07-4825

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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U.S. COURT OF APPEALS

BERTRAM COOPER,

Plaintiff-Appellee,

v.

UNITED STATES POSTAL SERVICE and RONALD G. BOYNE

Defendants-Appellants,

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

Intervenors-Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

Defendants-Appellants Full Gospel Interdenominational Church, Dr. Phillip Saunders Heritage Association, Inc., and Sincerely Yours, Inc. (collectively "the church"), appeal from judgments of the United States District Court for the District of Connecticut (Squatrito, J.), entered April 20, 2007, May 1, 2007, August 30, 2007, and September 4, 2007.

The church was awarded a contract by the Postal Service to operate on its private property a "contract postal unit" (CPU) wherein the church (acting through Sincerely Yours, Inc.) provides various postal services for sale to the public. In its CPU facility the church posts a number of displays presenting religious messages and descriptions of its various ministries. Plaintiff Bertram Cooper patronized the church's CPU on several occasions and alleges he felt "uncomfortable" when seeing such displays. As a result, he sued the Postal Service which had contracted with the church, in order to compel the removal of the church's displays. The church and its affiliated entities were thereafter granted intervention in the case.

There is no dispute between the parties that Sincerely Yours, Inc. ("SYI") is a private entity operated by the Full Gospel Interdenominational Church; or that the property in which SYI's CPU operates is private property belonging to the church; or that the Postal Service has no regulatory standards in its CPU contracts that forbid the presence of religious speech in a private CPU facility; or that the

religious speech displayed by the church in the SYI CPU is exclusively the result of the church's initiative with no contribution made to that presentation by the Postal Service. That is to say, the speech against which Mr. Cooper complains is private speech on private property that has not been encouraged in any way by the government.

The district court's decision validating Mr. Cooper's establishment clause complaint is thus an unprecedented one. Never has the Supreme Court or this Circuit validated the counter-intuitive notion that private religious speech presented by a religious institution on its own property is subject to scrutiny under—let alone prohibition under—the establishment clause of the First Amendment. That same First Amendment, notably, contains affirmative protection for the freedom of speech and free exercise of religion by private actors. But the district court proposed that the church's speech violates the establishment clause because the church is properly classified as the government. The court's explication of its conclusions hereon is fundamentally flawed both in its premises and in the methods it employed to achieve its result.

For these reasons as more fully elaborated below, as well as for other considerations set forth herein, the district court erred as a matter of law in granting summary judgment to Plaintiff Mr. Cooper and issuing a permanent injunction which forbids the presentation of the church's speech on its own property.

ISSUES PRESENTED

1. Whether a church's private speech communicated on its private property may be classified as government speech for purposes of the establishment clause, through operation of a classification inquiry that is alien to establishment clause jurisprudence and that reaches its government status conclusion without considering whether the government had any role in the act identified as governmental.

2. Whether the Establishment Clause is violated when private religious speech is communicated on private property at the exclusive initiative of and participation by a private party, because that speech occurs near government symbols.

STATEMENT OF FACTS

As a means of providing postal services to local communities without the expense and responsibility of maintaining a facility and staff of employees of its own (A310), the United States Postal Service contracts with private organizations to provide such services while operating on private property. (A334) These private contract arrangements operate what is called a "Contract Postal Unit," or "CPU." A CPU, according to the Postal Service's Glossary of Postal Terms, "is usually located in a store or place of business and is operated by a contractor who accepts mail from the public, sells postage and supplies, and provides selected special services (for example, post money order or registered mail)." (A301)

There are approximately 5,200 CPUs nationwide, and they are currently operated in, among other places, colleges, grocery stores, pharmacies, quilting shops, and even private residences. (A990) There are several CPUs being operated by religious entities, including sectarian universities, seminaries, religious bookstores, camps, a Catholic Press Society, and Catholic sisters organizations. (A983-984) Appellant Sincerely Yours, Inc., a corporation organized and owned by the Appellant Full Gospel Interdenominational Church, operates a CPU in the town of Manchester, Connecticut.

The process by which the Postal Service enters CPU contracts commences with the solicitation of bids for CPU operation from businesses or other entities in

the target community. Upon receipt of the bids, selection for the awarding of a CPU contract is based on a formula regarding a "business score" and a "price score." The standard criteria used in evaluating CPU proposals as to the business score include the suitability of the proposed location, the suitability of the proposed facility, and the ability of the bidder to provide services. (A1012-1013; A1040) Separately evaluated is the desirability of the financial proposal in the bid. (A1039-1040; A325) The religious nature of an entity proposing to operate a CPU is not a consideration relevant to the Postal Service's CPU evaluation (A991-1013) and was not a consideration when evaluating the church's bid. (A1138-1139, A1042)

Before the CPU contract was awarded to the church (which contract was subsequently transferred to the Sincerely Yours, Inc.—an entity the church created for the purpose of operating the CPU (A852)), the Town of Manchester had two prior CPUs in operation: the Weston Pharmacy CPU and the Community Place CPU. (A1014-15) The Community Place CPU was a community outreach organization (A252), and was in operation for approximately ten years before closing. (A199)

Eight months prior to its closing, the Community Place CPU served the Postal Service with notice of its intention to close. There was substantial community interest generated by this closing, as the community sought to find a

suitable replacement. (A1016-1018) As a result of the Postal Service's ensuing solicitation of bids throughout the Manchester community, two organizations responded with their offers to operate the replacement CPU: Manchester Hardware, Inc. and the Full Gospel Interdenominational Church. (A1018; A926; A1055-1132) Of the two, the church attained the higher suitability score from the Postal Service Evaluation Committee, and on November 21, 2001, the Postal Service awarded the CPU contract to the Church. (A132; A832)

Once a CPU is in operation, a Postal Service supervisor conducts periodic on-site reviews to ensure that the business is acting in compliance with the contract. Such contact and oversight of the SYI CPU has been minimal. (A1016; A1046, p.36) SYI runs the day-to-day operations of the CPU (A1016; A1046; A1053-1054), and SYI has the authority to hire and fire its CPU employees (A1044). SYI has paid for its employees to receive training from the Postal Service on matters such as accounting procedures and equipment operation. There are no government employees on the Board of Directors of SYI or the church. (A962 ¶59.)

The SYI CPU initiated operation on June of 2002. Its facility is located on Main Street in Manchester, and is marked with various signs, both inside and out of its facility, marking it as the Sincerely Yours, Inc. Contract Postal Unit. (A88-90, 92, 97-98) Inside the building, the church has posted a number of photographs

and other displays which detail or otherwise exhibit its ministries. For instance, on one wall is a framed display urging those seeking prayer to contact the church: "At this very moment someone is praying in our 24 hour Prayer Tower and we would love to pray for you. Please drop your request into our confidential prayer box, or if you would prefer to speak to someone personally, call our Church office. Once your need has been answered, we'd be so happy to hear from you. Please call our Church office … and let our receptionist know that God has answered your prayer." (A76-77 ¶9 (j); A239) The church also makes "prayer cards" available, as well as a receptacle into which patrons may place these cards. The text on these cards states that the petitioner can either "fill out this prayer card or call our Church Office at any time." It additionally states that "We have a 24-hour Prayer Tower at the Full Gospel Interdenominational Church, Inc., continually praying on the behalf of others." (A241; A76 ¶(i))

Other displays in the SYI CPU include a description of the church's missionary organization "World-Wide Lighthouse Missions" (WWLM) (which is dedicated to feeding, clothing, and educating the afflicted in poverty-stricken and war-torn regions of the world); pamphlets which describe and present photos of overseas missionary service of WWLM ministers (A73-77 ¶9-10); and a television monitor presents varied videos relating to WWLM, and the church and its ministries. (A78-79 ¶11)

For those patrons who might have overlooked these various displays in the SYI CPU wherein the church speaks of its church office, church receptionist, its church Prayer Tower, and its various church missions and organizations, there also is a sign on the postal counter announcing that the CPU is, indeed, operated by a church: "[The SYI] United States Contract Postal Unit is operated by the Full Gospel Interdenominational Church. Thank you for your patronage." (A80, ¶12(a)(2).) Additionally, there is a sign greeting patrons inside the door of the CPU stating that "The Full Gospel Interdenominational Church is so delighted to serve you—our community. We are dedicated to making your visit with us a pleasant and successful one for all of your mailing needs. Sincerely Yours." (A282; A20 ¶24)

Not surprisingly, the church's various displays on its property which offer prayer support and relate information about the church and its ministries were presented because church leaders wanted them presented. (A252-253) The United States Postal Service did not ask, suggest, encourage, coerce, or manipulate the church into speaking about its own ministries in its own facility. (A1050; A1054) The Postal Service simply does not concern itself with such issues; its CPU contract terms and regulations do not contain any discriminatory provisions which disallow the presentation of religious speech by the parties with whom it contracts, nor preclude those who wish to advertise their enterprises to do so (even if those

enterprises involve, for instance, feeding, clothing, and caring for the needy as a service to God). (A1050; A132; A991-1013.) Nonetheless, to make its indifference perfectly clear, the USPS arranged the placement on the postal counter a sign bearing its official logo which reads as follows: "The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit." (A80, A98-99)

Plaintiff Mr. Cooper patronized the SYI CPU on several occasions, and knew full well that the religious speech found in that CPU is speech of the church (A18 ¶14, A19 ¶¶21-22, A20 ¶24), and understood that the CPU system involves private parties operating the postal units. (A18 ¶14, A19 ¶21, A20 ¶24.) Mr. Cooper testified in his affidavit that he felt "very uncomfortable" when in the church's facility, because of the messages presented there by the church. (A65 ¶5.)

In the proceedings below, the district court found that the church's speech in its displays at the SYI CPU could be considered the actions of the federal government because SYI and the government were "entwined." Notably, in reaching that entwinement finding, the district court did not evaluate whether the Postal Service participated in any respect in the presentation of the church's speech to which Mr. Cooper objected. It additionally gave no attention to whether any First Amendment standards might militate against the court identifying the church's speech as that of the government. Nonetheless, having determined that

SYI is a government actor, the court perfunctorily applied the *Lemon* test to analyze SYI's posting of the religious displays, and determined that SYI failed the purpose, effect, and entanglement prongs, thereby violating the establishment clause of the First Amendment.

SUMMARY OF ARGUMENT

The district court identified the church's wall-hangings at its property as the speech of the federal government, and thus unconstitutional. The court's conclusion is dangerously mistaken, and resulted from an unprecedented method of evaluation which relied on entirely unsustainable premises. There is an essential dichotomy in our constitutional system between government and private acts; maintaining this distinction is critical in order to "preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 936 (1982). The concern for the preservation of individual freedom is particularly at issue in this case, where mischaracterizing that which is private as if it were governmental entails the censoring of the speech and religious exercise of a church on its own property.

The question of what actions may be attributed to the government is a perennial one at the heart of establishment clause jurisprudence, and the answer to that question is governed by a number of considerations specifically tailored for the First Amendment context (wherein the protections for converse private liberties are vigilantly honored). In addition to those context-specific rules on this question presented by the Supreme Court in establishment clause caselaw, the more general standards therein dictate that a court's evaluation be directed to the challenged act

or speech itself, and the question of government participation is answered by appeal to objective facts, not postulated misperceptions of ignorant onlookers.

The district court disregarded all of these authoritative considerations. The court neglected the establishment clause strictures in its approach to classifying the church's speech as governmental, and in reaching that government classification, the court misapplied state-action "entwinement" analysis in which the court gave no consideration to whether the government had anything to do with the speech at issue. The court's failure to focus its classification inquiry on the matter about which Plaintiff complains violated the most basic rule of operation in the government-action assessment, one on which the Supreme Court has repetitively insisted.

The fallacy of the district court's importation of its "government action" conclusion to the church is presented in stark relief during the court's subsequent establishment clause evaluation as it blithely treated the church's motives for its ministries as if these were the federal government's motives. Not only is this fantastical in theory, it is particularly aberrant in application in this instance when there was no involvement of the federal government with either the church's ministries or its speech. Indeed, in a separate section of its opinion, the court (without acknowledging the dissonance created hereby) embraced the evident fact that there was no involvement of the federal government in anything but the

"secular" aspects of this commercial contract with SYI that dealt with the sale of postal goods and services.

There are no categories of establishment clause jurisprudence that require the prohibition of the church's speech at the SYI CPU facility. Even assuming there is a form of establishment clause inquiry that could in some way be applied to a church, the church would be vindicated by such analysis because the objective reality regarding the private nature of its speech disallows its attribution to a government entity that had no part in its presentation.

POINT I

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE CHURCH'S SPEECH WAS GOVERNMENT ACTION

A. The district court improperly engaged a form of analysis alien to establishment clause jurisprudence when classifying the church's speech as government action.

The district court first proceeded to adjudicate Plaintiff Mr. Cooper's establishment clause challenge not by evaluating the church's status under standards of establishment clause jurisprudence, but rather under the terms of "state action" caselaw. Before we turn a critical eye to the district court's mishandling of even that latter standard, we would first identify that the introduction of such an alien process into the establishment clause realm was itself

improper. Establishment clause jurisprudence is implicitly hostile to the importation of conclusions on government-versus-private action from other legal tests, because the establishment clause caselaw contains its own standards to reach a conclusion on just this matter (and indeed this is a perennial evaluation thereunder). For this same reason, even if determinations derived from foreign evaluations were to be given provisional notice in an establishment clause case, they would ultimately be superfluous, for there is no legal authority for the idea that critical portions of establishment clause analysis may be discarded or trumped by conclusions reached from extraneous assessments. It is no doubt significant that the Supreme Court and this Circuit have never, by precept or by example, authorized the utilization of tests from "state action" caselaw in circumstances where speech has been challenged as an establishment of religion.

This Court recently pointed out that "[a]s the Supreme Court has recognized, there is a 'crucial difference' between government and private speech that endorses religion: while the former is forbidden by the Establishment Clause, the latter is protected by the Free Speech and Free Exercise Clauses." *Skoros v. City of New York*, 437 F.3d 1, 36 (2d Cir. 2006). In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302 (2000), the Supreme Court emphasized the "crucial difference" between government and private speech, and there announced that "we are not persuaded that the pregame invocations should be regarded as 'private

speech.'" The Supreme Court "examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries … to assess whether the use of that aid to indoctrinate religion could be attributed to the State." *Agostini v. Felton*, 521 U.S. 203, 230 (1997). In *Agostini* the Court had to "decide whether such activities are 'governmental indoctrination' because they are supported directly and almost entirely by State funds." *Id*. at 234 (emphasis added). In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) the Court explained that the question of governmental indoctrination hinges on whether such could "be attributed to state decisionmaking." The Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) evaluated whether it was "fair to say that the government itself has advanced religion through its own activities and influence." In *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 415 (2d Cir. 2001), this Court explained that "[t]he question under the establishment clause cases … is whether State funding of the [challenged program] results in *governmental* indoctrination—that is, indoctrination attributable to the government." *See also Mitchell v. Helms*, 530 U.S. 793 (2000); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

The distinction between what is private and what is government is clearly a fundamental and recurring dispute in this context, and this dispute is resolved

exclusively through establishment clause analyses tailored to the particular interests implicated in the First Amendment context. The Supreme Court's decision in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), for instance, may well have turned out differently if generic "entwinement" analysis had been the standard of measure; as it is, such an evaluation was not even mentioned by the Court in that case. That the establishment clause context has its own developed set of standards on this point is evidenced in this Court's summarizing statements in *DeStefano v. Emergency Housing Group, Inc*.

> [There are] many establishment clause cases in which the Supreme Court has upheld government activity despite the fact that it plainly did result in indoctrination. [Collecting cases.] We read the holdings of these cases and the language of *Agostini* itself to require that there be some nexus between the disputed government action and the resulting indoctrination, beyond the bare existence of a causal relationship between the two, before we can properly attribute the indoctrination to 'state decisionmaking' and thereby declare it to be 'governmental.'

247 F.3d at 415. This operative legal standard clearly restricts the circumstances in which responsibility may be assigned to the government for purposes of the establishment clause in the discussed context. Such a standard does not bend to assertions of government status derived in a manner (such as from the evaluation misapplied by the district court) that do not honor considerations from this realm of jurisprudence.

Guidance contained in establishment clause caselaw instructing against findings of government responsibility for religious actions includes as a premier consideration the determinative role played by private decisionmaking in response to neutral government eligibility criteria. *See Agostini*, 521 U.S. at 226 ("in *Zobrest*… we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a 'result of the private decision of individual parents' and '[could not] be attributed to *state* decisionmaking'"). This principle of government neutrality combined with private decision-making also finds application in cases involving speech in public forums. Government permission for religious speech in a neutrally available government forum cannot be the basis for finding government action in connection with the religious speech. *See, e.g., Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 763 (1995) ("We stated categorically that 'an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.' … Quite obviously, the factors that we considered determinative in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor respondent's expression[.]")

The list of rules and applications found in establishment clause caselaw need not be exhaustively presented here to make the point that when considering

whether an action may be attributed to the government, there are in-house standards to be used to resolve that question. This implies that use of extraneous tests for government classification is improper, or is at least unnecessary—for the foreign conclusion would be obliged to align itself with the local principles anyway.

B. Generic "state-action" analytical standards require that a court focus its evaluation on the specific act about which the plaintiff complains

Even if, *arguendo*, state action caselaw were properly employed in this establishment clause context,[1] and its conclusion could endure on more than a provisional basis, the district court mishandled that form of analysis on its own terms, for the court failed to direct its evaluation of government action to the conduct about which Plaintiff complains. The district court unaccountably assigned government-speech status to the church's displays when the court had not given any attention to whether the government had anything at all to do with these displays.

The prominent and consistent declaration and example of "state-action" caselaw is that the focus of a court's analysis must be on the particular action about which the Plaintiff complains. Whether there may be a "governmental"

[1] This Circuit has never validated the use of "state action" caselaw to review whether private action can be categorized as *federal* government action, but there is not an immediately apparent reason that this transfer of analysis is not sensible, other considerations being equal. *See United States v. Davis*, 482 F.2d 893, 897 n. 3 (9th Cir. 1973).

classification properly applied to *other* aspects of the private entity's endeavors is not determinative of the status assigned to the specific actions the plaintiff challenges. The district court below thus could not have demonstrated a more dramatic failure of protocol when ignoring the very conduct in dispute in the process of (nonetheless) classifying it.

The district court's method of proceeding can only be understood as an expression of its belief that if *any* portion of endeavor of a private entity is susceptible to "governmental" classification, this derivatively extends to *everything* that the party does. Here, since the district court found that the church's provision of postal services was "entwined" with the government, so also the displays the church hung on the walls of its facility were actions of the government.

But as the Supreme Court affirmed in *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), "[t]he judicial obligation is not only to '"preserv[e] an area of individual freedom by limiting the reach of federal law and avoi[d] the imposition of responsibility on a State for conduct it could not control,"' … but also to assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.'" *Id.* at 295 (citing *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. at 191; *Blum* v. Yaretsky, 457 U.S. 991, 1004 (1982)) (underline emphasis added). The Supreme Court in *Brentwood Academy*

went on to reiterate that "state action may be found if, though only if, there is such a 'close nexus between the State and *the challenged action*' that seemingly private behavior 'may be fairly treated as that of the State itself.' *Id*. at 295 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)) (emphasis added).

Similarly, in *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), the Supreme Court had emphasized the specific focus necessary to the analysis. "Our approach … begins by identifying 'the specific conduct of which the plaintiff complains,'" and that "'[f]aithful adherence to the 'state action' requirement … requires careful attention to *the gravamen of the plaintiff's complaint*.'" *Id*. at 51 (*quoting Blum v. Yaretsky* 457 U.S. at 1004, 1003) (emphasis added). This Court has similarly explained the need to focus on the close connection "between the State and the *challenged action*." *Gorman-Bakos v. Cornell Cooperative Extension of Schenectady County*, 252 F.3d 545, 551 (2d Cir. 2001) (citation omitted, emphasis added). "In the absence of such a nexus, a finding of state action may not be premised on the private entity's creation, funding, licensing, or regulation by the government." *Id*. at 552. There is thus a non-transferability of the status of other actions to the challenged action. As the court in *Young v. Halle Housing Associates, L.P.*, 152 F.Supp.2d 355, 364 (S.D.N.Y. 2001) explained:

> As these cases show, the crucial relationship for a finding of state action is between the governmental entity and the *action* taken by the

> private entity, not between the governmental entity and the private *actor*. While the respective benefits and burdens flowing from government funding and regulation alone might speak to the latter, in the absence of some indication of how they shaped or compelled the *challenged conduct*, they simply do not speak to the former in any meaningful way.

A highly instructive case on this point is *Polk County v. Dodson*, 454 U.S. 312 (1981), wherein the plaintiff had sued the public defender alleging counsel's improper handling of her criminal case. In *Polk County*, the plaintiff argued that "a public defender's employment relationship with the State rather than his [complained of] function, should determine whether he acts under color of state law." *Id.* at 319. The Supreme Court demurred; "[w]e take a different view." *Id.* The Court insisted that the act complained of must be the focus of its analysis.

> With respect to Dodson's § 1983 claims against Shepard, we decide only that a public defender does not act under color of state law *when performing a lawyer's traditional functions as counsel* to a defendant in a criminal proceeding. Because it was based on *such activities*, the complaint against Shepard must be dismissed.

Id. at 325 (emphasis added). Though the public defender was "a full-time state employee, working in an office fully funded and extensively regulated by the State and acting to fulfill a state obligation," *id.* at 322 n.13, the Court insisted that the relevant question of classification only pertained to the act challenged by the plaintiff. Whether the defendant could be identified as a state actor with respect to other undertakings was not material. "In concluding that Shepard did not act under color of state law in exercising her independent professional judgment in a

criminal proceeding, we do not suggest that a public defender never acts in that role." *Id*. at 324-25. The Court's message is simply that the requisite evaluation calls for scrutiny of the *act in question* for a proper classification to ensue.

The Supreme Court demonstrated this principle also in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). In that case the plaintiff had been excluded from membership in the Moose Lodge because of his race, and he then sued the Lodge for violating the equal protection clause. He argued that the Lodge should be classified as the State because it was extensively regulated by the State. But the Court instead focused on whether the discriminatory policy itself could in any way be ascribed to a governmental decision, and determined that it could not. *Id*. at 175-76. "The Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor." *Id*. at 175.

The Supreme Court's conclusion here was made notwithstanding the fact that the Lodge was extensively regulated: "an applicant for a club license must make such physical alterations in its premises as the board may require, must file a list of the names and addresses of its members and employees, and must keep extensive financial records. The board is granted the right to inspect the licensed

premises at any time when patrons, guests, or members are present."[2] The Court did not find these regulatory considerations to be relevant to the specific act for which the plaintiff filed his complaint: "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." *Id.* at 176-77.

The church's speech about which Mr. Cooper complains is exclusively the product and responsibility of the church, and is outside the reach of the terms of the contract between it and the Postal Service that regulates the consignment sale of postal products. The content of the challenged speech is entirely about the church and the church's ministries, and is conveyed in a way so as to identify that it is being spoken by the church. Also, the initiative for and presentation of that speech is exclusively the possession of the church. Conversely, the Postal Service is not the subject of the speech, it is not identified as the speaker, and it had no role in the presentation of the speech.

Moreover, the law will not permit attribution of responsibility to the government for the church's speech simply because the Postal Service did not forbid the church to present it. "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *American Manufacturers Association v. Sullivan*, 526 U.S. at 52 (citing *Blum v. Yaretsky*, 457 U.S. at 1004-

[2] This is reminiscent of certain aspects of SYI's contractual arrangement with the Postal Service.

1005; *Flagg Bros. v. Brooks*, 436 U.S. 149, 154-165 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357). Nor is that acquiescence "sufficient to justify holding the [government] responsible" for the permitted act. *Blum*, 457 U.S. at 1004-05. Nor will the Court abide "the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.'" *Sullivan*, 526 U.S. at 54 (citing *Flagg Bros.*, 436 U.S. 149, 164-65 (1978)). A private party's exercise of a prerogative allowed by law **"**where the initiative comes from it and not from the State, does not make its action in doing so 'state action'[.]" *Jackson*, 419 U.S. at 357; *accord Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003).

It is beyond dispute as a factual matter that the Postal Service did not participate at all in the church's speech displayed in its CPU facility. And as a legal matter, the Postal Service's acquiescence in the church's presentation of its own speech on its own property is incapable of serving as a basis for attributing responsibility to the government for what it clearly did not participate in. Accordingly, Plaintiff Mr. Cooper's complaint is directed against private speech. The district court disregarded the governing legal standards in concluding otherwise.

C. The district court erred in classifying the church's speech as government action when it had not evaluated whether the government participated in any way in the presentation of that speech

The foregoing discussion of legal standards exposes the critical inadequacies of the district court's government-classification methodology. While it is the church's position that the factors the district court assessed are incapable of demonstrating an "entwinement" of *any* aspect of the relationship between the church and the Postal Service, the only truly relevant question for purposes of this case is whether the acts complained of by Mr. Cooper are fairly attributable to the government. To this question the district court never directed its attention.

Instead, the court pursued a series of considerations incapable of imposing a governmental identity on the church's speech. For instance, the court began by assigning significance to its speculation that certain customers who saw the specific signs at the CPU bearing the postal logo and the words "contract postal unit" may not understand that a contract postal unit is a privately operated entity. The court related that

> [t]here is no definition of 'contract postal unit' contained in the signs outside of the SYI CPU, and the court is highly doubtful that the public at large understands the implications of the term 'contract postal unit' (i.e., that a CPU is operated by a private contractor, not the Postal Service). * * * [T]he Defendants have not demonstrated that the signage on the outside of the SYI CPU informs the public the SYI CPU is, in fact, a private entity operating on private property.

482 F.Supp.2d at 293.

The court thus explicitly acknowledges the most critical fact in the evaluation ("a CPU is operated by a private contractor, not the Postal Service"), but discards this reality and elevates to determinative status the erroneous view (which the court acknowledges to be erroneous) of a hypothetical patron who might not understand what a "CPU" *actually is*.[3] The court unsurprisingly fails to provide any legal authority to show that this hypothetical concern is relevant to the "entwinement" analysis it purports to be applying. There exists no caselaw remotely implying that the mistaken belief of an onlooker requires the legal determination that the observed private entity is thereby "entwined" with the government. And apart from the absence of entwinement caselaw authorizing consideration of this point, there is simply no conceptual connection between the idea of genuine "entwinement" and the postulated misapprehensions of onlookers.

The court additionally argues that while it is true that "the receipt [by the government] of revenue generated by a private entity is not, in and of itself, enough to establish state action by that private entity," the court nonetheless stipulated that this can be used as a factor showing pervasive entwinement. *Id.* at 294. But there is no reason (nor did the court offer one) to identify a profitable contractual relationship (which, axiomatically, involves *separate* parties) as

[3] As an aside, we would additionally note that the court skipped over the rather significant point that whether a hypothetical customer misunderstands what "contract postal unit" means does not entail that this customer would ignore the plethora of other indicators of the church's ownership and operation of the CPU.

entailing a merger of identities. All parties to voluntary contracts enter therein with the view that the agreement reached will be to their benefit. Most importantly, though, the Postal Service's receipt of revenue from SYI's consignment sales of postal products presents no reason to identify the church's poster detailing its mission efforts in Africa as the speech of the Postal Service.

The court also attempts that "the Defendants' assertion that the SYI CPU employees are not Postal Service employees carries little weight." This is patently wrong; the fact that an operation is run entirely by private (not government) parties is most assuredly a factor militating against a finding of entwinement. *See*, *e.g.*, *Brentwood Academy*, 531 U.S. at 293 (entwinement found for reasons including the fact that "[w]hen these penalties were imposed, all the voting members of the board of control and legislative counsel were public school administrators"); *Id.* at 299 (this is an "organization overwhelmingly composed of public school officials who select representatives (all of them public officials at the time in question here)); *Id.* at 300 ("There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms"). The fact that no government official operates the SYI CPU facility is certainly a significant observation in an entwinement inquiry.

The court also inexplicably highlights as supporting its entwinement determination that "the SYI CPU's only function is to perform its contract with the Postal Service. Indeed, the Church created SYI expressly for the purpose of operating the CPU[.]" *Id.* at 295. Yet the presence or absence of other contracts participated in by a private entity is clearly irrelevant to whether the private contractor is "entwined" with the government in the contract under consideration. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Furthermore, this consideration likewise does not show the government to be entwined in the church's wall-hangings.

The district court also erroneously opines that the contract between the Postal Service and the church gives the Postal Service broad oversight of the SYI CPU. In truth, that contract only grants the postal service the right to conduct audits, customer surveys and to review and inspect the CPU (A1006-1007, A1022, A1046, A1053-54, A1134); it does not authorize the Postal Service to command, supervise, or manage the CPU (and the Postal Service does not do so). (A132-192; A991-1013) Most relevantly, the contract is indifferent to whether the private party speaks about its religious ministries.

The district court's efforts were unhinged from any legal standards, and bereft of evaluation on the only matter of consequence: the speech complained of by Mr. Cooper.[4] For the court to announce that the church's speech was "government action" when the court had never looked to whether the government had any role in the speech, was entirely arbitrary.

Point II

THE DISTRICT COURT ERRED IN IDENTIFYING THAT THE CHURCH VIOLATED THE ESTABLISHMENT CLAUSE

A. The erroneous character of the district court's government-action finding is on display in the court's awkward and equally erroneous *Lemon* analysis

The artificiality of the court's classification of the church's speech as government action is on awkward display during its application of the terms of the *Lemon* test to that speech. In an incongruous paragraph in which the court ostensibly evaluated whether the government had a "secular purpose" for its action, the court states:

> The court finds that the religious displays in the SYI CPU… do not have a secular purpose. Those displays, which are evangelical in nature, were set up by the Church, whose mission is to "engage in the

[4] The Supreme Court's decision in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (where the Court exampled its speech-focused means of categorizing the speech as belonging to the federal government) provides yet another methodological contrast with the district court's means of resolution of the question.

> preaching of the Gospel of Jesus Christ," "establish … Churches for the advancement of the kingdom of Jesus Christ," and "send forth preachers and workers whose princip[al] objective shall be to promote the Kingdom of the Lord Jesus Christ.

482 F.Supp.2d at 296-97. Thus the court emphasizes that it is the *church* that set up the displays, so as to prove that *Lemon*'s first prong, which forbids 'religious purpose' of the *government*, has been violated. Also peculiar is that the court here does not evaluate the purpose for the displays in the CPU; it evaluates the purpose of the *church itself*. On that form of analysis, *everything* the church does would be unconstitutional (as the church is the government).

In another baffling passage, the court says, "There is no indication that the purpose of the SYI CPU's religious displays are meant to impart to the reasonable observer anything other than the Church's evangelical mission, and the court cannot fathom how one could argue otherwise." *Id.* at 297. It is not clear why the court would think that one would be inclined to argue otherwise. The contest is not about whether the church is a religious entity with religious motives; it is whether the church can be classified as the federal government, thereby turning the First Amendment on its head.

This same anomalous outlook appears in the court's application of prong two of *Lemon* when it states that, "[t]here is no serious contention made by the parties that a reasonable observer would perceive the SYI CPU's above-described religious displays as anything other than endorsements or sponsorships of *the*

Church and *its* evangelical mission." *Id.* at 297 (emphasis added). Later the court expounds: "Indeed, these displays put *the Church's beliefs* front and center, out for the public to see, endorsing *the Church's* form of Christianity and seeking outsiders to join *the Church* in its mission. Therefore, the court concludes that SYI CPU's religious displays violate the second prong of the *Lemon* test." *Id.* (emphasis added). The church's displays undoubtedly direct the reader to understand the *church's* objectives and missionary endeavors; it could not be clearer that the federal government has nothing at all to do with these communications, and that *Lemon*'s second prong is not violated. But to the district court, the church is the federal government, thus evidence of the church's religiosity demonstrates establishment of religion.

The court's analysis of the third prong of *Lemon* is noteworthy for several reasons. First, the court has inexplicably (and apparently without realization) shifted course and abandoned the government classification of SYI's speech, now evaluating it as private speech. Second, though the third prong of *Lemon* is directed to evaluating "excessive entanglement," the court does not investigate entanglement, but instead perceptions of endorsement. Third, the court formulates its own curious revision of endorsement analysis, predicated upon an "ignorant outsider." Says the court:

> There is nothing wrong, *per se*, with the Church exhibiting religious displays. Here, however, the Church is exhibiting such displays while

> it is performing its duties under a contract with the Postal Service, i.e., the U.S. Government. To an outsider, the fact that the SYI CPU's religious displays are in relatively close proximity to Postal Service displays (e.g., the Postal Service eagle) could indicate that, despite certain signs indicating otherwise, the Postal Service endorses the purpose and message of those religious displays. The court therefore finds that the religious displays in the SYI CPU violate the third prong of the *Lemon* test.

Id. at 298.

On the court's view, the mere possibility that an uninformed outsider "could" think that the federal government endorses the church's speech—notwithstanding the absence of affirmative indications of such government imprimatur, and ample indicators to the contrary—presents an establishment clause violation. Never has the Supreme Court or this Circuit attributed determinative significance to hypothetical perceptions of an uninformed "outsider."

B. The establishment clause contains no standards prohibiting the church's speech on its property

As the church's speech may not legitimately be categorized as speech of the government, an establishment clause analysis in the form the district court employed it is improper. The Supreme Court and this Circuit have never validated the application of establishment clause restrictions to private speech on private property. Instead these restrictions are applied only to actions of the government itself. As demonstrated above, no such government classification can be applied to the speech Plaintiff here challenges. That speech is thus not susceptible to

prohibition under the establishment clause standards applied in this Circuit. "We continue in this Circuit to apply the general test first set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 [] (1971), as modified by *Agostini v. Felton*[.]" *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d at 405. The *Lemon*/*Agostini* standard by its terms forbids only acts of the government.

As to the operation of the endorsement test, in *DeStefano* this Court explained that "[w]e read these [Supreme Court] decisions as casting doubt on the vitality of the endorsement test as a stand-alone measure of constitutionality in most establishment clause cases[.]" The Court allowed that the "endorsement inquiry remains a viable test of constitutionality in certain unique and discrete circumstances—for example, where the *government embraces* a religious symbol or allows the prominent display of religious imagery on *public property*[.]" *Id.* at 411 (emphasis added). Therefore, it appears that the endorsement inquiry as well does not apply to the circumstances of this case, as the speech Mr. Cooper challenges is neither presented on public property nor involves the government embrace of a religious symbol.

Nevertheless, if this Court were to employ the terms of the endorsement analysis in reviewing the speech displays at the SYI CPU, no government endorsement could possibly be found. The reason for this certain result is that the "observer" construct utilized in the endorsement inquiry is one imputed with

plenary information about the circumstance under evaluation, so would be fully apprised of the private nature of the speech and property herein at issue. "[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying the challenged program." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (internal quotation marks omitted) (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001)). The observer is also "acquainted with the text, legislative history, and implementation of the" program under evaluation. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

Corresponding to this attribution to the "observer" of all legally pertinent information, is the irrelevance of the actual perceptions of real observers. "As Justice O'Connor has explained, the reasonable observer standard does not 'focus on the actual perception of individual observers, who naturally have differing degrees of knowledge.'" *Skoros v. City of New York*, 437 F.3d at 24, quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 799 (O'Connor, J., concurring in part and concurring in the judgment). It therefore logically follows that a court

> is not required to ask 'whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.' " … Rather, it considers whether a 'reasonable observer … aware of the history and context of the community and

> forum in which the religious display appears,' would understand it to endorse religion[.]

Skoros, 437 F.3d at 30 (internal citation omitted, emphasis in original).

Because of the comprehensive factual understanding attributed to the "observer," and because the observer is exclusively an analytical device (not a source of empirical information about the misperceptions maintained by real observers), the endorsement analysis does not permit the attribution of ignorance and error to the "observer" so as to manipulate the result of the endorsement inquiry. That is, the First Amendment does not permit acknowledged falsehoods to govern the results of First Amendment questions.[5] Therefore, in the context of this case, there can be no place in the establishment clause analysis for an unreasonable, uninformed observer who is ignorant of the common knowledge

[5] It is because the so-called "observer" in the endorsement test has all the relevant facts and the legal rules imputed to it, it may not be said that the observer is independently contributing anything to the evaluation. "Observer" is thus a rather misleading designation for the method (and misleading in precisely the way that leads to the sort of errors indulged by the court below). Similarly, it is also why the Court in *DeStefano* was not entirely precise in identifying the endorsement test as a "stand-alone" test, even in the limited contexts it identified. *DeStefano*, 247 F.3d at 411. Whether "endorsement" can be identified is entirely the result of the outcome of other legal rules (*e.g.*, rules of neutrality, private choice, public forum, etc.) applied to the objective facts of the case. The "observer" observes nothing; it serves as the repository for the facts and rules the court utilizes in its analysis. Perhaps this is why the Supreme Court identified in *Santa Fe* that the endorsement evaluation is "one of the relevant questions"— not the determinative standard—in the resolution of the question of the football game invocations treated in that case. 530 U.S. at 308. The "observer" is instructed by the Court as to what it may think and conclude; it contributes nothing back to the Court.

possessed by those in the Manchester community; who knows nothing of what the 5,200 contract postal units actually are; who is forbidden to know that the CPU is operated on private property; who is incapable of seeing, reading, or understanding the clear indicia of church operation of the CPU and sponsorship of the speech which is at issue; and who cannot see or understand the USPS disclaimer which repudiates decisively any misimpression that may derive from ignorance.

For this reason also, the proximity of the church's speech to "contract postal unit" signs containing the Postal Service logo is of no legal consequence. The only argument that could be made assigning significance to this proximity factor is one premised on the legal fallacy just refuted: that an "ignorant outsider" blinded to history and context, without ability to understand the meaning of words, and who refuses to countenance the numerous indicators demonstrating the reality of the church's ownership and operation of the CPU and the Postal Service's indifference to the church's speech, is reason to censor the church as violating the Establishment Clause.

There is simply no category of First Amendment analysis that can facilitate a condemnation of the church's speech as an establishment of religion. The absence of a legal category able to countenance Mr. Cooper's complaint is the message inadvertently communicated by the district court through the confounding lengths

to which it went to identify the church as the federal government: it had no other way to find an establishment clause violation.

In stark contrast to the district court's evaluation of the church's displays in its CPU is the court's method of analysis used when denying Mr. Cooper's challenge on establishment clause grounds to the contractual relationship itself between SYI and the Postal Service. There the court employed a refreshingly sensible form of reasoning that if engaged earlier in its opinion would have handily repudiated Mr. Cooper's challenge to the church's speech in the CPU. The district court helpfully explained that:

> The relationship between the Postal Service and SYI is not religious in nature, i.e., the Postal Service has not contracted for services that are in any way sectarian or religious.
>
> … The primary effect of the Postal Service's interaction with SYI is that the SYI CPU performs the secular, public postal services that otherwise would have been performed by the Post Service (or another CPU). There is no indication that the Postal Service is 'advancing' or 'sponsoring' the Church's religion simply by entering into a contractual relationship with SYI; the Postal Service solicited bids for that contract from an entire community, not just from religious organizations. The fact that a religious organization happened to win that bid does not mean that the Postal Service was advancing or sponsoring religion.

482 F.Supp.2d at 299. The court continued:

> The SYI CPU's primary purpose … is to provide postal services. Thus, the Postal Service's oversight of the SYI CPU is related to that secular purpose, not to any religious purpose. In short, the Postal Service provides postal supplies to the SYI CPU and ensures that the SYI CPU is operating within the Postal Service's standards. From

> what the court can determine, the Postal Service has no direct interaction with the Church's religious activities.

Id. at 300.

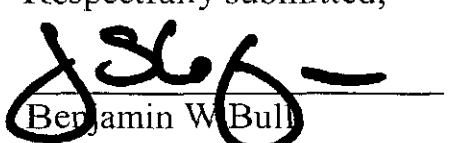
The church's speech about its ministries as found in the displays in the SYI CPU is obviously its own, and exclusively so. It may not be attributed to the federal government under any legal doctrine recognized by this Court. The district court's judgment should be reversed, and summary judgment granted to Defendants.

CONCLUSION

The judgment appealed from should be reversed, the injunction vacated, and summary judgment granted to defendants-appellants.

Dated: Washington, D.C.
February 18, 2008

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(b). As measured by the word count provided by Microsoft Word 2007, and in accordance with provisions of Federal Rule of Appellate Procedure 32(a)(7)(b)(3)(iii), this brief contains 8,732 words.

Jeffrey A. Shafer

ANTI-VIRUS CERTIFICATE

I, Jeffrey A. Shafer, certify that I have scanned for viruses the PDF version of the Plaintiffs-Appellants' Brief that will be submitted in this case as an email attachment to brief@ca2.uscourts.gov and that no viruses were detected. The anti-virus detector used was Virus Scan Enterprise 8.0.

Dated: February 18, 2008

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief and Joint Appendix have been served via overnight delivery (and electronic service of the brief) on the following persons on this the 19th day of February, 2008:

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