

No. _____

IN THE
Supreme Court of the United States

INITIATIVE AND REFERENDUM INSTITUTE, ET AL.,
Petitioners,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. Postal Service prohibits petition circulators from collecting signatures on post office sidewalks, except certain perimeter sidewalks that are indistinguishable from municipal sidewalks. 30 C.F.R. § 232.1(h)(1). Violators are subject to criminal punishment. *Id.* § 232.1(p)(2). The questions presented are:

1. Whether post office sidewalks that are open to the public are public fora, so that a prohibition of First Amendment activities must be narrowly tailored to further a significant governmental interest.

2. Even if post office sidewalks are not public fora, whether the regulation banning signature gathering on petitions is reasonable when it simultaneously permits the collection of signatures in voter registration drives on the same sidewalks, *id.*, § 232.1(h)(4), and when the justification for the latter provision (that it is the *solicitation* of a signature, rather than its *collection*, that may be disruptive) directly contradicts the justification for the former provision (that it is the *collection* of a signature, rather than its *solicitation*, that may be disruptive).

**PARTIES TO THE PROCEEDINGS AND
RULE 29.6 DISCLOSURE STATEMENT**

Petitioners are the Initiative and Referendum Institute, Citizens for Limited Taxation, Humane Society of the United States, and U.S. Term Limits, Barbara C. Anderson, Andrew J. Bandyk, Bart Grant, and Gloria Robinson. The organizational petitioners do not have parent corporations and no publicly held corporation owns 10% or more of any stock in them.

Respondent is the United States Postal Service.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 685 F.3d 1066 (D.C. Cir. 2012) and reprinted at App. 1a.¹ The opinion of the district court is reported at 741 F. Supp. 2d 27 (D.D.C. 2010) and reprinted at App. 21a.

An earlier opinion of the court of appeals is reported at 417 F.3d 1299 (D.C. Cir. 2005) and reprinted at App. 48a. Earlier opinions of the district court are reported at 297 F. Supp. 2d 143 (D.D.C. 2003) (reprinted at App. 84a) and 116 F. Supp. 2d 65 (D.D.C. 2000) (reprinted at App. 103a).

JURISDICTION

The court of appeals entered its judgment on July 13, 2012 and denied rehearing on September 10, 2012 (reprinted at App. 124a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting
an establishment of religion, or
prohibiting the free exercise thereof; or
abridging the freedom of speech, or of

¹ The Appendix to this Petition is cited as "App." "J.A." refers to the Joint Appendix before the court of appeals.

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant provisions of the regulation at issue, 39 C.F.R. § 232.1, as promulgated in 1998 and in its current version, are reprinted at App. 126a-133a.

STATEMENT OF THE CASE

Time out of mind, sidewalks located on U.S. Post Office property and open to the general public were freely used as venues to solicit and collect signatures on petitions to place proposed initiatives and referenda on election ballots. Post office sidewalks are uniquely suitable for that activity, because the people who use a post office are likely to be local registered voters, whose signatures are needed on such petitions. There is no evidence that such activity had ever caused a significant problem. But in June 1998 the Postal Service issued a regulation prohibiting that use of its sidewalks, on the ground that a handful of customers had complained about a handful of petition circulators. This case presents the question whether such sidewalks are traditional public fora whose use for petitioning can be subject to reasonable regulations of time, place and manner, but not prohibited.

A. The Postal Service Regulation

On June 25, 1998, the Postal Service amended its regulation governing conduct on postal property to prohibit “soliciting signatures on petitions, polls,

or surveys (except as otherwise authorized by Postal Service regulations).” 39 C.F.R. § 232.1(h)(1). The amended regulation applied to “all real property under the charge and control of the Postal Service,” *id.* § 232.1(a), including all sidewalks on post office property. Violators are subject to criminal punishment by fine or imprisonment. *Id.* § 232.1(p)(2).

Later, in response to a ruling of the court of appeals, the Postal Service amended the regulation by replacing the prohibition on “soliciting” signatures with a ban on “collecting” them, § 232.1(h)(1), and by exempting from the ban’s scope sidewalks that are at the perimeter of postal property and indistinguishable from public sidewalks, § 231(e). App. 126a-127a.

B. Proceedings Below

Petitioners are individuals and organizations that have long used post office sidewalks to circulate petitions to place initiatives and referenda on state election ballots. They filed this suit in June 2000, challenging § 232.1(h)(1) on its face and as applied to their petitioning activities. Petitioners argued that the ban failed the test of narrow tailoring applicable in a public forum, and unreasonably restrained speech even in a nonpublic forum. The district court denied the parties’ pre-discovery cross-motions for summary judgment. App. 103a.

Following discovery, the parties renewed their cross-motions. At argument, the Postal Service offered to publish changes to its interpretation of

§ 232.1(h)(1) in its *Postal Bulletin*, an internal employee circular. App. 52a-54a. While the express language of the regulation prohibited *soliciting* signatures on *all* postal property, the Postal Service offered to prohibit only the *collection* of signatures on sidewalks that were “easily distinguishable” from non-postal sidewalks “by means of some physical feature.” *Id.* The district court accepted this new interpretation and upheld § 232.1(h)(1) as so interpreted. App. 101a-102a. The court then rejected Petitioners’ First Amendment facial challenge because under the reinterpreted regulation, Petitioners could not show that the ban was unconstitutional in every application at all 34,000 post offices nationwide. App. 87a. Finding that the ban would be narrowly tailored even within a traditional public forum, the court did not reach the public forum status of the sidewalks. App. 93a-98a.

Plaintiffs appealed, and the court of appeals reversed, holding, as relevant here, that § 232.1(h)(1) “cannot be upheld as a time, place or manner restriction of speech if applied in a public forum” because it swept in substantially more speech than necessary to meet the government’s legitimate ends and failed to leave open ample alternative channels for communication. App. 70a. The court also reversed the district court’s holding that Petitioners could sustain their facial challenge only by proving the ban unconstitutional in every application. App. 70a-71a. Instead, applying the well-established rule tracing back to *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the court held that the ban would be unconstitutional on its face if it encompassed a “substantial number” of postal sidewalks

constituting traditional public fora. App. 71a. It also instructed that, at a minimum, sidewalks running alongside public streets are traditional public fora, and therefore remanded to determine whether the number of traditional public fora within the scope of the ban was “substantial.” App. 73a-74a. Finally, the court held that the Postal Service overreached by prohibiting even a request for signatures, which it found unreasonable even in a nonpublic forum. App. 75a-79a.

On remand, Petitioners moved for summary judgment consistent with the court of appeals’ decision, showing that a substantial number of sidewalks covered by the ban ran alongside public streets and were therefore traditional public fora. The Postal Service thereupon amended § 232.1(h)(1) to exempt sidewalks that are at the perimeter of postal property and indistinguishable from public sidewalks, 39 C.F.R. § 232.1(e), and replaced the prohibition on “soliciting” signatures with a ban on “collecting” them, *id.* § 232.1(h)(1). *Compare* App. 126a-127a *with* App. 129a-130a. The Postal Service then filed an opposition and cross-motion for summary judgment, claiming that its changes had rendered Petitioners’ challenge moot. Petitioners opposed that cross-motion and moved alternatively for summary judgment based on the public forum status of a substantial number of *non*-perimeter postal sidewalks (*e.g.*, sidewalks leading from perimeter sidewalks or parking lots to the doors of post offices).

The district court asked the parties to supplement the record, suggesting that they

cooperate to devise a survey of postal managers regarding the actual use of postal sidewalks. J.A. 956-67. The parties negotiated and implemented such a survey, asking postal managers to describe the frequency of expressive activity they had personally observed on discrete categories of sidewalks on postal property. App. 24a-25a.

On the parties' cross-motions for summary judgment, the district court held, as relevant here, that Petitioners had not met the burden of showing that a substantial number of non-perimeter post office sidewalks were traditional public fora. App. 42a. It held the survey results did not establish that postal sidewalks had been used historically for expressive activity, and that a comparison showing that non-perimeter sidewalks were used to the same extent as perimeter sidewalks for expressive activity was immaterial because perimeter sidewalks remained physically indistinguishable from "classical variety sidewalks." App. 41a. The court also rejected Petitioners' contention that the ban, as amended, is unreasonable. App. 42a-45a. The court thus granted summary judgment to the Postal Service. App. 47a.

Plaintiffs again appealed, and the court of appeals affirmed the district court's ruling. The court declined to apply a presumption that a public sidewalk, "without more," is a traditional public forum, App. 8a-9a, but held that the physical characteristics of the postal sidewalks (the fact that they do not run alongside public streets) distinguishes them from ordinary sidewalks, App. 9a, and that the survey concerning their observed

use for expressive activity shed no light on their forum status, App. 12a. It rejected evidence of the longstanding use of postal sidewalks for expressive activity, likening these open sidewalks to the airport terminals at issue in *International Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680-81 (1992) (“ISKCON”), as being of too recent vintage to qualify as “traditional” public fora. App. 11a. Finally, the court rejected Petitioners’ argument that § 232.1(h)(1), as amended, failed the First Amendment reasonableness test by banning the *collection* of signatures when *solicitation* was the root of the alleged harm, concluding that it could not penalize the Postal Service for “simply following our lead” in the earlier appeal, where it had held the ban on pure solicitation (*qua* pure speech) unconstitutional. App. 14a-15a. Writing separately, Judge Brown questioned the reasonableness of the regulation, but agreed that the court’s earlier ruling had tied its hands, and urged the Postal Service to rescind the ban voluntarily. App. 17a-20a.

Petitioners’ subsequent request for panel rehearing or rehearing en banc was denied. App. 124a-125a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT FIRST AMENDMENT QUESTION THAT THIS COURT PREVIOUSLY GRANTED CERTIORARI TO ADDRESS BUT NEVER RESOLVED

This case brings before the Court a question that it previously granted certiorari to consider, but could not resolve: Whether non-perimeter sidewalks on U.S. Post Office property, which are open to all members of the public, are traditional public fora for First Amendment activity. Twenty-two years ago, this Court was unable to resolve this question in *United States v. Kokinda*, 497 U.S. 720 (1990). The question was an important one in 1990 and remains important today. The Court should grant certiorari to resolve it.

A. This Court Recognized The Importance Of The Question Presented In *United States v. Kokinda*, But Was Unable To Resolve It

Kokinda involved the respondents' attempts to collect cash contributions for their cause on a non-perimeter post office sidewalk, in contravention of a U.S. Postal Service ban. They challenged the ban as a violation of their rights to free speech. The Fourth Circuit sustained their challenge, holding that the sidewalk was a traditional public forum and the challenged regulation failed the heightened scrutiny applicable there. *United States v. Kokinda*, 866 F.2d 699 (4th Cir. 1989). On review, this Court was unable to muster a clear majority on the question. Four Justices believed the sidewalk at issue was a nonpublic forum and the ban was reasonable. 497 U.S. at 730, 737 (opinion of O'Connor, J.). Four Justices concluded that the sidewalk *was* a public forum and the ban must be struck down. *Id.* at 740 (opinion of Brennan, J.). Justice Kennedy cast the

deciding vote. He believed there was a “powerful argument” that the sidewalk was “more than a nonpublic forum.” *Id.* at 737 (opinion of Kennedy, J.). But he thought personal solicitation for the immediate exchange of money in a public place so invasive that its exclusion survived heightened scrutiny even in a traditional public forum. *Id.* at 738-39. In so ruling, Justice Kennedy stressed that the regulation still allowed wide berth for other expressive activities—which then included the signature-gathering that is now subject to fine or imprisonment under § 232.1(h)(1). *Id.* at 738-39.

Because the Court was unable to resolve the forum status of the postal sidewalk, the only question *Kokinda* resolved was the narrow one Justice Kennedy decided in concurrence: whether the Post Office could ban solicitations for contributions on a sidewalk that was presumptively a traditional public forum. That was the only holding in the case. *See Marks v. United States*, 430 U.S. 188, 193 (1977). This Court has never resolved the question that prompted it to grant certiorari in *Kokinda*: the public forum status of a postal sidewalk.

The time is ripe to resolve it now. Now that the Postal Service has banned other forms of expression protected by the First Amendment, the question assumes an even greater importance and immediacy, for the ban now encompasses core political speech in which thousands have engaged and seek to engage within this forum. Moreover, the lack of guidance from this Court has troubled lower courts, leading them in some instances to issue

decisions inconsistent with the division in *Kokinda* itself. After two decades, this judicial indecision has come to chill legitimate speech, especially where, as here, a statute or regulation imposes criminal penalties for its exercise. Finally, the decision below, like many decisions in this area, exemplifies how the public forum doctrine has become “a jurisprudence of categories rather than ideas,” converting “what was once an analysis protective of expression into one which grants government authority to restrict speech by fiat.” *ISKCON*, 505 U.S. at 693-94 (Kennedy, J., concurring and dissenting). This case presents a second chance to resolve a question this Court thought important enough to address before, protect a vitally important means of political expression, and inject needed pragmatism into an increasingly ossified public forum jurisprudence.

**B. The Question Presented Is
Extraordinarily Important To The
Many People Who Seek To Exercise
Their First Amendment Rights**

The activity in which Petitioners seek to engage is of the highest constitutional importance, for it involves the core First Amendment activity of collecting signatures on ballot-access petitions, and the rights of numerous citizens who seek to engage in that activity in the place best suited for it.

This Court has emphasized that “the solicitation of signatures for a petition involves protected speech” which is “at the core of our electoral process and First Amendment freedoms—an area of public policy where protection of robust

discussion is at its zenith.” *Meyer v. Grant*, 486 U.S. 414, 422 n.5, 425 (1988) (citations omitted). Moreover, the collection of signatures involves more than the right to advocate for particular causes in a particular way. It also involves the right of interested individuals to hear those messages and, if they choose, themselves engage in expressive and associational activities protected by the First Amendment by joining their names to a petition and thus to join in advocacy of a cause. As the court of appeals acknowledged, “[i]t is hard to imagine many activities more central to the purposes of the First Amendment.” App. 6a.

The extent to which this regulation impinges on the exercise of First Amendment rights is well documented. The record shows that post office sidewalks have been used extensively for petitioning activity. The National Director of U.S. Term Limits testified that its campaigns had reached virtually every post office in every state where term limits measures were proposed. J.A. 265-66. The now-President of the Humane Society of the United States also testified that his organization instructs signature-gatherers for ballot petitions to make post offices a significant focus of their activity. J.A. 232-33. And a professional manager of petition drives testified that postal sidewalks were the *primary* venue for petition circulators during his 30 years of experience preceding the ban. J.A. 212.

Perhaps uniquely in public forum jurisprudence, the parties (at the request of the district court) conducted an extensive survey of postal managers to determine the extent of

expressive activity they had personally observed on different categories of postal sidewalks—including perimeter sidewalks like those in *United States v. Grace*, 461 U.S. 171, 179 (1983), and non-perimeter sidewalks like those in *Kokinda*. App. 24a-26a. Many postal managers generally cannot see these sidewalks from their interior offices and testified that normally they would become aware of expressive activity only when told. J.A. 248, 534, 583-84. Yet several hundred postmasters reported observing such activity, and of those, 13.5% reported observing it themselves at least three to six times a year. J.A. 814-15. Notably, the data was remarkably consistent whether on *Kokinda* sidewalks or *Grace* sidewalks. J.A. 815. Thus, within a group comprising less than a seventh of all post offices, postal managers *observed* hundreds of attempts to engage in expressive activity on postal sidewalks.

Indeed, the Postal Service promulgated its ban with the knowledge that signature gathering on postal sidewalks has been pervasive and longstanding—“a regular thing,” as the ban’s architect testified at deposition. J.A. 186. He testified that the ban was promulgated precisely because of the number of times petition circulation occurs on postal sidewalks, which he testified, “in [his] opinion,” was intrusive to customers, who might be annoyed by messages they did not necessarily agree with. *Id.*² The Postal Service’s motivating

² Such annoyance, of course, is not a valid ground for excluding speech from a public forum. *See, e.g. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (“public expression of ideas may not be prohibited merely because the ideas are themselves

perception, that signature gathering on postal sidewalks has been pervasive, is a fact that bears witness to the long and widespread exercise of the rights that § 232.1(h)(1) seeks to criminalize and exclude.

Postal sidewalks have been important for petitioning activity not only because they are still regularly used by pedestrians in our increasingly automotive society, but also because of their *centrality* to the initiative and referendum process. Most states that have initiatives or referenda require proponents to collect a minimum number of valid signatures from registered voters in each county or legislative district. Because postal customers normally live within the neighborhood of the post office they patronize, collecting signatures there enables circulators to achieve compliance with such laws. J.A. 213-14, 217. Conversely, depriving petition circulators of access to this forum imposes a heavy burden on their rights, because in many communities there are few if any places where citizens can be approached on public property, as retail space has migrated into private shopping malls and commerce is conducted increasingly through Amazon.com instead of in public *places*.³

offensive to some of their hearers.”); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) (“public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms”).

³ See, e.g., Owen Fiss, *In Search of a New Paradigm*, 104 Yale L. J. 1613, 1614 (1995) (suggesting the proper paradigm for First Amendment discourse has moved from “the street corner” to “CBS”); Matthew D. McGill, Note, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*,

In such an environment, as Justice Kennedy realized, “it becomes essential to protect public spaces where traditional modes of speech and forms of expression can take place.” *Kokinda*, 497 U.S. at 737 (Kennedy, J., concurring). Thus, this case is of the highest importance, not only because of the constitutional value of expressive activity or the undecided character of the question presented, but because of how it relates to the social and technological crossroads we have reached.

C. In The Absence Of A Holding By The Court, Lower Courts Have Been Unable To Produce Decisions Consistent With The Division In *Kokinda*

Lower courts have struggled to make sense of the divided outcome in *Kokinda*. Their decisions have been marked by prominent dissents and often, in significant respects, are at odds with *Kokinda* itself. As the First Circuit remarked, “The problem of classification grows increasingly difficult in instances in which no presumption is available, and categorical distinctions are of little help in borderline cases.” *New England Council of Carpenters v. Kinton*, 284 F.3d 9, 20-21 (1st Cir. 2002). One writer, commenting on the apparent inconsistency of this Court’s reasoning, observed: “This form of analysis appears unprincipled and leads courts to conclude that there is no agreement on the goals or

52 Stan. L. Rev. 929, 951 (2000) (suggesting that parks and sidewalks have been marginalized in “our modern informational age”).

application of the traditional public forum doctrine.” Michael J. Friedman, *Dazed and Confused: Explaining Judicial Determinations of Traditional Public Forum Status*, 82 Tul. L. Rev. 929, 940 (2008).

An instructive example is *Paff v. Kaltenbach*, 204 F.3d 425 (3d Cir. 2000). There, at a postmaster’s behest, a police officer arrested leafleters for criminal trespassing on a non-perimeter postal sidewalk. They sued the officer for damages under 42 U.S.C. § 1983 for violating their First Amendment rights. Significantly, the district court *upheld* plaintiffs’ First Amendment right to leaflet on the postal sidewalk—a ruling that was not appealed. 204 F.3d at 431. Thus, as the Third Circuit acknowledged, the only question before it was whether plaintiffs’ First Amendment right was sufficiently settled to overcome the officer’s qualified immunity from damages. *Id.* at 432-33. The court concluded that the officer had immunity, citing the opinion of four Justices in *Kokinda* as if it were the holding of the Court. *Id.* at 433 (“a sidewalk like the one involved here is a non-public forum. This follows from *Kokinda*”).⁴ In dissent, Judge Cowan argued that the officer would not be justified in relying on these authorities as a basis for arrest, nor was a ban on leafleting supported by the decision in *Kokinda*.

⁴ The court also relied on an earlier Third Circuit decision, *United States v. Bjerke*, 796 F.2d 643 (3d Cir. 1986), which had treated discrete parts of several postal sidewalks as nonpublic fora. But in that case the court noted that the post offices had other “interior” paved areas up to 30 feet from their entrances, and that its holding would not reach sidewalks at such “a great distance” from the entrances. *Id.* at 651.

Id. at 438-40 (Cowan, J., dissenting). As Judge Cowan observed, while Justice Kennedy was prepared to uphold a ban on soliciting for immediate money contributions even within a public forum, in reaching this conclusion he placed weight on the fact that leafleting and other alternative forms of expression were still allowed. *See id.* at 438 (Cowan, J., dissenting) (citing *Kokinda*, 497 U.S. at 738-39 (Kennedy, J., concurring)). As Judge Cowan noted, although the majority did not, *Kokinda* actually left the “status of the sidewalk ... unclear.” *Id.* at 441. At least to the extent it relied on *Kokinda* to suggest that the forum status of the property was clearly established, the Third Circuit substituted the opinion of four Justices for the holding of five.

Another example is the Ninth Circuit decision in *Jacobsen v. U.S. Postal Service*, 993 F.2d 649 (9th Cir. 1993), which involved a publisher’s challenge to the exclusion of passive distribution of newspapers from several post office sidewalks. The majority relied on indicia of physical demarcation between postal and non-postal property to assess the forum status of three sidewalks—although it admitted that its call respecting one of them was “very close.” *Id.* at 656-57. But *Jacobsen*, like *Paff*, finds no support in the division in *Kokinda*. The deciding vote of Justice Kennedy relied on the uniquely intrusive nature of a demand for the immediate exchange of money. It is most unlikely that a majority would also have found it permissible to banish the passive distribution of newspapers from a traditional public forum. That the Ninth Circuit could cull this result from *Kokinda* is testament to the confusion engendered by the lack of a holding in that case.

Further, the emphasis in the prevailing *Kokinda* opinion on physical demarcations as indicia of exclusive dedication to some nonpublic purpose, while slighting other objective factors, has engendered an unseemly pettiness of application, exemplified in *Jacobsen*. Judge John Minor Wisdom, who sat by designation in that case and dissented in part from the panel decision, observed:

The majority states “there is a clear line of demarcation in the sidewalk that distinguishes the federal entryway from the municipal sidewalk.” ... A review of the transcript and exhibits reveals that the only demarcation consists of a crack in the sidewalk between two sections of the concrete and a difference in the texture of the concrete itself.... Here, there is no physical separation, there is only a property line and the fact that the contractor poured the concrete so that a crack is fortuitously located on or near that property line.

Id. at 663 (Wisdom, J., dissenting in part) (citation omitted). Judge Wisdom’s opinion underscores that the *Kokinda* plurality’s logic is driving federal judges to make First Amendment rights depend on their close examination of “crack[s] in the sidewalk” and “the texture of the concrete.”

Del Gallo v. Parent, 557 F.3d 58 (1st Cir. 2009) is to similar effect. There, the court considered a postal sidewalk that provided a direct path through postal property (behind a narrow parking lot), from

one street to another. Perceiving that *Kokinda* made the forum status of the sidewalk depend on whether or not it could be characterized as a “thoroughfare,” the court declared that it was not, even though it provided a pathway between two thoroughfares. *Id.* at 71. The court predicated this judgment on the fact that the sidewalk included a short set of steps. *Id.* But see *Pouillon v. City of Owosso*, 206 F.3d 711, 716-17 (6th Cir. 2000) (city hall steps were a traditional public forum).

Surely such subtle indicia are a far cry from describing the type of “enclave” this Court had in mind when it used that term to describe why a sidewalk in an enclosed military installation was not a public forum in *Greer v. Spock*, 424 U.S. 828, 838 (1976). First Amendment rights supposedly “at their zenith,” *Meyer*, 486 U.S. at 422 n.5, should not be made to depend on such trifles.⁵

⁵ One other Circuit has addressed the forum status of postal sidewalks since *Kokinda*. In *Longo v. U.S. Postal Service*, the Second Circuit stayed its proceedings to await a forum ruling in *Kokinda*, and finding none, attempted to apply an adaptation of Justice Kennedy’s approach instead, deciding that a ban on political campaigning within a postal sidewalk could be sustained even if it was a traditional public forum. 953 F.2d 790, 797 (2d Cir. 1992). But this Court granted certiorari and remanded for reconsideration after finding in *Burson v. Freeman*, 504 U.S. 191 (2d Cir. 1992), that regulation of political campaigning was subject to strict scrutiny. On remand, the Second Circuit held that the property in question was a nonpublic forum. *Longo v. U.S. Postal Service*, 983 F.2d 9, 12 (1992). Of course, in *United States v. Kokinda* the Fourth Circuit found that an interior postal sidewalk *was* a traditional public forum, 866 F.2d 699 (4th Cir. 1989), a judgment only

II. THIS CASE PRESENTS AN APPROPRIATE OPPORTUNITY TO CLARIFY THE PUBLIC FORUM DOCTRINE

The Court's failure to determine the forum status of the sidewalk in *Kokinda* has fostered uncertainty and inconsistency in the law. As both courts remarked below, the disposition in *Kokinda* "provide[d] no definitive guidance," leaving the issue to be "determine[d] anew." App. 72a, 109a-111a. This failure has led to nagging inconsistencies in the application of the public forum doctrine, on postal sidewalks and elsewhere, and a wide chilling of expressive activity as administrative officials have been emboldened to restrict speech in a broader array of public places. Justices of this Court have joined commentators in complaining about a rigid jurisprudence of categories that too often defeats the objectives of the First Amendment. This case presents an appropriate opportunity for the Court to revisit the question left open in *Kokinda* and to resolve inconsistencies that have persisted and metastasized in this important area of First Amendment law.

A. The Public Forum Doctrine Has Become Disassociated From Its Purpose Of Protecting Free Speech

Despite its lack of a holding on the public forum question, *Kokinda* marked an unmistakable

four Justices were prepared to reverse, but which was vacated by the result in *Kokinda*.

inflection point in this Court's public forum jurisprudence, and together with the conflicting visions of public forum analysis two years later in *ISKCON*, left important constitutional questions unanswered and lower courts in doubt.

The significance of *Kokinda* is best understood against its historical backdrop. The Court's earliest pronouncements in this area were not opaque:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights, and liberties of citizens.

Hague v. CIO, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

The Court acknowledged that speech rights may be regulated “in consonance with peace and good order; but ... must not, in the guise of regulation, be abridged or denied.” *Id.* at 516. Building on this theme, in *Grayned v. City of Rockford*, the Court described “the crucial question” as “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” 408 U.S. 104, 116 (1972). Consistent with this analysis, in *Adderley v. Florida*,

385 U.S. 39 (1966), and *Greer*, 424 U.S. at 838, it rejected the notion that public protest was compatible with the intended uses of spaces within particular special-use enclaves, such as county jails and military bases.

But subsequent attempts to systematize public forum doctrine have produced dissonance and reduced flexibility, making it difficult to engage in a practical assessment of rights and regulations based on facts and common sense. The Court's jurisprudence, initially tethered to speech-protective notions and attempts to apply concepts flexibly, has devolved into a kind of fine-line-drawing, divorced from reality on the ground. And the rationales given in different decisions have varied enough to produce confusion in the courts below.

For example, in *Grace*, the Court found the physical similarity of the sidewalks at the perimeter of its own grounds to "any other sidewalks in Washington, D.C." a sufficient reason to apply the forum tradition that it applies to public sidewalks generally. 461 U.S. at 179. But in *Kokinda*, the four Justices who rejected the public forum status of the postal sidewalk turned the Court's willingness in *Grace* to find a forum on sidewalks that were "like" municipal sidewalks into a basis for excluding speech by noting physical dissimilarities which they took to define an "enclave" with an exclusive "nature and purpose." 497 U.S. at 730, 737 (opinion of O'Connor, J.). Yet the four Justices who voted to uphold the sidewalk's forum status objected to the suggestion that its mere placement within grounds that were universally open to the public should

suffice to overcome the constitutional presumption, articulated in *Grace*, 461 U.S. at 177, that a sidewalk, “without more,” is a traditional public forum, *see Kokinda*, 497 U.S. at 740-42 (opinion of Brennan, J.), and as noted, Justice Kennedy appeared to agree, *see id.* at 737-39 (opinion of Kennedy, J.).

The fissures in the Court’s jurisprudence were displayed again in *ISKCON*, which involved the public forum status of airport terminals where a religious group wanted to solicit alms and distribute literature. There, the Court came to opposite conclusions regarding the two bans in question, marshaling different majorities for each decision, but no more than four votes for any single line of reasoning. Four Justices joined an opinion that relied heavily on a perception of history as a basis for decision, finding that the recent vintage of airport terminals precluded their classification as traditional public fora. *ISKCON*, 505 U.S. at 679 (plurality). Justice Kennedy joined these four in concluding that soliciting alms could be excluded from the terminals, although he complained that a reliance on history alone allowed no room for recognition of new fora with changing times, and concluded, from a broader view of the physical attributes of the terminals, their compatibility with expressive activity, as well as the history of their use, that they were traditional public fora. *Id.* at 703 (Kennedy, J., concurring, joined by three Justices). While Justice O’Connor had rejected the public forum status of the terminals based on their lack of historical pedigree, she nevertheless concurred with Justice Kennedy and three others in forming a

majority to hold that the ban on distributing literature must be struck down. *Id.* at 693 (Kennedy, J., concurring), 690 (O'Connor, J., concurring), 709 (Souter, J., concurring). The *ISKCON* Court's multiple factions divided over (1) the significance of long historical use, which four Justices considered critically important; (2) the properties' physical similarities to traditional sidewalks (and what attributes make property similar to such sidewalks), to which all Justices assigned some importance, but in varying degrees; and (3) the importance of compatibility with the property's normal use as a determinant of its forum status, which four Justices considered important.

Notably, Justice Kennedy, who concurred in both striking down the distribution ban and upholding the solicitation ban, criticized the Court's constrained view of traditional public fora, and worried that its analysis conferred too much authority on officials to determine whether speech would be permitted. *Id.* at 695. Justice Kennedy described the majority's notion that traditional public fora have speech and debate as a principal purpose as "a most doubtful fiction." *Id.* at 696. He proposed an "objective" approach to determine the forum status of property, focusing on its physical similarities to traditional public fora, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would interfere significantly with the uses to which it was dedicated. *Id.* at 698-99.

Thus, in addressing forum status, Justices of this Court have in turns elevated as competing

standards for decision the history of expressive use; physical similarity to, or indicia of difference or separation from, municipal sidewalks; and compatibility with supposed “normal uses.” The result is a welter of lower court decisions that “[seem] to pick and choose whichever variables support the conclusion that will be reached, without even considering other factors that have, in other instances, been considered relevant or even critical.” Friedman, *supra*, at 958. Thus, while cases like *Jacobsen* and *Del Gallo*, *supra*, have focused on architectural trivia like “cracks in the sidewalk” or a few steps interrupting their path, others have found that the steps themselves may be a traditional public forum. See *Pouillon*, 206 F.3d at 716-17. While some cases, like the decision below, have held that data regarding historical use is immaterial because it putatively cannot overcome the fact that a sidewalk is interior, to some degree, to defined property, App. 12a, other decisions have specifically held that sidewalks interior to public property are public fora. See, e.g., *Lederman v. United States*, 291 F.3d 36, 39 (D.C. Cir. 2002) (non-perimeter sidewalk within Capitol grounds); *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) (sidewalks interior to Vietnam Veterans Memorial grounds).

B. Courts And Commentators Have Underscored The Confusion Inherent In The Current State Of Public Forum Analysis

Judicial criticism of the current public forum doctrine is legion. Courts have expressed confusion over the doctrine’s “murky status” and “quite

muddled” state. *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 9 (1st Cir. 1994); *Jacobsen*, 993 F.2d at 655 n.2. This uncertainty, according to the Ninth Circuit, has resulted in lower court decisions that “consider a jumble of overlapping factors, frequently deeming a factor dispositive or ignoring it without reasoned explanation.” *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099-1100 (9th Cir. 2003).

Scholars agree. Robert Post has written that the public forum doctrine is “an elaborate, even byzantine scheme of constitutional rules” that is “virtually impermeable to common sense” and has “received nearly universal condemnation from commentators.” Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1715-16 (1987). Another scholar described the doctrine as producing “incoherent results untouched by the interplay of considerations that should ... inform decisionmaking under the first amendment.” Keith Werhan, *The Supreme Court’s Public Forum Doctrine and the Return of Formalism*, 7 Cardozo L. Rev. 335, 341 (1986).

It is widely perceived that the Court’s categorical taxonomy of public fora—their rigid classification as “traditional public fora,” “designated public fora,” and “nonpublic fora,” together with the outcome-determinative application of different levels of scrutiny for each forum type—has ossified into a barrier to critical analysis giving real effect to the imperatives of the First Amendment. In his textbook, Professor Tribe criticizes the doctrine’s

“excessive focus on the public character of some forums, coupled with an inadequate attention to the precise details of the restrictions on expression, [that] can leave speech inadequately protected in some cases, while unduly hampering [governmental] authorities in others.” Laurence A. Tribe, *American Constitutional Law* § 12-24, at 993 (2d ed. 1988). Dean Post describes the doctrine as “heedless of its constitutional foundations” and “a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government’s requirements in controlling its own property” Post, *supra*, at 1715-16. He argues that it “is in such a state of disrepair as to require a fundamental reappraisal of its origins and purposes.” *Id.*⁶ The common theme of such academic criticism is that the existing taxonomy has become a substitute for

⁶ See also, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 93 (1987) (a “myopic focus on formalistic labels [that] serves only to distract attention from the real stakes”); Lyrrisa Lidsky, *Public Forum 2.0*, 91 B.U.L. Rev. 1975, 1976 (2011) (describing doctrine as “lacking in coherence—to put it mildly”); Randall P. Bezanson & William G. Buss, *The Many Faces of Governmental Speech*, 86 Iowa L. Rev. 1377, 1381 (2001) (“an edifice so riven with incoherence and fine distinctions that it is on the verge of collapse”); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 Hastings L.J. 309, 309-10 (1999) (a “labyrinth of conflicting rules” that is “crude, historically ossified, and seemingly unconnected to any thematic view of the free expression guarantee”); David S. Day, *The End of the Public Forum Doctrine*, 78 Iowa L. Rev. 143, 186 (1992) (“difficult to apply with any internal consistency”); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo. Wash. L. Rev. 109, 110 (1986) (“an inadequate jurisprudence of labels”).

reasoning based on real facts and interests, inviting courts to end the analysis at the point of slotting property into categories—particularly where, as here, slight deviations from the “traditional” norm—like a particular location or an architectural difference—can be taken as a signal that a sidewalk is not a “normal” sidewalk and therefore does not belong in the traditional category.

Current and former members of this Court have joined the criticism. In *Kokinda*, Justice Brennan, joined by three others, protested that “[i]ronically, these public forum categories—originally conceived of as a way of *preserving* First Amendment rights—have been used in some of our recent decisions as a means of upholding restrictions on speech.” 497 U.S. at 741 (opinion Brennan, J.) (emphasis in original; citations omitted). He suggested that the doctrine served to “obfuscate rather than clarify the issues at hand,” *id.*, and objected to the “doctrinal pigeonholing, complex formula, or multipart test” that obscured what he believed the self-evident conclusion that free speech on public sidewalks was “not a matter of grace by government officials but rather ... inherent in the open nature of the locations.” *Id.* at 742-43.

Justice Kennedy remarked in *ISKCON*, “Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.” 505 U.S. at 693-94 (Kennedy, J., concurring and dissenting). He urged that the definition of a traditional public

forum should not be so bound by notions of historical pedigree that the doctrine remained closed to the opening of new fora, nor should the government's "intent" in "designating" a forum become tantamount to "almost unlimited authority to restrict speech ... by doing nothing more than articulating a non-speech-related purpose for the area." *Id.* at 695.⁷ In dissenting from the exclusion of airport terminals from the category of traditional public fora, Justice Kennedy warned that, in times of "fast-changing technology and increasing insularity," the public forum doctrine was threatened with irrelevance, as "failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity." *Id.* at 697-98.

Justice Souter objected in *ISKCON* to the reduction of the "archetypes" of traditional public fora ("streets, sidewalks and parks") into "static categories." *Id.* at 710 (Souter, J., dissenting):

To treat the class of such forums as closed by their description as 'traditional,' taking that word merely as a charter for examining the history of

⁷ Similarly, Justice Blackmun urged in *Cornelius v. NAACP Legal Defense & Education Fund*, "[I]f the government's ability to define the boundaries of a limited public forum is unconstrained, the limited-public-forum concept is meaningless." 473 U.S. 788, 826 (1985) (Blackmun, J., dissenting). He protested that categorizing property as a nonpublic forum meant "we need not even be concerned about whether expressive activity is incompatible with the purposes of the property." *Id.* at 820-21.

the particular public property claimed as a forum, has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life. If that were the line of our direction, we might as well abandon the public forum doctrine altogether.

Id. He also warned that “[p]ublic forum analysis is stultified not only by treating its archetypes as closed categories, but by treating its candidates so categorically as to defeat their identification with the archetypes,” such that all airport terminals, for example, are necessarily nonpublic fora. *Id.*

The shortcomings of the public forum doctrine as it exists today—its rigidity, confusions, and infidelity to the principles that gave it birth—are widely and openly acknowledged. The indecisive outcome of the case that has become a tripwire to the Petitioners, *Kokinda*, is a leading contributor to this confusion. That makes this an ideal opportunity to revisit the issue, and set right the defects of the current jurisprudence.

III. THIS CASE WAS WRONGLY DECIDED BECAUSE THE COURT OF APPEALS IGNORED OBJECTIVE INDICIA POINTING TO THE PUBLIC FORUM STATUS OF POSTAL SIDEWALKS

Petitioners below addressed all the indicia that show that postal sidewalks are traditional public fora. Because they are public sidewalks, they

are subject to a presumption, rebuttable only by concrete evidence, that they are traditional public fora. *Grace*, 461 U.S. at 179 (“Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.”). The Postal Service did not supply evidence to rebut that presumption. The sidewalks’ placement within postal grounds is insufficient to distinguish them from other public sidewalks, for they are not inside protected “enclaves,” but wide open to the public. The record evidence—which included not only testimony but photographs and maps of a range of postal properties—displayed ample room for expressive activity that would not interfere with normal business, *see, e.g.*, J.A. 368-477 (photographs), and the court of appeals recognized that their use for expressive activity need not interfere with the properties’ normal use for access to the post offices. App. 60a. Petitioners provided extensive documentary evidence that postal sidewalks have been used widely for expressive activity, both historically and recently—evidence reinforced by the testimony of lay and expert witnesses on both sides and by the hundreds of instances of non-disruptive expressive activity disclosed in the survey of postal managers.

In this case, the court of appeals applied only a narrow “physical layout” test—consistent with that advocated by only four Justices in *Kokinda*—to determine the forum status of postal sidewalks. The court rejected Petitioners’ argument that under a

rebuttable constitutional presumption, a public sidewalk that is open to the general public is a traditional public forum. App. 9a. It rejected the relevance of extensive evidence concerning the actual use of postal sidewalks for expressive activity, finding that such evidence could neither establish a long tradition, nor overcome the fact that these were “interior” sidewalks and thus distinct from municipal sidewalks. App. 11a-12a.

The court of appeals did not discuss the physical similarities of postal sidewalks to other public forum sidewalks. It did not consider that the Postal Service allows not just broad, but universal, public access to the sidewalks. It did not consider whether expressive activity would tend to interfere in any significant way with the normal uses of the property. *Compare ISKCON*, 505 U.S. at 698-99 (Kennedy, J., concurring) (proposing these three objective characteristics as factors to assess whether a location is a public forum). The court only addressed interference with normal use of the property to the extent that it—perhaps reluctantly, but uncritically—acquiesced in the Postal Service’s asserted justification for the ban as passing muster under the “reasonableness” test that applies in a nonpublic forum. App. 13a-14a.

Like the Third Circuit in *Paff* and the Ninth Circuit in *Jacobsen*, this led the court to apply a logic that no more than four Justices in *Kokinda* would have endorsed—one that can make small architectural differences the principal determinant of First Amendment rights. Under that reasoning, if a sidewalk is not a “thoroughfare,” then it falls

outside the traditional archetype, and must be excluded from the category of traditional public fora, even by the closest analogy. (Such reasoning would also exclude municipal streets and sidewalks that happen to be cul-de-sacs or dead ends.) And if a sidewalk is not a traditional public forum, the Postal Service has unfettered discretion to define its forum status merely by announcing an “intention” for the property.

Although this represents a result only a minority in *Kokinda* would have approved, it is perhaps the inevitable result of an indecision that has left courts searching for ways to implement consistent outcomes without the benefit of a consistent theory. One commentator wrote that the current approach has “cut the tap root of the traditional public forum, leaving it a lifeless snag incapable of further growth. The clearest indicators of this indelicate pruning are *United States v. Kokinda* and *International Society for Krishna Consciousness v. Lee*.” Massey, *supra*, at 319. And, while leaving the category of traditional public fora incapable of growth, *Kokinda* deferred all other fora to the discretion of government administrators, with the possibility that speech rights—if exercised in a forum that such an administrator had announced no intention to make public—hangs only on a court’s most forgiving level of scrutiny.

IV. THE BAN ON SIGNATURE GATHERING IS UNREASONABLE

Even in a nonpublic forum, restrictions on speech survive constitutional scrutiny only if they

are “reasonable,” that is, if they reasonably further the government’s interest in maintaining property for its dedicated use. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983). Making this rule meaningful becomes even more important if more and more public places come to be classified as nonpublic fora.

In the first appeal of this case, the court of appeals found that the original version of the ban was not reasonable, because it imposed criminal penalties not only for collecting signatures, but even for making a spoken request for them on postal property. App. 75a-79a. The Postal Service amended § 232.1(h)(1) on remand to permit the solicitation—but not the collection—of signatures on postal sidewalks.

But even as amended, § 232.1(h)(1) is unreasonable. The Postal Service asserted, and the court of appeals accepted, that it is more disruptive to *collect* signatures than to *solicit* them. App. 14a-15a. But an exception in § 232.1(h) itself contradicts this assertion. While the amended regulation allows a person to solicit but not to collect signatures on petitions, it expressly *permits* the *collection* of signatures in voter registration drives on non-perimeter postal sidewalks. 39 C.F.R. § 232.1(h)(4). The Postal Service justified this exception on the ground that the alleged absence of any verbal *solicitation* during voter registration renders that activity non-disruptive. Gov’t’s D.C. Cir. Opening Br. at 44-45. Thus, the Postal Service has given diametrically conflicting justifications for the rule and its exception.

The Postal Service emphasized that voter registration is conducted at a table, *id.*, which, if anything, makes it more likely to obstruct a sidewalk. But this is no distinction, as signatures on petitions could also be collected at a table, and there is nothing to prevent the Postal Service from adopting a valid time, place or manner restriction requiring signature-gatherers for petitions to sit at tables, if the Postal Services believes that would be less disruptive.

The court of appeals did not address the inconsistency between the Postal Service's regulation of signature gathering on petitions and signature gathering on voter registration cards. It observed only that because an earlier panel in the case had suggested that it would be permissible to limit the ban to pure solicitation, "[t]he Postal Service is simply following our lead." App. 14a. In concurring, Judge Brown threw a spotlight on the problem. While agreeing that the disposition was controlled by the court's earlier ruling, she remarked that "this half-a-loaf solution seems more persnickety than practical." App. 17a.

As I imagine an encounter under the current set of regulations, a postal patron will approach the door to a post office. The patron will then be approached by a signature-gatherer and asked to sign a petition, at which point, one of two things will happen: the patron may ignore the signature-gatherer, giving him the brush-off and walking right into the post office, or

seek to sign the petition. All of these interactions are permitted. Once the patron expresses an interest in signing the petition, however, the signature-gatherer will have to explain that postal regulations prohibit collecting signatures in this location, and invite the patron to move to the nearest *Grace* sidewalk to affix his signature.

App. 18a. As Judge Brown observed, “the disruption is only increased by the awkward two-step required by the regulations.” App. 19a. Moreover, not all interior postal sidewalks are within walking distance of a so-called *Grace* sidewalk, or even of any safe place for a signature-gatherer to stand. For example, many suburban and rural post offices, including specific examples discussed in the record below, are located on roads that do not have sidewalks, and may not even have safe shoulders. *See, e.g., Paff*, 204 F.3d at 429 (noting that “[t]he East Brunswick postal building is set back approximately 75 feet from the nearest thoroughfare, Cranbury Road, which has no adjoining sidewalk.”); J.A. 237-38, 871-74 (additional examples). In such places, the regulation effectively prohibits signature gathering altogether. Thus, the ban is not calculated to solve the problem the Postal Service claims to exist; if anything, it exacerbates it.

The panel opinion suggested that the ban on signature collection could be sustained as reasonable based on indications in the *Kokinda* plurality opinion and Justice Kennedy’s concurrence. App. 14a. But there are no such indications. *Kokinda*

focused on solicitations for immediate transfers of cash, which both the plurality opinion, 497 U.S. at 734, and Justice Kennedy, *id.* at 738, believed entailed a distinctly intrusive encounter. Indeed, Justice Kennedy voted to uphold the regulation at issue in *Kokinda* because it went “no further than to prohibit personal solicitations on postal property for the immediate payment of money.” *Id.* In *ISKCON*, Justice Kennedy also voted to sustain a regulation banning solicitations for the immediate exchange of money, relying significantly on the non-speech element of conduct involved in the exchange of funds. 505 U.S. at 703-05. But unlike exchanges of money, requests for signatures on petitions do not involve a non-speech element of conduct, for the act of signing a referendum petition is itself political expression entitled to First Amendment protection. *Doe v. Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2817 (2010).

Here, the ban on signature gathering burdens core political expression without advancing the government’s stated interests at all. Far from preventing an intrusion on the postal patron, it prolongs it. The Postal Service’s suggestion that signature collection is more intrusive than solicitation is belied by its contrary insistence that, in voter registration, actual signature collection is benign precisely because it does *not* involve solicitation. The ban is neither rationally related to its stated purpose nor a reasonably limited regulation of First Amendment activity.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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