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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REMOVAL OF CUSTOMIZED POSTAGE FROM THE MAIL CLASSIFICATION SCHEDULE	Docket No. MC2020-126

RESPONSES OF THE UNITED STATES POSTAL SERVICE TO
CHAIRMAN'S INFORMATION REQUEST NO. 1

The United States Postal Service hereby provides its responses to the above-listed questions of Chairman's Information Request No. 1, issued on May 20, 2020. Each question is stated verbatim and followed by the response.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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May 27, 2020

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1. Please complete the following chart with more information regarding historic Customized Postage information. Please provide or link to source documents.

Fiscal Year	Number of Authorized Vendors	Volume (Pieces of Postage Sold)	Revenue
2015			
2016			
2017			
2018			
2019			

RESPONSE:

Fiscal Year	Number of Authorized Vendors	Volume (Pieces of Postage Sold)	Revenue
2015	3	22,240,142	$28,428,268.33
2016	3	27,857,990	$33,364,798.96
2017	3	39,815,519	$45,464,167.38
2018	3	31,560,738	$36,852.200.60
2019	1	11,063,442	$15,654,316.75

Data Source: NMATS (National Meter Accounting Tracking System)

The requested source document is provided at Library Reference USPS-LR-MC2020-126/NP1. The Postal Service has chosen to file the source information for this response under seal to protect commercially sensitive information of its vendors. The Application for Nonpublic Treatment of Materials is included at Attachment 1. The Postal Service has also provided a public, redacted version of the source document, which is attached to the response.

In response to the discrepancy in revenue information reported by Stamps.com, the Postal Service investigated why its initially reported postage revenue number was so much lower than what Stamps.com reported. Docket No. MC2020-126, Comments

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of Stamps.com, May 18, 2020, at 7 (hereinafter "Comments of Stamps.com"). The Postal Service found that the data needed to fully account for the postage came from two different sources, not one, and by adding the second source the Postal Service believes it is including all of Customized Postage. That is why the volumes and revenues for FY2017-FY2019 reported above are higher than initially reported in its Request (submitted on May 1, 2020). Although the volumes and revenues are higher than initially reported, there is still a very noticeable decline over these years.

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2. Please refer to the Postal Service's response to Chairman's Information Request No. 1 in Docket No. MC2009-19.[1] There, the Postal Service asserted that the Customized Postage program furthered objectives 2 and 5 of 39 U.S.C. § 3622(b) by increasing postal revenue and encouraging increased mail volume, and enhanced relative value to postal customers consistent with factor 8 of 39 U.S.C. § 3622(c). *See* Docket No. MC2009-19 CHIR No. 1, question 4. Please reconcile these statements with the Postal Service's current assertion that "none of the factors and objectives of 39 USC § 3622 are directly applicable" to the Customized Postage program. Request at 4.

RESPONSE:

In the ten years that followed the Postal Service's statements in Docket No. MC2009-19, the Postal Service's assessment of the Customized Postage program has evolved, primarily due to the quality issues relating to the program's administration and the introduction of lawsuits challenging the Customized Postage program's eligibility criteria. Both examples are described in greater detail below in response to Questions 3 through 6. The type of quality issues that the Postal Service has faced and the nature of the lawsuits and allegations contained therein are such that the Postal Service has now determined that Customized Postage's risk to Postal Service's business interests greatly outweighs the program's benefits.

Additionally, the Postal Service does not believe its statements in response to Chairman's Information Request No. 1 in Docket No. MC2009-19 preclude a change in strategy. In Docket No. MC2009-19, the Postal Service provided analysis as to why Customized Postage should be added to the Mail

[1] Docket No. MC2009-19, Responses of the United States Postal Service to Chairman's Information Request No. 1, May 29, 2009 (Docket No. MC2009-19 CHIR No. 1).

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Classification Schedule ("MCS"). Now, with the benefit of over ten years of experience, the Postal Service has demonstrated why "the change" (that is, the elimination of Customized Postage from the MCS) advances the objectives of 39 U.S.C. § 3622(b), taking into account the factors of 39 U.S.C. § 3622(c). The addition of a product to the MCS necessarily requires a different analysis than that required for removing a product from the MCS.

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3. Please provide more specific examples of customer complaints concerning the eligibility for the Customized Postage program. *See id*. at 2.

RESPONSE:

There have been numerous customer complaints involving Customized Postage made over the life of the program. For one recent example, see Attachment 2, a demand letter and press release from a legal advocacy organization on behalf of a customer seeking to purchase Customized Postage in 2018.

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4. Please provide specific examples of legal disputes centered on the Customized Postage program. *See id.*

RESPONSE:

Zukerman v. United States Postal Serv., No. 19-5168 (D.C. Cir.)

In 2015, Plaintiffs brought a First Amendment challenge to the Customized Postage political content restrictions. The D.C. District Court dismissed the case in 2019. Zukerman v. United States Postal Serv., 384 F. Supp. 3d 44, 67 (D.D.C. 2019). Plaintiffs appealed, and the D.C. Circuit Court of Appeals heard oral argument in February, 2020, and has not yet issued an opinion.

Fletcher v. United States Postal Serv., No. 19-0925 (E.D. Tex.)

In 2019, Plaintiff brought a First Amendment and Religious Freedom Restoration Act challenge to the Customized Postage religious content restrictions. A joint status report was filed with the court May 5, 2020, giving notice of the Postal Service's request in this docket to remove Customized Postage from the MCS and stating that Plaintiff agrees to voluntarily dismiss the case as moot if the PRC grants the request. Based on this information, the court ordered a continuing stay of the proceedings and required the Postal Service to submit a status report on August 5, 2020.

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5. Please provide specific information supporting the Postal Service's view that Customized Postage represents a risk to its brand interests. *See id*. at 4.

RESPONSE:

Because Customized Postage products "share the function and appearance of U.S. stamps," the Postal Service must guard its brand interests against "dilution, false attribution, appearances of endorsement, and other potential impacts." Revisions to the Requirements for Authority to Manufacture and Distribute Postage Evidencing Systems; Customized Postage Products, 82 Fed. Reg. 60117 (Dec. 19, 2017). For enduring examples of impacts to Postal Service brand interests, see the Customized Postage products purchased in 2005 still featured on The Smoking Gun website at http://www.thesmokinggun.com/documents/crime/vanity-stamps-go-postal-again (last accessed May 21, 2020). As those examples show, even carefully applied eligibility criteria may not prevent the creation and distribution of products that harm the Postal Service's brand interests.

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6. Please provide specific examples of quality issues experienced in the Customized Postage program. *See id*. at 3.

RESPONSE:

Authorized providers have implemented content restrictions designed to protect Postal Service brand interests unevenly. In fact, the comments filed in this docket demonstrate non-compliance with the Customized Postage regulations. The Postal Service previously considered and rejected public comments requesting that content depicting non-profit causes be included as an eligible product category, explaining that "[s]elective acceptance of only those non-profit causes or organizations that do not present threats to the Postal Service's brand would constitute impermissible viewpoint discrimination, which would endanger the entire program" under First Amendment requirements. 82 Fed. Reg. 60117 ("Such legal risks would offset any potential revenue increases attributable to the eligibility of non-profit content."). Nevertheless, content depicting non-profit causes—a category which is demonstrably ineligible under existing regulations—features prominently in the comments of Stamps.com and the Alliance of Nonprofit Mailers. Comments of Stamps.com at 3; Docket No. MC2020-126, Comments of Alliance of Nonprofit Mailers ("ANM"), May 21, 2020, at 4 (hereinafter "Comments of ANM"); *see also* Zukerman v. United States Postal Serv., 384 F.Supp.3d 44, 56 n.4 (D.D.C. 2019) (noting that provider's acceptance of political designs "squarely violated" both Postal Service content restrictions and the provider's internal

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standards). Comments in this docket also demonstrate that authorized providers have applied their own content restrictions despite the regulatory requirement that they only apply Postal Service content restrictions. *Compare* 39 C.F.R. § 501.21(c)(2)(i) ("Providers may not use [nor represent the use of] any other [than Postal Service] eligibility criteria.") *with* Comments of Stamps.com at 10 ("Stamps.com has its own eligibility content guidelines which prohibit the printing of controversial images.") *and* Zukerman, 384 F.Supp.3d at 52 (referring to authorized provider's application of its own "Appropriate Use Guidelines").

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7. Please provide the following information regarding authorized vendor participation in the Customized Postage program:

   a. Please identify the number of vendors, if any, that have voluntarily withdrawn from the Customized Postage program. Please provide the year in which the voluntary withdrawal occurred. Please identify any reason(s) provided by the vendor(s) for voluntary withdrawal.

   b. Please identify the number of vendors, if any, that have been involuntarily removed from the Customized Postage program. Please provide the year in which the removal occurred. Please identify the reason(s) for their removal.

   c. Please identify what proportion, if any, of the declining vendor participation in the Customized Postage program is due to industry consolidation. *See id*. at 3

RESPONSE:

(a) One authorized vendor voluntarily withdrew from the Customized Postage program. The reason for the voluntarily withdrawal is low demand.

(b) In 2018, one authorized vendor was not renewed for participation in the program based on its misapplication of Postal Service content restrictions. See Zukerman v. United States Postal Serv., 384 F. Supp. 3d 44, 56 n.4 (D.D.C. 2019). In 2020, the Postal Service determined that Customized Postage products constituted an unacceptable risk to its business interests and terminated the authorization of the last remaining vendor. Docket No. MC2020-126, Request of the United States Postal Service to Remove Customized Postage From the Mail Classification Schedule, May 1, 2020, at 2-3.

(c) There was one instance of consolidation. One authorized vendor acquired

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another, and that acquisition took place in 2010s.

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8. Please provide support for the assertion that "the impact to consumers and small businesses will be minimal." *Id*. at 3. In particular, please explain how the alternatives offered by the Postal Service fulfill the market niche currently offered by the Customized Postage program.

RESPONSE:

As noted in the Postal Service's Request, consumers' and small businesses' demand for Customized Postage has always been weak relative to the Postal Service's other products. The additional data points for revenue and volume the Postal Service provided in response to Question 1 of this Information Request further demonstrate this point. Additionally, the Postal Service's last remaining vendor of Customized Postage made a similar observation in its Q1 2020 Earnings Call. There, Stamps.com told investors that the elimination of the Customized Postage program is "not material" to the company from a financial perspective. Stamps.com Inc (STMP) Q1 2020 Earnings Call Transcript (May 8, 2020), https://www.fool.com/earnings/call-transcripts/2020/05/08/stampscom-inc-stmp-q1-2020-earnings-call-transcrip.aspx (last accessed May 25, 2020). To further illustrate this point, Stamps.com noted that the program's "[c]ontribution to the bottom line is in the low single digits for EBITDA annually." *Id.* Lastly, Stamps.com agrees that the removal of Customized Postage will have a minimal impact to consumers. In its comment, Stamps.com noted that consumers accounted for only 10 percent of its customer base; the remainder consists of small businesses and non-profit associations. Comments of Stamps.com at 3.

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There are plenty of alternatives to Customized Postage that will help consumers and small businesses fulfill the niche currently offered by the Customized Postage program, thereby further minimizing the impact to affected customers. Commenters noted that consumers, small businesses, and non-profit associations turn to Customized Postage to personalize their communications. For example, consumers use Customized Postage to provide recipients another avenue to share a happy milestone or a sneak peak of the correspondence. *See* Comments of Stamps.com at 2; Docket MC2020-126, Comments of Minted, May 18, 2020, at 1. Small businesses and non-profit associations use Customized Postage to increase brand recognition. *See* Comments of Stamps.com at 2-3; Comments of ANM at 2.

While stamps are an important aspect of a mailed communication, other aspects of the mailed communication, such as the envelope, address label, and communication contained within the envelope, provide avenues for consumers, small businesses, and non-profit associations to personalize their communications. There are many private companies who provide these services. For example, commenter Minted provides consumers and small businesses with the ability to personalize address labels, envelopes, and communications contained within with photos or images. Thus, a small business can increase brand recognition by choosing envelope colors that signify its brand or using address labels adorned with the business's brand.

Because content depicting non-profit causes is ineligible for use as

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Customized Postage, the impact to non-profit associations should be limited. Nevertheless, like consumers and small businesses, non-profit associations can use other aspects of their mailings to achieve the goals they previously sought to achieve through the use of eligible Customized Postage content. For example, some non-profit associations send mailings that include greeting cards and address labels to help increase mindshare of a respective non-profit association to potential donors.

In sum, the removal of the Customized Postage program will likely have a minimal impact on consumers, small businesses, and non-profit associations. As demonstrated by the revenue and volume figures over time, demand for the product has been weak as compared to other Postal Service products. Additionally, there are alternatives available that can fulfill the niche currently offered by the Customized Postage program. More importantly, the impact of eliminating the program must be weighed against the impact of retaining the program. As noted above, the Postal Service has determined that retaining the program risks causing outsized damage to the Postal Service's customer relations and brand image. This disproportionate impact to the Postal Service's business interests far outweighs any impact of the program's elimination to consumers, small businesses, and non-profit associations.

APPLICATION OF THE UNITED STATES POSTAL SERVICE FOR NON-PUBLIC TREATMENT OF MATERIALS

In accordance with 39 C.F.R. Part 3011, the Postal Service hereby applies for non-public treatment of certain materials filed with the Commission in this docket. The materials covered by this application consist of the contents of library reference USPS-LR-MC2020-126/NP1, which includes one Excel file pertaining to the revenue and volume information for the Customized Postage program.

The Postal Service hereby furnishes below the justification for this application as required by 39 C.F.R. § 3011.201(b).

(1) The rationale for claiming that the materials are non-public, including the specific statutory provision(s) supporting the claim, and an explanation justifying application of the provision(s) to the materials.

The materials designated as non-public consist of information of a commercial nature as well as third party business information that, under good business practice, would not be disclosed to the public. The Postal Service does not believe any commercial enterprise would voluntarily publish third-party specific volume and revenue data. Thus, in the Postal Service's view, this information would be exempt from mandatory disclosure pursuant to 39 U.S.C. § 410(c)(2); 5 U.S.C. § 552(b)(4). Because the portions of materials filed non-publicly in this docket fall within the scope of information not required to be publicly disclosed, the Postal Service asks the Commission to support its determination that these materials are exempt from public disclosure and grant its application for their non-public treatment.

(2) A statement of whether the submitter, any person other than the submitter, or both have a proprietary interest in the information contained within the non-public materials, and the identification(s) specified in paragraphs (b)(2)(i) through (iii) of this section (whichever is applicable). For purposes

of this paragraph, identification means the name, phone number, and email address of an individual.

The Postal Service believes that the vendors in the Customized Postage program have proprietary interests in the non-public materials and that vendor-identifying information is sensitive and should be withheld from public disclosure. Therefore, rather than identifying the vendors, the Postal Service gives notice that it is in the process of informing the vendors, in compliance with 39 C.F.R. § 3011.200(b), of the nature and scope of this filing and its ability to address its confidentiality concerns directly with the Commission. The Postal Service employee responsible for providing notice to the third parties with proprietary interest in the materials filed in this docket is Amanda Hamilton, Attorney, 475 L'Enfant Plaza SW, Washington, D.C. 20260-1137, whose email address is Amanda.J.Hamilton@usps.gov and whose telephone number is 202-268-4559.

(3) A description of the information contained within the materials claimed to be non-public in a manner that, without revealing the information at issue, would allow the Commission to thoroughly evaluate the basis for the claim that the information contained within the materials are non-public.

In connection with its Response to ChIR No. 1, the Postal Service included library reference USPS-LR-MC2020-126/NP1. This library reference includes data pertaining to the Customized Postage program. These materials were filed under seal. The Postal Service maintains that these materials should remain confidential because they contain commercially sensitive information such as vendor-specific revenue and volume information.

(4) Particular identification of the nature and extent of the harm alleged and the likelihood of each harm alleged to result from disclosure.

The data includes specific information, such as vendor-specific Customized Postage revenue and volume information. This information is highly confidential in the business world. If the redacted information were to be disclosed publicly, the Postal Service considers that it is likely that the vendors would suffer commercial harm. The information is commercially sensitive of third parties, and the Postal Service does not believe that it would be disclosed under good business practices.

(5) At least one specific hypothetical, illustrative example of each alleged harm.

Identified harm: Public disclosure of information in USPS-LR-MC2020-126/NP1 would be used by a vendor's competitors to its detriment.

Hypothetical: A competitor obtains a copy of the unredacted version of USPS-LR-MC2020-126/NP1 to the detriment of the Postal Service's vendors. Company B uses the information to detect proprietary business strategies of a vendor and changes its business practices to minimize differentiation, identify their key customer base and cause defection of the vendor's customers. Other companies would then refuse to participate in future Postal Service's programs, which would harm the Postal Service's ability to compete in the marketplace for additional volume and revenue.

(6) The extent of the protection from public disclosure alleged to be necessary.

The Postal Service maintains that the redacted portions of the materials filed non-publicly should be withheld from persons involved in competitive decision-making in the market for Customized Postage, as well as their consultants and attorneys.

Additionally, the Postal Service believes that current or former vendors of the Postal Service for Customized Postage should not be provided access to the non-public materials in library reference USPS-LR-MC2020-126/NP1.

(7) The length of time for which non-public treatment is alleged to be necessary with justification thereof.

The Commission's regulations provide that non-public materials shall lose non-public status ten years after the date of filing with the Commission, unless otherwise provided by the Commission. 39 C.F.R. § 3011.401(a). However, because the Postal Service's relationships with vendors often continue beyond ten years, the Postal Service intends to oppose requests for disclosure of these materials pursuant to 39 C.F.R. § 3011.401(b-c).

(8) Any other relevant factors or reasons to support the application.

None.

FIRST LIBERTY

News Release
For Immediate Release: 12.20.18
Contact: Lacey McNiel, media@firstliberty.org
Direct: 972-941-4453

(Left: Original Hunt family photo rejected by Zazzle; Right: Cropped version of photo suggested by Zazzle. Photos may be used with credit to, "First Liberty Institute" or "FirstLiberty.org")

United States Postal Service Regulation Denies Personalized Christmas Stamp Because of Religious Content

Regulation that prevents "any depiction" of religious content forces USPS vendors to reject family vacation photo in front of historic cathedral

PLANO, TX—First Liberty Institute sent a letter today to the United States Postal Service ("USPS") seeking clarification of its policies regarding custom postage. The letter follows the adoption in 2017 by the USPS of a regulation barring "any depiction" of religious content, which forced vendor Zazzle and Stamps.com to deny First Liberty client Tavia Hunt the purchase of a personalized, custom Christmas card stamp featuring her family's vacation photo in front of a historic cathedral.

You can read the letter here.

"No one should have to go to court to send a Christmas card," said Hiram Sasser, General Counsel for First Liberty Institute. "USPS policies are so ambiguous and unequally applied that even its approved vendors don't know what is allowed and what isn't. The USPS has made Zazzle and Stamps.com agents of discrimination."

In late November, Mrs. Hunt sought to purchase a personalized, custom stamp through Zazzle, which partners with Stamps.com to print custom postage, that included a photo of her family in front of St. Basil's Cathedral taken this year while in Moscow for the World Cup. After initially accepting her order, Zazzle informed Mrs. Hunt that her order was being cancelled because of its "religious" nature, specifically the presence of St. Basil's cathedral in the background. Zazzle then indicated that Mrs. Hunt's order would be

approved if the photo were cropped to make the cathedral "less obvious." Ultimately, Zazzle chose to indefinitely "pause" its production of custom postage for the entire nation rather than run afoul of the Postal Service's comprehensive ban on religious images.

In response to the rejection of her stamp, Mrs. Hunt said, "All I wanted was to add something personal to my family's Christmas cards. I was shocked that a family photo that includes a historic cathedral in the background is considered too religious by the Post Office."

First Liberty explained that the USPS regulation is overly broad and as applied may violate the First Amendment's free exercise clause. Both Stamps.com and Zazzle.com commented against the breadth of the religious restriction when it was published in the Federal Register, but the offending provision was not changed. Without clarification, legal action is possible.

"American taxpayers who fund the Postal Service deserve to know whether they can order a customized stamp or not," added Sasser.

# # #

About First Liberty Institute
First Liberty Institute is the largest legal organization in the nation dedicated exclusively to defending religious freedom for all Americans.

To arrange an interview, contact Lacey McNiel at media@firstliberty.org or by calling 972-941-4453.

FIRST LIBERTY

December 20, 2018

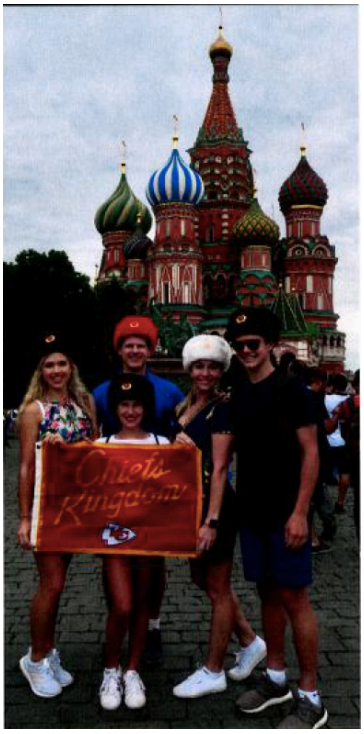
Megan J. Brennan
Postmaster General and Chief Executive Officer
United States Postal Service
475 L'Enfant Plaza, SW
Room 4012
Washington, DC 20260

Dear Postmaster Brennan,

First Liberty Institute represents Tavia Hunt on this matter. Please direct any correspondence on this matter to the undersigned.

We write to request that you immediately rescind an unconstitutional United States Postal Service ("USPS") regulation that bans *any* depiction of religious content on customized postage.[1]

Mrs. Hunt's efforts to send out this year's Christmas cards to her friends and family featuring a customized postage stamp of her family in front of St. Basil's Cathedral have been stymied by the USPS because of its confusing, onerous, and unconstitutional regulations. The customized postage stamp repeatedly denied is the following image:



[1] https://www.federalregister.gov/d/2017-27241/p-32

Unconstitutionality of USPS's Ban on Religious Viewpoints and Content

Zazzle and Stamps.com are USPS-approved licensed third-party vendors who sell customized postage stamps. On November 28, 2018, Mrs. Hunt placed an order with Zazzle (to be fulfilled through Stamps.com) to purchase a customized postage stamp featuring the photograph depicted above. On December 3, both Zazzle and Stamps.com cancelled Mrs. Hunt's order, stating that the Hunt family photo violates the aforementioned USPS regulation banning *any* depiction of religious content on customized postage, including, evidently, an image containing the UNESCO World Heritage site St. Basil's Cathedral.[2]

The Hunt family are devoted Christians who desire to share their religious identity with others via customized postage stamps during the Christmas season. But as a result of the USPS regulation at issue, they are unable to do so purely because they depict the Hunt family posing in front of a historic cathedral and landmark.

Less than one week before Christmas, Mrs. Hunt still has not received her stamps. After accepting her order, Zazzle informed Mrs. Hunt that her order was cancelled. The stated reason for the cancellation was because of the picture's "religious" nature. Specifically, Zazzle noted "the prominence of St. Basil's Cathedral on [*sic*] the background." However, to resolve Zazzle's concern, Zazzle indicated that Mrs. Hunt's order would likely be approved if the photo were cropped to make the cathedral "less obvious." Zazzle sent Mrs. Hunt the following cropped version of her family photo as an example of a photo that would likely be consistent with USPS guidelines:

After several rounds of correspondence, including numerous approvals and cancellations, Stamps.com finally indicated that it would approve her stamps and asked Mrs. Hunt to resubmit her order through Zazzle. When she attempted to order the stamps shortly thereafter, Zazzle had completely withdrawn from offering custom stamps due to the onerous USPS regulations.[3] As a

[2] https://photo.stamps.com/Store/conditions/crPopup.jsp.
[3] https://forum.zazzle.com/news/zazzle_custom_postage_update.

result, Mrs. Hunt has been unable to obtain the customized stamps she has repeatedly attempted to order.

Sadly, the tremendous frustration experienced by Mrs. Hunt and Zazzle and Stamps.com's inability to fulfill her order or provide necessary clarity is ultimately a problem of USPS's creation. Although an image of St. Basil's Cathedral, which was secularized and converted into a museum decades ago, does not meet the definition of "religious" under the USPS regulations, the regulation as written is nevertheless overly broad. Both Stamps.com and Zazzle submitted public comments against the breadth of the religious restriction when it was published in the Federal Register, but the offending provision was not changed.[4]

Zazzle and Stamps.com each rejected Mrs. Hunt's order due to their understanding that "all religious content is forbidden" under USPS's customized stamp regulations. Notably, both companies face suspension or termination from the Customized Postage Program if they are found in violation of the USPS's guidelines.[5] And the confusing and onerous nature of USPS's regulations led Zazzle suspend (for the second time) its offering of custom stamps.

If the USPS determines Mrs. Hunt's stamps were properly rejected under its regulations, the regulations raise serious First Amendment concerns. The USPS Customized Postage Program's total censorship on even incidentally religious images is unreasonable given that the USPS directly markets stamps to the public containing religious acknowledgements, such as nativities and menorahs. For these reasons, we ask that the USPS immediately rescind its unconstitutional regulation and provide immediate clarification to Zazzle and Stamps.com indicating that the custom stamps requested by Mrs. Hunt are not prohibited by USPS regulations so that Mrs. Hunt may receive her stamps as ordered.

Factual Background

Mrs. Hunt attempts to order customized stamps for her Christmas cards.

On November 22, Mrs. Hunt received a personalized email from Zazzle indicating that Zazzle partnered with Stamps.com to offer "create-your-own postage through our site." Mrs. Hunt's design would be "subject to review," but the e-mail explained that Zazzle "would be delighted to work with [her] to expedite this through that process." On November 28, she submitted her order for customized postage featuring a photo of her family taken while visiting Moscow's Red Square during the 2018 World Cup.

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[4] *See* Bill McAlister, "Stamps.com, Zazzle lodge complaints against proposed USPS rules for computer-generated stamps," Linn's Stamp News, Feb. 21, 2017, available at https://www.linns.com/news/us-stamps-postal-history/2017/february/stampscom-zazzle-complaints-usps-rules-computer-stamps html; *see also* 82 Fed. Reg. 600117.
[5] 39 C.F.R. § 501.21(c)(7).

Zazzle cancels Mrs. Hunt's Order due to the presence of St. Basil's Cathedral.

On December 3, Zazzle emailed Mrs. Hunt to inform her it had cancelled her order because the stamps "are in conflict with our content guidelines."

Order Cancellation Notice

We're unable to process your order.

Hello Tavia Hunt,

Thank you for your recent order: 1316516825489703 04.

Unfortunately, we are unable to process your order. The designs are in conflict with our content guidelines.

Mrs. Hunt immediately emailed Zazzle for clarification to "make sure [she didn't] choose another photo with the same issue." Mrs. Hunt also followed up via phone, and a Zazzle representative indicated Zazzle cancelled her order due to the presence of St. Basil's Cathedral in the background. A follow up email later that day provided the content guidelines from Zazzle's website.

Zazzle approves Mrs. Hunt's photo for printing.

On December 4, Mrs. Hunt emailed Zazzle about her concerns about the rejection, including that the rejection "appears to be an attempted ban on religion." Mrs. Hunt followed up with Zazzle via phone, and its representative explained that he understood her position and that she should resubmit her order. On December 4, Mrs. Hunt resubmitted her order and received an email confirmation that her "Zazzle reorder has been approved and will be shipped to [her] as soon as possible."

Zazzle's raises copyright concerns that Mrs. Hunt quickly addresses.

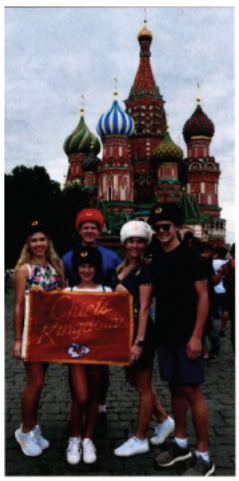
Mrs. Hunt attempted to track her order, learned that it had again been cancelled, and contacted Zazzle customer service. The Zazzle representative suggested that Mrs. Hunt contact Stamps.com directly as Stamps.com was responsible for content decisions. Mrs. Hunt followed his instructions and called Stamps.com. Its representative indicated that the problem stemmed from copyright concerns due to the presence of the Kansas City Chiefs' logo. Mrs. Hunt explained that her family owned the rights to the trademark, and the Stamps.com representative indicated that she should submit a copyright affirmation form. On the same day, Zazzle sent Mrs. Hunt an email providing the form and asking her to fax it to Stamps.com "to ensure a replacement order is processed as needed."

Zazzle again cancels Mrs. Hunt's order despite its previous approvals.

After submitting the copyright authorization paperwork, Zazzle called Mrs. Hunt and explained that the order was cancelled because of the presence of St. Basil's Cathedral. In a subsequent email, Zazzle confirmed that the rejection was "due to the prominence of St. Basil's Cathedral on [*sic*] the background," but the order would be approved if "the image is cropped so that the cathedral is not obvious."

> Hello Tavia,
>
> Thanks for contacting the support team at Zazzle.
>
> It was a pleasure speaking with you again this evening and I once again apologize for the trouble and inconvenience this has caused. As I mentioned the order was canceled due to the prominence of St. Basil's cathedral on the background, Due to the new rules on religious images from the USPS, we could not pass the image as provided.

Zazzle attached a proposed photo that was tightly cropped to remove any identifiable features of St. Basil's Cathedral.



Stamps.com approves the order and asks Mrs. Hunt to resubmit through Zazzle.

On December 11, the day after the third rejection, Mrs. Hunt spoke with representatives of Stamps.com over the phone. In a subsequent email, Stamps.com indicated to Mrs. Hunt's assistant

Ashleigh that under USPS regulations "all religious content is forbidden no matter the intent or faith."

> Dear Ashleigh,
>
> Thank you for contacting the Stamps.com Customer Relations Team.
>
> I just spoke with Tavia regarding the order that was placed with Zazzle. A member of our management team will be calling her within the hour to discuss further.
>
> In the meantime, I wanted to provide additional information. Stamps.com is a PC Postage Vendor licensed and approved by the USPS since 1999, and therefore we are required to adhere to USPS guidelines. Per USPS, all religious content is forbidden no matter the intent or faith.

Mrs. Hunt continued to speak with Zazzle and Stamps.com by phone in an attempt to resolve the issue. Following these calls, a representative of Stamps.com emailed Mrs. Hunt later that day to inform her that a review of her photo "was escalated to senior members of our team and the decision to reject the image has been reversed." The email invited Mrs. Hunt to "re-submit the image to Zazzle so we can print it for you."

Zazzle refuses to print Mrs. Hunt's stamps due to suspension of its offerings.

Mrs. Hunt attempted to resubmit her order on December 16, 2018 through Zazzle. However, when she attempted to resubmit, the Zazzle order page indicated that the customized stamps were "sold out" despite being custom-made. After further inquiry, Zazzle informed her via email that its "offering of Photostamps by Stamps.com is on pause at the moment. There are multiple variables involving federal guidelines for custom postage that still require more understanding before we go forward."

Exasperated and frustrated by an on-again-off-again process made necessary by the overly broad regulation of the USPS, that consumed nearly three weeks—and being no closer to actually getting her Christmas cards to her friends and family—Mrs. Hunt was left with no choice but to seek clarification directly from the USPS as to why her custom stamp could not be processed by Zazzle and Stamps.com.

Legal Analysis of the USPS Regulation

A photo's inclusion of a secular cultural icon such as St. Basil's Cathedral cannot plausibly be prohibited under a regulation for "religious" depictions.

Simply put, the regulation should not apply to Mrs. Hunt's photo. The photograph at issue cannot be fairly characterized as having any "religious" depictions and the rejection of this image shows how overly broad the regulation is construed. St. Basil's Cathedral was secularized when

it was seized and secularized by the soviet government in 1929 and is now a part of the State Historical Museum.[6] Located in Moscow's Red Square, it is recognized worldwide for its cultural, historical, and architectural significance. As the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") recognizes, the building not only "has become the symbol of the city [of Moscow], but also of the whole country."[7] St. Basil's is only nominally a cathedral and is recognized more for its cultural, historical, and architectural significance than for any religious significance.

Both Courts and the USPS have recognized similar distinctions. Numerous courts have rejected challenges to arguably religious symbols imbued with historical significance. *See Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008); *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991). Indeed, the Tenth Circuit held that despite the presence of three crosses, a city seal was "a secular symbol, which could be, and was, understood to be secular." *Weinbaum*, 541 F.3d at 1035. When the USPS received similar criticism for a stamp depicting Mother Teresa, a spokesman for the USPS indicated that "Mother Teresa is not being honored because of her religion, she's being honored for her work with the poor and her acts of humanitarian relief."[8] Just as in those cases, Mrs. Hunt wanted a picture of St. Basil's because it is "one of the most famous and photographed buildings in the world." *See* Exhibit H. Because the same considerations apply here, the USPS should inform Stamps.com and Zazzle that Mrs. Hunt's picture does not violate USPS regulations so they can fill her order in time for Christmas.

If the USPS determines that Mrs. Hunt's photo was properly rejected under its regulations, the regulation raises serious First Amendment concerns.

If the USPS determines that Mrs. Hunt's picture violates the criteria against religious depictions, then the regulations as construed are hostile toward religious expression. The USPS's own discussion of its regulations acknowledges that customized stamps are a forum for private speech.[9] Under USPS regulations, customized stamps may contain "incidental" depictions of "alcohol, tobacco, gambling, or firearms and other restrictions," but not "any depiction" that could be construed as religious, placing "religious" content in the same category as "violent or sexual content" and "subject matter prohibited for display under U.S. law."[10]

The regulation promotes unconstitutional viewpoint discrimination. Images can be approved if they are of a "less obvious" religious nature, but the Supreme Court has held that otherwise permissible speech cannot be prohibited due to its perceived religious character. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001) (explaining that the exclusion of religious speech from a limited public forum was "impermissible viewpoint discrimination"); *cf. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 126 (1981) ("[The postal

[6] http://architectuul.com/architecture/saint-basil-s-cathedral
[7] Technical assistance for the restoration of Saint Basil's Basilica, Moscow, Russian Federation, UNESCO, https://whc.unesco.org/en/activities/781/.
[8] https://www.foxnews.com/story/atheist-group-blasts-postal-service-for-mother-teresa-stamp
[9] 82 Fed. Reg. 600117 (citing *Matal v. Tam*, 137 S. Ct. 1744 (2017) and noting that relevant free speech considerations fall under a limited public forum analysis).
[10] 39 C.F.R. § 501.21(b)(2).

power] may not of course be exercised by Congress in a manner which abridges the freedom of speech or of the press protected by the First Amendment to the Constitution.”).

Moreover, the regulations are not supported by their proposed justifications to protect the USPS “against dilution, false attribution, appearances of endorsement, and other potential impacts.”[11] Indeed, the USPS currently issues and markets stamps including, for example, nativity scenes, menorahs, depictions of “Madonna and Child,” and Diwali lamps under its own name. Moreover, the USPS disassociates its products from the customized postage products.[12] The USPS’s absolute ban on private religious acknowledgements on postage is unreasonable in light of its practice of selling stamps acknowledging religion directly to the public.

Mrs. Hunt considers these stamps to be an essential aspect of her Christmastime message for friends and family and is withholding sending the cards until this issue is resolved. For these reasons, we ask that the USPS contact its approved vendors Stamps.com and Zazzle no later than **12:00pm Central Time, Friday, December 21, 2018,** to clarify that Mrs. Hunt’s image does not violate USPS guidelines from customized postage. If you insist that Mrs. Hunt’s photo contains “religious content” in violation of the USPS guidelines, then the guidelines raise significant First Amendment concerns and we will consider appropriate legal remedies to vindicate Mrs. Hunt’s constitutional rights.

Sincerely,

Hiram Sasser
General Counsel
First Liberty Institute

CC: Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service Law Department
475 L’Enfant Plaza SW
Washington, DC 20260

Office of Brand Marketing
United States Postal Service
475 L’Enfant Plaza SW

[11] 82 Fed. Reg. 600117.
[12] *See, e.g.*, 39 C.F.R. § 501.21(c)(4).

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