No. 00-1384

In The
United States Court of Appeals
for the Fourth Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

AMERICAN TARGET ADVERTISING, INC.,
VIGUERIE AND ASSOCIATES, INC.,
AND THE VIGUERIE COMPANY,

Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia
Alexandria Division

BRIEF FOR APPELLANTS

MARK J. FITZGIBBONS
Suite 400
9625 Surveyor Court
Manassas, VA 20110
(703) 392-7676

* *Lead Counsel*

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

Counsel for Appellants

CORPORATE DISCLOSURE STATEMENT

None of the appellants is, or ever was, publicly held.

One-hundred percent of the stock of American Target Advertising, Inc. is owned by The Viguerie Company, which is a privately held corporation. Viguerie & Associates, Inc., also a privately held corporation, was merged into The Viguerie Company on December 1, 1996.

Each of the appellants previously submitted its respective "Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation" to this Court with the appellants' Docketing Statement, transmitted for filing to the Court on April 13, 2000. The information contained in those disclosure statements has not changed and is expressly re-affirmed in this Corporate Disclosure Statement.

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JURISDICTIONAL STATEMENT

The district court's jurisdiction was invoked under 5 U.S.C. app. 3 Section 6(a)(4) and 28 U.S.C. Sections 1331 and 1345. This Court has jurisdiction under 28 U.S.C. Section 1291, as the appellants filed a timely appeal on March 29, 2000 to this Court from the final Order of the U.S. District Court for the Eastern District of Virginia, dated and filed August 16, 1999, granting summary enforcement of the appellee's subpoenas, and the said district court's final Order, dated and filed February 14, 2000, denying the appellants' timely-filed motion of August 25, 1999, under F.R. Civ.P. 59(e), to alter or amend the judgment.

STATEMENT OF THE ISSUES

1. Whether the district court erred in ordering enforcement of the Postal Service's administrative subpoenas, where the subpoenas were issued in furtherance of the Postal Service's erroneous interpretation of the Cooperative Mailing Rule.

2. Whether, in ordering enforcement of the Postal Service's administrative subpoenas, the district court erred in totally deferring to the Postal Service and refusing to analyze, and make an independent determination of, the correct legal

meaning of the Cooperative Mailing Rule, where the Postal Service's erroneous interpretation of that Rule constituted the sole basis for issuance of the subpoenas.

3. Whether a decision on enforcement of the Postal Service's administrative subpoenas should have been deferred to allow respondents below to engage in discovery, where (i) there was evidence that the Postal Service's investigation was prompted by a politically-motivated request designed to chill the exercise of core First Amendment activity, (ii) respondents below reasonably allege unusual facts and an unlawful purpose to the subpoenas, and (iii) petitioner below relies on an interpretation of a statute and regulation that is contrary to the plain meaning of those laws as well as the underlying intent of the Congress.

STATEMENT OF THE CASE

This matter arises out of a Petition for Summary Enforcement of Inspector General Subpoenas issued by the U.S. Postal Service. The subpoenas purported to be issued and served on appellants in aid of the Postal Service's enforcement of the so-called Cooperative Mailing Rule, which the Postal Service asserts could result in the imposition of a revenue deficiency for the alleged improper use of

the nonprofit Standard A mail rates. The appellants, American Target Advertising, Inc., The Viguerie Company, and Viguerie and Associates (hereinafter collectively referred to as "ATA"), declined to comply with the subpoenas because of their belief that the Postal Service's interpretation of the Cooperative Mailing Rule is wrong as a matter of law, that the investigation is beyond the Postal Service's authority because it is based on unlawful purposes, and that ATA may be an improper target of politically- or unlawfully-motivated enforcement activity by the Postal Service.

After refusing to sustain any of ATA's repeated objections to the subpoenas, the government filed this subpoena enforcement case on July 9, 1999 (JA 7). ATA responded by objecting to the subpoenas, seeking to have them quashed, and, additionally, seeking discovery with respect to the genesis of the investigation prompting the subpoenas and the pursuit of that investigation (JA 168). After argument on the motions on August 13, 1999 (JA 338),[1] the district court ordered that the subpoenas be enforced. Reading narrowly its obligation to

[1] "JA" refers to the parties' Joint Appendix, which has been filed herein. The Joint Appendix contains, *inter alia*, the parties' pleadings, most of the documents filed in the district court proceeding, the transcript of the hearing of August 13, 1999, the district court's orders granting summary enforcement and denying the relief requested by ATA, and the notices of appeal. An Addendum to this brief contains statutes, regulations and other documents.

determine whether the investigation was "within the authority of the agency," United States v. Morton Salt, 338 U.S. 632, 652 (1950), the district court chose to "defer to the agency's interpretation of its own statute…," Order of August 16, 1999, p. 4, JA 512, and refused to make an independent judicial assessment of the substantive legal question presented with respect to whether the subpoenas were issued for a legitimate purpose, rather than politically-motivated or otherwise improper purposes as ATA alleged. The Order of August 16, 1999 granted the petition to enforce the subpoenas and denied ATA's request for discovery.

ATA filed a Motion to Alter or Amend the Order on August 25, 1999 (JA 362) which was denied by the district court's Order dated February 14, 2000 (JA 513). ATA filed its Notice of Appeal from these Orders on March 29, 2000 (JA 521), and an Amended Notice of Appeal on April 7, 2000 (JA 524). ATA's requests to the district court and to this Court for a stay pending appeal were denied (JA 516), and ATA complied with the subpoenas during the pendency of this appeal.

STATEMENT OF FACTS

The Postal Service issued administrative subpoenas for documents in the possession of ATA for the stated reason of investigating possible violation by ATA and its nonprofit clients of the Cooperative Mailing Rule — a Postal Service regulation reinforcing the grant of reduced nonprofit postal rates in 39 U.S.C. Section 3626, by expressly providing that an authorized organization may only mail its "own matter" at those rates. *See, e.g.*, Petition for Summary Enforcement ¶10, and Exhibit 4 and 5, JA 11, 29, 34-46; Mem. in Support of Petition, pp. 10, 13, JA, 72, 75. The appellant companies herein are related through the common ownership of Richard A. Viguerie. Mr. Viguerie is a well-known, politically-conservative businessman and political spokesman, generally credited as having revolutionized the direct mail industry through his fundraising efforts on behalf of a wide variety of conservative organizations.[2]

ATA provides services to various nonprofit organizations in the conduct of those organizations' mailings to the general public and the organizations' members and donors. ATA is a fundraising consulting and creative agency.

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[2] For detailed press comments and views by conservatives and liberals about Mr. Viguerie, *see* Memorandum of American Target in Support of Response to Petition For Summary Enforcement of Inspector General Subpoenas (hereinafter "ATA Mem. No. 1"), pp. 4-5 (JA 172, 176-77).

Like other consulting agencies of its type, ATA drafts proposed program and fundraising letters for its clients, and uses its expertise to procure mailing lists and determine appropriate mailing dates. Once the letters are approved by the nonprofit organization and finalized, third-party vendors print, package, and deliver the letters to a post office. Other third parties process the responses. (*See* ATA Mem. No. 1, pp. 2- 4, JA 174-176.)

As previously indicated, the Postal Service's investigation concerns the Cooperative Mailing Rule, a Postal Service regulation interpreting the right of nonprofit organizations to mail at discounted postal rates, as set forth in 39 U.S.C. Section 3626. (*See* Domestic Mail Manual, Section E670.5.0,[3] Addendum, p. A-13.) The Rule simply requires that qualified nonprofit organizations mail only their own matter at the special nonprofit rates, and that its authorization to mail at these rates not be used by others for the mail of such other non-authorized entities. It reinforces the statutory design that only

[3] The Domestic Mail Manual is incorporated by reference as a part of the United States Postal Service's regulations. *See* 39 CFR 111.1-111.5.

qualified nonprofit organizations are entitled to mail at the special nonprofit rates. *Id.*[4]

In January and February 1998, the subpoenas at issue in this case were served on ATA.[5] The subpoenas sought extensive proprietary and confidential business records from ATA relative to the arrangements with three of ATA's nonprofit clients, TEL Seniors, 60 Plus Association, and United States Seniors Association, Inc. (hereinafter collectively referred to as ATA's "nonprofit clients"), which inform the public regarding public policy issues affecting senior citizens. *Id*. The subpoenas did **not** request any documents that had actually been mailed, *i.e.*, the only material that should have triggered a Cooperative Mailing Rule inquiry. The mailings of ATA's nonprofit clients did not advertise any product or service. Nor did they contain any matter belonging to ATA or promote any service or product of ATA or any other organization or entity. *See* Affidavit of Richard A. Viguerie, *supra*, JA 197; Affidavit of Harvey K. Altergott, ATA Mem. No. 1, Exhibit 7, JA 252, 257. Indeed, the Postal

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[4] The Domestic Mail Classification Schedule, which is set forth at 39 CFR Part 3001, Subpart C, Appendix A, contains virtually identical language. *See id.*, §321.412; Addendum, p. A-12.

[5] For a detailed description of the documents subpoenaed, *see* Petition to Enforce, Exh. 1-3, JA 16-28; ATA Mem. No. 1, pp. 6-7, JA 178-179.

Service has not even alleged that any mailing at issue in this case advertised any product or service whatsoever. Thus, the subpoenas do **not** in any way relate to letters offering or promoting any product or service. *See* subpoenas attached as Exhibits 1-3 to the government's petition, JA 16-28; Affidavit of Richard A. Viguerie, ¶¶ 2-4, JA 197-198.

Upon receiving confirmation from the Postal Service that the subpoenas were designed to obtain evidence relative to a revenue deficiency to be imposed for alleged violation of the Cooperative Mailing Rule, ATA communicated its position to the Postal Service that the subpoenas were not issued for a legitimate purpose. ATA resisted the subpoenas, primarily on the ground that the Postal Service's interpretation of the Cooperative Mailing Rule is contrary to the statute granting authorization for nonprofits to mail at discounted rates. ATA's fundamental position is that since none of its nonprofit clients' mailings involved the mail of any other person or organization (or any product or service of any such other person or organization), then the Cooperative Mailing Rule does not apply. Indeed, as proof positive that the Cooperative Mailing Rule cannot apply, ATA submitted the report of the Postal Service's former head of classification, who opined that the mailings of ATA's nonprofit clients would not violate the

Cooperative Mailing Rule, and ATA pointed out that the Postal Service had already approved the mailings of its nonprofit clients at the nonprofit postal rates **after** the Postal Service had already seen the letters and reviewed them for content. *See* ATA Mem. No. 1, pp. 8-17, and Exhibit 7 thereto (Expert Witness Report of Harvey K. Altergott, with attachments), JA 180-189, and 251-290.

The Postal Service responded that it was not required to address the substantive legal question presented by ATA, although it defended its interpretation of the Cooperative Mailing Rule. *See* Reply in Support of Petition for Summary Enforcement, pp. 1-8, JA 315-322. As authority for its legal position on the Cooperative Mailing Rule, the Postal Service relied primarily on a guidance booklet it has published known as USPS Publication 417, which explains that "[t]his publication discusses eligibility, authorization, and mailing rules for Nonprofit Standard Mail rates." Mem. in Support of Petition, p. 1, JA 82. *See* USPS Publication 417, JA 79-140.

ATA's other main objection to the subpoenas rested upon its claim that the Postal Service investigation was politically and/or unlawfully motivated. In support, ATA proffered evidence that on May 24, 1993, then U.S. Senator David Pryor, a Democrat from Arkansas and a member of the Senate's

subcommittee with oversight over the Postal Service, attacked Mr. Viguerie and certain of ATA's nonprofit clients on the floor of the United States Senate. Senator Pryor's attack was directed against core First Amendment communications by ATA's nonprofit clients criticizing legislation of which Senator Pryor was a principal advocate. ATA Mem. No. 1, pp. 17-22, and Exhibits 4, 8, JA 189-194. ATA alleged, upon information and belief, that Senator Pryor had requested an investigation of ATA, but the Postal Service has refused to disclose any details regarding such a request or Senator Pryor's role in the current investigation. *See* Reply in Support of Petition to Enforce, pp. 3-4, JA 317-318.[6] In addition to showing Senator Pryor's involvement, ATA questioned whether, because of the antagonistic positions expressed by ATA's nonprofit clients regarding certain government policies promoted by officials close to the Postal Service, the subpoenas may have been issued for the wrong reasons. *See*, *e.g.*, April 9, 1998 letter from Mark J. Fitzgibbons to Postal Service, JA 215-217; ATA Mem. No. 1, pp. 17-18, JA 189-190; ATA Mem. in Support of Motion to Alter or Amend, pp. 23-24, JA 391-392. ATA's efforts to

[6] The same organizations and types of mailings at issue here were also the subject of Justice Department subpoenas in connection with a grand jury investigation which resulted in no finding of wrong-doing. *See* ATA Mem. No. 1, p. 5, JA 177.

pursue these proffers and allegations by discovery were to no avail as the district court denied ATA any opportunity to conduct discovery in an effort to prove the Postal Service's improper purposes.

ATA requested the district court to quash the subpoenas and to permit discovery on the issue of the Postal Service's motives in pursuing ATA. By Order dated August 16, 1999, the district court granted the government's Petition for Summary Enforcement, and ATA timely filed its Motion to Alter or Amend Order, under Rule 59(e) of the Federal Rules of Civil Procedure. By Order dated February 14, 2000, the district court denied ATA's Motion to Alter or Amend Order, and ATA's motions to stay that Order pending this appeal were denied by the district court (JA 516) and this Court.

Subsequent to denial of their motions for stay pending appeal, appellants complied with the subpoenas. Although obvious and irreparable injury has already occurred, the return of documents that were wrongfully subpoenaed would at least provide some redress of the wrong that has been suffered. *See* Church of Scientology v. United States, 506 U.S. 9, 12-13 (1992). Accordingly, appellants are pursuing this appeal to secure a reversal of the district court's judgment and the return of their documents, to obtain discovery of the Postal

Service's motives in pursuing ATA, to clarify the law to diminish the likelihood of the issuance of further improper administrative subpoenas, and to obtain all appropriate ancillary relief.

SUMMARY OF ARGUMENT

The Postal Service's subpoenas were issued in furtherance of the Postal Service's erroneous interpretation of the Cooperative Mailing Rule. Thus, they were not issued for a legitimate purpose, and should not have been enforced. Accordingly, the district court erred in ordering enforcement of the subpoenas, which should have been quashed. The district court also erred by deferring to the Postal Service's claim that its investigation was "within the authority of the agency" (one of the criteria for enforcing administrative subpoenas) rather then making an independent judicial determination of this contested, foundational issue. Alternatively, the district court should have granted ATA's request for discovery in light of evidence that the Postal Service's investigation has been undertaken for improper purposes and set the matter down for an evidentiary hearings.

ARGUMENT

STATEMENT OF STANDARD REVIEW

Generally, an order enforcing an administrative subpoena is reviewed for clear error, and the court's order denying discovery is reviewed for abuse of discretion. *See* EEOC v. Lockheed Martin Corp., 116 F.3d 110, 113 (4th Cir. 1997); Reich v. National Engineering & Contracting Co., 13 F.3d 93, 98 (4th Cir. 1993). In this case, however, appellants believe that plenary, de novo review is appropriate and necessary, because the contested issues are pure questions of law, involving foremost the construction of statutes and regulations, as well as fundamental questions regarding the lawful foundations of administrative subpoenas and judicial review thereof. Additionally, the district court conducted no evidentiary hearing and made no findings of fact based upon the presentation of the testimony of witnesses or other evidence, but rather granted the government's petition for summary enforcement and denied appellants' requests for discovery based upon the papers presented. Under such circumstances, the facts are in the same posture before this Court as they were before the district court; hence, the district court's decision should be subject to de novo review.

I. THE SUBPOENAS ENFORCING THE POSTAL SERVICE'S ERRONEOUS INTERPRETATION OF THE COOPERATIVE MAILING RULE WERE ISSUED WITHOUT LAWFUL AUTHORITY AND SHOULD BE QUASHED.

A. The Postal Service had No General Authority to Issue the Subpoenas in this case.

The subpoenas in question were issued by the Postal Inspection Service in January-February 1998, citing the Inspector General Act of 1978 ("IG Act") as authority with respect to one or more of the purposes set forth in 5 U.S.C. app. 3, §§4(a)(1), 4(a)(3), 4(a)(5), or 4(d). *See* Petition to Enforce, ¶¶ 7-9, JA 10-11. That Act grants certain subpoena authority to Inspector Generals, 5 U.S.C. app. 3, §6(a)(4), but the legal basis for the Inspection Service to exercise the powers of the Inspector General is not clear.

Section 662 of Public Law 104-208 (1996) gave the Postal Service Board of Governors ("Governors") the authority to appoint and remove the Inspector General of the U.S. Postal Service ("IG"). *See* 39 U.S.C. Section 202(e), as amended. The first Inspector General of the Postal Service was appointed by the Governors in January 1997. Prior to that time, the Postal Inspection Service was delegated the duties assigned to the office of the Inspector General (39 CFR § 224.3(c)), but in early 1998 it appears to have lost any authority it had previously

enjoyed under the Inspector General Act when an Inspector General for the Postal Service was appointed, fully one year before the issuance of the subpoenas in question.[7]

Although delegation authority was alleged in the Petition for Summary Enforcement, the Postal Inspection Service has not demonstrated in this case that it received a delegation of authority from the newly-appointed IG to issue the subpoenas to ATA, even if such a delegation is permissible. Certainly, without such a delegation, the Postal Inspection Service's authority to issue the subpoena could not derive from the IG Act and the subpoenas therefore would not be enforceable.

Moreover, the law establishing the Inspector General of the Postal Service places the IG under the authority, direction, and control of the Governors with respect to the issuance of certain subpoenas, including subpoenas with regard to ongoing civil or criminal investigations or proceedings. P.L. 104-208, §662(b)(2). *See* 5 U.S.C. app. 3 §8G(b)(3)(A)(i). The Postal Service has not identified the standards established by the Governors for such subpoenas, nor has

[7] "The Chief Postal Inspector may continue to serve as Inspector General of the United States Postal Service until the date on which an Inspector General is appointed…" 39 U.S.C. § 201 note, 110 Stat. 3009-382.

it shown where the subpoenas issued by the Postal Inspection Service to ATA has conformed to these standards.

Further, the subpoenas were admittedly issued in pursuit of a revenue deficiency investigation against ATA. *Id.*, ¶ 10, JA 11. *See also* Mem. in Support of Petition to Enforce, pp. 10, 13, JA 72, 75. This would appear to be the kind of "program operating responsibility" investigation that at least one federal court of appeals has determined exceeds an Inspector General's authority. *See* Burlington Northern v. Office of Inspector General, 983 F. 2d 631, 638-43 (5th Cir. 1993).

B. The Postal Service Cannot Rely Upon the Cooperative Mailing Rule as a Legitimate Purpose for the Subpoenas in this Case.

Even assuming the Postal Service has general authority to issue subpoenas, it may not do so in pursuance of its investigation into alleged violations by ATA of the Cooperative Mailing Rule in this case. The Postal Service claims that ATA's nonprofit clients were not entitled to send mail at nonprofit Standard A Mail rates (hereinafter referred to as"nonprofit rates"), and therefore, violated the Cooperative Mailing Rule, despite the fact that they were determined by the Postal Service to be qualified nonprofit organizations, they mailed letters promoting their own programs and advertising no products or services, and their

mailings had been accepted by the Postal Service as being eligible for such rates. The basis for this view is a theory that fundraising agreements between authorized nonprofits and their fundraising counsel must provide that the nonprofit bears the complete risk of financial loss if there is a loss on the mailings. Such a requirement is not contained in either the Postal Reorganization Act or the regulations issued pursuant thereto, and the Postal Service's position is contrary to what it has been in the past. Nevertheless, the Postal Service is pursuing a proposed revenue deficiency based upon its "risk" theory, and the subpoenas to ATA were issued solely in pursuit of that purpose.

1. Relevant Statutes and Regulations Conclusively Demonstrate that the Cooperative Mailing Rule is not Implicated Where, as Here, the Authorized Organization Mails Its Own Matter.

Former Post Office Department Statute and Regulations

Under the law as it existed prior to 1970, nonprofit organizations could enter their mail at nonprofit rates (then referred to as "special third-class rates," third-class nonprofit bulk rates," or "preferred rates") once they had been qualified, essentially as organizations exempt from federal taxation as described in section 501(c) of the Internal Revenue Code, by furnishing proof of their qualification to the Postmaster General. It was not the Postal Service's function

to review and approve the terms of the contracts of qualified nonprofit mailers with their fundraising consultants. It was only years later, after passage of the Postal Reorganization Act, that the Postal Service began to deal with the issue of products and services being included in mailings at the nonprofit rates. *See* Affidavit of Harvey K. Altergott, Exh. 7 to ATA Mem. No. 1, JA 252-289.[8] The Postal Service's authority prior to 1970 was derived from former section 4452 of Title 39, U.S. Code, which provided in relevant part as follows:

> (d) The term "qualified nonprofit organization" as used in this section means religious, educational, scientific, philanthropic, agricultural, labor, veterans, or fraternal organizations or associations not organized for profit and none of the net income of which inures to the benefit of any private stockholder or individual. Before being entitled to the preferential rates set out in this section, the organization or association shall furnish

[8] Mr. Altergott was employed by the Postal Service from 1971-1985, and was General Manager of the Domestic Mail Classification Division from 1979-1985. As such, he was responsible for writing and administering virtually all regulations governing domestic mailings, including postal regulations dealing with the nonprofit rates. *Id.*, ¶¶ 1-2, JA 252. He was the person who originated the idea of risk as a factor to consider in evaluating the possible applicability of the Cooperative Mailing Rule, and has stated that under postal regulations that Rule would possibly apply only if a mailing involved the products or services of persons or entities other than the authorized nonprofit organization. *Id.*, ¶¶ 7-12, JA 254-257. He has stated unequivocally that the letters of ATA's nonprofit clients would not violate the Cooperative Mailing Rule under the regulations. *Id.*, ¶ 13, JA 257.

> proof of its qualifications to the Postmaster General….
> [Addendum, p. A-1.]

The Postal Reorganization Act

The Postal Reorganization Act of 1970 ("Act") comprehensively restructured the entire postal system. This Act created the Postal Rate Commission to establish postal classifications and set rates, and, out of the former cabinet-level Post Office Department, created the U.S. Postal Service as "an independent establishment of the executive branch of the Government…." 39 U.S.C. § 201. The section of the Act governing nonprofit mailing privileges (39 U.S.C. § 3626), however, did not change the terms of former section 4452 with respect to which organizations could enter mail, and what type of mail they could enter, at nonprofit rates.

Although section 3626, in turn, has been amended, those amendments have not changed the fundamental provision that certain nonprofit organizations qualify for the nonprofit rates with respect to their own mail. The essence of the eligibility requirements for nonprofit rates of section 3626 — and of its predecessor, section 4452 — is limited to the status of the organization entitled to mail at the nonprofit rates. Neither that statute as originally enacted nor its predecessor statutes governing eligibility for the nonprofit rates expressly

addressed the question whether the matter being mailed had to be that of the nonprofit organization.

Postal Service Regulations

Cooperative Mailing Rule regulations designed to assure that qualified nonprofit organizations mail only their own mail matter at the nonprofit rates were in place in the 1970's, after enactment of the Postal Reorganization Act (39 U.S.C.). Those regulations, set forth at section 134.57 of the Postal Service Manual, provided (i) that authorized nonprofit organizations are only entitled to mail their own matter at the nonprofit rates, and may not delegate or lend the use of their authorization, and (ii) that cooperative mailings involving the mailing of matter on behalf of or produced for a non-authorized organization are not eligible for the nonprofit rates. *See* National Retired Teacher's Ass'n v. United States Postal Service, 593 F.2d 1360, 1362 (D.C. Cir. 1979); Postal Rate Commission *Opinion and Recommended Decision*, Docket No. MC76-5, vol. 1, p. 104 (November 29, 1978). They are virtually identical to the regulations in their present form, discussed below.

In November 1978, the Postal Rate Commission recommended, and the Postal Service Board of Governors subsequently adopted, a comprehensive

Domestic Mail Classification Schedule ("DMCS") to establish the framework of all postal mail classes pursuant to 39 U.S.C. section 3623(a). Under the Postal Reorganization Act, the Commission has the exclusive right to recommend changes in mail classifications, and the Postal Service's Board of Governors has the sole right to implement (or reject) recommended changes. 39 U.S.C. section 3623(b). Postal Service management cannot modify the DMCS in the way that it can modify the Postal Service regulations contained in the Domestic Mail Manual, discussed below. The DMCS is set forth at 39 CFR Part 3001, Appendix A. The relevant section of the DMCS provides the following statement of eligibility for the nonprofit rates, including the Cooperative Mailing Rule:

> **Limitation on Authorization**. An organization authorized to mail at the nonprofit Standard rates for qualified nonprofit organizations may mail only its own matter at these rates. An organization may not delegate or lend the use of its permit to mail at nonprofit standard rates to any other person, organization or association. [DMCS, section 321.412 January 10, 1999, Addendum, p. A-12]

As can be seen, the DMCS provision essentially carried forth the essence of the nonprofit eligibility rules contained in the statute and in the Postal Service Manual, discussed above.

The Postal Service issues more detailed operational mailing regulations in its Domestic Mail Manual ("DMM")[9] which may not contradict the DMCS. The current regulations, which carry forth the Cooperative Mailing Rule in much the same form that it has been in for over thirty years, is as follows:

> 5.0 Eligible and Ineligible Matter
>
> 5.1 Organization's Own Mail
>
> An organization authorized to mail at the Nonprofit Standard Mail rates may mail only its own matter at those rates. An authorized organization may not delegate or lend the use of its authorization to mail at the Nonprofit Standard Mail rates to any other person or organization.
>
> 5.2 Ineligible Matter
>
> No person or organization may mail, or cause to be mailed by contractual agreement or otherwise, any ineligible matter at the Nonprofit Standard Mail rates.
>
> 5.3 Cooperative Mailing
>
> A cooperative mailing may be made at the Nonprofit Standard Mail rates only when each of the cooperating organizations is individually authorized to mail at the Nonprofit Standard Mail rates at the post office where the mailing is deposited. A cooperative mailing involving the mailing of any matter on behalf of or produced for an organization not itself authorized to mail at the Nonprofit Standard Mail rates at the post

[9] The DMM constitutes an official repository of Postal Service regulations, and has replaced the Postal Service Manual. *See* 39 C.F.R. §§ 111.1 - 111.5 and 211(a)(2).

> office where the mailing is deposited must be paid at the applicable Regular or Enhanced Carrier Route Standard Mail rates. The mailer may appeal the decision under G020. [Domestic Mail Manual, Sections E670.5.0 - 5.3; Addendum, p. A-13]

USPS Publication 417

Where an authorized nonprofit enters its own mail, it is clear from the plain language of the Act and regulations quoted above, that neither the statute, nor the DMCS, nor the DMM provide the Postal Service with any authority for examining the contract between a nonprofit organization and its fundraising consultant to see if the consultant is bearing some of the risk of loss. Sometime after 1985 the Postal Service developed its current theory, and inserted that theory into a booklet known as USPS Publication 417. *See* Mem. in Support of Petition, Attach. B, JA 79. This booklet defines its scope as follows: "[t]his publication discusses eligibility, authorization and mailing rules for Nonprofit Standard Mail rates." *Id*. The booklet is not, and does not even purport to be, a Postal Service regulation. Yet, it is the following language contained in this booklet upon which the Postal Service has solely relied to justify the issuance of the subpoenas in this case:

> A cooperative mailing is a mailing produced by an authorized organization that "cooperates" with one or more organizations to **share** the cost, **risk**, or benefit of the mailing. Cooperative mailings may not be entered at the Nonprofit Standard Mail rates unless all cooperating organizations are authorized to mail at these rates at the post office of mailing. [*Id.*, p. 19, JA 97. Emphasis added.]

The booklet provides no legal authority for its assertion, and one searches in vain to find language in the statute, DMCS regulations or DMM regulations to find support for the notion that assumption of the risk of loss by a fundraising consultant should render an authorized nonprofit's mail ineligible to be entered at nonprofit rates.[10] For the Postal Service's position to make sense, it is necessary to conclude that if a fundraising consultant bears the risk of loss on one or more mailings, the mail being sent somehow ceases to be the mail of the nonprofit organization. The logic of this position is impossible to defend, and the policy implications seriously undermine long-standing Congressional and Postal Service rules and practices.

The Postal Service's interpretation of the Cooperative Mailing Rule contained in USPS Publication 417 is curious, at best. It certainly does not have

[10] The same problem exists regarding USPS Publication 417's assertion that sharing the cost or benefit or a mailing somehow renders the mailing a cooperative mailing, where the authorized organization mails its own matter.

the force of law. Its obvious effects on a hypothetical nonprofit charitable Foundation, which is in need of funds to carry on its charitable mission, illustrates part of the problem. Assume the following:

- that the Foundation utilizes the services of direct mail agency (Hatfield);
- that another direct mail agency (McCoy) believes that it could do a better job assisting the Foundation in its educational mission as well as with fundraising;
- that McCoy approaches the Foundation and asks for the opportunity to demonstrate the agency's direct mail effectiveness by offering to undertake certain mailings at no financial risk to the Foundation; and
- that the agency requires only that the cost of the mailing be paid from the proceeds of the mailing, and any loss would be paid for by the agency.

The result could be a disaster for the Foundation. For, although such an approach would make eminent sense to the fiduciaries running the Foundation, and although it would not violate the Cooperative Mailing Rule as set forth in the Domestic Mail Classification Schedule, or in the Domestic Mail Manual, a

mailing pursuant to the arrangement between McCoy and the Foundation would be considered by the Postal Service to be a violation of the Cooperative Mailing Rule as set forth in Publication 417 and under its interpretation being applied against ATA, since it would remove the risk of loss from the nonprofit and involve "a prohibited contribution of printing or mailing costs by the commercial enterprise" (§ 5-3, Publication 417, JA 97; Addendum p. A-15) As a result, assuming it even knew about the Postal Service's theory, the Foundation would be forced to choose between mailing the letter at for-profit rates, or rejecting the Agency's offer to bear the risk of loss. Irrespective of whether it knew of Postal Service's theory, if it agreed to the proposal a revenue deficiency could be asserted against it.

Such an interpretation by the Postal Service raises several questions. What sense does it make for the trustees of the Foundation to be given this Hobson's choice? What evidence is there that it was Congress' intent — when it stated that eligible nonprofits can mail their mail at the nonprofit rate — to give the Postal Service power to scrutinize their private papers, including their direct mail contracts, to determine whether its contracts are acceptable? Should the Postal Service have power to second-guess and constrain the trustees of a nonprofit

organization in their negotiation of such contracts? Should the Postal Service have the power to demand any and all documents relating to every nonprofit using nonprofit mail and all of their direct mail vendors? Could Congress have intended that such an investigation of every nonprofit mailer be undertaken to ensure that the contract not be too favorable to the nonprofit organization?

2. The Postal Service's Cooperative Mail Rule Theory Contradicts the Plain Meaning of the Governing Statute.

The statute and regulations quoted above are fairly simple in design and wording and are not reasonably capable of conflicting interpretations. In determining the meaning of statutory provisions, such as 39 U.S.C. section 3626, the courts must start with the language of the statute itself. Bowsher v. Merck & Co., 460 U.S. 824, 830 (1983); Bread Political Action Committee v. FEC, 455 U.S. 577, 580 (1982). The plain meaning of the above provisions of law as they have existed from their inception to the present day is that a qualified nonprofit organization is entitled to mail at the nonprofit rates if it mails its own matter.[11]

[11] As discussed below, Congress amended 39 U.S.C. Section 3626 in 1990 and 1993 to exclude certain mail matter from eligibility for the nonprofit rates, but those exclusions do not apply to the mailings of ATA's nonprofit clients.

If they mail any other organization's matter, the mailing is not eligible for the nonprofit rates. Whether a mailing would qualify for the nonprofit rates under section 3626 at the time the statute was passed in 1970 could be determined from an examination of the mailing itself. Nothing has changed. In fact, the Postal Service so believed at that time, and its official policy, as set forth in Postal Service regulations, has not changed. *See* Affidavit of Harvey Altergott, attached as Exhibit 7 to ATA Mem. No. 1, JA 252-257.

Nothing in 39 U.S.C. section 3626 or the Cooperative Mailing Rule, expressly or by implication, would support the Postal Service's position in this litigation that nonprofit rates would not be available to, or that the Cooperative Mailing Rule would be violated by, qualified nonprofit organizations mailing only their own educational and fundraising letters. In other words, if, as here, it is undisputed that the letters being mailed are truly the matter of the qualified nonprofit organization entitled to mail at the nonprofit rates, and if no product, service, or item of any other person or organization is being advertised or sold, the mailings cannot be considered cooperative mailings as a matter of law. Under those circumstances, it cannot be disputed that the only matter being mailed is the qualified nonprofit organization's "own matter." Thus, in the

absence of matter belonging or referring to another person or organization, or the products or services of another organization, there is no legal basis on which to conclude that the mailing is not eligible for the nonprofit rates.

As indicated above, this was both the official and unofficial position of the Postal Service, at least until 1985, which was the last year Harvey Altergott served as General Manager of the U. S. Postal Service's Mail Classification Division. *See* ATA Mem. No. 1, Exhibit 7 ¶¶ 4-12, JA 253-257. Mr. Altergott — under whose guidance and direction during 1979-1985 the Postal Service developed the factors to determine the application of the Cooperative Mailing Rule — has examined mailings of ATA's nonprofit organizational clients that are (or are typical of) mailings that the Postal Service now contends were cooperative mailings, and has reviewed Postal Service rulings interpreting the Cooperative Mailing Rule. According to him, the mailings in question in this case would **not** constitute cooperative mailings under the Postal Service regulations. *Id.*, ¶ 13; JA 257.

3. The Cooperative Mail Rule as Interpreted by the Postal Service in this Case has not been Ratified or Approved by any Act of Congress.

At no time has Congress ever adopted a law even remotely supporting or ratifying the Postal Service's theory of the Cooperative Mailing Rule at issue in this case. Section 3626 of the Postal Reorganization Act provides no basis for support of the Postal Service's booklet (Publication 417) or interpretation. *See* former 39 U.S.C. section 3626, Addendum, p. A-2. *See also* Conference Rep. No. 1363, 91st Cong., 1st Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N., pp. 50, 85-86. In fact, as ATA explained in the district court, Congress appears to have flatly rejected the Postal Service's lobbying efforts to move in that direction. *See* ATA Mem. in Support of Motion to Alter or Amend, pp. 10-17, JA 378-385.

Between 1970 and 1990, Congress amended section 3626 several times. Two of those changes directly — and favorably — impacted the extension of nonprofit rates to qualified organizations.[12] In 1990 Congress further amended section 3626 by adding subsections (j) and (k) thereto, expressly denying the

[12] In 1974, Congress extended the phasing-in period established in the Act for increasing nonprofit rates (Pub. L. 93-328; *see* H.R. Rep. No. 1084, 93rd Cong., 1st Sess. (1974). In 1978, Congress enacted subsection (e) of section 3626, extending nonprofit rates to certain political organizations. Pub. L. 95-593. *See* 39 U.S.C. sec. 3626(e).

availability of the nonprofit rates to certain commercial matter, including advertisements, promotions, and services (Pub. L. 101-509). *See* 39 U.S.C. section 3626(j), (k). *See also* H.R. Rep. No. 589, 101st Cong., 1st Sess. (1990). In 1993, Congress added subsection (D) to section 3626(j)(1), expressly referring to the Cooperative Mailing Rule, along with other provisions specifying what kind of product or services would or would not be eligible for the nonprofit rates. Pub. L. 103-123. *See* 39 U.S.C. section 3626(j)-(m). *See also* H.R. Rep. No. 127, 105th Cong., 1st Sess. (1993). In neither of these latter two amendments did the Congress provide any authority for the Postal Service's current interpretation of the Cooperative Mailing Rule. Instead, one could say that Congress essentially codified the extent of the Cooperative Mailing Rule, by expressly declaring which type of advertising was eligible to be entered at nonprofit rates.

What Congress accomplished, in amending section 3626, was a more comprehensive or detailed statutory scheme with respect to eligibility for the nonprofit rates. Congress **listed** the various types of mail and arrangements not eligible for the nonprofit rates in subsection (j) of section 3626, and expressly referred to the Cooperative Mailing Rule as part of that exclusion. *See* 39 U.S.C. Section 3626, Addendum, pp. A-3- A-10. The action of Congress in its

1990 and 1993 legislation, by expressly declaring that products and services of other organizations were not eligible for the nonprofit rates and by otherwise limiting use of the nonprofit rates by authorized organizations, while rejecting the Postal Service's proposals to exclude certain nonprofit organizations confirms ATA's position in this litigation. *See* ATA Mem. in Support of Mot. to Alter or Amend, pp. 10-17, JA 378-385.

Section 3626 still provides, as it always did, that qualified nonprofit organizations are entitled to mail at the nonprofit rates. However, the 1990 and 1993 legislative changes (adding subsections (j) and (k) of Section 3626) excluded certain specific types of mailings from eligibility. **All** of those excluded mailings involved the promotion of products and/or services. The 1990 legislative changes involved products or services of other organizations that might be promoted or advertised in a nonprofit organization's mailings eligible for the nonprofit rates. The 1993 legislative changes went further, by excluding certain mailings promoting products or services of an authorized organization if those products or services are not substantially related to the accomplishment of the authorized organizations' tax-exempt purposes or if the mail matter is part of a cooperative mailing. *See* 39 U.S.C. section 3626(j)(i)(D)(i), (ii). In other

words, even if an authorized organization's mailing promoted products or services substantially related to the accomplishment of a purpose constituting a basis for the organization to mail at the nonprofit rates, the mailing would not qualify for the nonprofit rates if it was part of a cooperative mailing.

Thus, every category of excluded mailing in 39 U.S.C. section 3626 concerns the promotion of products or services. In enacting those exceptions to the types of mailings eligible for the nonprofit rates, Congress reinforced the plain meaning of the statute, that an authorized organization's own mail matter — including matter substantially related to the accomplishment of its tax-exempt purposes — qualifies for the nonprofit rates.

C. The Postal Service's Cooperative Mail Theory Invites a Standardless Approach and One Which Encroaches on First Amendment Rights.

The Postal Service's claim of power under its Cooperative Mail Rule resembles a recent attempt by the Internal Revenue Service to broaden the reach of its rule prohibiting private inurement from the activities of a charitable organization. In United Cancer Council, Inc. v. Commissioner, 165 F.3d 1173 (7th Cir., 1999), the IRS asserted that it had the right to revoke a charity's tax exemption "simply because the Service thinks its contract with its major

fundraiser too one-sided…." Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit rejected that contention, warning that if the IRS had the power to scrutinize charitable organizations' fundraising contracts to determine if they met the Service's standard of fairness, then "the tax status of charitable organizations and their donors [would become] a matter of whim of the IRS." *Id.*, 165 F.3d at 1179.

Likewise here, if the Postal Service has the power to examine the terms of a nonprofit organization's contract with its professional fundraiser to determine whether the fundraiser had agreed to "share the cost, risk or benefit of the mailing," in the precise way deemed proper by the Postal Service subsequent to the mailing, then the statutory nonprofit mailing privileges of every nonprofit organization that relies upon a professional fundraiser exist solely at the whim of the Postal Service. Further, since the version of the Cooperative Mail Rule sought to be enforced by the Postal Service itself is not a regulation, it is obvious that the Postal Service has not promulgated in a proper fashion the rules by which it will determine whether a fundraiser has agreed to contract terms that, in the Postal Service's eyes, impermissibly share the costs, risks, or benefits. Rather, it appears that the Postal Service, like the IRS in the United Cancer case

chooses to employ an ad hoc "facts and circumstances" test to guide its decisions. As Chief Judge Posner ruled in United Cancer, however, such a test is "no standard at all." *Id.*, 165 F3d at 1179. The doctrine of agency discretion, then, should not determine the result in this case.

The communications of ATA's nonprofit clients to the public, including ATA's fundraising appeals, constitute protected First Amendment activity. *See* Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State of Maryland v. Joseph A. Munson Co., 467 U.S. 947 (1984); Riley v. National Federation of the Blind, 487 U.S. 78 (1988). The Postal Service's Cooperative Mail theory, which appears to be founded on the notion that only nonprofits with a sizeable bankroll should be eligible for the nonprofit rates, threatens the exercise of those First Amendment rights, at least by start-up organizations or smaller nonprofits lacking the fundraising and outreach resources of larger, more established nonprofits, and which may not have the capacity (or the funds) to bear the risk of loss on a fundraising appeal. By rendering the mailings of such smaller organizations ineligible for the nonprofit rates by virtue of its cooperative mail risk-sharing theory, the Postal Service demands to police the fundraising efficiency of those groups (by

examining their fundraising agreements) and to deny eligibility for the nonprofit rates if it does not like the allocation of risk (or other costs and benefits under the agreement). The Supreme Court has consistently rejected efforts by regulations to govern such fundraising activity by reference to the financial efficiency of the efforts. *See* Riley, 487 U.S. of 389, 792-94; Munson, 467 U.S. at 961, 963-64; Schaumberg, 444 U.S. at 635-36. Clearly, the Postal Service's theory cannot stand as a legitimate purpose justifying the subpoenas issued to ATA.

II. THE DISTRICT COURT ERRED BY DEFERRING TO THE POSTAL SERVICE'S ASSERTION THAT ITS SUBPOENAS WERE JUSTIFIED AS BEING WITHIN THE AUTHORITY OF THE AGENCY RATHER THEN MAKING AN INDEPENDENT JUDICIAL DETERMINATION OF THIS CONTESTED, THRESHOLD ISSUE.

A. The District Court Was Required to Determine that the Contested Subpoenas Were Issued for a Legitimate Purpose.

While ATA acknowledges that the judicial role in enforcing administrative subpoenas is "sharply limited," EEOC v. Lockheed Martin Corp., 116 F.3rd 110, 113 (4th Cir. 1997) (*quoting* EEOC v. City of Norfolk Police Dep't, 45 F.3d 80, 82 (4th Cir. 1995)), it is nevertheless an important role, and the courts must not passively accede to all agency subpoena demands. Because it is

invading the privacy of the person or entity being investigated, "an agency's 'broad access to information relevant to inquiries' is not without limits." Lockheed Martin, 116 F.3rd at 113 (*quoting* EEOC v. Ford Motor Credit Co., 26 F.3d 44, 47 (6th Cir. 1994)). Simply stated, in administrative subpoena enforcement actions, there is a fine but critically important line between (i) the agency's need for information and (ii) the public's judicial protection against unwarranted intrusion into their business and personal affairs.

In striking this balance to determine whether the subpoena should be enforced, the district court must find that the agency has prevailed on three fundamental issues. These tests apply in the Fourth Circuit, and were recently set forth again by this Court in Lockheed Martin: "[i]n order to enforce such a subpoena, a court must be satisfied that the administrative agency has shown that: '(1) it is authorized to make such investigation; (2) it has complied with statutory requirements of due process; and (3) the materials requested are relevant.' 116 F.3d at 113 (*quoting* Norfolk Police Dep't, *supra*, 45 F.3d at 82).

In the instant case, the district court should have made an independent assessment of ATA's claim that the Postal Service failed to meet the initial test.[13]

[13] If the purpose were not lawful, of course, it would also follow that the subpoenas were not relevant to a legitimate purpose.

ATA resisted the Postal Service's subpoenas because it believes they were issued in pursuit of an illegal investigation, and are unrelated to determining whether there was a violation of the Cooperative Mailing Rule. The Postal Service is not authorized to conduct its current investigation of ATA because that investigation is founded upon an interpretation of the Cooperative Mailing Rule that contravenes the intent of Congress in establishing the special nonprofit rates. *See* section I of this Argument, *supra*. The district decided not to assess the merits of the Postal Service's claim of authority, apparently on the theory that the Inspector General has the general authority to issue subpoenas for investigative purposes, and an enforcement proceeding is not the forum in which to litigate the specific purpose behind issuance of the subpoenas. ATA respectfully submits that this was error, and that the district court was required to determine whether the admitted purpose for issuing the subpoenas was a legitimate one.

B. The District Court Erred By Failing to Determine Independently Whether the Postal Service's Subpoenas Were Issued for an Improper Purpose.

The district court's Order of August 16, 1999 (JA 508) demonstrates that the trial court interpreted the requirement that the agency be "authorized to make such investigation" in an abstract, general sense, unrelated to the facts of the case

before it, refusing to consider whether Congress had given the Postal Service authority to conduct the specific investigation of ATA based on the Cooperative Mailing Rule.

The district court concluded that "the agency is clearly authorized by statute to engage in the instant investigation" (Order of August 16, 1999, paragraph 2) but it supported this conclusion only with references to the Postal Service's general power to investigate "fraud[] and abuse of [the] agency's programs and operations" JA 510. If this type of judicial analysis were sufficient, any agency that has the power to issue subpoenas could investigate virtually any activity of any person dealing with the agency, at any time, and for any reason. This is not and cannot be the rule. The definition of what an agency is "authorized to … investigat[e]" must come from examination of the "program" or "operation" the agency is seeking to investigate. In this case, the Postal Service asserts that it is investigating an alleged violation of the Cooperative Mailing Rule. *E.g.*, Mem. in Support of Pet. for Summary Enf., pp. 10, 13, JA 72, 75. ATA contended that the Postal Service's interpretation of the Cooperative Mailing Rule as it relates to ATA is contrary to law, and thus that the Postal Service's investigation of — and subpoenas issued to — ATA are

unlawful. But rather than examine the Postal Service's reliance on the Cooperative Mailing Rule as the basis for authority to issue the subpoenas in this case, the district court expressly declined to review this issue:

> 5. The respondents' argument about improper interpretation of the cooperative mailing rule is also unpersuasive at this point. Under the Postal Inspection Service's interpretation of the cooperative mailing rule, the respondents' activities constitute potential violations. The respondents argue that under their interpretation of the cooperative mailing rule, which differs from the agency's construction, there has been no violation of the rule. At this stage of the case, in this summary proceeding, **the Court will defer to the agency's interpretation of its own statute**. [Dist. Ct. Order of August 16, 1999, pp. 3-4, ¶ 5, J.A. 511-512 (emphasis added)].

Deference to the agency's interpretation of its own statute is not appropriate in a case such as this, particularly where the interpretation is inconsistent with the agency's past interpretation, and the dispositive legal question can be decided by analyzing the relevant statute and regulation which the government purports to be enforcing. *See* subsection C, *infra*, pp. 45-49. ATA argued to the district court that the Postal Service's interpretation of the Cooperative Mailing Rule contravenes both the letter and the spirit of 39 U.S.C. Section 3626, and that the Postal Service is not authorized to make an

investigation in pursuit of such an unlawful purpose. As shown in paragraph 5 of its Order, the district court apparently believed that the reviewing court is legally **bound** by the Postal Service's determination. Such an approach would virtually eliminate any meaningful inquiry into whether the agency is "authorized to make such investigation," as required by Morton Salt, Lockheed Martin, and other cases setting the standard for subpoena enforcement. Every time an agency issues such a subpoena, it knows that the subpoena must be designed to pursue a result sustainable under the law, and that the agency has the burden to demonstrate such a result can obtain legally. If the reviewing court were to simply defer to any interpretation of the underlying substantive law, no matter how erroneous that interpretation may be, the court's review would be tantamount to a mere rubber stamp for the agency.

It is beyond dispute that agencies sometimes err by overstepping the bounds of their authority, and the courts do not meekly defer to an agency's view of its own authority when the court believes the agency's view is erroneous. The U.S. Supreme Court decided a series of cases preceding this Circuit's Lockheed Martin decision, which demonstrates that the district court's refusal to analyze

the legality of the purpose behind the Postal Service's subpoenas was clearly erroneous.

In an early subpoena enforcement case, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), the Supreme Court examined the petitioner's contention that the subpoenas were beyond the FTC's authority and stated that "the statute's language leaves no room to doubt that Congress intended to authorize just what the Administrator did…." *Id*. at 197-98. In addressing the petitioner's argument that the subpoena violated the Fourth Amendment's prohibition of illegal searches and seizures, the Oklahoma Press Court stated that

> [t]he requirement of 'probable cause, supported by oath or affirmation' literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is **authorized by Congress**, is **for a purpose Congress can order**, and the documents sought are relevant to the inquiry. [*Id*. at 209 (emphasis added)].

United States v. Morton Salt Co., 338 U.S. 632 (1950), involved an administrative order issued by the Federal Trade Commission requiring several companies to file detailed reports with supporting documentation and information pursuant to section 6 of the Federal Trade Commission Act. 338 U.S. at 636. In enforcing the Commission's Order, the Supreme Court considered the

companies' argument that "the power will be unconfined and its arbitrary exercise subject to no judicial review or control" and concluded:

> It is enough to say that, in upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term **as used by Congress** in the context of this Act. [*Id*. at 654 (emphasis added).]

In United States v. Powell, 379 U.S. 48 (1964), the Supreme Court held that the Internal Revenue Service was not required to make a showing of probable cause to suspect fraud before its administrative summons would be enforced, *id*. at 51, but looked at the agency's authority to conduct the investigation in terms of its "legitimate purpose."[14] The interchangeability of these two formulations highlights the error committed by the district court in this case. Rather than equating the Postal Service's purported "authority" in this case to its right to conduct investigations generally, the trial court should have considered what was being investigated so that it could determine whether the

[14] The Court determined that the agency "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." 379 U.S. at 57-58.

Postal Service's investigative purpose is legitimate. The Powell Court emphasized that there are Congressional limitations on the agency's power that the reviewing court must examine, because "[i]t is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." [*Id*. at 58].

The link between the determination of "authorized to make such investigation" and Congress' original (*i.e.*, statutory) grant of authority to the agency was made clear by the Court in EEOC v. Shell Oil Co., 466 U.S. 54, 57 (1984):

> If the EEOC were able to insist that an employer obey a subpoena despite the failure of the complainant to file a valid charge, Congress' desire to prevent the Commission from exercising unconstrained investigative authority would be thwarted.

See also See v. City of Seattle, 387 U.S. 541, 544 (1967) ("The agency has the right to conduct all reasonable inspections of such **documents which are contemplated by statute**…." (emphasis added)).[15] The documents demanded by

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[15] The Court in the See case was addressing the limitations on use of on-premises administrative inspections conducted without a warrant and looked to the analogous situation of administrative subpoenas for guidance. The Court there expressed the criteria for enforcement of subpoenas as follows:

It is now settled that, when an administrative agency subpoenas

the Postal Service in this case were not contemplated by any statute since they are irrelevant to any legitimate purpose in pursuing ATA, and the district court should have so held.

C. The District Court Erred By Deferring Completely to the Postal Service's Interpretation Despite ATA's Showing that Such Interpretation Is Contrary to Law

The U.S. Supreme Court has expressly rejected the type of analysis employed by the district court in this case, stating that when considering what records are covered by an agency's investigation, deference will not be given to the agency's interpretation where that interpretation conflicts with the statutory language.[16] Therefore, rather than simply "defer[ring] to the agency's

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> corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply. [387 U.S. at 544-45 (footnote and citations omitted]

[16] Bowsher v. Merck & Co., 460 U.S. 824, 837 (1983):

interpretation of its own statute,' the court below was required to compare that interpretation to the statute establishing eligibility for the special nonprofit rates, as well as the actual language of the Cooperative Mailing Rule regulation. This is particularly so in light of ATA's showing in the district court that the Postal Service's current theory is contrary to its past interpretation and that the Postal Service's interpretation is wrong as a matter of law. *See*, *e.g.*, INS v. Cardoza - Fonseca, 480 U.S. 421, 446 n.30, 447-48 (1987); Watt v. Alaska, 451 U.S., 259, 273 (1981); General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976).

Particularly relevant also is the Supreme Court's recent decision in Christensen v. Harris County, __U.S.__, 120 S. Ct. 1655 (2000), holding that an opinion letter by the Department of Labor was not entitled to deference because it represented a mere interpretation by the agency, and was not a regulation. The Court rejected an argument that the agency opinion letter was entitled to

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> Nor are we persuaded by the Government's argument that the GAO's consistent and longstanding interpretation of its authority under the access-to-records statutes supports the view that indirect cost records are subject to examination under the fixed-price contracts in question here. Even if that interpretation could be characterized as consistent, it would not be entitled to deference, for, as we have noted above, it is inconsistent with the statutory language. *See* Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979).

deference under the decision in Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984), noting that the agency's opinion was not even entitled to respect because it was not persuasive. Christensen, 120 S. Ct. at 1663. The same rationale should apply in this case, where the Postal Service's Publication 417 is a mere information document and its statements regarding application of the Cooperative Mailing Rule are inconsistent with past Postal Service practice, as well as the law. *See* Affidavit of Harvey K. Altergott, JA 252-257.

The case law in the Fourth Circuit also supports the conclusion that the district court erred by deferring to the agency's interpretation of its own authority rather than examining Congress' intent as embodied in the underlying statute. The district court correctly noted that its role is "sharply limited" (Order of August 16, 1999, p.1, ¶1, *citing* Lockheed Martin, 116 F.3d at 113).[17] But this

[17] The district court's reliance on Lockheed Martin in this regard was misplaced because Lockheed Martin expressly did not address the issue of whether the agency was"authorized to conduct such investigation," the very issue raised by ATA in the instant case. *See* Lockheed Martin, 116 F.3d at 113:

> Neither in the district court nor on appeal does Lockheed make any claim that the EEOC was not authorized to conduct this investigation or that the Commission failed to comply with statutory due process requirements. Lockheed's sole argument is that the requested information is not relevant.

Circuit has made it clear that a "sharply limited" role still requires serious judicial scrutiny.

For example, in United States v. Newport News Shipbuilding and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988), the Defense Contract Audit Agency ("DCAA") asked this Court to reverse the district's order denying enforcement of its administrative subpoena. This Court affirmed the district court's refusal, holding that "[o]ur review of the relevant statutes leads us to reject the government's assertion that they give DCAA practically unlimited access to NNS's internal records." *Id*. at 166. The Court emphasized that whether an agency is "authorized to make such investigation" is determined by looking at the statute itself.

> It is anything but clear from the face of the statute that DCAA is entitled to the material it seeks. Where, as here, the "language does not dictate an answer," the court must "analyze the policies underlying the statutory provision to determine its proper scope." Bowsher v. Merck & Co., 460 U.S. at 831 n.7, 103 S.Ct. at 1592 n.7. [*Id*. at 166]

Neither the U.S. Supreme Court nor the Fourth Circuit has allowed agencies total deference to determine the scope of their subpoena powers. Instead, they require an independent examination of the statute, especially where,

as here, the agency's interpretation would fundamentally conflict with the underlying statute. In this case, the district court expressly refused to examine the statute, choosing, instead, to defer without any apparent scrutiny to the Postal Service's own interpretation of its own authority. In doing so, it erred, and its judgment should be reversed.

III. THE TRIAL COURT ERRED BY NOT AFFORDING APPELLANTS THE OPPORTUNITY OF CONDUCTING DISCOVERY TO ASCERTAIN THE POSTAL SERVICE'S PURPOSE IN ISSUING THE SUBPOENAS.

The district court ordered the Postal Service's subpoenas enforced at the time of the initial hearing in this matter, on the basis of the parties' pleadings, without hearing any testimony, and it denied ATA's request for discovery to explore the Postal Service's political or other motivation, if any, in issuing the subpoenas. *See* Transcript of Hearing of August 13, 1999 (JA 338, 359); Order of August 16, 1999 (JA 508, 511). In so doing, it acknowledged that ATA had raised questions of improper purpose behind the subpoenas, but stated that ATA had not raised a question sufficient to warrant discovery. This, appellants, submit was error.

Bad faith in issuing administrative summonses or subpoenas is a basis for denying enforcement. Discovery and a hearing on the factual issues related to the purpose underlying the investigation are necessary and appropriate in attempting to resolve those factual issues. *See, e.g.*, United States v. Powell, 379 U.S. 914, 919 (1964); Burlington Northern R.R. v. Office of Inspector General, 983 F. 2d 631, 638, 641-43 (5th Cir. 1993); SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 123-25 (3rd Cir. 1981); United States v. Cortese, 614 F.2d 914, 919 (3rd Cir. 1980). As ATA argued in the district court (Memorandum in Support of Motion to Alter or Amend, pp. 19-25, JA 387-389), the possible initiation of the Postal Service's investigation through the offices of a member of Congress or other government officials politically opposed to the First Amendment activities of ATA's nonprofit clients, particularly when coupled with an absence of any likelihood of prevailing on the merits of a claim founded upon violation of the Cooperative Mailing Rule, should have constituted a sufficient basis to allow reasonable discovery concerning the actuating motivation behind the investigation. The Postal Service did not refute the factual basis for ATA's discovery request, merely claiming that what ATA had alleged and proffered did not warrant any relief.

The Postal Service argued, and the district court appeared to agree, that there is nothing improper about an agency receiving advice about potential investigations from any source. While that may be so within certain bounds (*e.g.*, legality, ethics), the facts in this case raise a specter of possible impropriety, indicating that individual members of Congress having influence over the agency, or other government officials who regularly consult with the agency, may have commandeered the agency into doing their bidding, for the purpose of intimidating, harassing, or otherwise injuring their political opponents.

In SEC v. Wheeling-Pittsburgh, *supra*, the Third Circuit noted that enforcement of an administrative subpoena is a judicial decision, and that "federal courts have never lent their enforcement machinery to an executive branch investigative body in the manner of a rubber stamp," *id.*, 648 F.2d at 12. There, the court determined that the involvement of a U.S. Senator in initiating an agency investigation of a private company could lead to a conclusion of illicit purpose and bad faith underlying the issuance of administrative subpoenas. If an improper purpose is at the foundation of the investigation, discovery is one way to flesh out the relevant facts (*e.g.*, what role did the congressmen's complaints

have in initiating the investigation, what other instances of similar conduct have caused the Postal Service to attempt to apply the Cooperative Mailing Rule to educational letters and fundraising solicitations mailed by nonprofit organizations). If not, it may implicate an abuse of the federal courts' processes, for as the Third Circuit aptly pointed out:

> [a]n administrative agency that undertakes an extensive investigation at the insistence of a powerful United States senator "with no reasonable expectation" of proving a violation and then seeks federal court enforcement of its subpoena could be found to be using the judiciary for illicit purposes. [The Court] need not lend its processes … to aid such behavior. [*Id*.]

This case involves a government agency proceeding against a direct mail consulting company whose clients include advocacy groups engaged in core First Amendment activity through the mails, *see* Greenberg v. Bolger, 497 F. Supp. 756, 774 (E.D.N.Y. 1980), outspoken on public policy issues and often critical of big government. There is specific evidence that former Democratic Senator David Pryor of Arkansas launched diatribes and attacks against ATA and its nonprofit organizational clients. *See* Affidavit of Richard A. Viguerie, JA 197-198; ATA Mem. No. 1, pp. 17-23, and Exhibits 4 and 8-10, JA 189-195, and 205 and 291-295. What is not known is the connection between the Senator, or

any other government official, and the Postal Service investigation at issue in this case. Significant First Amendment freedoms are at stake, and any encroachment on those rights must be carefully scrutinized. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1977); Meyer v. Grant, 486 U.S. 414, 420, 425 (1987); Riley v. National Federation of the Blind, 487 U.S. 781 (1988); Spencer v. Herdesty, 571 F. Supp. 444, 451-52 (S.D. Ohio 1983). ATA raised multiple, specific, unusual facts with documents and allegations, sufficient to justify discovery to learn the Postal Service's possibly illegal motivation in pursuing the investigation against ATA. *See* ATA Mem. No. 1, pp. 17-23, JA 189-195; ATA Mem. in Support of Motion to Alter or Amend, pp. 19-24, JA 387-392. Given those facts and allegations, the district court should have permitted reasonable discovery of the relevant facts concerning the Postal Service's intent and motivation in proceeding against ATA.

CONCLUSION

The Postal Service's subpoenas should not have been enforced without the district court's independent assessment regarding the Postal Service's authority to issue subpoenas in support of what ATA believes is an illegal interpretation of

the Cooperative Mailing Rule, and this Court should either determine that issue now, in favor of ATA, or remand the case for an initial determination by the district court. Furthermore, the district court should have afforded ATA the opportunity to conduct discovery on the impetus and direction of the Postal Service investigation. Although its evidence of improper purpose at this stage of the proceeding is limited, ATA is entitled to inquire, through discovery, in order to find out whether it has been unfairly and illegally pursued. For these reasons, the district court's decision should be reversed, and the case should be remanded to the district court for discovery and a hearing on the purpose of the Postal Service's investigation.

REQUEST FOR ORAL ARGUMENT

Appellants, through their counsel respectfully request that they be heard on oral argument in this matter.

Respectfully submitted,

_____
WILLIAM J. OLSON

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

MARK J. FITZGIBBONS
Suite 400
9625 Surveyor Court
Manassas, VA 20110
(703) 392-7676

Counsel for Appellants
* *Lead Counsel*

ADDENDUM

1. Former 39 U.S.C. Section 4452

§ 4452. Postage Rates.

(a) Except as provided in subsection (c) of this section, and subject to the minimum charge per piece provided in subsection (b) of this section, the postage rates on third-class mail are as follows:

* * *

(b) Matter mailed in bulk under subsection (e) of this section is subject to a minimum charge for each piece of 2 5/8 cents when mailed subsequent to January 6, 1963 and prior to January 1, 1964, 2 6/8 cents when mailed during calendar year 1964, and 2 7/8 cents when mailed after December 31, 1964, except that the minimum charge per piece on such matter mailed by qualified nonprofit organizations is 1 1/4 cents.

(c) The pound rates on matter mailed in bulk under subsection (e) by qualified nonprofit organizations are 50 per centum of the pound rates provided by subsection (a).

(d) The term "qualified nonprofit organization" as used in this section means religious, educational, scientific, philanthropic, agricultural, labor, veterans, or fraternal organizations or associations not organized for profit and none of the net income of which inures to the benefit of any private stockholder or individual. Before being entitled to the preferential rates set out in this section, the organization or association shall furnish proof of its qualifications to the Postmaster General.

(e) Upon payment of a fee of $30 for each calendar year or portion thereof, any person may mail in the manner directed by the Postmaster General, separately addressed, identical pieces of third class mail in quantities of not less than fifty pounds or of not less than two hundred pieces subject to pound rates of postage applicable to the entire bulk mailed at one time.

[Pub.L. 86-682, Sept. 2, 1960, 74 Stat. 673; Pub.L. 87-646 § 12, Sept. 7, 1962, 76 Stat. 444; Pub.L. 87-793 § 107, Oct. 11, 1962, 76 Stat. 834.]

2. Former 39 U.S.C. Section 3626, as originally enacted

§ 3626. Reduced Rates.

If the rates of postage for any class of mail or kind of mailer under former sections 4358, 4421, 4422, 4452, or 4554 of this title as such rates existed on the effective date of this subchapter, are, on the effective date of the first rate decision under this subchapter affecting that class or kind, less than the rates established by such decision, a separate rate schedule shall be adopted for that class or kind effective each time rates are established or changed under this subchapter, with annual increases as nearly equal as practicable, so that—

(1) the revenues received from rates for mail under former sections 4358, 4452 (b) and (c), and 4554 (b) and (c) shall not, on and after the first day of the tenth year following the effective date of the first rate decision applicable to that class or kind, exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service): and

(2) the rates for mail under sections 4359, 4421, 4422, 4452 (a), and 4554(a) shall be equal, on and after the first day of the fifth year following the effective date of the first rate decision applicable to that class or kind, to the rates that would have been in effect for such mail if this subsection had not been enacted.

No person who would have been entitled to mail matter under former section 4359 of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates.

[Pub. L. 91-375, Aug. 12, 1970]

3. Current 39 U.S.C. Section 3626

§ 3626. Reduced rates.

(a)(1) Except as otherwise provided in this section, rates of postage for a class of mail or kind of mailer under former section 4358, 4452(b), or 4452(c) 4454(b), or 4454(c) of this title shall be established in accordance with the applicable provisions of this chapter.

(2) For the purpose of this subsection —

(A) the term "costs attributable", as used with respect to a class of mail or kind of mailer, means the direct and indirect postal costs attributable to such class of mail or kind of mailer (excluding any other costs of the Postal Service);

(B) the term "regular-rate category" means any class of mail or kind of mailer, other than a class or kind referred to in paragraph (3)(A) or section 2401(c); and

(C) the term "institutional-costs contribution", as used with respect to a class of mail or kind of mailer, means that portion of the estimated revenues to the Postal Service from such class of mail or kind of mailer which remains after subtracting an amount equal to the estimated costs attributable to such class of mail or kind of mailer.

(3)(A) Except as provided in paragraph (4) or (5), rates of postage for a class of mail or kind of mailer under former section 4358, 4452(b), 4452(c), 4554(b), or 4554(c) of this title shall be established in a manner such that the estimated revenues to be received by the Postal Service from such class of mail or kind of mailer shall be equal to the sum of —

(i) the estimated costs attributable to such class of mail or kind of mailer; and

(ii) the product derived by multiplying the estimated costs referred to in clause (i) by the applicable percentage under subparagraph (B).

(B) The applicable percentage for any class of mail or kind of mailer referred to in subparagraph (A) shall be the product derived by multiplying —

(i) the percentage which, for the most closely corresponding regular-rate category, the institutional-costs contribution for such category represents relative to the estimated costs attributable to such category of mail, times

(ii)(I) one-twelfth, for fiscal year 1994;

(II) one-sixth, for fiscal year 1995;

(III) one-fourth, for fiscal year 1996;

(IV) one-third, for fiscal year 1997;

(V) five-twelfths, for fiscal year 1998; and

(VI) one-half, for any fiscal year after fiscal year 1998.

(C) Temporary special authority to permit the timely implementation of the preceding provision of this paragraph is provided under section 3642.

(D) For purposes of establishing rates of postage under this subchapter for any of the classes of mail or kinds of mailers referred to in subparagraph (A), subclauses (I) through (V) of subparagraph (B)(ii) shall be deemed amended by striking the fraction specified in each such subclause and inserting “one-half”.

(4) the rates for the advertising portion of any mail matter under former section 4358(d) or 4358(e) of this title shall be equal to the rates for the advertising portion of the most closely corresponding regular-rate category of mail, except that if the advertising portion does not exceed 10 percent of the

issue of the publication involved, the advertising portion shall be subject to the same rates as apply to the nonadvertising portion.

(5) The rates for any advertising under former section 4358(f) of this title shall be equal to 75 percent of the rates for advertising contained in the most closely corresponding regular-rate category of mail.

(b)(1) For the purposes of this title, the term "periodical publications", as used in former section 4351 of this title, includes (A) any catalog or other course listing, including mail announcements of legal texts which are part of post-bar admission education issued by any institution of higher education or by a nonprofit organization engaged in continuing legal education; and (B) any looseleaf page or report (including any index, instruction for filing, table, or sectional identifier which is an integral part of such report) which is designed as part of a looseleaf reporting service concerning developments in the law or public policy.

(2) Any material described in paragraph (1) of this subsection shall qualify to be entered and mailed as second class mail in accordance with the applicable provisions of former section 4352 through former section 4357 of this title.

(3) For purposes of this subsection, the term "institution of higher education" has the meaning given it by section 101 of the Higher Education Act of 1965 [20 U.S.C.A. § 1001], and includes a nonprofit organization that coordinates a network of college-level courses that is sponsored primarily by nonprofit educational institutions for an older adult constituency.

(c) In the administration of this section, one conservation publication published by an agency of a State which is responsible for management and conservation of the fish or wildlife resources of such State shall be considered a publication of a qualified nonprofit organization which qualifies for rates of postage under former section 4358(d) of this title.

(d)(1) For purposes of this title, the term "agricultural", as used in former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, includes the art or

science of cultivating land, harvesting crops or marine resources, or raising of livestock.

(2) In the administration of this section, and for purposes of former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, agricultural organizations or associations shall include any organization or association which collects and disseminates information or materials relating to agricultural pursuits.

(e)(1) In the administration of this section, the rates for third-class mail matter mailed by a qualified political committee shall be the rates currently in effect under former section 4452 of this title for third-class mail matter mailed by a qualified nonprofit organization.

(2) For purposes of this subsection —

(A) the term "qualified political committee" means a national or State committee of a political party, the Republican and Democratic Senatorial Campaign Committees, the Democratic National Congressional Committee, and the National Republican Congressional Committee;

(B) the term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level; and

(C) the term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level.

(f) In the administration of this chapter, the rates for mail under former section 4358(g) of this title shall be established without regard to either the provisions of such former section 4358(g) or the provisions of this section.

(g)(1) In the administration of this section, the rates for mail under subsections (a), (b), and (c) of former section 4358 of this title shall not apply to an issue of a publication if the number of copies of such issue distributed within

the county of publication is less than the number equal to the sum of 50 percent of the total paid circulation of such issue plus one.

(2) Paragraph (1) of this subsection shall not apply to an issue of a publication if the total paid circulation of such issue is less than 10,000 copies.

(h) In the administration of this section, the number of copies of a subscription publication mailed to nonsubscribers during a calendar year at rates under subsections (a), (b), and (c) of former section 4358 of this title may not exceed 10 percent of the number of copies of such publication mailed at such rates to subscribers.

(i) Repealed. Pub.L. 103-123, Title VII, § 704(a)(3)(A), Oct. 28, 1993, 107 Stat. 1269

(j)(1) In the administration of this section, the rates for mail under former section 4452(b) or 4452(c) of this title shall not apply to mail which advertises, promotes, offers, or, for a fee or consideration, recommends, describes, or announces the availability of —

(A) any credit, debit, or charge card, or similar financial instrument or account, provided by or through an arrangement with any person or organization not authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title;

(B) any insurance policy, unless the organization which promotes the purchase of such policy is authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title, the policy is designed for and primarily promoted to the members, donors, supporters, or beneficiaries of the organization, and the coverage provided by the policy is not generally otherwise commercially available;

(C) any travel arrangement, unless the organization which promotes the arrangement is authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title, the travel contributes substantially (aside from the cultivation of members, donors, or supporters, or the

acquisition of income or funds) to one or more of the purposes which constitutes the basis for the organization's authorization to mail at such rates, and the arrangement is designed for and primarily promoted to the members, donors, supporters, or beneficiaries of the organization; or

(D) any product or service (other than any to which subparagraph (A), (B), or (C) relates), if —

(i) the sale of such product or the providing of such service is not substantially related (aside from the need, on the part of the organization promoting such product or service, for income or funds or the use it makes of the profits derived) to the exercise or performance by the organization of one or more of the purposes constituting the basis for the organization's authorization to mail at such rates; or

(ii) the mail matter involved is part of a cooperative mailing (as defined under regulations of the Postal Service) with any person or organization not authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title;

except that —

(I) any determination under clause (i) that a product or service is not substantially related to a particular purpose shall be made under regulations which shall be prescribed by the Postal Service and which shall be consistent with standards established by the Internal Revenue Service and the courts with respect to subsections (a) and (c) of section 513 of the Internal Revenue Code of 1986; and

(II) clause (i) shall not apply if the product involved is a periodical publication described in subsection (m)(2) (including a subscription to receive any such publication); and

(III) clause (i) shall not apply to space advertising in mail matter that otherwise qualifies for rates under former section 4452(b) or 4452(c) of this title, and satisfies the content requirements established by the Postal

Service for periodical publications: *Provided,* That such changes in law shall take effect immediately and shall stay in effect hereafter unless the Congress enacts legislation on this matter prior to October 1, 1995.

(2) Matter shall not be excluded from being mail at the rates for mail under former section 4452(b) or 4452(c) of this title, by an organization authorized to mail at those rates solely because —

(A) such matter contains, but is not primarily devoted to, acknowledgments of organizations or individuals who have made donations to the authorized organization; or

(B) such matter contains, but is not primarily devoted to, references to and a response card or other instructions for making inquiries concerning services or benefits available as a result of membership in the authorized organization: *Provided,* That advertising, promotional, or application materials specifically concerning such services or benefits are not included.

(3)(A) Upon request, an organization authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title shall furnish evidence to the Postal Service concerning the eligibility of any of its mail matter or mailings to be sent at those rates.

(B) The Postal Service shall establish procedures to carry out this paragraph, including procedures for mailer certification of compliance with the conditions specified in paragraph (1)(D) or subsection (m), as applicable, and verification of such compliance.

(k)(1) No person or organization shall mail, or cause to be mailed by contractual agreement or otherwise, at the rates for mail under former section 4452(b) or 4452(c) of this title, any matter to which those rates do not apply.

(2) The Postal Service may assess a postage deficiency in the amount of the unpaid postage against any person or organization which violates paragraph (1) of this subsection. This assessment shall be deemed the final decision of the Postal Service, unless the party against whom the deficiency is assessed appeals

it in writing within thirty days to the postmaster of the office where the mailing was entered. Such an appeal shall be considered by an official designated by the Postal Service, other than the postmaster of the office where the mailing was entered, who shall issue a decision as soon as practicable. This decision shall be deemed final unless the party against whom the deficiency was assessed appeals it in writing within thirty days to a further reviewing official designated by the Postal Service, who shall issue the final decision on the matter.

(3) The Postal Service shall maintain procedures for the prompt collection of postage deficiencies arising from the violation of paragraph (1) of this subsection, and may in its discretion, follow the issuance of a final decision regarding a deficiency under paragraph (2) of this subsection deduct the amount of that deficiency incurred during the previous 12 months from any postage accounts or other monies of the violator in its possession.

(l) In the administration of this section, the term "advertising", as used in former section 4358(j)(2) of this title, does not include the publisher's own advertising in a publication published by the official highway or development agency of a State.

(m)(1) In the administration of this section, the rates for mail under former section 4452(b) or 4452(c) of this title shall not apply to mail consisting of products, unless such products —

(A) were received by the organization as gifts or contributions; or

(B) are low cost articles (as defined by section 513(h)(2) of the Internal Revenue Code of 1986).

(2) Paragraph (1) shall not apply with respect to a periodical publication of a qualified nonprofit organization.

[Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 762; Pub.L. 93-328, Sec. 1, June 30, 1974, 88 Stat. 287; Pub.L. 94-421, Sec. 11, Sept. 24, 1976, 90 Stat. 1311; Pub.L. 95-593, Sec. 11(c), Nov. 4, 1978, 92 Stat. 2538; Pub.L. 99-272, title XV, Sec. 15102(b)(1), (c), 15104, 15105, Apr. 7, 1986, 100 Stat. 330, 331;

Pub.L. 99-509, title VI, Sec. 6003(a), Oct. 21, 1986, 100 Stat. 1933; Pub.L. 101-509, title II, Sec. 1(a), 3, Nov. 5, 1990, 104 Stat. 1397, 1399; Pub.L. 102-141, title II, Oct. 28, 1991, 105 Stat. 842, 843; Pub.L. 103-123, title VII, Sec. 704(a)(1), (3)(A), 705(a)-(c), 708(e), Oct. 28, 1993, 107 Stat. 1267, 1269, 1271, 1273; Pub.L. 103-329, title VI, Sec. 639, Sept. 30, 1994, 108 Stat. 2432; Pub.L. 104-255, Sec. 2, Oct. 9, 1996, 110 Stat. 3169; Pub.L. 105-244, title I, Sec. 102(a)(12), Oct. 7, 1998, 112 Stat. 1620.]

4. Domestic Mail Classification Schedule (39 CFR, Part 3001, Subpart C, Appendix A)

320 Description of Subclasses

* * *

321.4 **Nonprofit Subclass**

321.41 **General**. The Nonprofit subclass consists of Standard Mail * * * that is mailed by authorized nonprofit organizations or associations of the following types:

* * *

321.412 **Limitation on Authorization**. An organization authorized to mail at the nonprofit Standard rates for qualified nonprofit organizations may mail only its own matter at these rates. An organization may not delegate or lend the use of its permit to mail at nonprofit Standard rates to any other person, organization or association.

5. Domestic Mail Manual, Section E670.5.0

5.0 Eligible and Ineligible Matter

5.1 Organization's Own Mail

An organization authorized to mail at the Nonprofit Standard Mail rates may mail only its own matter at those rates. An authorized organization may not delegate or lend the use of its authorization to mail at the Nonprofit Standard Mail rates to any other person or organization.

5.2 Ineligible Matter

No person or organization may mail, or cause to be mailed by contractual agreement or otherwise, any ineligible matter at the Nonprofit Standard Mail rates.

5.3 Cooperative Mailing

A cooperative mailing may be made at the Nonprofit Standard Mail rates only when each of the cooperating organizations is individually authorized to mail at the Nonprofit Standard Mail rates at the post office where the mailing is deposited. A cooperative mailing involving the mailing of any matter on behalf of or produced for an organization not itself authorized to mail at the Nonprofit Standard Mail rates at the post office where the mailing is deposited must be paid at the applicable Regular or Enhanced Carrier Route Standard Mail rates. The mailer may appeal the decision under G020.

* * *

6. USPS Publication 417 (October 1996) Chapter 5, §§ 5-1 through 5-3

5-1 **Overview**

A cooperative mailing is a mailing produced by an authorized organization that "cooperates" with one or more organizations to share the cost, risk, or benefit of the mailing. Cooperative mailings may not be entered at the Nonprofit Standard Mail rates unless all cooperating organizations are authorized to mail at these rates at the post office of mailing.

Furthermore, the cooperative mail rule prevents authorized organizations from sharing their authorizations with others who are not authorized. The rule restricts Nonprofit Standard Mail mailings to the authorized organizations' own mail.

5-2 **Eligible Mailings**

5-2.1 Eligibility Factors

For determining whether a mailing is eligible for the Nonprofit Standard Mail rates, the Postal Service evaluates the answers to these questions:

- Who devised, designed, and paid for the mailpiece?
- Who paid the postage on the mailing, either directly or indirectly?
- How are the profits and revenues divided from the mailing or an enterprise it supports?
- What risks are entailed with the mailing or with an enterprise it supports and who bears these risks?
- Who makes managerial decisions about the content of the mailing or the enterprise it supports?
- What are the participants' intentions and interests?

5-2.2 Commercial Mailing Agent

An authorized organization may use a commercial mailing agent (or other unauthorized entity) if the organization can show that the relationship is a legitimate principal-agent relationship. If a question arises whether a mailing is eligible for the Nonprofit

Standard Mail rates, the authorized organization must provide, on request, documentation of the relationship that includes all contracts between the organization and other parties to the mailing.

Examples - Acceptable principal-agent relationships

- Authorized university U enters into an agreement with agent A (a for-profit company) to handle university U's conference. Agent A's sole function is to plan and mange the conference. For this function, agent A receives $1,500 (a fixed payment that is consistent with the amount agents typically receive for such services in that city). Agent A enters mailings for university U that are acceptable at the Nonprofit Standard Mail rates. Although the arrangement with agent A is acceptable, arrangements with others might make the mailing an improper cooperative mailing.

- Authorized organization O hires commercial mailing agent C at a fixed fee to print and mail organization O's newsletter at the Nonprofit Standard Mail rates. Organization O's name and return address appear on the envelope containing the newsletter. The envelope shows agent C's permit imprint number (identified with "Nonprofit Organization," "U.S. Postage Paid," etc.). This arrangement is considered an acceptable principal-agent relationship.

5-3 **Ineligible Mailings**

Mail matter associated with joint enterprises between an authorized organization and a commercial enterprise (or other unauthorized mailer) is ineligible for the Nonprofit Standard Mail rates.

Typically, ineligible cooperative mailings are arranged as follows:

- Both parties contribute something to the mailing:
  1. A list of names and use of the Nonprofit Standard Mail authorization by the authorized organization.
  – Payment of printing or mailing costs by the commercial enterprise.
- Both parties take something out of the mailing (a share of the proceeds or profits).

Example - Ineligible cooperative mailing

- Authorized organization B and grocery store G agree to prepare mailpieces for distribution to organization B's members. Organization B provides its membership list and uses its Nonprofit Standard Mail authorization to enter the mailpieces at the Nonprofit Standard Mail rates. Grocery store G pays the postage and donates to organization B two percent of the sales to organization B's membership during a 1-year period. Because grocery store G pays the cost of the mailing and benefits accrue to it, this improper cooperative mailing is ineligible for the Nonprofit Standard Mail rates.

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief for Appellants American Target Advertising, Inc., *et al*. was served, this 29th day of June, 2000, by depositing copies thereof in the United States mail, First-Class, postage prepaid, addressed to counsel for the appellee, as follows:

Gerard J. Mene, Esquire
Assistant U.S. Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314

and

Colette G. Matzzie, Esquire
Appellate Section, Civil Division
United States Department of Justice
601 D Street, N.W., Room 9121
Washington, D.C. 20530

_____
John S. Miles