannot ban literature distribution here, in a traditional public forum, where scrutiny is at its zenith. Second, if a ban on seeking petition signatures on postal property lacks narrow tailoring, then, certainly, a ban on literature distribution (a less disruptive activity) must also lack narrow tailoring. Therefore, the Postal Service simply may not ban Mr. Choate’s attempts to distribute literature outside the Oakland, Tennessee post office.

DEMAND

I trust this information helps clarify the rights and responsibilities of the Postal Service. In summary, the First Amendment does not allow the Government to bar Mr. Choate’s literature distribution outside the Oakland, Tennessee post office. Because Mr. Choate retains a strong desire to distribute his literature as

² Indeed, for this reason, the forum classification is largely irrelevant in this case. Even if the postal sidewalk is deemed a nonpublic forum, the ban on distribution fails because it is not reasonable.

³ For similar reasons, the decision in *Del Gallo v. Parent* is inapplicable here. 557 F.3d 58 (1st Cir. 2009). *Del Gallo* upheld a ban on election campaigning outside a post office because the ban prevented any appearance of partisan endorsement or preference for political positions. *Id.* at 73. Obviously, that rationale does not apply here because Choate does not want engage in any sort of election campaigning.

soon as possible, we demand that you notify us in writing – no later than three weeks from the date of this letter – that you will not apply 39 C.F.R. § 232.1(o) (or any other policy) to prevent Mr. Choate from distributing literature in the location specified above. If we do not hear from you in writing before the specified deadline, we can only assume that the Postal Service approves of the ban on Mr. Choate's expression and that the Postal Service will continue to use 39 C.F.R. § 232.1(o) in the future to ban literature distribution in all areas outside the Oakland post office, including the location used by Mr. Choate. Under that scenario, we would have no choice but to take legal action to ensure the exercise of Mr. Choate's First Amendment rights.

Sincerely,

Jonathan Scruggs
Litigation Staff Counsel

JAS/mk

cc: Mike Choate
[insert name of allied atty. here]