

07-4825-cv(L)

07-4826-cv(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

BERTRAM COOPER,

Plaintiff-Appellee,

—against—

U.S. POSTAL SERVICE, JOHN E. POTTER, AS POSTMASTER GENERAL,
RONALD G. BOYNE, AS POSTMASTER, MANCHESTER, CT POST OFFICE,

Defendants-Appellants,

FULL GOSPEL INTERDENOMINATIONAL CHURCH INC., DR. PHILIP SAUNDERS
HERITAGE ASSOCIATION INC., SINCERELY YOURS INC.,

Intervenors-Defendants-Appellants,

GARY CHIPMAN, KIMON KARATH, LESLIE STRONG,

Intervenors.

APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

**BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION
LEAGUE, AND JEWISH SOCIAL POLICY ACTION NETWORK
SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE**

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STATEMENT OF IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public interest organization based in Washington, D.C., that is committed to the preservation of the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has regularly been involved – as a party, as counsel, or as an *amicus curiae* – in many of the leading church-state cases in federal and state courts throughout the nation. Americans United has more than 120,000 members and supporters nationwide, including many within the jurisdiction of this Court.

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races to combat racial, ethnic, and religious prejudice in the United States. Today ADL is one of the world’s leading organizations fighting anti-Semitism, hatred, discrimination, and all forms of bigotry. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents.

The Jewish Social Policy Action Network (“JSPAN”) is an organization of American Jews who seek to protect the constitutional liberties and civil rights of all Americans. JSPAN believes the religion clauses of the First Amendment are the

bedrock of American freedom, and that without separation of Church and State neither religious freedom nor any other basic freedoms can endure. JSPAN has filed *amicus curiae* briefs in Establishment Clause cases regularly since it was formed in 2003, and members of JSPAN's Church/State Policy Center have done so in scores of cases over the past 50 years, most recently before the Supreme Court in *Pleasant Grove City v. Summum*, No. 07-665.

SUMMARY OF ARGUMENT

“[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948). The Establishment Clause gives life to this premise by prohibiting the fusion of governmental and religious functions.

The United States Postal Service (“USPS” or “Postal Service”) has an obligation to provide adequate postal services to the people of Manchester, Connecticut. Here, USPS purported to satisfy this obligation by contracting with Appellants Full Gospel Interdenominational Church Inc., Dr. Philip Saunders Heritage Association Inc., and Sincerely Yours Inc. (“SYI”) (collectively “the Church”) for the operation of a contract postal unit (“CPU”). The Church, however, has used the SYI CPU to proselytize and distribute religious messages as an inseparable part of its postal operations.

The SYI postal unit impermissibly fuses governmental and religious functions, because USPS has delegated to the Church the public function of providing postal services, because SYI uses the Postal Service’s authority and resources to further the Church’s mission, and because SYI’s use of the Postal Service’s unique and legally protected name, trademarks, and signage serves to designate the federal government as the very source or sponsor of the religious

materials pervasively displayed inside the CPU. When the state contracts with a private entity to fulfill a governmental obligation in the government's name and under the government's banner, the state has a special burden to ensure that its power and identity are not used to advance constitutionally impermissible purposes.

Amici respectfully urge this Court to affirm the judgment below that SYI is a state actor, and that SYI's proselytizing while providing postal services in the government's name violates the Establishment Clause. The district court correctly reached this conclusion by finding pervasive administrative "entwinement" of USPS with SYI's operations, and *amici* fully support all of Plaintiff-Appellee's arguments in favor of affirmance on that point and other matters. But the decision can also be affirmed on the ground that SYI performs a "public function," as that term is defined for purposes of state action, and *amici* focus their state action arguments on the public function question because of their concern about preventing a fusion of governmental and religious functions.

USPS delegated to SYI the federal government's traditionally exclusive power and obligation to provide postal services. Further, USPS gave SYI the government's exclusive right to use – and indeed *required* SYI to use – USPS's name, trademarks, and signage when providing those services. This had the effect of designating the government as the source or sponsor of the services – including

religious services – offered within the CPU. The Postal Service’s delegation of its public function is thus a delegation of both its power and its very identity. SYI acts as an arm of the Postal Service, under its exclusive imprimatur, in performing services that no other private companies are permitted to offer. Such conduct amounts to state action under the public function test.

Finally, even if SYI were not a state actor, the Postal Service’s support of and delegation of authority to SYI constitute an independent violation of the Establishment Clause. First, USPS coerces Manchester residents into receiving and supporting SYI’s religious message as a condition of fulfilling their “need” for essential postal services. Second, USPS directly aids the Church’s religious mission by providing SYI with USPS revenues, intellectual property, signs, and custom-made furnishings, all of which let SYI enjoy the competitive advantage and prestige that come with providing postal services under the government’s banner. Third, the Postal Service’s delegation of its name and authority to SYI creates an impermissible symbolic union of church and state.

ARGUMENT

I. THE PROVISION OF UNIQUE “POSTAL SERVICES” UNDER THE BANNER OF THE UNITED STATES POSTAL SERVICE RENDERS SINCERELY YOURS, INC. A STATE ACTOR UNDER THE “PUBLIC FUNCTION” TEST.

Under the “public function” doctrine, a private entity is considered a state actor when it is charged with “activities or facilities so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency.” *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968); accord *New York City Jaycees, Inc. v. U.S. Jaycees, Inc.*, 512 F.2d 856, 860 (2d Cir. 1975). Whether a particular function qualifies as a “public function” turns on whether the function is “traditionally associated with sovereignty,” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974), or “has been ‘traditionally the *exclusive* prerogative of the State.’” *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (quoting *Jackson*, 419 U.S. at 353). If an activity “that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity,” then the entity is a state actor. *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 151 (2d Cir. 2004). The crucial question is not whether any private actor has ever exercised some facet of the governmental function, but whether the power to exercise that function is itself traditionally “reserved” exclusively to the government. *Jackson*, 419 U.S. at 352.

The court below was incorrect in concluding that USPS has not “contracted out to the SYI CPU an activity that traditionally has been the exclusive function of the government.” A-1254 (April Judgment). Although the court reasoned that “the various services performed by the SYI CPU are not exclusive to the government,” A-1256, the court overlooked that it is the government’s exclusive prerogative to provide postal services, including services which SYI provides that other private entities cannot, *under the government’s banner*. Only the government lawfully may designate itself as the source or sponsor of a service, as it has done here by requiring SYI to use the Postal Service’s name, trademarks, and signage to designate the source of services provided within the CPU. Thus, when the government enlists a private entity to perform services that the government is exclusively empowered to provide, *and* also requires that the entity publicly designate the government as the source of those services, the entity unquestionably becomes a state actor with respect to that work. Were it otherwise, government could “avoid its constitutional responsibilities by delegating a public function to private parties.” *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).

According to Ronald G. Boyne, Postmaster of the Manchester-area’s main “classified” post office, a CPU “represent[s] the post office” and functions “as an arm of the postal service” by doing “the work of the post office” in its geographic area. A-222-24 (Deposition of Ronald Boyne (“Boyne Dep.”)). The “work” of a

post office is the federal government’s statutory obligation. *See infra* Part I.A. The SYI postal unit exercises the Postal Service’s power and identity when fulfilling that obligation on the government’s behalf through a business bearing the sign “United States Post Office Contract Unit.” *See* A-88 (SYI photograph). By carrying out the government’s obligation while representing publicly that the government sponsors that work, SYI becomes “an instrumentality of the government.” *See Janusaitis v. Middlebury Volunteer Fire Dep’t*, 607 F.2d 17, 23 (2d Cir. 1979); *see also West v. Atkins*, 487 U.S. 42, 54-56 (1988) (public function properly found where state delegated to private doctor its constitutional obligation to provide medical treatment to injured prisoners). Because SYI is a state actor insofar as it provides postal services as an arm of the government, SYI’s proselytizing while providing those services violates the Establishment Clause. *See* U.S. Const. amend. I.

A. It Is The Federal Government’s Exclusive Prerogative And Obligation To Provide “Postal Services.”

The U.S. Constitution’s Postal Clause empowers Congress “[t]o establish Post Offices and post Roads,” U.S. Const. art. I, § 8, cl. 7, and “impose[s]” upon the federal government the “great public duty” of “the transportation of the mails.” *Searight v. Stokes*, 44 U.S. 151, 166-67 (1845); *see also Nat’l Ass’n of Letter Carriers, AFL-CIO v. Indep. Postal Sys. of Am., Inc.*, 470 F.2d 265, 270 (10th Cir. 1972) (noting the Postal Clause’s “constitutional mandate”). Indeed, the

government long ago argued that “the effective and convenient operation of the postal service” is its “constitutional duty.” *U.S. v. Boston Elevated Ry. Co.*, 176 F. 963, 965 (D. Mass. 1910).

There is “no doubt” that Congress was empowered to facilitate this duty by “reserv[ing] to the postal department of the government a monopoly of the business of *receiving, transmitting, and delivering* the mails of the country....” *Williams v. Wells Fargo & Co. Express*, 177 F. 352, 356 (8th Cir. 1910) (emphasis added). In 1792, the First Congress enacted the “private express statutes” to continue the federal government’s enjoyment of the postal “monopoly” first established for the central government by the Continental Congress. *See Brennan v. U.S. Postal Serv.*, 439 U.S. 1345, 1347 & n.2 (1978) (citing Act of Feb. 20, 1792, 1 Stat. 232, 236, adopting Act of Oct. 18, 1782, 23 J. Cont. Cong. 672-673). Today, the Private Express Statutes are codified in 39 U.S.C. §§ 601-606 and 18 U.S.C. §§ 1693-1699, and maintain one facet of the postal monopoly by generally precluding private competition in the carrying of “letters or packets,” 18 U.S.C. § 1696(a), although USPS may suspend its letter-carrying monopoly where the public interest requires it. 39 U.S.C. § 601(b).¹

Of course, USPS must do more than just *carry* mail. Congress has imposed upon USPS the “obligation to provide postal services to bind the Nation together

¹ For example, USPS permits private competitors such as FedEx to carry “extremely urgent letters.” 39 C.F.R. § 320.6.

through the ... correspondence of the people.” 39 U.S.C. § 101(a). As part of this broad obligation, USPS “shall *receive*” mail throughout the country in order to serve, “as nearly as practicable,” the nation’s entire population. *Id.* § 403(a) (emphasis added). Among other things, USPS must “maintain an efficient system of collection” and “sorting” of the mail nationwide, and must “establish and maintain” enough “postal facilities” to provide the nation’s “postal patrons” with “ready access to essential postal services,” *id.* § 403(b), particularly “where post offices are not self-sustaining.” *Id.* § 101(b).

B. USPS Has Delegated To The Church A Broad Range Of Postal Services Traditionally Performed Only By The Government.

When considering whether USPS delegated its public function to SYI, the district court focused solely upon whether SYI obtained a piece of the government’s monopoly over “the sending and carrying of letters on postal routes.” A-1254-55 (April Judgment). The court’s analysis was too narrow, because the “exclusivity” of the Postal Service’s public function is *not* limited simply to the letter-carrying monopoly created by the Private Express Statutes. The Postal Service in fact performs many additional tasks that private delivery services traditionally cannot.

It is the government’s exclusive prerogative to maintain post offices that offer patrons a full line of postal services (many of which are off-limits to private businesses) while using the government’s name and prestige. USPS delegated this

prerogative to the Church through the CPU contract, making SYI “an arm of the postal service.” A-223 (Boyne Dep.).

The district court erred in focusing on how SYI provides some postal services that even a grocery store can provide, such as the sale of stamps and money orders, A-1256, while ignoring the many functions that remain the federal government’s exclusive prerogative and here were performed by SYI. Without USPS’s grant of governmental authority, SYI could not provide the wide variety of postal services and benefits that it does, nor could it carry USPS’s imprimatur while doing so. Indeed, the government here has not only delegated to a private entity the exclusive *power* to provide a broad range of postal services, but the government has also delegated its *identity*, by requiring SYI to inform the public that the government is the sponsor of the services offered within the CPU.

1. USPS has delegated the exclusive power to run a “post office.”

According to the Postal Service, “the term ‘post office’ has one meaning – a meaning controlled by the USPS.” *U.S. Postal Serv. v. Reflex Pub., Inc.*, FA 96761 (Nat. Arb. Forum 2001), at <http://domains.adrforum.com/domains/decisions/96761.htm>. Without authority from the Postal Service, it is a crime to establish or maintain “any office or place of business bearing the sign, name, or title of post office....” 18 U.S.C. § 1729. USPS requires that each contract postal unit be known as the “United States *Post Office* Contract Unit,” A-470 (CPU

contract clauses), and has authorized the Church to place that name over the main entrance to the SYI postal unit. *See* A-88. The Church thus shares USPS's exclusive power to publicly proclaim its place of business to be a "post office," without fear of criminal penalty, in order to carry out what the government has long insisted is its "constitutional duty." *See Boston Elevated*, 176 F. at 965.

2. USPS has delegated the exclusive right to use the USPS brand identity.

The label "United States Postal Service" has an unmistakable meaning as a designation of the source and sponsorship of government services. SYI's unfettered commercial use of USPS's name and intellectual property cloaks SYI's operations with the Postal Service's identity. As USPS itself has argued, there exists "a 'common sense' awareness of the Postal Service and its governmental nature," such that no consumer could reasonably conclude that USPS services such as "Priority Mail and Global Priority Mail are services offered by a *private* commercial entity." *Fed. Express Corp. v. U.S. Postal Serv.*, 40 F. Supp. 2d 943, 955 (W.D. Tenn. 1999) (emphasis added). The USPS imprimatur and its governmental status thus confer "power and prestige" upon SYI that gives the Church access to a wide audience of patrons that only the government could command. *See Monsky v. Moraghan*, 127 F.3d 243, 246 (2d Cir. 1997) (plaintiff validly alleged that judge acted under color of law where judge "implicitly invoked the power and prestige of his office" and "was enabled to take the alleged actions

only because of his judicial status”); *accord Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979) (ruling that judge abused “power and prestige” of his office by writing defamatory letters on official letterhead and issuing press releases).

Through comprehensive branding strategies and the assertion of its intellectual property rights, USPS ensures that “postal” services remain indelibly associated with the federal government’s historical and exclusive mandate to provide such services. USPS imposes consistent “postal branding” among its CPUs, A-388 (CPU procedures), so that “when you walk into a business you know you are doing business with the Postal Service.” A-320 (Deposition of Robert Evans). For example, CPUs must employ USPS signage and custom-made interior furnishings in order to present “a uniform Postal image to the public.” A-395 (CPU design requirements); A-166-192 (CPU site specifications). In addition, the USPS contract clause entitled “Contract Postal Unit Identity” grants CPUs a license to use various trademarked emblems and phrases, such as the “Sonic Eagle” logo and the phrases “United States Postal Service,” “Postal Service,” “Post Office,” “Priority Mail,” “Express Mail,” “First-Class Mail,” “Certified Mail,” “Delivery Confirmation,” and “Post Office Box.” A-470 (CPU contract clauses); USPS Annual Report 59 (2007), *available at* http://www.usps.com/financials/_pdf/AR2007_final.pdf.

By contrast, USPS has not hesitated to take action to prevent unauthorized users of its trademarks from diluting and distorting the meaning, value, and uniformity of the “postal brand” as a designation of the governmental source of services. Under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, the owner of a valid trademark may prevent others from using that mark in commerce in a way that might mislead consumers into believing that the products or services being offered are sponsored by the mark’s true owner. *See Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 115 (2d Cir. 2006). A trademark infringement claim requires that the mark in question be distinctive by virtue of its “secondary meaning,” which is its ability “to identify the *source of the product* rather than the product itself.” *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 167 (2d Cir. 2007) (quotation marks omitted; emphasis added). USPS “advertises aggressively” in the course of competing with private delivery services and uses the Lanham Act to protect its trademarks and ward off infringers. *Global Mail Ltd. v. U.S. Postal Serv.*, 142 F.3d 208, 215 (4th Cir. 1998).

In *Zipee Corp. v. U.S. Postal Service*, 140 F. Supp. 2d 1084 (D. Or. 2000), USPS successfully argued that the secondary meaning of the phrase “postal service” entitled USPS to an injunction prohibiting an email provider from confusing the public through its use of the Internet website address “postal-service.com.” The *Zipee* court found that “‘postal service,’ standing alone,” is a

protectable descriptive phrase that “has attained secondary meaning in the minds of consumers *as a designation of source* rather than as a product or genus of products.” *Id.* at 1087 (emphasis added). The court found that most consumers “associate the phrase ‘postal service’ *with an organization*,” that domestic media and advertising consistently use the phrase “as a short-hand version for the United States Postal Service,” and that competitors such as Federal Express (“FedEx”) and United Parcel Service (“UPS”) “use alternative descriptive words and phrases while still competing effectively.” *Id.* (emphasis added). The court concluded that “consumers have in fact been confused by plaintiff’s maintenance of the postal-service.com website, mistakenly believing that it is sponsored by and/or associated with the United States Postal Service.” *Id.*

In several Internet domain-name transfer proceedings, USPS has also successfully argued that websites such as “postoffice.com” and “prioritymail.com,” which offered free email services to the public, were too similar to USPS’s own trademarks. *See U.S. Postal Serv. v. Postoffice.com, Inc.*, FA 96313 (Nat. Arb. Forum 2001), at <http://domains.adrforum.com/domains/decisions/96313.htm>; *U.S. Postal Serv. v. Consumer Info. Org.*, FA 95757 (Nat. Arb. Forum 2000), at <http://domains.adrforum.com/domains/decisions/95757.htm>; *Reflex Pub.*, FA 96761. USPS has even sought to prevent unauthorized commercial use of the word “postal” in contexts far removed from the conveyance of private

correspondence. *See, e.g.*, Ben Sisario, *Postal Service Tale: Indie Rock, Snail Mail and Trademark Law*, N.Y. Times, Nov. 16, 2004, at A1 (USPS threatened trademark suit against music group “Postal Service”); *POSTAL Video Game Victorious Over USPS*, Gamezone.com, June 25, 2003, at http://pc.gamezone.com/news/06_25_03_01_41PM.htm (reporting on USPS’s 6-year effort to enjoin violent video game’s use of the title “Postal”).

Because the government and the public alike understand that the phrase “postal services,” *standing alone*, refers to the governmental origin of such services, *Zipee*, 140 F. Supp. 2d at 1087, the brand and registered trademark “United States Postal Service” necessarily makes an even stronger statement about the exclusively governmental identity and source of services provided within a building bearing that name. SYI has so thoroughly assumed the Postal Service’s identity that not only did SYI’s president attest that “we’re a unit of that identity,” A-277 (Deposition of Reverend Eleanor Kalinski (“Kalinski Dep.”)), but Manchester residents also appear to view the SYI postal unit as *both* “the Main Street Post Office” *and* an arm of the “church.” *See* A-902 (Church newsletter). This is understandable, because the Church’s ability to exploit the tightly controlled USPS brand sends an unmistakable message to the public: from the sign and eagle logo over SYI’s front door, A-88, to its offering of services trademarked and exclusively provided by USPS, such as Priority Mail and Post Office Boxes,

A-151 (SYI contract), to its use of the “All-Purpose Dating Stamp” that marks receipts with “USPO,” A-777 (operations guide), SYI’s activities are authorized by – and undertaken on behalf of – the Postal Service. *See* A-1259 (April Judgment).

3. USPS has delegated the exclusive ability to provide a full line of mail services.

The essence of the Church’s contract with USPS is to provide “postal goods and services.” A-135 (SYI contract). Unlike a purely profit-driven private enterprise that sells delivery services, SYI is specifically entrusted with fulfilling the government’s mandate to provide postal services. Accordingly, all revenue generated from SYI’s sales of postal products and services is USPS property. A-136. USPS supports the SYI postal unit by funding it with 18% of those sales and 33% of SYI’s rentals of post office boxes. A-158. This support pays the salaries of all SYI employees, with no money coming from the Church. A-1046 (Deposition of Reverend Salvador Mancini (“Mancini Dep.”) at 34).

Pursuant to its USPS contract, the SYI postal unit “offer[s] everything that a normal post office would offer,” A-225 (Boyne Dep.), including a full line of domestic, international, and “special” mail services. A-151 (SYI contract); *see also* A-678 (CPU press release). USPS prevents competitors from offering that same full line of services. For example, only USPS or its “agents” may offer and operate post office boxes. USPS Domestic Mail Manual (“DMM”) § 508.4.2.1; 39 C.F.R. § 211.2(a)(2) (incorporating DMM into USPS regulations). The SYI CPU

offers post office boxes, *see* A-151, thus reinforcing that SYI is USPS’s “agent.” By contrast, commercial mail receiving agencies (“CMRAs”) – private businesses, such as Mail Boxes Etc., that accept delivery of a customer’s mail and then hold it for pickup or remail it to the addressee with new postage – may only offer “Private Mailbox” (“PMB”) numbers. *See id.* § 508.1.9.2(e)-(g). Mail addressed to a former CMRA customer at his or her old PMB does not receive automatic mail forwarding through USPS; the customer must “make special arrangements for the CMRA operator to remail the mail with payment of new postage.” *Id.* § 507.2.2.7.

Similarly, only USPS may offer its customers a full range of “accountable” mail services, which include Priority, Registered, and Return Receipt Mail. *Id.* § 508.1.1.7. The CPU contract permits SYI to offer this same range of services. A-151; *see also* A-1255 (April Judgment). CMRAs, however, are only permitted to accept, for remailing on their customers’ behalf, six types of accountable mail; in order to mail any other type, including Priority, Registered, and Return Receipt Mail, CMRA customers must visit a post office. DMM § 508.1.9.1(d).

4. USPS has delegated the ability to offer exclusive access to timely filing privileges.

Federal statutes and regulations have long applied special “timely filing” rules to papers delivered to government entities via U.S. mail. Thus, even where private competitors such as FedEx may offer services that are comparable to USPS services such as Express Mail, these private carriers cannot always offer the legal

filing benefits that attach to U.S. mail. Because SYI is “an arm of the postal service,” A-223 (Boyne Dep.), SYI’s patrons have access to timely filing privileges that carriers such as FedEx cannot offer to their own customers.² For example, patent and trademark applications are deemed filed upon their deposit with USPS if sent via Express Mail; otherwise, they are deemed “filed” only upon receipt by the Patent and Trademark Office, even if sent via FedEx or other rush services. 37 C.F.R. § 1.10(a)(1) & (2); *In re Pacemaker Group Inc.*, 45 U.S.P.Q.2d 1703 (Comm. Pat. & T.M. 1996). Similarly, notices of appeal sent to the Court of Appeals for Veterans Claims through USPS are “filed” on their postmark date, but appeals sent via FedEx or other services are only “filed” upon the court’s receipt. *See* 38 U.S.C. § 7266(c); *Mapu v. Nicholson*, 397 F.3d 1375, 1379 (Fed. Cir. 2005).

In addition, the Internal Revenue Service deems tax documents timely filed, even if received after the filing deadline, if postmarked by USPS on or before the deadline. *See* 26 U.S.C. § 7502(a)(1). Until 1996, this timely filing rule was inapplicable to private delivery services. Even with its 1996 amendment, the rule remains inapplicable to private services *unless* the Secretary of the Treasury “designates” them as having satisfied certain criteria. *Id.* § 7502(f) (added in

² Even if SYI cannot postmark mail, *see* A-776 (operations guide), a CPU’s mail is collected daily and taken to the local processing facility for postmarking. *See* A-427 (“Collection Times” plaque); A-776. A postal patron who deposits mail with a CPU in time for its “daily collection” can have it processed by USPS that same day. *See* A-780.

1996). This designation may be bestowed, withdrawn, or constrained at the federal government's discretion. *See* I.R.S. Notice 2004-83, 2004-2 C.B. 1030, 2004 WL 2971128 (Dec. 27, 2004) (withdrawing one carrier's designation and declining to designate others beyond certain services already designated). While certain specific services offered by FedEx, UPS, and DHL are presently "designated private delivery services," CMRAs such as Mail Boxes Etc. are not. *See id.*; *Schafer v. C.I.R.*, No. 7612-02S, 2002 WL 31163740, at *3 (T.C. Sept. 16, 2002) (tax petition deposited with Mail Boxes Etc. on filing deadline was untimely filed).

C. SYI's Proselytizing Is Unconstitutional State Action Because SYI Uses The Government's Delegated Public Function To Advance The Church's Own Religious Message.

USPS has deputized SYI as an arm of the government. Through the SYI postal unit, the Church performs a number of public functions that are, and have long been, exclusively performed by and reserved to the government, including the provision of USPS-branded mail services and associated benefits such as mail forwarding and timely filing privileges. Accordingly, SYI acts as a state actor when providing postal services under the USPS banner. Yet the Church attempts to argue that SYI's religious presentations are not impermissible state action, even if it is a state actor for some purposes. *See* Appellants' Br. at 18-29. The Church contends that SYI's religious presentations are solely the Church's own expression and responsibility and cannot be attributed to the federal government, because the

CPU contract does not prohibit the Church from enmeshing religious ministry with its provision of postal services. *Id.* at 23, 28.

This is irrelevant, because “[t]he public function doctrine focuses less on the degree of government involvement and more on the nature of the function performed,” *Janusaitis*, 607 F.2d at 23, and SYI’s religious displays and message are inseparable from its performance of the public function of providing postal services. SYI sells nothing except USPS products and services. A-277 (Kalinski Dep.); A-254 (Mancini Dep.). Reverend Kalinski, the Church’s and SYI’s president, nevertheless also views SYI as the “church store with no products in it.” A-280-81. Despite the lack of tangible religious products for sale, Reverend Mancini, the Church’s and SYI’s vice-president, explained that “everything we have there is designed to make people acquainted” with what the Church does. A-262. Mancini affirmed that the Church can “use the postal unit to further the mission of the church” and “preach the gospel” by “using the space to send [the Church’s] message out to the public....” A-252. He also stated that it is the Church’s and SYI’s “right” to “apply[] their message to the community at the same time” that they “offer a service to their community.” A-255.

Indeed, SYI’s sole reason for existence is to disseminate religious messages while simultaneously providing postal services *under the banner of the United States Postal Service*. SYI has no other function. As the district court found, “[i]f

there were no contract, the SYI CPU would not exist.” A-1264 (April Judgment). The Church incorporated SYI solely to obtain the CPU contract and operate the CPU, *see* A-68-69 (Church’s interrogatory answers), because the Church felt that “operating the CPU would fit in with its broader mission...” A-1045 (Mancini Dep. at 28). This is confirmed by press statements made by Appellants’ counsel long before the decision below was issued: “If the church is forced to sanitize the place of any religious reference in order to keep Sincerely Yours open, [] then the Contract Postal Unit will shut down.” Nicholas Hengen, *Self-Adhesive Salvation: A Mailroom with a Mission*, Legal Affairs, Mar./Apr. 2005 at 13 (quoting Joseph P. Secola), *available at* http://www.legalaffairs.org/issues/March-April-2005/scene_hengen_marapr05.msp. Because the Church is using the government’s power and identity to advance its own religious message, the requisite “nexus” between the government and the challenged activity exists here. *See* Appellee’s Br. at 36-37. Therefore, SYI’s proselytizing is unconstitutional state action.

II. EVEN WITHOUT A FINDING THAT SINCERELY YOURS, INC. IS A STATE ACTOR, THE GOVERNMENT’S CONTRACT WITH THE CHURCH CONSTITUTES AN INDEPENDENT VIOLATION OF THE ESTABLISHMENT CLAUSE.

Regardless of whether SYI is a state actor, USPS itself directly violated the Establishment Clause by contracting with the Church in a way that promotes SYI’s religious activities under the government’s banner. The Establishment Clause forbids government from engaging in conduct that has the effect of advancing

religion. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002). Here, the Postal Service’s contract with the Church advances religion in three principal ways: (1) it coerces Manchester residents to enter a religious environment in order to obtain essential postal services; (2) it provides governmental aid to a religious enterprise; and (3) it creates an impermissible fusion of governmental and religious functions.

A. USPS Promotes Religious Coercion By Conditioning Access To “Needed” Government Services Upon Receipt Of SYI’s Religious Message.

The CPU contract violates the Establishment Clause because USPS coerces downtown Manchester postal patrons to expose themselves to the Church’s religious message in order to satisfy their “need” for postal services. Under the Establishment Clause, “government may not coerce anyone to support or participate in religion or its exercise.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)); *accord DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 411 (2d Cir. 2001). Unconstitutional religious coercion “need not involve ... the forcible subjection of a person to religious exercises,” but may also take the form of pressure “that interferes with an individual’s ‘real choice’ about whether to participate in worship or prayer.” *DeStefano*, 247 F.3d at 412 (quoting *Lee*, 505 U.S. at 592). The “fulcrum” of the coercion inquiry “is individual conscience and free will,” because

“the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”

DeStefano, 247 F.3d at 412-13 (quoting *Lee*, 505 U.S. at 596); *accord Santa Fe*, 530 U.S. at 312.

Congress has mandated that USPS provide the nation’s population with “ready access to essential postal services.” 39 U.S.C. § 403(b)(3); *see supra* Part I.A. To that end, USPS is empowered “to determine the *need* for post offices ... and to provide such offices ... as it determines are *needed*...” 39 U.S.C. § 404(a)(3) (emphasis added). USPS has detailed procedures for analyzing and verifying a community’s “need” for a CPU. *See generally* A-369-83; A-781. These procedures include a “CPU Needs Analysis” that considers whether the local main post office offers “insufficient hours” and “insufficient area coverage.” A-375. As a “subordinate” postal unit, CPUs must be located at “sites more convenient to customers” than the existing main post office. A-778 (Postal Operations Manual). The bidding process for CPUs helps identify “the most desirable locations.” A-350. Indeed, “suitability of location” is one of three “universal criteria” for evaluating a proposed CPU. A-959 (Church’s Statement of Facts); A-788 (SYI evaluation form).

USPS’s decision to solicit CPU bids in Manchester thus began with the determination “that there [was] a *need* for a CPU” in that “particular area.” *See* A-

955-56 (Church’s Statement of Facts). Given the factors considered during the CPU needs analysis, USPS must have concluded that the main Manchester-area post office was “insufficient” to serve the local population’s needs, thereby triggering USPS’s statutory obligation to remedy the situation. The logical inference from the fact that USPS awarded the CPU contract to the Church is that other postal facilities were less “convenient” and less “suitable” for the needs of many Manchester residents.

By allowing SYI to proselytize while providing exclusive postal services and benefits such as post office boxes, Priority Mail, and timely filing privileges that private delivery services cannot offer, *see supra* Part I.B, the Postal Service forces Manchester residents to choose between obtaining those services from SYI and directly receiving SYI’s religious message, or traveling elsewhere to an inconvenient post office previously deemed “insufficient” to meet their postal “needs.” Therefore, a Manchester resident’s decision to visit the SYI postal unit instead of another postal facility is not necessarily made “as a matter of his or her own genuine personal choice....” *See DeStefano*, 247 F.3d at 413. A theoretical choice among unequally suitable post offices is not a meaningfully “voluntary” choice, because avoiding SYI “would require forfeiture of those intangible benefits” that USPS sought to provide in the first place by establishing a CPU on Main Street. *See id.* (quoting *Lee*, 505 U.S. at 595).

Indeed, the Church incorporated SYI to help “those who found it difficult to travel across town” to the existing classified post office. A-68 (Church’s interrogatory answers). “[M]any businesses” in downtown Manchester “depended on” having a Main Street CPU, and transporting mail “across town to the main [post] office” was “very difficult,” even for the Church. A-1045 (Mancini Dep. at 27). The supposed “alternative” of avoiding the SYI CPU is thus a clear imposition upon the elderly, infirm, and persons with low income or limited ability to leave the Main Street area during business hours. For such individuals, travel to a post office that is farther away and less convenient could ultimately mean not traveling to a post office at all. With no reasonably accessible “real alternative” to the SYI postal unit, *Lee*, 505 U.S. at 598, Manchester residents’ “theoretical choice to avoid the facility does not mitigate any coercion that might occur there.”

DeStefano, 247 F.3d at 413.

B. The Unrestricted Grant Of USPS Revenues To SYI Impermissibly Supports The Church’s Religious Indoctrination.

The Establishment Clause prohibits the government from sponsoring or financing religious indoctrination or activity. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O’Connor, J., concurring);³ *Agostini v. Felton*, 521 U.S. 203, 219

³ Justice O’Connor’s concurrence in *Mitchell*, not the plurality opinion, represents controlling law on this point, because a majority of the Justices agreed with Justice O’Connor on this principle, and because the concurrence represented the narrowest ground of decision supporting the judgment. *DeStefano*, 247 F.3d at 418-19 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

(1997); *DeStefano*, 247 F.3d at 406. The CPU contract impermissibly advances religion by directly supporting the Church’s ability to promote religion through SYI’s proselytizing displays.

The Church uses SYI to “send [its] message out to the public,” A-252 (Mancini Dep.), through religious displays and videos that seek to “convinc[e] citizens to turn their will and their lives over to the care of God.” *DeStefano*, 247 F.3d at 419 (quotation marks and alterations omitted). These religious presentations “inculcate” and “impress” the Church’s beliefs “upon the mind of the listener” or viewer by “frequent instruction or repetition.” *Id.* at 415. By maintaining these displays, SYI and its employees serve to “imbue [customers] with [the Church’s] point of view.” *Id.* As Reverend Mancini explained, while SYI is “there as a business,” it is also “there as an outreach” that offers “an extended hand, friendship, [and] prayer....” A-261 (Mancini Dep.); *see also* A-262 (explaining that “everything we have there is designed to make people acquainted” with what the Church does).

USPS directly aids this religious indoctrination and activity, because SYI’s operations and employees are supported “directly through” the Postal Service. *DeStefano*, 247 F.3d at 416. SYI’s employees are paid entirely from USPS revenues. A-1046 (Mancini Dep. at 34). Because SYI sells nothing except postal products, A-277 (Kalisnki Dep.), USPS funds are “directly financing the salaries”

of SYI employees who maintain the postal unit's indoctrinating displays of religious videos, posters, and literature. *DeStefano*, 247 F.3d at 419 (finding that government-supported indoctrination would exist if state was "directly financing the salaries" of rehabilitation center employees who regularly screened religious videotapes for residents).

The government also aids the Church's indoctrination with USPS *property* – custom-made interior furnishings, signage, and intellectual property – that confers upon SYI the benefits of the Postal Service's significant competitive advantage. By giving SYI the right to share in USPS's exclusive ability to provide postal services as an arm of the government, and by giving SYI the exclusive right to use USPS trademarks, the government provides SYI with commercially valuable "power and prestige." *Monsky*, 127 F.3d at 246. Because SYI's operations bear the name "post office" and exploit USPS's trademarks without criminal or civil penalty, consumers reasonably perceive that USPS sponsors and permits what goes on within SYI's walls. *See generally supra* Parts I.B.1 & 2. As a result, the Church is able to use the Postal Service's consumer goodwill to attract postal patrons as captive audiences for its own evangelical purposes. *Compare* A-363-65 ("CPU Success Stories" (describing how CPUs exploit USPS's competitive advantage to attract patrons)) *with Consumer Info.*, FA 95757 (finding that

unauthorized website exploited USPS trademarks and “lured” customers for its own purposes).

Moreover, when providing aid to religious organizations, it is the government’s responsibility to put in place “effective means of guaranteeing that the state aid ... will be used exclusively for secular, neutral, and nonideological purposes.” *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *accord Freedom from Religion Found. v. Bugher*, 249 F.3d 606, 614 (7th Cir. 2001). But here, the contract between USPS and SYI contains no restrictions to limit religious activity by SYI. *See* Appellants’ Br. at 28. The Postal Service’s unrestricted grant of revenues and other property to SYI thus violates the Establishment Clause.

C. The Delegation Of Governmental Power And Identity To The Church Creates An Impermissible Fusion Of Governmental And Religious Functions.

A core purpose of the Establishment Clause is to prevent “a fusion of governmental and religious functions.” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963). Accordingly, the government “may not delegate a governmental power to a religious institution....” *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590-91 (1989); *accord Larkin v. Grendel’s Den*, 459 U.S. 116, 125-27 (1982). Yet USPS has delegated its governmental power *and identity* to SYI, whose operations are thoroughly suffused with religion. Even

if this delegation did not render the Church a state actor under the public function doctrine, the Church's use of this delegated authority to win an audience for its ministry creates a very public union of the government's authority and the Church's gospel.

USPS exercises exclusive control over the use of its name, intellectual property, and other branded products. USPS also authorizes – and in fact requires – the Church to use the Postal Service's imprimatur in order to publicly represent that the government is the source of SYI's ability to provide services.

Accordingly, SYI bears the title of “post office” and employs USPS signs, trademarks, and custom-made furnishings. SYI's use of the government's name, signs, and symbols communicates to the public that the Postal Service authorizes and permits all activities – even proselytizing – that may take place within SYI's walls. *See Zipee*, 140 F. Supp. 2d at 1087; *see also Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1991) (city seal is “a clear symbol of government power” and “acts as the City's imprimatur for official ... business” (internal quotation marks omitted)). However, the Establishment Clause “prohibits government from appearing to take a position on questions of religious belief...” *Knight v. Dep't of Pub. Health*, 275 F.3d 156, 165 (2d Cir. 2001) (quoting *Allegheny*, 492 U.S. at 593-94).

What is more, SYI's maintenance of religious displays is inextricably fused with its provision of postal services within a building bearing the Postal Service's name and logo. Such fusion inevitably leads the public to perceive a "joint exercise" of the Postal Service's authority by a church and the government. *Larkin*, 459 U.S. at 126. Indeed, the Church's newsletter offered one congregant's view that SYI is the "Main Street Post Office." A-902. And the Church's president views SYI as both a "unit of [the USPS] identity" and a "church store" that sells nothing except postal services. A-277, 280 (Kalinski Dep.). The "mere appearance" of such joint exercise of governmental and religious authority has a "primary and princip[al] effect of advancing religion," *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2d Cir. 2002) (quotation marks omitted), because it provides "a significant *symbolic* benefit to religion in the minds of some by reason of the power conferred." *Larkin*, 459 U.S. at 125 (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's grant of summary judgment in favor of Plaintiff-Appellee.

Respectfully submitted,

AMICI CURIAE AMERICANS UNITED FOR
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Docket Number: 07-4825-cv(L)

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Sworn to me this

September 24, 2008

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