No. 05-929

IN THE

Supreme Court of the United States

UNITED SENIORS ASSOCIATION, INC.,
Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF FREE SPEECH DEFENSE AND EDUCATION FUND, INC., FREE SPEECH COALITION, INC., CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, CITIZENS UNITED FOUNDATION, AND DOWNSIZE DC FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

This Brief *Amicus Curiae* in Support of Petitioner is submitted jointly on behalf of Free Speech Defense and Education Fund, Conservative Legal Defense and Education Fund, Lincoln Institute for Research and Education, Citizens United Foundation, and Downside DC Foundation — all of which are nonprofit educational organizations and public charities, exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code ("IRC"), whose purposes and activities include the study of, and education and defense regarding, rights guaranteed under the United States Constitution. The brief is also filed on behalf of the Free Speech Coalition, exempt from federal taxation under IRC section 501(c)(4), which is a nonpartisan group of ideologically diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs, dedicated to the protection of First Amendment rights through the reduction or elimination of regulatory burdens on the exercise of those rights.[1]

At issue in this case is the constitutionality of § 1140(a)(1) of the Social Security Act and the court of appeals' affirmation of the imposition of a $554,196 civil penalty arising from the use of certain statutorily-protected words, namely, "Social Security." If allowed to stand, the decision of the court of appeals would have a substantial chilling effect upon the free exercise of core political speech by persons and organizations critical of the Social Security Administration and other

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief. These *amici curiae* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

statutorily-protected government agencies, policies and programs. These *amici* believe that this brief will assist the court, bringing to its attention relevant matters not addressed by the petition.

THE STATUTE AT ISSUE

The challenged statute — § 1140(a)(1) of the Social Security Act (42 U.S.C. § 1320b-10(a)(1)) — provides, in relevant part, as follows:

> (1) **No person may use**, in connection with any item constituting an advertisement, solicitation, circular, book, pamphlet, or other communication, or a play, motion picture, broadcast, telecast, or other production, alone or with other words, letters, symbols, or emblems --
>
> > (A) **the words** "Social Security", "Social Security Account", "Social Security System", "Social Security Administration", "Medicare", "Centers for Medicare & Medicaid Services", "Department of Health and Human Services", "Health and Human Services", "Supplemental Security Income Program", "Medicaid", "Death Benefits Update", "Federal Benefit Information", "Funeral Expenses", or "Final Supplemental Plan", **the letters** "SSA", "CMS", "DHHS", or "SSI", or any other **combination or variation of such words or letters** . . . in manner which such person **knows** or **should know** would convey, **or** in a manner which **reasonably could be interpreted** or construed as conveying, the **false impression** that such item is **approved, endorsed, or authorized** by the Social Security Administration. [Emphasis

added.]

The Social Security Administration ("SSA") itself is charged with the enforcement of § 1140(a)(1). *See* 42 U.S.C. § 1320b-10(d).

The prohibition of § 1140(a)(1) applies to virtually any conceivable "communication" by any person using any of the 15 listed word or word combinations or any of the four listed letters/acronyms. The statute does not require intent, or even negligence, but prohibits the use of such words or letters if they "reasonably could be interpreted or construed as conveying the false impression" of approval, endorsement or authorization by SSA.

Admitted by the court of appeals to be a "low threshold to support a finding of liability" (USA v. SSA, 423 F.3d 397, 405 (4th Cir. 2005)), this statute sets a dangerous trap for anyone who dares to critique, or even discuss, the SSA, Social Security programs, or congressional policies related thereto.

SUMMARY OF ARGUMENT

On its face, and as applied, § 1140(a)(1) is a content-based regulation of core political speech. Yet, the court of appeals refused to subject the statute, and its application to USA's references to "Social Security" on their direct mail envelopes, to strict scrutiny. Instead, the court of appeals dismissed petitioner's First Amendment claims of overbreadth and vagueness, misusing Illinois v. Telemarketing Assoc., Inc., 538 U.S. 600, 611-12 (2003), and misapplying Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980), neither of which is apposite to core political speech and content-based regulation like § 1140(a)(1).

Had the court of appeals subjected § 1140(a)(1) to strict scrutiny, as required by McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995) (political speech), and Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991) (content-based communications), it could not have affirmed the constitutionality of a statute with such a low threshold of liability, effectively imposing strict liability upon USA's use of "Social Security" on its direct mail envelopes.

Indeed, by affirming the imposition of the $554,196 civil penalty — without insistence upon proof that USA knowingly, or in reckless disregard, created a false impression that its mailings were authorized or endorsed by SSA — the court of appeals failed to extend to USA the constitutional protection afforded libelous communications of governmental officials. Instead, it upheld § 1140(a)(1)'s no-fault, presumed damage scheme comparable to the Alabama common law libel standard struck down in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Compounding this error, the court of appeals gave USA's core political speech even less First Amendment protection than this Court has given to "obscene" communications, isolating USA's use of "Social Security" on its envelopes from their contents, and deferring to an administrative finding that they could have appeared to come from an official SSA source. Had the envelopes, on which alone the finding was based, contained an alleged obscenity, the court of appeals would have been required by Roth v. United States, 354 U.S. 476 (1957), to examine the direct mail communications as a whole, and by Jenkins v. Georgia, 418 U.S. 153 (1974), to conduct an independent judicial review of the administrative findings to determine for itself whether the communication was obscene.

In sum, the court of appeals' decision is a constitutional

outlier which conflicts with this Court's First Amendment jurisprudence, and should be reviewed by this Court.

ARGUMENT

Petitioner "USA is a nonprofit, lobbying and advocacy group organized to educate and mobilize senior citizens on a variety of issues affecting them, including Social Security benefits." USA v. SSA, 423 F.3d at 400. It regularly communicates with senior citizens on matters of "health care freedom, retirement investment freedom, tax freedom, and economic freedom" (SSA v. USA, Decision No. CR 1075 (Aug. 8, 2003), p. 33a[2]) by "mass mailings," a major feature of which are envelopes "design[ed] ... to entice recipients to open the envelopes" to read the information contained therein. *See* USA v. SSA, 423 F.3d at 400; SSA v. USA at 37a. With respect to the two mass mailings that gave rise to this litigation, the USA envelopes contained the words "Social Security" and thereby triggered the operation of § 1140(a)(1), subjecting the envelopes and their contents to review by the SSA to ascertain whether the mailings ran afoul of the statute's prohibition of the use of "Social Security" in a way that USA "kn[ew] **or** should [have] know[n] would convey, **or** ... which reasonably **could** [have] be[en] interpreted or construed as conveying ... the **false impression** that such item[s] [were] approved, endorsed, or authorized by ... [SSA]." *See* 42 U.S.C. § 1320b-10(a)(1)(A) and (B) (emphasis added).

In response to USA's contention that this statutory provision was unconstitutionally overbroad and vague, the court of appeals, citing Illinois v. Telemarketing Assoc., Inc., 538 U.S.

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[2] The ALJ decision is unreported. It appears on pages 33a-70a of the Appendix to the Petition for a Writ of Certiorari. All page references to this decision herein are to the Petitioner's Appendix.

600, 611-612 (2003), held that — since there was "substantial evidence" before the ALJ indicating that USA, knew or should have known that its envelopes "'would convey' the false impression of government endorsement" — the message on the envelopes was "'**unprotected** speech,'" USA v. SSA, 423 F.3d at 407 (emphasis added). Additionally, the court of appeals ruled that even the portion of the statute that does not require **any** evidence of fault was constitutional because "[t]he government has a substantial interest in protecting Social Security, as the financial lifeline of most senior Americans, and it has a strong interest in protecting Social Security recipients from deceptive mailings." *Id.,* 423 F.3d at 407. In summary, the court of appeals concluded that "'[a]ll that is at issue is a statute that forbids the impersonation of a federal agency by a private organization bent on **sowing confusion** among beneficiaries of a program and thereby thwarting the purposes it was intended to serve.'" *Id.,* 423 F.3d at 408 (emphasis added).

The court of appeals erred, however, both by misapplying the cited precedents and by ignoring this Court's First Amendment rulings requiring "exacting scrutiny" of "content-based restrictions" and "core political speech." For, at stake in this litigation is whether communications concerning "Social Security," "Medicare," "Medicaid," and other "Health and Human Services" programs and policies are given the same high First Amendment protections as this Court gives to communications concerning other federal public policy issues. Moreover, at stake in this case is whether communications concerning "Social Security," "Medicare," "Medicaid" and other "Health and Human Services" policy matters fall into a special category of disfavored speech, deserving even lower protection than libel and obscenity.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE SUPREME COURT PRECEDENTS UPON WHICH IT RELIED.

A. The Court of Appeals Misused Illinois v. Telemarketing Associates, Inc.

In Illinois v. Telemarketing Associates, Inc., this Court ruled that "the First Amendment does not shield fraud," but in doing so it did **not** — as the court of appeals opined below — deny First Amendment protection to "message[s] [that are] so deceptive and misleading that [the messenger] should have known that the message conveyed the **false impression** of government endorsement" (*id.,* 423 F.3d at 407 (emphasis added)), as § 1140(a)(1) proscribes. Rather, in the Illinois telemarketing case, this Court carefully declared that the First Amendment provided no barrier to "a properly tailored **fraud action** [in which] the State bears the **full** burden of proof" (Illinois v. Telemarketing Assoc, 538 U.S. at 620 (emphasis added)):

> False statement **alone** does **not** subject a fundraiser to fraud liability.... [T]o prove a defendant liable for fraud, the complainant must show that the defendant made a **false representation of a material fact knowing** that the representation was **false;** further, the complainant must demonstrate that the defendant made the representation with the **intent** to **mislead** the listener, and **succeeded in doing so**.... Heightening the complainant's burden, these showings must be made by **clear and convincing evidence.** [*Id.* (emphasis added).]

Clearly, § 1140(a)(1), both on its face and as applied, fails to meet any of this Court's strict criteria. First, the statute does

not require proof of any "intent to mislead." Second, the statute does not require that the alleged false representation be of a "material fact." Third, there is no statutory requirement that anyone have been actually misled. Fourth, there is no statutorily-dictated standard of proof. Instead, as the court of appeals concluded:

> The baseline inquiry under § 1140(a)(1) is whether the envelopes reasonably *could* be interpreted or construed to have conveyed the **false impression** that the SSA approved, endorsed, or authorized USA's envelopes, **not** whether a recipient **in fact** interpreted or construed them in that way. Admittedly, this test creates a relatively **low threshold** to support a finding of liability. Nonetheless, § 1140(a)(1) provided the ALJ with the authority to find USA liable ... based on the sample envelopes ... even **without evidence of actual confusion by recipients.** [USA v. SSA, 423 F.3d at 405 (italics original; bold added).]

Clearly, the court of appeals' reliance upon Illinois v. Telemarketing Assoc. was misplaced, based upon a completely erroneous reading of this Court's narrow holding in that case.

B. The Court of Appeals Misapplied Village of Schaumburg v. Citizens for a Better Environment.

Characterizing § 1140(a)(1) as a "charitable solicitation" regulation, the court of appeals applied the substantiality test of Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980), to evaluate § 1140(a)(1)'s constitutionality. *See* USA v. SSA, 423 F.3d at 407. But § 1140(a)(1) is **not** a charitable solicitation statute. To be sure, § 1140(a)(1) applies to certain "solicitation[s]," but it also

applies to "advertisement[s], circular[s], book[s], pamphlet[s], [and] other communications," as well as "play[s], motion picture[s], broadcast[s], telecast[s], [and] other production[s]." Moreover, § 1140(a)(1) does **not** apply to **all** charitable solicitations, but only to such solicitations that use the words or letters, or combinations of words or letters, specified in the statute. Furthermore, SSA did not apply § 1140(a)(1) to USA's envelopes because the offending envelopes constituted or contained a charitable solicitation. Rather, SSA applied § 1140(a)(1) to the envelopes because they contained words of enticement designed to get the recipients' attention so that they would read the information contained therein. *See* USA v. SSA, 423 F.3d at 400-01.

Thus, neither the statute on its face, nor the statute as applied, is a charitable solicitation regulation. Rather, as the court of appeals acknowledged, § 1140(a)(1) had been designed by Congress not just "to protect Social Security recipients," but, more importantly, "to **preserve the line of communication** between the SSA and its recipients...." USA v. SSA, 423 F.3d at 399 (emphasis added). Indeed, it was this latter purpose, rather than the former one, that persuaded the court of appeals to defer to the ALJ's judgment that USA's envelopes, standing alone, were subject to regulation by § 1140(a)(1). *See* USA v. SSA, 423 F.3d at 404-05. Additionally, the ALJ justified the $554,196 **not** as a deterrent to protect the public from "false impressions," but as "compensation ... for damage" caused to SSA's "integrity." *See* SSA v. USA at 57a.

Unlike the city ordinance in Schaumburg, then, § 1140(a)(1) casts a wide net, bringing within its sweep all manner of communications, so long as such communications use certain words identified with certain subject matters of federal public policy. Further, unlike the city ordinance in Schaumburg, § 1140(a)(1) confers enforcement power upon the very agency

that would most likely be criticized by those using the triggering words and would be directly benefitted by any civil penalty imposed. *See* 42 U.S.C. §§ 1230b-10(b) and (c)(2)(A). By contrast, the Schaumburg ordinance was a "content-neutral" provision applying to all causes, charitable or political, and enforceable by city officials who did not necessarily have a direct interest in the "cause" for which funds were being solicited. Thus, that ordinance was subject to "intermediate scrutiny," tested to ascertain whether "it serve[d] a sufficiently strong, subordinating interest that the Village [was] entitled to protect...." *See* Schaumburg, 444 U.S. 620, at 636. This lesser standard is inapplicable here, where the statute is "content-based" and concerns "core political speech."

II. THE COURT OF APPEALS FAILED TO APPLY STRICT SCRUTINY AS REQUIRED BY PRIOR DECISIONS OF THIS COURT.

Because the threshold question concerning § 1140(a)(1)'s applicability turns on whether a communication contains one or more of the statutorily-specified words or letters/acronyms, and because those words and letters are political speech concerning matters of public policy and are content-based — applying to some, but not all federal policy matters — the court of appeals erred when it refused to subject § 1140(a)(1) to strict scrutiny.

For decades, this Court has ruled that "core political speech," if burdened by any governmental regulation, is subject to "exacting scrutiny" and may be upheld "only if [the regulation] is narrowly tailored to serve an overriding state interest." McIntyre v. Ohio Elections Commission, 514 U.S. 334, 347 (1995). Included within the category of "core political speech" deserving of this Court's strict scrutiny is not only the "free discussion of governmental affairs" (Mills v. Alabama, 384

U.S. 214, 218 (1966)), but the right of the people "to select what they believe to be the most effective means for [advocating their cause]." Meyer v. Grant, 486 U.S. 414, 424 (1988). Indeed, according to this Court, access to the political marketplace of ideas comes only if the First Amendment "affords the **broadest** protection to such political expression, [thereby] 'assur[ing] [the] **unfettered** interchange of ideas for the bringing about of political and social changes desired by the people.'" McIntyre, 514 U.S. at 346 (emphasis added). Thus, this Court has applied strict scrutiny to regulations governing core political speech even when the purported object of such contested regulations is the prevention of "fraud" (*see* McIntyre, 514 U.S. at 441), or the protection of the "integrity" of the government. *See* Meyer, 486 U.S. at 425; Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 191 (1999). As this Court put it in Meyer v. Grant, any "statute [that] trenches upon an area" of public policy does so upon an area where "First amendment protection is 'at its zenith.'" *Id.*, 486 U.S. at 425.

Additionally, this Court has consistently applied strict scrutiny to **content-based restrictions** on communications. In Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991), this Court stated emphatically that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech":

> This is a notion so engrained in our First Amendment jurisprudence that last Term we found it so "obvious" as to not require explanation.... It is but one manifestation of a far broader principle: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." [*Id.*, 502 U.S. at 115-16.]

The need to apply strict scrutiny to content-based restrictions on communications is especially important here, where Congress has entrusted to the SSA and HHS gatekeeping responsibilities concerning communications that might very well be critical of the policies and practices of the very government agencies authorized to interpret and enforce § 1140(1)(a)'s marketplace restrictions. While the statute on its face does not authorize such discriminatory application, the court of appeals approved such a "low threshold to support a finding of liability" (USA v. SSA, 423 F.3d at 405) that the statute provides no meaningful restraint against "arbitrary and discriminatory enforcement" (*see, e.g.,* Grayned v. Rockford, 408 U.S. 104, 108 (1972)), thereby "rais[ing] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." Simon & Schuster v. N.Y. State Crime Victims Bd., 502 U.S. at 116.

Section 1140(a)(1) also violates "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *See* Cohen v. California, 403 U.S. 15, 24 (1971). It does so by placing in the hands of the SSA how the words "Social Security" will be used, enabling the SSA to sterilize the discussion of Social Security policies and practices and eliminating more robust and effective efforts to communicate one's views, as evidenced by this case wherein USA's more "catchy" expressions of "SOCIAL SECURITY ALERT" and "URGENT — ... SOCIAL SECURITY INFORMATION ENCLOSED" were rejected by the SSA, while a more staid "IMPORTANT NEW INFORMATION ENCLOSED ON: PENDING SENATE ACTION ON THE SOCIAL SECURITY LOCK BOX BILL" had been approved. *See* USA v. SSA, 423 F.3d at 400, 405. Clearly, the former mode of expression is more likely to get a mailed recipient's attention than the latter. And, as this Court put it in Cohen v. California:

> The constitutional right of freedom of expression ... is designed to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. [*Id.*, 403 U.S. at 24.]

Yet, § 1140(a)(1) rests upon the contrary premise, subjecting the communicator's decision (regarding how best to attract the recipients' attention) to the editorial power of the government as to whether that decision interferes with "the line of communication between the SSA and its recipients." *See* USA v. SSA, 423 F.3d at 399.

According to the court of appeals, Congress was justified in transferring such discretionary power to the SSA, lest USA's envelopes "entice" recipients to open them and read the information contained therein, because "at first glance" they "could" appear to someone to be from the SSA. *See* USA v. SSA, 423 F.3d at 401. Or, as the ALJ ruled, Congress designed § 1140(a)(1) because "it did not want mass mailers to attempt to induce mailing recipients to make snap judgments to open envelopes based on their 'official' appearance." SSA v. USA at 40a. But any content-based regulation aimed at "the emotive impact of speech on its audience" does not legitimate the impermissible content-based discrimination otherwise imposed by the statute. *See* R.A.V. v. St. Paul, 505 U.S. 377, 394 (1992). Such a statute must still meet the strict scrutiny requirement that the restriction be "narrowly tailored to serve compelling state interests." *Id.*, 505 U.S. at 395.

III. THE COURT OF APPEALS GAVE USA'S POLITICAL SPEECH MUCH LESS PROTECTION THAN IS GIVEN TO LIBEL OF A GOVERNMENT OFFICIAL OR OBSCENITY.

A. The First Amendment Protection Afforded by the Court of Appeals to USA's Core Political Speech Erroneously Fell Below That Afforded Libel of a Government Official.

Forty-two years ago, this Court addressed the constitutionality of a civil libel determination against *The New York Times*, wherein a jury had returned a $500,000 judgment for publication of an advertisement containing libelous false statements of fact concerning actions taken by a police commissioner in Montgomery, Alabama. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). At stake in the case was whether the First Amendment freedom of speech guarantee was violated by a common law libel action whereby a public official could recover significant damages without proof of fault or actual injury. *Id.*, 376 U.S. at 262-64. This Court ruled against the public official, laying down the rule that no public official could "recover... damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* 376 U.S. at 264, 279-80.

In this case, the court of appeals addressed the constitutionality of the SSA's § 1140(a)(1) determination, wherein the ALJ returned a $554,196 penalty judgment against USA because of its publication of two envelopes, on the theory that they had the appearance of an "official" source, thus creating a "false impression" that the mailings were from the

SSA. *See* SSA v. USA at 39a-40a, 43a-45a, 47a, 49-50a. In imposing this penalty judgment, the ALJ not only ruled that "[i]t is not necessary to prove a likelihood of deception in order to establish a violation of section 1140(a)(1)," but also that SSA need not prove that **even one person** was actually misled, much less injured, by the "deception." *See* SSA v. USA at 39a, 57a-63a. The ALJ simply presumed that the $554,196 award to SSA (calculated at $1 per envelope) was appropriate "to compensate the [SSA] for damage caused to its **program integrity** by individuals or entities who mislead the public into believing that their publications are official or are officially sanctioned." *Id.* at 57a (emphasis added). The court of appeals in this case, like the Alabama Supreme Court in New York Times, found nothing wrong with the ALJ's "low threshold ... of liability" and lack of any actual "evidence" that SSA's integrity had been harmed. *See* USA v. SSA, 423 F.3d at 405.

Ignoring these obvious parallels, the court of appeals dismissed USA's First Amendment challenge despite the absence of any significant fault standard in § 1140(a)(1), discarding the challenge based upon its erroneous assumption that it was controlled by this Court's decision in Illinois v. Telemarketing Assoc. *See* USA v. SSA, 423 F.3d at 407. Had the court of appeals paid more careful attention to this Court's reasoning in the Illinois telemarketing case, it (a) not only would have found no support for its cavalier treatment of the lax standards of liability contained in § 1140(a)(1), as authoritatively construed by the SSA (*see* Part I.A., *supra*), but (b) would have discovered that this Court had upheld the fraud complaint in Illinois v. Telemarketing Assoc. only because potential liability under that complaint was governed by "[e]xacting proof requirements [which], in other contexts, have been held to provide sufficient breathing room for protected speech," citing New York Times Co. v. Sullivan.

In the New York Times case, this Court ruled that no person participating in the "debate on public issues ... forfeits [First Amendment] protection by the falsity of some of [his] factual statements." *Id.*, 376 U.S. at 270-71. Further, in New York Times, this Court ruled that no one forfeits that protection because of any claimed "[i]njury to official reputation." *Id.*, 376 U.S. at 272. Nor, according to New York Times, can there be any forfeiture of such protection by any combination of "factual error" and "defamatory content." *Id.*, 376 U.S. at 273. Indeed, this Court ruled in New York Times that the First Amendment's guarantee of an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (*id.*, 376 U.S. at 269) could **not** even be curtailed by evidence of "**negligence**" which fell short of the constitutional minimum of proof of "recklessness." *Id.*, 376 U.S. at 288 (emphasis added).

In this case the court of appeals completely ignored these principles, upholding a $554,196 fine or damage award without any proof of either fault or actual damage:

> The baseline inquiry under § 1140(a)(1) is whether the envelopes reasonably *could* be interpreted or construed, to have conveyed the false impression that the SSA approved, endorsed, or authorized USA's envelopes, **not** whether a recipient **in fact** interpreted or construed them in that way. [USA v. SSA, 423 F.3d at 405 (italics original, bold added).]

No libel action or prosecution based upon such a "low threshold to support a finding of liability" (*id.*, 423 F.3d at 405) would survive a First Amendment challenge. Likewise, neither should the editorial power conferred upon the SSA by § 1140(a)(1) survive constitutional scrutiny. Otherwise, as this Court observed in the New York Times case, the hard-earned

lesson of the discredited Sedition Act of 1798 — that "censorial power is in the people over the Government, and not in the Government over the people" — will be lost. *See* New York Times Co. v. Sullivan, 376 U.S. at 275.

B. The First Amendment Protection Afforded USA's Envelopes by the Court of Appeals Erroneously Fell Below that Afforded to Sexual Expression Bordering on Obscenity.

Nearly 50 years ago, this Court ruled in Roth v. United States, 354 U.S. 476 (1957), that the "Hicklin test" — the "leading standard of obscenity" — violated the First Amendment's freedom of speech guarantee because it permitted sexually-explicit communications to be judged "by ... an **isolated excerpt** upon particularly **susceptible persons**." *Id.*, 354 U.S. 488-89 (emphasis added). The First Amendment, the Roth Court concluded, required obscenity to be defined, as follows: "whether to the **average person**, applying contemporary community standards, the dominant theme of the material **taken as a whole** appeals to prurient interest." *Id.*, 354 U.S. at 489 (emphasis added). This formulation, the Court reasoned, was necessary because the First Amendment's marketplace was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes" which, in turn, required that no idea "having even the slightest redeeming social importance" would be excluded from that marketplace. *Id.*, 354 U.S. at 484. Because the lower court had not applied the Hicklin test, but had "sufficiently followed the proper standard" formulated by this Court, the federal conviction for mailing obscene literature was affirmed. *Id.,* 354 U.S. at 489.

Unlike the lower court in Roth, however, the court of appeals in this case applied a Hicklin-type test to USA's use of the

words "Social Security," expressly rejecting USA's contention that "the contents of an envelope must be examined along with the envelope itself to determine if the envelope creates a false impression that it is approved or endorsed by the government." USA v. SSA, 423 F.3d at 404. Indeed, the ALJ ruled that the language of § 1140(a)(1) required examination of the use of the words "Social Security" on the envelopes "without consideration of the envelope's contents" because it prohibits the use of words or symbols "'*alone* or with other words...'":

> The word "alone" plainly means that words, symbols, or combinations of words and symbols, may, in and of themselves, create a false impression of approval, endorsement, authorization, or a relationship. Thus, it is **irrelevant** to deciding whether words or designs on an envelope violate section 1140(a)(1) that the **contents** of an envelope may dispel false impressions created by words or designs on the outside of that envelope. [SSA v. USA at 37a (emphasis added).]

The ALJ's reading of the statute — that the words or symbols listed therein may be viewed in isolation from the communication taken as a whole — was not only accepted as authoritative by the court of appeals, but is reinforced by § 1140(a)(3), which states that "a violation of [§ 1140(a)(1)] **shall be made without regard to** any inclusion ... of a **disclaimer** of affiliation with the United States Government or any particular agency or instrumentality thereof." (Emphasis added.)

By affirming the legitimacy of applying § 1140(a)(1) to one or more of the listed words in **isolation,** rather than examining those words as they appear in the communication **as a whole**, the court of appeals had no difficulty affirming the ALJ's conclusion that the statute was violated if "**a recipient**" could

have gotten the misimpression that the mailing was from an official source. *See* USA v. SSA, 423 F.3d at 405 (emphasis added). Neither the ALJ nor the court of appeals asked the question whether the **average** recipient would have been left with such a false impression; it was **enough** that a **single** recipient **could** make such a "snap judgment" and open the envelope. SSA v. USA at 40a.

Thus, access to the marketplace of ideas about Social Security policy and practices, according to the court of appeals, is to be governed by the most susceptible and naive, not by the average person, and by words taken out of context, rather than the communication as a whole, even though this Court has rejected such a standard when applied to obscenity. By accepting this construction and application of § 1140(a)(1), the court of appeals rejected USA's "overbreadth" argument that the statute "suppresses the protected speech within the envelopes." USA v. SSA, 423 F.3d at 406.

The court of appeals compounded this error by diminishing the role of the judiciary in policing the First Amendment marketplace. Throughout its opinion the court of appeals paid great deference to the ALJ's interpretation of § 1140(a)(1) and to the ALJ's fact-findings, reviewing the former only for "reasonable[ness]" and "permissi[bility]" (423 F.3d at 402-03) and the latter only for "substantiality" (423 F.3d at 404-05). Had the court of appeals been deciding a First Amendment obscenity case, it would have been required to exercise independent judgment, not only with respect to the interpretation of § 1140(a)(1), but also in its application to the facts. In Jenkins v. Georgia, 418 U.S. 153 (1974), for example, this Court did not let stand a jury determination that the motion picture "Carnal Knowledge" was obscene, notwithstanding its finding that the jury had been properly instructed on the law. Instead of deferring to the jury finding, this Court exercised its

independent judgment, making its own application to the facts of the First Amendment standards governing obscenity. *Id.*, 418 U.S. at 160-61.

In contrast, the court of appeals deferred to the ALJ's findings that the use of "Social Security" on the USA envelopes reasonably could have been construed by a recipient as creating a "false impression" that the mailing had come from SSA or been authorized by SSA. By deferring to the ALJ's findings on this point, the court of appeals dismissed USA's contention that the virtual strict liability prong of § 1140(a)(1) created no overbreadth problem. *See* USA v. SSA, 423 F.3d at 407-08. Such deference to administrative discretion is totally foreign to this Court's First Amendment jurisprudence in the enforcement of laws against obscenity. *See, e.g.,* Freedman v. Maryland, 380 U.S. 51, 58 (1965) ("[O]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."). By deferring to the statutory interpretation and factual findings of the ALJ, the court of appeals failed to afford USA's core political speech even the level of protection extended by this Court to sexually-explicit expression as provided by its obscenity precedents.

CONCLUSION

For the reasons stated herein, USA's petition for a writ of certiorari should be granted.

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February 24, 2006

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