

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 13, 2003

No. 01-5449

---

---

In The  
United States Court of Appeals  
for the District of Columbia Circuit

---

AID ASSOCIATION FOR LUTHERANS,  
*Plaintiff-Appellee,*

v.

UNITED STATES POSTAL SERVICE,  
*Defendant-Appellant.*

---

On Appeal from the United States District Court  
for the District of Columbia

---

**BRIEF *AMICUS CURIAE* OF  
FREE SPEECH DEFENSE AND EDUCATION FUND, INC.  
IN SUPPORT OF APPELLEE**

---

WILLIAM J. OLSON  
JOHN S. MILES  
HERBERT W. TITUS  
WILLIAM J. OLSON, P.C  
8180 Greensboro Drive, Suite 1070  
McLean, VA 22102-3860  
(703) 356-5070

Counsel for *Amicus Curiae*, Free  
Speech Defense and Education  
Fund, Inc.

November 15, 2002

---

---

**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and D.C. Circuit Rule 26.1, *amicus curiae*, Free Speech Defense and Education Fund, Inc., states that it has no parent company or affiliate. It is a non-stock, nonprofit corporation, and no person or entity owns it or any part of it.

**TABLE OF CONTENTS**

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST . . . . . i

TABLE OF AUTHORITIES . . . . . iii

STATEMENT OF INTEREST OF THE FREE SPEECH DEFENSE AND  
EDUCATION FUND, INC. . . . . 1

SUMMARY OF ARGUMENT . . . . . 2

ARGUMENT

I. THE POSTAL SERVICE’S INTERPRETATION AND APPLICATION OF  
THE STATUTE IS SUBJECT TO JUDICIAL REVIEW

A. The Postal Service, by Interpreting and Applying Section 3626  
Against AAL, Has Exercised Quasi-Judicial Power . . . . . 4

B. The Postal Service’s Adjudicatory Actions Against AAL Are Subject  
to Judicial Review . . . . . 7

CONCLUSION . . . . . 10

**TABLE OF AUTHORITIES**

**U.S. Constitution**

\*Amendment V . . . . . 7, 8, 9

**Statutes**

28 U.S.C. section 1339 . . . . . 3  
 39 U.S.C. section 101, *et seq.* . . . . . 4  
 39 U.S.C. section 409 . . . . . 3  
 39 U.S.C. section 410(a) . . . . . 1, *passim*  
 39 U.S.C. section 3626(j) . . . . . 1, *passim*

**Regulations**

Domestic Mail Manual, Section E670.5.5 . . . . . 5

**Cases**

Board of Regents v. Roth, 408 U.S. 564 (1972) . . . . . 9  
Carlin v. McKean, 823 F.2d 620 (D.C. Cir. 1987) . . . . . 4  
Edward J DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) . . . . . 3  
Goldberg v. Kelly, 397 U.S. 254 (1970) . . . . . 8  
 \*Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) . . . . . 7, 8, 9  
 \*National Ass’n. of Postal Supervisors v. United States Postal Service,  
 602 F.2d 420 (D.C. Cir. 1978) . . . . . 3, *passim*  
National Easter Seal Society v. United States Postal Service,  
 656 F.2d 754 (D.C. Cir. 1981) . . . . . 7  
Tumey v. Ohio, 273 U.S. 510 (1927) . . . . . 7  
Ward v. Village of Monroeville, 409 U.S. 57 (1972) . . . . . 7

\* Authorities upon which we chiefly rely are marked with asterisks.

**STATEMENT OF INTEREST OF THE FREE SPEECH DEFENSE  
AND EDUCATION FUND, INC.**

This *Amicus Curiae* Brief in Support of the Appellee is submitted on behalf of the Free Speech Defense and Education Fund, Inc. (“FSDEF”), a nonprofit educational organization dedicated, for the benefit of the public, to the study of, and education and defense regarding, rights guaranteed under the United States Constitution. FSDEF, incorporated in 1995 in the State of Maryland, is a nonpartisan educational organization exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code.<sup>1</sup>

This case concerns the correct interpretation of a federal statute — 39 U.S.C. section 3626(j) — which the district court resolved in favor of the appellee. The appellant contends that the district court erred, in part, because the appellant’s regulation interpreting that statute is not subject to judicial review, and it relies upon 39 U.S.C. section 410(a) to support its argument. The Postal Service thus has advanced the view in this case that 39 U.S.C. section 410(a) gives it *carte blanche* to regulate within the scope of its statutory authority, and that its regulations — unless a statute expressly states to the contrary — are not subject to judicial review.

FSDEF believes that the appellee, Aid Association for Lutherans (“AAL”), has provided strong argument demonstrating that the Postal Service’s view should be rejected. Nevertheless, if the Postal Service’s view were accepted, it could have a potentially drastic impact upon all persons using the United States mail. FSDEF wishes to focus this Court’s

---

<sup>1</sup> FSDEF, which only recently became aware of the pendency of this case, sought the consent of the parties to the filing of this *amicus curiae* brief. The appellee consented, but the appellant refused to consent. Accordingly, FSDEF has filed a motion for leave to file this *amicus curiae* brief in accordance with Rule 29(b), Federal Rules of Appellate Procedure, and Rule 29(b) of the Local (D.C. Circuit) Rules of this Court.

attention on one aspect of the issue that is not treated expressly in the parties' briefs, namely, the lack of procedural due process that inexorably attaches to the Postal Service's interpretation of 39 U.S.C. section 3626(j)(1)(B), and application of that interpretation to nonprofit mailers like AAL. This constitutional analysis supplies an additional reason for construing 39 U.S.C. section 410(a) narrowly, in addition to AAL's argument that 39 U.S.C. section 3626(j)(1)(B) should be construed in such a way as to avoid infringing upon AAL's core First Amendment activities and equal protection rights.

FSDEF would not appear to be directly affected by the underlying Postal Service regulation at issue in this case regarding the purported denial of the nonprofit mailing rate by the Postal Service in light of its interpretation of 39 U.S.C. section 3626(j), although all nonprofit organizations which mail to the public potentially could be affected by that issue at some future time. Nevertheless, FSDEF, like all users of the United States mail, could be directly affected by the Postal Service's interpretation of 39 U.S.C. section 410(a), and it is one of the constitutionally-related aspects of that interpretation which is addressed in this *amicus curiae* brief.

### **SUMMARY OF ARGUMENT**

In its brief, Appellee AAL urges this Court to construe 39 U.S.C. section 3626(j)(1)(B) in a way to avoid trespassing on AAL's First Amendment and equal protection rights. AAL Brief at 3-4, 36-43. It has not expressly urged this Court, however, to construe 39 U.S.C. section 410(a) in such a way as to avoid infringing AAL's procedural due process rights. This *amicus* brief is submitted in favor of a narrow construction of 39 U.S.C. Section 410(a) in order to avoid such an infringement, as counseled by the general rule that statutes should be

construed to avoid “serious constitutional problems ... unless such construction is plainly contrary to the intent of Congress.” Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

Section 1339 of Title 28, United States Code, provides that federal district courts shall have “original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.” 39 U.S.C. section 409 provides that, except for postal rate decisions, the federal district courts “shall have original ... jurisdiction over all actions brought ... against the Postal Service.” In this case, AAL brought a lawsuit contending that the action of appellant United States Postal Service (“the Postal Service”) denying it nonprofit mail privileges violated 39 U.S.C. section 3626(j)(1)(B), and seeking damages. The district court clearly had jurisdiction in that the claims asserted by AAL “arise under” an Act of Congress. *See National Ass’n. of Postal Supervisors v. United States Postal Service*, 602 F.2d 420, 429 (D.C. Cir. 1978).

Because the AAL claim arises out of an Act of Congress, 39 U.S.C. section 410(a) does not bar judicial review of the Postal Service’s action interpreting and applying 39 U.S.C. section 3626(j)(1)(B) to AAL. Because the Postal Service’s action denying previously-granted nonprofit mail privileges to AAL is quasi-judicial, and because the Postal Service has a direct economic interest in the exercise of its quasi-judicial powers, 39 U.S.C. section 410(a), if construed to bar judicial review of the exercise of such power, would deprive AAL of its property without due process of law. To avoid this constitutional infirmity, in addition to all of the other reasons advanced by AAL in its brief herein, 39 U.S.C. section 410(a) should be construed to allow for judicial review of the Postal Service’s quasi-judicial action. Such

review should extend not only to the issue whether the Postal Service acted *ultra vires*, but also whether the Postal Service's interpretation of 39 U.S.C. section 3626(j)(1)(B) is substantively correct.

## ARGUMENT

### **I. THE POSTAL SERVICE'S INTERPRETATION AND APPLICATION OF THE STATUTE IS SUBJECT TO JUDICIAL REVIEW**

#### **A. The Postal Service, by Interpreting and Applying Section 3626 Against AAL, Has Exercised Quasi-Judicial Power**

As recognized by this Court, in 1970 Congress enacted the Postal Reorganization Act, 39 U.S.C. section 101, *et seq.* ("the Act"), "so that USPS would operate more along the lines of a private company," but nonetheless remain "an independent establishment of the executive branch of the Government of the United States." Carlin v. McKean, 823 F.2d 620, 621, 622 (D.C. Cir. 1987). *See* 39 U.S.C. section 201. *Accord*, National Ass'n. of Postal Supervisors v. United States Postal Service, *supra*, 602 F.2d at 423, 430-31. From the beginning of its operations under the Act, this Court has acknowledged that, although the Postal Service has managerial discretion in the conduct of its business affairs, it remains statutorily accountable for its conduct as a government agency. *See* National Ass'n. of Postal Supervisors v. United States Postal Service, *supra*, 602 F.2d at 431-32. In order to ensure such accountability, "the ultimate responsibility for determining the bounds of [the] administrative discretion [of the Postal Service] is judicial," including the "proper interpretation of the particular statute [at issue] and the congressional purpose." *Id.*, 602 F.2d at 432-33.

With respect to the claims of AAL to engage in insurance-related mailings at nonprofit rates, Congress has not left the matter within the business/managerial discretion of the Postal



Service. Rather, it has established a statutory policy governing such mailings, a policy that is designed to limit the Postal Service's discretion as a government agency. According to 39 U.S.C. section 3626(j)(1)(B), AAL may make such mailings at the nonprofit rate if it meets three statutory requirements. In dispute in this case is only whether AAL meets the third of these requirements, namely, whether "the coverage provided by the [insurance] polic[ies] [offered] is not commercially available."

The Postal Service's regulation (Domestic Mail Manual Section E670.5.5) interpreting the statutory term, "coverage ... not otherwise commercially available," states in pertinent part, as follows:

The term "not generally otherwise commercially available" applies to the actual coverage stated in the insurance policy, without regard to the amount of premiums, the underwriting practices, and the financial condition of the insurer. When comparisons are made with other policies, consideration will be given to policy coverage benefits, limitations, and exclusions, and to the availability of coverage to the targeted category of recipients. When insurance policy coverages are compared for the purpose of determining whether coverage in a policy offered by an organization is not generally otherwise commercially available, the comparison will be based on the specific characteristics of the recipients of the piece in question (e.g., geographic location or demographic characteristics).

**Note:** The types of insurance considered to be generally commercially available include, but are not limited to: ... life ... insurance.

In explanation of its regulation, the Postal Service has stated in its opening brief that it has defined "coverage" to mean "the general types of insurance coverage, as opposed to the specific details of coverage of a particular policy." Thus, because life insurance is a "type" of insurance, then any life insurance policy is presumed to be "generally otherwise commercially

available under the regulation, even if the policy offered contains certain features that are unique to it.” Postal Service Brief at 3 (emphasis original). Additionally, the Postal Service has stated in its opening brief that any “organization ... may attempt to show on a case-by-case basis that a policy was not otherwise commercially available.” *Id.*

AAL attempted to demonstrate to the Postal Service that the life insurance coverage offered in its mailings was not “generally otherwise commercially available,” but to no avail. In its submission to the Postal Service, AAL claimed that the very nature of its insurance offering, its own “fraternal” life insurance, is an integral part of its core nonprofit function, and could not reasonably be considered “generally otherwise commercially available.” Additionally, AAL noted that its fraternal life insurance policy contained several unique coverage features that were not available on the open life insurance market. The Postal Service nevertheless ruled against AAL. Postal Service Brief at 9; AAL Brief at 11-12. As a direct consequence of this Postal Service ruling, AAL discontinued its insurance promotional mailings at the nonprofit rate, sending them out “under protest” at the higher commercial bulk rate. Postal Service Brief at 9; AAL Brief at 42.

By interpreting 39 U.S.C. section 3626(j)(1)(B), and by applying its interpretation to deny AAL the privilege of mailing its life insurance offerings at the nonprofit rate, with severe financial consequences, the Postal Service has exercised quasi-judicial power. As stated in National Ass’n. of Postal Supervisors v. United States Postal Service, *supra*, “[t]he judicial role is to determine the extent of the [Postal Service’s] delegated authority and then determine whether the agency has acted within that authority.” *Id.*, 602 F.2d at 432. In this case, the Postal Service has done both. First, it has determined the “extent” of its own authority under

39 U.S.C. section 3626(j)(1)(B), by defining the meaning of “coverage not otherwise generally commercially available.” Second, it has “acted” accordingly, denying AAL nonprofit mailing privileges for its life insurance offerings on the ground that those offerings do not meet the Postal Service’s interpretation of 39 U.S.C. section 3626(j)(1)(B). Hence, its action against AAL is judicial or quasi-judicial in nature.<sup>2</sup>

**B. The Postal Service’s Adjudicatory Actions Against AAL Are Subject to Judicial Review**

In order for such quasi-judicial power to accord with the Due Process Clause of the Fifth Amendment, the Postal Service must be “an impartial and disinterested tribunal.” Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). And, in order to be impartial and disinterested, the Postal Service must not have an economic self-interest that undermines the “neutrality requirement [that] helps guarantee that ... property will not be taken on the basis of an erroneous or distorted conception of facts or law.” *Id. Accord*, Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village of Monroeville, 409 U.S. 57 (1972).

The Postal Service’s denial of nonprofit rate eligibility to the AAL insurance mailings brings about a result that directly enhances the Postal Service’s postal revenue. With respect to

---

<sup>2</sup> The Postal Service’s reliance upon National Easter Seal Society v. United States Postal Service, 656 F.2d 754, 766 (D.C. Cir. 1981), for the broad proposition that 39 U.S.C. section 410(a) exempts all actions by the Postal Service from judicial review under the Administrative Procedures Act (“APA”), is misplaced. *See* Postal Service Brief at 21. In that case, this Court simply held that Postal Service rulemaking in a mail classification case (following a complete hearing before the Postal Rate Commission) was not subject to the APA requirement of notice and comment. Rulemaking, however, is quasi-legislative in nature, not quasi-judicial, and the process due in the making of rules has no bearing on the due process requirements of a right to be heard by an impartial decision-maker when the Postal Service takes action to enforce one of its rules against an individual mailer, as here.

AAL, the Postal Service's ruling has already resulted in severe financial penalties, including AAL's mailing all of its insurance offerings at the higher commercial bulk rate. Without question, then, the Postal Service has directly benefitted economically, and will continue to receive direct economic benefits, from its rulings against AAL. Indeed, it would be difficult, if not impossible, for the Postal Service to divorce its business interest in raising revenues and controlling costs from its "direct and continuing responsibility to the people and to Congress" in making adjudicative decisions that have such a direct bearing on its effort to "break even" financially. See National Ass'n. of Postal Supervisors v. United States Postal Service, *supra*, 602 F.2d at 430-32.

Because the Postal Service receives a direct economic benefit from its interpretation and application of 39 U.S.C. section 3626(j)(1)(B), AAL cannot have any "assurance" that the Postal Service "is not predisposed to find against" AAL. Thus, according to settled procedural due process principles of "both the appearance and reality of fairness," the Postal Service cannot discharge its duty to interpret and apply 39 U.S.C. section 3626(j)(1)(B) consistent with the strictures of the Due Process Clause. See Marshall v. Jerrico, Inc., *supra*, 446 U.S. at 242-43.

There is no question that AAL has more than a unilateral expectation to have its nonprofit mail rate claims decided according to the terms of 39 U.S.C. section 3626(j)(1)(B). Indeed, it had enjoyed mailing its insurance offerings at the nonprofit rate until the Postal Service changed course by denying nonprofit rate eligibility because of its newly-propounded regulation. Thus, AAL has a property interest protected by the Due Process Clause, entitling it to an opportunity to be heard by an "impartial decision maker." See Goldberg v. Kelly, 397

U.S. 254, 261-63, 271 (1970). Indeed, AAL has a property interest entitling it to such a right to be heard because its “claim of entitlement” to nonprofit mailing rates for its insurance offerings “was grounded in [39 U.S.C. section 3626(j)(1)(B),] the statute defining eligibility for them.” *Cf. Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).

There is also no question that the Postal Service decision denying AAL its right to continue to mail its insurance offerings at nonprofit rates was not subject to any independent administrative adjudicatory process, such as would have occurred if the Postal Service were generally subject to the APA. Thus, the Postal Service’s economic interest in raising revenues and cutting costs was not tempered by a disinterested administrative law judge, “required to conduct a de novo review of all factual and legal issues.” *See Marshall v. Jerrico, Inc.*, *supra*, 446 U.S. at 244-48. Instead, the Postal Service sits in sole judgment of its own actions — unless the courts subject the Postal Service’s decision in this case to judicial review.

In light of these Due Process considerations, the “well-established presumption favoring judicial oversight of administrative activities” is especially strong: not only is the Postal Service’s case against judicial review not a “compelling one,” it is unsustainable in light of AAL’s “constitutionally based claim” of right to an “impartial and disinterested tribunal.” *See National Ass’n. of Postal Supervisors v. United States Postal Service*, *supra*, 602 F.2d at 429-30; *Marshall v. Jerrico, Inc.*, *supra*, 446 U.S. at 242.

Not only should judicial review extend to whether, and to what extent, the Postal Service has authority to define the key term “coverage not otherwise generally commercially available,” but it should also extend to whether the Postal Service’s interpretation of that term is correct in light of the text and legislative history of 39 U.S.C. section 3626(j)(1)(B).

According to AAL, not only has the Postal Service defined “coverage” in a way that is inconsistent with the common meaning of the term in the insurance industry, it has also defined the term, and administered its regulation, in such a way as to disallow all mailings of life insurance by nonprofit organizations at nonprofit rates, even though 39 U.S.C. section 3626(j)(1)(B) indicates, on its face, that Congress intended such rates to be available if a nonprofit organization can meet the statute’s three-part test. *See* AAL Brief at 7-24. Such an “evisceration” of the purpose of the statute can only be explained as an attempt by the Postal Service to increase its own revenues, especially in light of its effort to “end virtually all subsidies for non-profit mail (‘revenue foregone’),” a proposal rejected by Congress with the enactment of 39 U.S.C. Section 3626(j)(1)(B). *See* AAL Brief at 17, n. 38.

### CONCLUSION

For the reasons stated, the Postal Service contention that its interpretation and application of 39 U.S.C. section 3626(j)(1)(B) is not subject to judicial review, or in the alternative, is subject to judicial review only on the limited issue of *ultra vires*, should be rejected.

Respectfully submitted,

---

William J. Olson (D.C. Bar No. 233833)  
John S. Miles (D.C. Bar No. 166751)  
Herbert W. Titus  
WILLIAM J. OLSON, P.C.  
8180 Greensboro Drive, Suite 1070  
McLean, Virginia 22102-3860  
(703) 356-5070; Fax: (703) 356-5085

Counsel for *Amicus Curiae*, Free Speech  
Defense and Education Fund, Inc.