

No. 00-1384

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**In The  
United States Court of Appeals  
for the Fourth Circuit**

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UNITED STATES OF AMERICA,

*Appellee,*

v.

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

*Appellants.*

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

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**REPLY BRIEF FOR APPELLANTS**

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## ARGUMENT

### I. THRESHOLD ISSUES.

#### A. This Court Should Determine Whether the Subpoenas Were Issued for an Improper Purpose.

The appellants, American Target Advertising, Inc., *et al.* (hereinafter collectively referred to as “ATA”) have consistently opposed the Postal Service’s subpoenas on the ground that they were issued for an improper purpose — assessment of a revenue deficiency for an alleged violation of the Cooperative Mailing Rule. This is a legal question that goes to the heart of the Postal Service’s authority to issue the subpoenas, and it is one that cannot be avoided simply by reciting the general rules applicable in subpoena enforcement cases. *See, e.g.*, Appellee’s Brief, pp. 21-23. The underlying facts concerning both the nature of the mailings by ATA’s nonprofit clients (advocacy and fundraising) and the purpose of the subpoenas are undisputed, and the question is one of law.

ATA is not trying to circumvent the rules applicable to subpoena enforcement actions by arguing facts showing that no violation occurred, as the Government suggests. *See* Appellee’s Brief, p. 7 (characterizing ATA’s objection to enforcement as being based on the fact that “the Postal Service would not be able to prove violations of the Cooperative Mail Rule”). ATA’s

position is, and consistently has been, that the Cooperative Mailing Rule, as a matter of law, cannot apply to the mailings by ATA's clients authorized to mail at nonprofit rates, because those mailings dealt exclusively with those organizations' own advocacy programs and fundraising effort and did not involve the sale of products or services. *See, e.g.*, J.A. 180-189; Brief for Appellants, pp. 27-29. ATA submits that the Postal Service's attempt to apply the Cooperative Mailing Rule to such mailings is contrary to law. The Postal Service cannot proceed on the theory that the mailings reflected an impermissible "cooperative enterprise" (Appellee's Brief, p. 5) with their nonprofit clients simply because ATA bore a financial risk in assisting their nonprofit clients in producing the mailings. This would be a complete perversion of the Cooperative Mailing Rule established by the Postal Service in the mid-1970's, and is contrary to the intent of Congress in authorizing nonprofits to mail at reduced postal rates. Surely, if Appellants are correct that the Postal Service cannot disqualify pure advocacy and fundraising mailings from paying nonprofit rates, there is no legitimate foundation for issuance of the subpoenas — under the undisputed facts of this case — and the subpoenas should not be enforced.

Stated another way, if the Postal Service’s interpretation of the Cooperative Mailing Rule were wrong as a matter of law, there could be no valid purpose justifying the subpoenas issued to ATA. If this Court had previously determined that the Cooperative Mailing Rule does not apply to the advocacy and fundraising mailings of qualified nonprofit organizations where the mailings do not advertise products or services, the subpoenas clearly would not be enforceable. Resolution of the legal question, therefore, is not an irrelevancy as the government contends, but is critical to the enforcement of the subpoenas. It cannot be avoided on the theory that the normal procedures applicable to subpoena enforcement actions preclude looking into the stated purpose of the subpoenas.

Indeed, resolution at this time of the legal question concerning the validity of the purpose behind the Postal Service’s subpoenas is consistent with federal law governing subpoena enforcement cases, including the law of this Circuit. *See* Section II. B., *infra*. ATA profoundly disagrees that this is a “comply now, challenge later” case (*see* Appellee’s Brief, p. 21). Rather, the legal question of the Postal Service’s unlawful interpretation of the Cooperative Mailing Rule

should be resolved prior to ordering compliance with subpoenas based upon that interpretation.

**B. Standard of Review.**

The Government has taken issue with ATA's assertion that plenary, *de novo* review is appropriate in this case. *See* Brief for Appellants, p. 13; Appellee's Brief, pp. 10 – 11. The district court's enforcement order in this case was premised not upon fact finding, but rather upon what ATA asserted was an improper conclusion of law, and that matter should therefore receive *de novo* review. Certainly, *de novo* review is required with respect to resolution of the questions concerning the correct interpretation of the applicable statutes (5 U.S.C. app. 3, §§ 4, 8; 39 U.S.C. § 202(e); and 39 U.S.C. § 3626), *see* United States v. Coyle, 943 F.2d 424, 426 (4<sup>th</sup> Cir. 1991), and the denial to ATA of Fourth Amendment protection is also justification for such review. *See* Bose Corporation v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984); Niemotko v. Maryland, 340 U.S. 268, 271 (1951). ATA agrees that the district court's order denying discovery is subject to review for clear error.

**II. THE GOVERNMENT HAS NOT SHOWN THAT THE POSTAL SERVICE'S SUBPOENAS WERE ISSUED UNDER LAWFUL AUTHORITY AND FOR LAWFUL PURPOSES.**

**A. The Postal Service Lacked Authority to Issue the Subpoenas.**

**1. The Government's Waiver Claim.** ATA has asserted that the **Postal Inspection Service** lacked authority to issue the subpoenas because such authority is held by the **Postal Service's Inspector General** as mandated by Congress, and the Government has failed to demonstrate legal authority for issuance of the subpoenas by the Postal Inspection Service. Brief for Appellants, pp. 14-16. The Government objected to this assertion of the Postal Inspection Service's lack of statutory authority because the issue was raised for the first time in Appellants' Brief. *See* Appellee's Brief, p. 12. ATA submits that the issue is properly before this Court, and should be considered and resolved in the interests of justice.

Generally, appellate courts are given discretion to hear matters raised for the first time on appeal. *See* 28 U.S.C. § 2106. Indeed, certain issues related to jurisdiction and equity may be sufficiently important to be raised by the appellate court, *sua sponte*. Schlesinger v. Councilman, 420 U.S. 738, 743

(1975). But in this case, there are even stronger reasons for this Court to decide the issue of authority.

In this case, the Government filed a Petition for Summary Enforcement, asserting the statutory basis for the Inspector General's authority to investigate certain matters and issue subpoenas, as well as a regulation (39 CFR § 224.3(c)) delegating such authority to the Postal Service's Inspection Service. Such delegation occurred prior to 1996, when there was no Inspector General for the Postal Service, and the powers of an Inspector General were bestowed on the Chief Postal Inspector. What the Government did not reveal in its Petition, however, was that the regulation delegating such authority had expired, as explained below. The allegations concerning the Inspection Service's authority were not admitted by ATA in the district court, although ATA had not discovered the error or misrepresentation in the Government's Petition concerning the effectiveness of the delegation regulation (39 CFR § 224.3(c)) and thus did not expressly raise that issue at that time. Research on appeal revealed that the delegation relied on by the Postal Inspection Service had been terminated by statute, and the appellants properly raised the issue on appeal. Brief for Appellants pp. 14-16. The Government has filed with this Court a

motion to supplement the record to introduce a document purporting to show that the Inspection Service nevertheless had the required authority to issue the subpoenas,<sup>1</sup> but now argues that ATA has waived any right to present the issue to this Court. ATA respectfully disagrees.

The Government has failed to explain how justice would be served by refusing to consider the issue raised by ATA, and the cases cited by the Government do not support the harsh position advocated by the Government in this case. All three cases relied upon by the Government are criminal cases involving an attempt by the convicted individuals to assert a defense on appeal that had not been raised in the trial court. Those situations are quite different from the circumstances of this case, where the Government filed a pleading citing erroneous legal authority. Furthermore, each of the cases relied upon by the Government helpfully reaffirms exceptions to the general rule that certain issues not raised in the trial court may be considered waived. *See* United States v. Lipford, 203 F.3d 259, 271 (4<sup>th</sup> Cir. 2000) (plain error exception); United States v. Bell, 5 F.3d 64, 67 (4<sup>th</sup> Cir. 1993) (various exceptions, including blatant

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<sup>1</sup> ATA also has opposed the Government's motion because the document sought to be introduced into the record raises more questions than it answers. *See* Appellants' Opposition to Appellee's Motion to Supplement the Record herein; *see also* pages 9-10, *infra*.

error resulting in serious injustice if uncorrected); United States v. Davis, 954 F.2d 182, 187 (4<sup>th</sup> Cir. 1992) (to prevent manifest injustice).

The federal courts are in agreement that the courts of appeal have the power “where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon” by the trial court. Morgan v. Garris, 307 F.2d 179, 180 (D.C. Cir. 1962). An appellate court may hear an issue raised for the first time “when the appellate court feels it must resolve a question of law to prevent miscarriage of justice.” Sussman v. Patterson, 108 F.3d 1206, 1210 (10<sup>th</sup> Cir. 1997). This is especially so when the question is one of law. *Id.* In the present matter, ATA has raised an important issue — that the Postal Inspection Service lacked legal authority to issue the very subpoenas that it seeks to enforce. The statute governing the issuance of the subpoenas — on which the Postal Inspection Service claims it relied to issue the subpoenas — lacks any apparent basis for the Postal Inspection Service to assert such jurisdiction or authority. This lack of statutory authority also raises important due process implications. *See* United States v. Wiley, 517 F.2d 1212, 1218 (D.C. Cir. 1975) (28 U.S.C. § 2106 “permits and indeed counsels protection of

sound and substantial interests ... even when they do not arise to the level of constitutional protections”).

The issue concerning the Government’s lack of authority arose because of the Government’s pleading, which misled ATA and may have misled the district court. Clearly, this is not a case where the appellants, having discovered the Government’s error, should be precluded from raising the issue now. It is proper and just that this Court determine whether, as a matter of law, the Postal Inspection Service had authority to issue the subpoenas to ATA.<sup>2</sup>

**2. The Government’s Attempt to Supplement the Record.** As discussed above, ATA has questioned whether the Postal Inspection Service had general authority to issue the subpoenas in light of the Inspector General Act of 1978 and 1997 appointment of an Inspector General (the “I.G.”) by the Postal Service Board of Governors pursuant to section 662 of Public Law 104-208.

Brief for Appellants, pp. 14 – 16. Seeking to supplement the record herein, the Government has produced for the first time a document identified as an Interim

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<sup>2</sup> If there were no authority to issue the subpoenas, the decision below should be reversed and the case dismissed. This would further support ATA’s claim raised in the district court that the subpoenas may have been illegally issued. Discovery as to the reasons for issuance of the subpoenas would be necessary to determine to what extent the Postal Inspection Service may have abused the court’s processes.

Memorandum of Understanding Between the Chief Postal Inspector and the I.G. (the "Interim MOU"), dated January 8, 1997. ATA opposed that motion for the reasons set forth in the Opposition filed with this Court, and principally because the Interim MOU, if it were to be added to the record, raises significant issues that would need further exploration.

The Interim MOU purports to be a transitional delegation of authority from the I.G. to the Postal Inspection Service. That transitional delegation occurred approximately one year before the issuance of the subpoenas at issue, so it remains to be explored, at a minimum, whether that transitional delegation had terminated prior to the issuance of the subpoenas. The Interim MOU also raises due process questions as to whether a specific grant of authority by Congress to an Inspector General may be delegated by the I.G. to anyone the I.G. chooses. Another question is whether the Congress intended the I.G. to be able to delegate such authority, when the effect of the Interim MOU was to undo Congress' express termination of the Chief Postal Inspector's authority to exercise the powers of an I.G. *See* 39 U.S.C. § 201, note 1. There is no indication whether this delegation of authority was promulgated in any way, and the Interim MOU appears as a somewhat clandestine agreement for the transference of I.G.

authority to issue subpoenas and engage in other matters protected by the Fourth Amendment to the United States Constitution.

Given the questions of fact created by the interjection of the Interim MOU, together with the Government's failure to explain this matter fully, and for the additional reasons set forth in the Appellants' Opposition to the Government's Motion, appellants urge that the question of the Postal Service Inspection Service's authority be decided on the current state of the record.

**B. The Postal Service Lacked Legitimate Purpose for the Subpoenas.**

**1. The Postal Service's Lack of Authority is a Legal Issue.** The fundamental substantive issue in this case involves whether an agency may lawfully issue a subpoena if the potential charge, which forms the basis for issuing the subpoena, is invalid as a matter of law. The Government, taking the same tack that government takes in virtually every subpoena case of record, recites the well-known rules generally applicable to enforcing administrative subpoenas.<sup>3</sup> See Appellee's Brief, pp. 21-26. ATA has recognized those

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<sup>3</sup> It is not even clear that the Postal Service should be treated as an ordinary government agency, as its governmental character is the subject of considerable controversy. The Postal Reorganization Act, 39 U.S.C. § 201, used an unique and unintelligible phrase to describe the Postal Service as an "independent establishment of the executive branch of the Government of the

(continued...)

authorities, which the district court apparently believed it was following, but has demonstrated their inapplicability. *See* Brief for Appellants, pp. 36-45. ATA

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<sup>3</sup>(...continued)  
United States ....”

Postmaster General William Henderson has publicly stated that the “Postal Service ‘needs to be deregulated, commercialized.’” Randolph E. Schmid, Associated Press Writer, “Postmaster General Says Mail Monopoly Won't Last Forever,” AP Online, 09-01-1998. Furthermore, General Henderson later observed: “I think the Postal Service ultimately will be commercialized.” Schmid, “Post Office Commercialization Seen,” AP Online, 05-16-2000. This trend to commercialization leads to complications when the Postal Service seeks to exercise federal law enforcement powers. This anomaly has not escaped notice by Congress.

On July 25, 2000, the House Committee on Government Reform, Subcommittee on the Postal Service, held a hearing to address the appropriateness of the Postal Service’s exercise of such law enforcement powers in light of its efforts to distance itself from its status as a governmental entity. Subcommittee Chairman John M. McHugh (R-NY) observed that the Postal Service “is still very much a part of the federal government, yet it competes with private companies that do not enjoy the luxury of an in-house federal police force.” He stated that, “[w]e would never imagine giving Microsoft law enforcement authority over their e-commerce products,” and added, “[p]erhaps we should also question the wisdom of giving the Postal Service that same power.” *The McHugh Report*, July 24, 2000, [http://www.house.gov/apps/list/press/ny24\\_mchugh/Pr72400postalhearing.htm](http://www.house.gov/apps/list/press/ny24_mchugh/Pr72400postalhearing.htm).

Even the Inspector General acknowledges the difference between a federal agency and the Postal Service in question and answer format. “Does the Postal Service have to follow Federal Government laws and rules like other agencies? No. Except for certain laws and regulations expressly made applicable to the Postal Service, most federal laws of government-wide applicability do not apply to the Postal Service. This permits the Postal Service, and independent establishment of the executive branch, to operate in a business-like manner.” Office of Inspector General Semiannual Report to Congress, April 1, 1999 - September 30, 1999, p. 8.

believes that the cases cited by the Government — to demonstrate that once the Government makes a showing concerning its authority to investigate, absent irrelevant or overbroad requests, the Government’s subpoenas must be enforced — are not directly on point, because this case involves an additional element. In this case, ATA has put into issue the Postal Service’s authority to issue its subpoenas for an illegal purpose, which is a question of law. The answer to that question, it is submitted, governs the issue of whether the Postal Service’s subpoenas should be enforced.

It is important to note that ATA is not claiming, as the Government suggests (*see Appellee’s Brief*, pp. 7, 23-24), that ATA is entitled to litigate the merits of a revenue deficiency claim at this stage of the proceeding. The issue concerns the Postal Service’s ability to pursue its record-gathering activities by subpoena where the undisputed purpose behind the subpoenas is to make a revenue deficiency assessment based upon the Postal Service’s interpretation of the Cooperative Mailing Rule. ATA submits that if that interpretation is unlawful, the subpoenas should not be enforced.

**2. The Subpoenas Should Not be Enforced if the Postal Service’s Underlying Purpose is Unlawful.** The Government argues that ATA

is mistaken in its belief that the district court erred by failing to determine whether the Postal Service's subpoenas would serve an unlawful purpose. According to the Government, an agency only need assert "a valid basis for the investigation in its statutory authority." Appellee's Brief, p. 22. That is not the rule, however, where the subpoenas were issued for an unlawful purpose. The law is clear that subpoenas will not be enforced where the purpose behind issuance of the subpoena cannot be sustained. In EEOC v. Ocean City Police Department, 820 F.2d 1378 (4<sup>th</sup> Cir. 1987), *vacated and remanded on other grounds*, 486 U.S. 1019 (1988), for example, it was determined that a subpoena for records that could not possibly serve as the basis for any charge of statutory violation should not be enforced:

if no action can be taken on the charge [which forms the basis for issuing the administrative subpoena], there is no justification for an investigation absorbing the resources of both [the subpoenaed party and the agency]. It would be anomalous to hold that a charge that was invalid to support an action was nevertheless valid to support investigation, the sole purpose of which is preparation for the action. [*Id.*, at 1380.]

That same rationale should obtain in this case. "Ordinary logic indicates that it is beyond the authority of [an agency] to investigate charges which cannot be pursued." *Id.*

As in Ocean City Police Department, *supra*, the question in this case is purely legal, for the relevant facts are undisputed with regard to the subpoenas sought to be enforced. It is undisputed that: (1) the subpoenas were issued to enforce a purported violation by ATA of the Cooperative Mailing Rule (“CMR”) because of its contractual relationship with its nonprofit clients authorized to mail at the nonprofit rates; (2) ATA is a direct marketing agency that assists its nonprofit clients in the preparation of the clients’ mail; (3) such mail merely advocated the public policy positions of the nonprofit clients and sought to raise voluntary contributions for such clients; and (4) the mail did not advertise or promote any products or services. Thus, ATA has argued that, as a matter of law, the CMR may not be applied to assess a revenue deficiency against ATA with respect to its nonprofit clients’ mailings. “[A] party can challenge the authority of an agency to issue a particular subpoena where ... the issue involved is strictly one not involving the agency’s expertise or *any factual determinations*.” *Id.*, at 1381 (citation omitted, emphasis in original). Where the question, as here, is merely one of law, courts must examine the preliminary issue of whether the subpoenas are issued to enforce a law. *See also Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490 (7<sup>th</sup> Cir. 1993) (Labor Department’s

subpoenas directed against Indian Fish & Wildlife Commission seeking evidence that the Commission was violating the Fair Labor Standards Act not enforceable because, as a matter of law, the Commission was not subject to the Act).

The district court and the Government have erred in their assumption that, merely because investigation of mail matter is within the purview of the agency, the Postal Service has jurisdiction or authority to issue the subpoenas. In FEC v. Florida for Kennedy Committee, 681 F.2d 1281 (11<sup>th</sup> Cir. 1982), the Federal Election Commission (“FEC”) made virtually the same “comply now, challenge later” argument that the Government is advancing in this case, and lost. The FEC was attempting to enforce a subpoena directed to a draft-a-candidate committee, as part of an investigation of potential violations of federal campaign laws. In denying enforcement despite the FEC’s invocation of the general rule applicable in administrative subpoena enforcement actions, the Eleventh Circuit stated that, “[i]n granting the exclusive power to enforce administrative subpoenas to the federal courts, Congress manifested its intention that the courts exercise independent judgment in evaluating agency subpoenas.” *Id.*, at 1284. This is especially so when the activities being investigated have First Amendment implications (*id.*) as they clearly do in the present case. *See J.A.*, at 187-189;

389–391. Where the agency’s “authority to issue this subpoena can be determined without reference to any further factual development ... the only issue left to be resolved is purely a legal question of statutory construction.” *Id.*, at 1285 – 1286.

At issue in the Florida for Kennedy case was whether the disclosure requirements of the Federal Election Campaign Act of 1971 applied to draft committees. At issue in the present matter is whether the CMR applies to direct mail agencies where the mail matter was advocacy and fundraising for a nonprofit organization, and contained no advertisements of products or services. As explained in the Brief for Appellants (pages 17-33), and as further addressed in Section III, below, the answer is “no.” And as the Fourth Circuit has stated in denying enforcement of such a subpoena under such circumstances, “[n]othing is to be gained from enforcing the subpoena at issue here” (Ocean City Police Department, 820 F.2d, at 1382), because an agency “subpoena may be enforced only if the underlying charge is valid.” *Id.*, at 1380.

### **III. THE POSTAL SERVICE'S INTERPRETATION OF THE COOPERATIVE MAILING RULE IS WRONG AS A MATTER OF LAW.**

#### **A. The Controlling Statute Demonstrates That, as a Matter of Law, the Cooperative Mailing Rule Does Not Apply.**

ATA's initial brief herein addresses the statutory arguments demonstrating that the Cooperative Mailing Rule simply does not apply where the mailings of an authorized nonprofit permit holder only contain its own matter. Brief for Appellants, pp. 17-33. The Government, disagreeing, simply argues that the Postal Service's newly created interpretation of the Cooperative Mailing Rule is a permissible agency effort to interpret an ambiguous statute. Appellee's Brief, pp. 26-32. In fact, however, the governing statute, 39 U.S.C. § 3626, is not ambiguous regarding authorization of a qualified organization to mail its "own matter," and the statute is not reasonably capable of the Postal Service's interpretation.

To the best of ATA's knowledge, the term "cooperative mailing" is used in one statute, and one statute only, 36 U.S.C. §3626(j)(1)(D)(ii), which was added by Public Law 103-123 in 1993. There should be no ambiguity regarding how Congress intended the CMR to apply. Section 3626(j)(1) provides that certain mailings are ineligible for the reduced nonprofit rates. Section 3626(j)(1)

applies only to “mail which advertises, promotes, offers, or, for a fee or consideration, recommends, describes, or announces the availability” (hereinafter, “advertise”) of certain products or services more fully identified in subparagraphs (A) through (D) of 3626(j)(1). Subparagraph (D) provides that the nonprofit rates may not be used to advertise “any product or service” that meets certain criteria. One of the criteria of the “product or service” that may not be advertised at nonprofit rates is when “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 nonprofit rates.

Thus, the only statutory application of the CMR relates to mailings that advertise a product or service, which is consistent with ATA’s argument that the CMR applies only to mail matter that advertises products or services.

**B. The Postal Service’s Interpretation of the Cooperative Mail Rule is Unreasonable.**

ATA re-emphasizes, in light of the arguments in the Appellee’s Brief (pages 26-32), that the Government is advancing an interpretation of the Cooperative Mailing Rule that does not remotely resemble either the statute or the regulation. The Government readily admits that the CMR regulation is found in the Domestic Mail Manual (“DMM”). Appellee’s Brief, p. 4. The only

section of the DMM describing the CMR is entitled “Cooperative Mailing,” found at section E670.5.3. It reads as follows:

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. [Brief for Appellants, A-13.]

The three sections of the DMM immediately following the definition of “Cooperative Mailing” deal with letters that advertise products and services. Nowhere in the DMM does the Postal regulation support the almost limitless interpretation of the CMR that the Government advances in its Brief.

The regulation that the Congress cites in the controlling statute — 39 U.S.C. section 3626 — is found in the DMM, and that is the regulation that Congress intended to govern cooperative mailings. That regulation requires that the review begin with the “matter” being mailed, and clearly contemplates mail matter pertaining to two different organizations. The mail matter at issue in this case pertains to advocacy programs and fundraising of ATA’s nonprofit clients, which are authorized to mail at the nonprofit rates. The Postal Service’s attempt

to stretch the Cooperative Mailing Rule to preclude use of the nonprofit rate for such mailings is contrary to the language of the regulation, and is unreasonable.

**C. The Government Misuses the Term “Cooperative Enterprise.”**

The Government ignores the plain language of the CMR and claims that the CMR forbids the mailing of otherwise perfectly legitimate nonprofit matter, if that mail matter is the product of a “cooperative enterprise” between a nonprofit organization and a for-profit entity (direct mail agencies such as ATA tending to be for-profit entities). But it has offered no legal authority defining “cooperative enterprise” or other related terms.<sup>4</sup> Without citing any authority, the Government states that “the inclusion of unauthorized parties or principals in the venture would disqualify the mail from being posted at the Nonprofit Mail rate.” Appellee’s Brief, p. 5.

The concept of a “cooperative enterprise” appears in the legislative history of 39 U.S.C. section 3626 solely in relation to a proposal to eliminate advertising of products at the nonprofit rates. J.A., at 404–405. That proposal was raised by the Postal Service simultaneously with unsuccessful proposals to eliminate the

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<sup>4</sup> The Government also uses the term “impermissible cooperative ventures.” *E.g.*, Appellee’s Brief, p. 7.

reduced nonprofit rates altogether, and to eliminate nonprofit rates for advocacy mailings. For several years running, the Postal Service advanced such proposals. J.A., at 407 (the 1991 legislative history); and J.A., at 426 (1993 legislative history). Postmaster General Frank, in addressing the proper use of nonprofit rates, acknowledged that the Postal Service was “right at the edge where [it has] some legal difficulties in changing their regulations [and to do so, they] really need legislation.” J.A., at 410. This appears to be an admission that the Postal Service could not go further than Congress had provided with respect to perceived abuses of the nonprofit rates.

The only discussions of cooperative mailings before Congress of which ATA is aware arose in the context of commercial enterprises using the reduced rates for advertising. *See, e.g.*, J.A., 410–411. According to then Postmaster General Frank, the perceived abuse was that “relatively few commercial enterprises [were] working with relatively many nonprofit enterprises to mail out commercial products and services under the preferred rates,” J.A., at 411. According to Mr. Hughes testifying for the Postal Service, it was necessary to look at contracts and financial arrangements only when commercial products were being advertised and where a nonprofit and a commercial entity shared

participation in the mailing of advertisements. J.A., at 411-412. The 1991 discussion of cooperative mailings clearly applies only to mail matter that promotes or advertises products or services, and not to direct mail agencies that help prepare the advocacy and fundraising mail. See J.A., at 412-413, under “Legislative Alternatives” proposed by the Postal Service. In 1993, the Postal Service continued to ask Congress to eliminate the reduced rates for nonprofit mailings, but did not propose that there was a cooperative mailing problem with direct mail agencies. J.A., 426-427, which is part of the “Suggestions for Reform of Revenue Foregone” beginning at J.A. 424.

A reading of the legislative history demonstrates that the Postal Service and the Congress addressed the concept of cooperative mailings only with respect to advertising of goods and services, not in relation to the Postal Service’s proposal to eliminate the nonprofit rates for advocacy mailings. The Congress accepted the Postal Service’s recommendation to apply the CMR to advertising, but chose not to limit in any way the mailing of advocacy letters, or fundraising by advocacy groups. The inescapable conclusion, then, is that the Congress intended to apply the CMR only to advertising of products and services.

Thus, the legislative history demonstrates that the use of the CMR was confined to advertisements. The concern that Congress addressed by specific legislation was not the mailing of fundraising and advocacy letters which relied on third parties, but the use of nonprofit rates in a commercial enterprise to mail advertising “matter” of commercial entities through cooperative arrangements with nonprofit organizations.

Having chosen to refine the scope of applicability of the nonprofit rates to certain mail matter, it is not for the Postal Service to expand its authority beyond that indicated in Congress’ legislative amendments to 39 U.S.C. § 3626. As the Supreme Court recently ruled:

At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The “classical judicial task of reconciling many laws over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” United States v. Fausto, 484 U.S., at 453. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we have recognized recently in United States v. Estate of Romani, “*a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended.*” [Food and Drug Administration v. Brown & Williamson Tobacco Corp., \_\_\_ U.S. \_\_\_, 120 S.Ct. 1291, 1306 (2000), emphasis in original.]

By adding subsection (D) to section 3626(j)(1), Congress created a distinct regulatory scheme under which the CMR, as defined by postal *regulation*, was to be applied in the instances where the mail matter advertised products or services. The legislative history confirms that Congress accepted the recommendation of the Postal Service to make certain advertisements of products and services subject to the CMR, but not the mailings of matter that merely advocates and asks for voluntary contributions. “[A]n administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” Food and Drug Administration v. Brown & Williamson Tobacco Corp., *supra*, \_\_\_ U.S. at \_\_\_, 120 S.Ct. at 1315.

There is no support in either the statute, the regulation or the legislative history, for the idea that the CMR should apply to a direct mail agency that provides vital services to a nonprofit organization with regard to mailing matter to advocate and raise funds for that nonprofit organization, where the mail matter is solely that of the authorized nonprofit organization. By attempting to apply the CMR to purely advocacy and fundraising letters, the Postal Service has gone beyond its authority and may be attempting to end run Congress’ rejection of the Postal Service’s proposal in 1993.

**D. The Subpoenaed Business Records Sought by the Postal Service in this Case Are Clearly Irrelevant to Any Legitimate Purpose.**

Although the Postal Service has attempted to justify its subpoenas as part of a legitimate investigation, they really have been issued in an attempt to obtain further confirmation of the facts on which they assert the Cooperative Mailing Rule has been violated as well as the financial data on which to base a revenue deficiency. There is no dispute about what the Postal Service is attempting to do. It has admitted, for example, that it had reviewed the contracts between ATA and the three nonprofit clients before the subpoenas were issued.

Appellee's Brief, p. 7. And it has admitted that its Law Department has already determined that the mailings were violative of the Cooperative Mailing Rule.

J.A. 29-31. *See* Appellee's Brief, p. 7. The Government makes much of its perceived need to examine the precise business arrangements between direct marketing agencies and their nonprofit organization clients, to determine whether the bargained compensation-for-services is within industry standards. But the contracts are irrelevant unless the Government were to assert that the mail matter appears on its face to potentially violate the CMR. It is only then that the contracts become relevant, as both the legislative history recited above and the Expert Witness Report of Harvey Altergott (J.A. 251-290) clearly demonstrate.

In reality, the Government's position is merely a thinly-veiled attempt to determine the reasonableness of the direct marketing agency's fees. Such an attempt to regulate fundraising contracts would tend to chill First Amendment activities of nonprofit organizations that have a myriad set of goals with regard to their selection of direct mail consulting agencies. See Riley v. National Federation of the Blind, 487 U.S. 781, 791-794 (1988). Moreover, it would discriminate against smaller and newer nonprofit organizations that use direct mail agencies, such as ATA, to assist them with both the creation and production of the nonprofit mail. Many larger, well-established nonprofit organizations have the resources to have their own experts on staff in this area. But new organizations, or those that lack the resources to have such experts on staff, must use agencies such as ATA to conduct their direct mail operations. Such new or smaller organizations also typically lack the funds to pre-pay costs of a mailing, the largest component of which is usually the postage. The direct mail agencies do the work of what would be a substantial department of a nonprofit organization, ranging from writing the letters, acquiring the services of printers and mail shops to package the letters, and finding financing to pay the up-front and other costs of mailing the letters.

The CMR cannot be made applicable to ATA under the undisputed facts. Such a finding would thwart congressional intent to allow **all** nonprofit organizations to mail their matter — even if prepared with the assistance of direct mail experts — if that matter advocates and asks for contributions to the nonprofit organization. Section 3626(k) provides for a review of contracts only if germane to "matter to which [the nonprofit] rates do not apply." The Government does not dispute that ATA's nonprofit clients are eligible to mail at the nonprofit rates.

In an attempt to label such mailings "cooperative," the Government has thrust before this Court what it calls a "paradigmatic example of a cooperative mailing" subject to the CMR. Appellee's Brief, p. 29, fn. 11. In this so-called cooperative mailing, a nonprofit would contribute its list of names and its eligibility to use the nonprofit mail rate, while a for-profit would pay the printing and mailing costs, and both parties would "share in the proceeds or profits of the mailing." That generalized example, however, if intended as a guide, only demonstrates how little expertise the Postal Service has regarding the world of nonprofit mailings. Virtually all nonprofit organizations communicating with the public utilize — or "contribute" — their mailing lists to mailings. These are

called “house file” or “membership” mailings. Often, small organizations lack the funds to advance the costs of the mailings, banks and other financial institutions rarely advance money to small nonprofit groups, and direct mail agencies such as ATA must assist nonprofits by finding advance funds. In many cases, the only funds by which such agencies can be compensated are the gross fundraising proceeds. According to the Government, this would constitute “sharing” and would violate the Cooperative Mailing Rule, despite the fact that it was the only way for the nonprofit organization to communicate with its members. Clearly, the Government’s approach is unreasonable, and its example of a “paradigmatic” cooperative mailing simply cannot be what Congress had in mind at any time in enacting or amending 39 U.S.C. § 3626.

Moreover, in this “paradigmatic example, the Postal Service believes it would have the authority to review at length a for-profit’s records — including contracts, bills, invoices, payments, and draft copy of mailings — if that for-profit had been retained by the nonprofit. *See* Postal Service Publication 417, p. 19, §§ 5-2.1, 5-2.2. J.A. 97. Likewise, the Postal Service claims authority to oversee and second-guess the decisions of nonprofit boards (and free rein to rummage through the books and records of a nonprofit). Furthermore, the Postal

Service evidently believes that it may exercise its unfettered judgment to target for-profits and nonprofits at its pleasure, singling out mailers and agencies based upon totally subjective criteria. There is no authority cited by the Government showing that the Congress intended for the Postal Service to be the regulator of nonprofit fundraising in America.

**E. The Government's Cases do not Supports the Government's Theory.**

Not a single case cited by the Government supports its interpretation of the CMR as applied to ATA. *See* Appellee's Brief, p. 27-29. All of the cooperative mail cases cited by the Government involve a commercial third party mailing its own commercial matter using the nonprofit permit of a separate nonprofit organization. *See* United States v. Raymond & Whitcomb Co., 53 F. Supp. 2d 436 (S.D.N.Y. 1999) (commercial travel agency promoting tours, for which the nonprofit rate is explicitly prohibited under the 1993 amendment to 39 U.S.C. section 3626(j)); United States Postal Service v. University Publishing Corp., 835 F. Supp. 489 (S.D. Ind. 1993) (a for-profit entity soliciting orders for alumni directories); and National Retired Teachers Association v. United States Postal Service, 430 F. Supp. 141 (D.D.C. 1977), *aff'd*, 593 F.2d 1360 (1979) (mailing a catalog of pharmaceutical products pertaining to a separate, but

affiliated, nonprofit organization not qualifying for the lower rates). None of the cases involved the application of the CMR to a direct mail agency that merely provides services in the preparation of mail that simply advocates and asks for contributions for the nonprofit organization itself.

**IV. THE GOVERNMENT HAS NOT ADEQUATELY DESCRIBED OR RESPONDED TO THE ALLEGATIONS OF IMPROPER PURPOSE REGARDING THE POSTAL SERVICE'S MOTIVATION IN PROCEEDING AGAINST ATA.**

ATA has been a player in the political arena long enough to know that it may be a target of its political adversaries. It did not argue before the district court that a mere referral of an investigation by a powerful United States Senator — with nothing more — is sufficient justification to cause the Court to allow ATA to conduct discovery of the potential illegal motives of this investigation. On the other hand, allegation of various **unusual** incidents of possible misconduct appeared to provide a sufficient basis for discovery.

ATA raised allegations of more than a senator merely seeking to chill First Amendment activities. The investigation started sometime shortly after the request from a United States Senator, as evidenced by the unlawful leak to the press by one of the postal inspectors. *See J.A.*, at 294 – 295. ATA raised other

factors to consider, including possible unlawful collaboration between certain postal inspectors and NAAG/NASCO (J.A., at 230), including targeting the Chairman of ATA. J.A., at 387 – 389. As ATA pointed out in the district court, the timing of the issuance of the subpoenas, just three months after ATA sued one of the NAAG/NASCO members (and some three years after the Postal Service’s investigation was initiated), raises serious questions of government abuse.

Given the lack of proper legal authority to investigate a violation of the CMR, it appears to ATA that the investigation is at least tainted with improper motives. And with no one policing the police in these circumstances, only discovery will provide ATA with a means of getting correct information. Thus, under the rationale of SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118 (3<sup>rd</sup> Cir. 1981), discovery concerning the purpose of the Postal Service’s investigation should have been allowed.

## **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in the Brief for Appellants, the district court’s decision should be reversed, the subpoenas

quashed, and the documents previously furnished ordered to be returned, or the case should be remanded to the district court for discovery and a hearing on the purpose of the Postal Service's investigation.

Respectfully submitted,

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# **CERTIFICATE OF COMPLIANCE**

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing Reply Brief for Appellants was served, this 18<sup>th</sup> day of August, 2000, by depositing copies thereof in the United States mail, First-Class, postage prepaid, addressed to counsel for the appellee, as follows:

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