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Justice Samuel A. Alito
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543-0001

October 22, 2024

Application to Justice Samuel A. Alito

Re: ***Foster v. Slomsky, USPS, et al.***
Third Circuit Case No: 23-1298

To the Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

I, Frederick Foster, Petitioner *Pro Se*, submits this *emergency* application to Justice Samuel A. Alito seeking a STAY and/or an INJUNCTION against the MANDATE for the Order and Opinion issued by the Panel upon which review is sought in Third Circuit Case No: 23-1298. (Appx. *infra* 1a)

This Application presents Justice Alito with an extraordinary circumstance in which, for more thirteen (13) years, the judicial officers of the Third Circuit and the Eastern District of Pennsylvania have deprived Petitioner of his Constitutional Rights to due process and equal protection of the law, “the most serious and least tolerable infringement” of the Fourteenth Amendment.

Petitioner is requesting a STAY and/or an INJUNCTION against the Third Circuit Panel’s MANDATE for the Panel’s: 1) abuse of discretion; 2) total disregard for Federal procedural law; 3) total disregard for the doctrine of “stare decisis” and the *binding* precedents enunciated by the previous panel; 4) violations of

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Constitutional and Federal law; and, 5) violations of the Third Circuit's own Internal Operating Procedures, I.O.P. Rule 9.1.

The following will show, granting a STAY and/or an INJUNCTION against the Panel's MANDATE in Case No. 23-1298 will prevent: 1) manifest injustice; 2) irreparable harm to the integrity and culpability of Third Circuit judicial officers; 3) irreparable harm to the District Court's *inherent* jurisdiction; and, 4) will prevent the present and future judicial officers of the Third Circuit and EDPA from implicating themselves as violators of Constitutional and Federal law by acting on the behalf of or in concert with the USPS and "such agency or any officer or employee" in any violation of Federal law, under the false pretense that their ***unlawful*** acts are protected by any doctrine of sovereign immunity.

Contemporaneously herewith, Petitioner has filed a "Petition for a Writ of Certiorari", Case No. 24-5531, with the Court of which a stay and/or injunction against the Panel's mandate will ease the burden of this Court in its decisions on the issues presented. Moreover, the Court's review of Petitioner's "Petition for a Writ of Certiorari", Case No. 24-5531, is not guaranteed, therefore, Justice Alito's grant of this application is needed to prevent further injustice.

The following will also show:

1. Based on the *intra-circuit* conflict between *Licata v. USPS* and *Foster v. Slomsky*, created by the Panel upon which review is sought, and the circuit conflict between the Third Circuit in *Licata v. USPS* and the Federal Circuit

in *Foster v. Pitney Bowes*, there is a significant possibility that the Court will grant certiorari to resolve said conflicts and will reverse the Panel's rulings;

2. Petitioner is likely to prevail since his pleadings are aligned with the Fourteenth Amendment, the prevailing and unassailable Federal procedural laws, Congress's intent, Third Circuit and DC Circuit precedents;
3. The need for immediate injunctive relief is urgent because the mandate is Panel's attempt to cloak and execute their, the EDPA judicial officers', and the Respondents' violations of Federal law, deprivation of Petitioner's rights, and deprivation of the District Court's *inherent* jurisdiction;

The "Questions Presented" in this application are:

1. "Whether, in accordance with the doctrine of "stare decisis", the Panel upon which review is sought is required to adhere to the *binding* precedents made by the previous panel on exactly the same legal issues presented? and,
2. "Whether, in accordance with the Third Circuit's I.O.P. Rule 9.1, the Panel upon which review is sought is required to acquire the approval of a majority of the en banc court in order to overrule the decisions already made by the previous panel on exactly the same legal issues presented?"

The germane issues on appeal in Third Circuit Case No. 23-1298 were already decided by the previous panel in *Licata v. USPS* Decision, Case No. 93-5637, (3d Cir. 1994), including: 1) Congress's specific waiver of the USPS's sovereign immunity protections; 2) a person's right to sue the USPS in its official name, for acts outside the scope of its Federal employment (the conveyance of mail matter),

common law damages, intentional torts, and violations of Federal law, without joining the United States as a party; 3) Congress having launched the Postal Service into the commercial world and giving it the status of a private commercial enterprise, “a legal entity separate from the United States itself”; and, 4) Congress’s *unequivocal* grant of jurisdiction over the USPS for claims arising from common law damages, intentional torts and violations of Federal law.

Moreover, these issues that were already decided by the previous panel in *Licata* are *unequivocally* consistent with the Acts of Congress and the Federal procedural laws that govern suits by and against the USPS. (Appx., *infra* 29a-50a)

Therefore, the Panel upon which review is sought was required to rule in accordance with Federal procedural law and to adhere to the doctrine of “stare decisis” and the *binding* precedents of the previous panel. Or, if the Panel found the precedents to be frivolous, erroneous, or unworkable, then the Panel was required act in accordance with Third Circuit Internal Operating Procedure Rule 9.1 and acquire the approval of a majority of the en banc court to overrule the decisions of the previous panel. Both of which, the Panel failed and refused to do.

Thus, the Panel has intentionally created a categorical *intra-circuit* conflict between *Foster v. Slomsky* Case No. 23-1298 and *Licata v. USPS* Case No. 93-5637.

What the Panel considered to be a “slew” of Federal employees, including the U.S. Attorney’s Office for the Eastern District of Pennsylvania, several Assistant U.S. Attorney’s, and several judicial officers, siding with the USPS and its primary private sector “stakeholder”, Pitney Bowes, Inc., to dismiss a suit brought against

them by a *pro se* litigant, under the false pretense that their acts were protected by doctrines of sovereign immunity — *unequivocally* constitutes — a “slew” of Federal employees who: 1) acted on the behalf of and in concert with the USPS in violations of Federal laws; 2) committed acts in furtherance of the conspiracy that deprived Petitioner of his clearly established rights; 3) deprived the District Court of its *inherent* jurisdiction; 4) *defrauded* the US Courts; 5) *defrauded* the United States; and, 6) waived *any* and *all* doctrines of sovereign immunity by doing so.

Consequently, the issues regarding Third Circuit I.O.P. Rule 9.1 and the doctrine of “stare decisis”, as they apply to this application, are of exceptional importance since Justice Alito’s resolution thereof will prevent the Panel and other judicial officers from placing themselves onto the “glue trap” of the Federal procedural laws enacted by Congress to govern suits by and against the USPS. By law, such judicial officers are culpable and will be named as defendants in forthcoming law suits for committing *intentional* torts and violations of Federal law in the courthouse.

Acts on the behalf of the USPS and *not* “*in connection with duties performed on the behalf of the United States*”.

“*Corruption takes the place of justice when procedural rules are allowed to be disregarded.*”

The record of Third Circuit Case: No. 23-1298 shows, the Panel upon which review is sought disregarded Federal procedural law and refused to rule in accordance with the *binding* precedents of the previous panel, violated Petitioner’s

clearly established Federal and Constitutional rights, enforced the VOID judgments of the district court, and attempted to provide a cloak for the Respondents' *unequivocal* violations. However, to accomplish said acts, this Panel went to the extent of disregarding and violating the Third Circuit's own Internal Operating Procedures, I.O.P. Rule 9.1, by attempting to overrule the decisions on issues already decided by the previous panel without the approval of a majority of the en banc court.

The following will show, this Panel is *without excuse* for abusing its discretion, disregarding the germane issues of due process law, AFFIRMING the District Courts' VOID judgments, refusing to adhere to the doctrine of "stare decisis" and the issues already decided by the previous panel, and violating the Third Circuit's own Internal Operating Procedures.

I. Brief Background

The issues regarding: 1) a person's private right of action to sue the USPS; 2) suits against the USPS in its private status; and, 3) the district court's jurisdiction, was already decided by the previous panel in *Licata v. USPS* Decision, Case No. 93-5637, (3d Cir. 1994):

1. "The plain meaning of the first sentence of 409(a) grants the district court "jurisdiction" over Licata's complaint, since it is an "action brought...against the Postal Service" and does not fall within the exception at the beginning of the sentence" ...

2. “the words of section 409(a) are a clear and unequivocal grant of jurisdiction to the district courts” ... “Indeed, we cannot imagine how Congress could grant jurisdiction more plainly”;
3. “It is 39 U.S.C. § 401(1) that waives the [Postal] Service's sovereign immunity by providing that it may “sue and be sued” in its official name.”;
4. “By launching the Postal Service into the commercial world, and giving it a sue and be sued clause in its charter, Congress has cast off the Service's cloak of sovereignty and given it the status of a private commercial enterprise;”
5. “The Postal Service is a legal entity separate from the United States itself; and, “a suit may be maintained against the Postal Service without joining the United States as a party, and... the district courts have jurisdiction over suits against the Postal Service for amounts over \$10,000.”;
6. “We believe the Postal Service conflates the issues of subject matter jurisdiction, sovereign immunity, and a valid cause of action.”;
7. “Congress made it clear in the Postal Reorganization Act of 1970 that the Postal Service was essentially to be separate from the government.”

And, in 2006, Congress amended Title 39 with the addition of a set of strict procedural laws that govern the USPS's private status, its activities in the private sector, and suits against the USPS and “such agency or any officer or employee” acting on the behalf of the USPS in any violation of Federal law with the Postal Accountability and Enhancement Act (“2006 PAEA”):

2006 Postal Accountability and Enhancement Act Bill Summary, H.R.6407 — 109th Congress (2005-2006) Public Law No. 109-435 — Section 404 “Suits By and Against the Postal Service”:

“(Sec. 404) Subjects all Postal Service: (1) activities to federal laws prohibiting the conduct of business in a fraudulent manner... **Eliminates Postal Service sovereign immunity protection.** Requires the Postal Service to: (2) represent itself in most legal proceedings (currently, representation is provided through the Department of Justice).

39 U.S.C. §409(d)(1) in pertinent part:

“For purposes of the provisions of law cited in paragraphs (2)(A) and (2)(B), respectively, the Postal Service — “(A) shall be considered to be a ‘person’, as used in the provisions of law involved; and “(B) **shall not be immune under any other doctrine of sovereign immunity from suit in Federal court by any person for any violation of any of those provisions of law by any officer or employee of the Postal Service.**”

39 U.S.C. §409(e) in pertinent part:

“To the extent that the Postal Service, or other Federal agency acting on behalf of or in concert with the Postal Service, engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18, the Postal Service or other Federal agency (as the case may be) — “(A) **shall not be immune under any doctrine of sovereign immunity from suit in Federal court by any person for any violation of Federal law by such agency or any officer or employee thereof.**”

39 U.S.C. §409(g)(1):

“Notwithstanding any other provision of law, legal representation may not be furnished by the Department of Justice to the Postal Service in any action, suit, or proceeding arising in whole or in part under...Subsection (d) or (e) of this section. The Postal Service may, by contract or otherwise, employ attorneys to obtain any legal representation that it is precluded from obtaining from the Department of Justice under this paragraph”.

As shown by the previous, with a few strict additions, the 2006 PAEA Bill Summary, Title 39 Section 404-409(d)(1), (e), & (g)(1), and the issues already decided by the previous panel in *Licata* are *unequivocally* consistent and aligned. However, a review of its Opinion shows, this Panel disregarded these germane issues, AFFIRMED and provided a cloak for the District Court's judgments that are *unequivocally* **VOID** *ab intitio* and contrary to Congress's intent, Federal procedural law, and the previous panel's decisions in *Licata*. (Appx., *infra* 1a)

In EDPA 2:11-cv-07303 ("2:11 Court"), the District Court: 1) allowed the DOJ/USAO to *unlawfully* represent the USPS; 2) embraced their numerous *fraudulent* misrepresentations of law; 3) disregarded the doctrine of "stare decisis"; and, 4) violated Federal procedural law and Third Circuit *binding* precedents enunciated in *Licata*, but instead, issued judgments that are **VOID** *ab intitio* for failure and refusal to act in accordance with due process law and being produced by *fraud*.

1. The 2:11 Court ruled: "*USPS is an agency of the federal government. See 39 U.S.C. § 201. To assert a tort claim against the federal government, a plaintiff must comply with the provisions of the Federal Tort Claims Act ("FTCA") ...the Court will grant Defendant United States Postal Service's Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1)*" (App., *infra*. 26a)

Here, the 2:11 Court conflated the USPS's Federal employment, which is the conveyance of mail matter—with—its status of a private commercial enterprise. A review of 39 U.S.C. §201 subsection "3621 Applicability; definitions" shows, the FTCA and §201 applies *exclusively* to the Postal Monopoly, the delivery of mail,

access to mail boxes, and Market-Dominate Products, “(1) first-class mail letters and sealed parcels; “(2) first-class mail cards; “(3) periodicals; “(4) standard mail; “(5) single-piece parcel post; *inter alia* Postal Monopoly, Market-Dominate, mail related products. None of Petitioner’s claims were mail related. The FTCA and §201 *do not* apply to Respondent USPS’s private status, those provisions are covered by 39 U.S.C. §§401(1), 409(a), (d)(1), (e), and (g)(1). (Appx., *infra.* 29a).

2. The 2:11 Court ruled: “*Plaintiff’s claim of misrepresentation and fraud will be dismissed because the FTCA specifically prohibits a party from filing a claim of misrepresentation against the federal government. See 28 U.S.C. § 2680(h).*” (App., *infra.* 26a)

Here, the 2:11 Court abused its discretion by asserting the provisions of 28 U.S.C. §2680(h) which applies *exclusively* to “Federal investigative or law enforcement officers” acting within the scope of their Federal employment. *Neither* Respondent USPS *nor* Pitney Bowes, Inc. were “Federal investigative or law enforcement officers” and *none* of Petitioner’s claims of misrepresentation/fraud arose from damages incurred as the result of Federal officers conducting an investigation or enforcing the law.

3. And, the 2:11 Court ruled: “*Because Plaintiff has not filed a claim with the PRC, his claim under Section 404a must be dismissed for lack of subject matter jurisdiction. Even if he had preserved such a claim, he is required to appeal an adverse ruling to the United States Court of Appeals for the District of Columbia, which would have subject matter jurisdiction over his suit.*” (Appx. *infra.* 26a)

Here, the 2:11 Court conferred jurisdiction over Petitioner's common law damages claims that arose under 39 U.S.C. §404a to the Postal Regulatory Commission where *none* existed. In PRC Order 2460, the Commissioners declared, "*the Commission has limited jurisdiction to hear rate and service complaints as prescribed by 39 U.S.C. §3662(a)*". And, in *Lopez v. PRC*, the Panel of the DC Circuit, including Justice Kavanah, ruled that *neither* the DC Circuit *nor* the PRC has jurisdiction to hear common law damages claims against the USPS, such claims are in the exclusive jurisdiction of the district courts. (Appx. *infra*. 47a, PRC Order No. 2460, and Appx., *infra* 41a & 43a, *Ramon Lopez v. Postal Regulatory Commission*, Judgment, Case No. 12-1341 (D.C. Cir. 2017))

After being bounced around from forum to forum, with *no* lapse in his pursuit of justice, and after the discovery of PRC Order 2460 and the DC Circuit in *Lopez*, showing all parties in EDPA 2:11-cv-07303, including the judicial officer and law clerk, did acts in furtherance of the conspiracy that: 1) deprived Petitioner of his 14th Amendment Rights; 2) deprived the district court of its *inherent* jurisdiction; 3) *defrauded* the U.S. Courts; and, 4) *defrauded* the United States, Petitioner filed independent action 2:22-cv-03349 pursuant to Fed. R. Civ. Pro. 60(b)(4), (d)(1) & (d)(3).

In 2:22-cv-03349, all parties were summoned under 39 U.S.C. §409(e) in their "individual capacities", with any and all doctrines of sovereign immunity waived for acting on the behalf of and in concert with the USPS in violations of Federal law,

acts *not* “*in connection with duties performed on the United States’ behalf*”.

Therefore, by law, the United States was *not* named as a defendant.

The 2:22 Court *not only*:

1. trespassed the law by attempting to execute and enforce the VOID judgments of the 2:11 Court;
2. disregarded and violated the strict set of Federal procedural laws enacted by Congress and Third Circuit ***binding*** precedents enunciated in *Licata*;
3. violated 39 U.S.C. §409(g)(1) by allowing the USAO for the EDPA to ***unlawfully*** represent the Defendants in “individual capacity” claims, thereby depriving Petitioner of his right to due process and equal protection of the law and committing waste, fraud and abuse of tax-payer dollars and United States resources; but also,
4. substituted the United States as a defendant in a proceeding where there were *no* claims against any employee or officer in their “official capacities” and the law prohibits claims against the United States for violations of Federal law;
5. incited or advised the USAO for the EDPA to ***unlawfully fabricate*** and enter a ***fraudulent*** “United States Statement of Interest” for the Court to dismiss Petitioner’s “individual capacity” claims in the early stage of the proceeding. The evidence and sequence of events shows, the USAO was *not* authorized or “sent” by the U.S. Attorney General to address United States interest in Petitioner’s “individual capacity” claims as required by 28 U.S.C. §517.

Additionally, such authorization would implicate the Attorney General for taking part in the USAO's **unlawful** representation of the USPS, *et al*, in their "individual capacities", which constitutes a violation of 39 U.S.C. §409(g)(1), and their deprivation of Petitioner's clearly established rights, deprivation of the District Court's *inherent* jurisdiction, "fraud upon the Court", and **fraud** against the United States.;

6. failed and refused to correct the 2:11 Court's VOID judgments; and,
7. treated Petitioner, his 14th Amendment Rights and his citing of Federal procedural and common law in a hostile and egregious manner. (Appx. *infra*. 9a)

The 2:22 Court ruled:

1. *"Like a punch-drunk boxer, Frederick Foster just doesn't know when to quit. Mr. Foster has spent the past decade bouncing from forum to forum, getting knocked out at each one. Refusing to accept that he lost fair and square, Mr. Foster now asserts that his losses were due to fraud. Because sovereign immunity, judicial privilege, and collateral estoppel bar his claims, the Court must ring the bell and declare another TKO against him."* (Appx. *infra*. 9a)

Here, the 2:22 Court failed and refused to rule in accordance with Third Circuit **binding** precedents enunciated in *Licata* and Congress's Federal procedural laws that specifically waive **any** doctrine of sovereign immunity from the USPS and "*such agency or any officer or employee*", including "judicial officers", acting on the behalf of the USPS in violations of Federal law. But instead, **unlawfully** invoked the very doctrines of sovereign immunity and judicial privilege which Congress

specifically waived. Moreover, the doctrine of collateral estoppel *cannot* be applied to 2:11-cv-07303 which was **invalidated** and **vitiated in its entirety** as the result of “fraud upon the court”, deprivation of rights, deprivation of the district court’s *inherent* jurisdiction, and the issuance of judgments that are *unequivocally VOID ab intitio*.

2. The 2:22 Court also imposed a filing injunction against Petitioner and Ordered:

“1. The Clerk of Court SHALL NOT ACCEPT any future filings by Plaintiff Frederick Foster in this matter or Foster v. Pitney Bowes Corp., et al., No. 11-cv-7303, without prior leave of Court; 2. Mr. Foster is ENJOINED from filing in this District any new case that is related to, or arises out of, the claims he has raised in this case and Foster v. Pitney Bowes Corp., et al., No. 11-cv-7303, without prior leave of Court; 3. Plaintiff must attach a copy of this Order to any motion for leave to submit further filings in this case, Foster v. Pitney Bowes Corp., et al., No. 11-cv-7303, or any related new case. 4. Any such motions that the Court concludes are frivolous or seek relief previously denied by the Court will subject pro se Plaintiff to sanctions of \$100 per violation.”

Here, after attempting to enforce the VOID judgments of the 2:11 Court and committing acts in furtherance of the conspiracy that: 1) deprived Petitioner of his Constitutional Rights to due process and equal protection of the law; 2) deprived the district court of its *inherent* jurisdiction; 3) **defrauded** the U.S. Courts; and 4) **defrauded** the United States, the 2:22 Court imposed a filing injunction against Petitioner that *only* exacerbated the District Court’s continued lawlessness.

Clearly, the 2:22 Court's filing injunction was an additional act intended to provide a cloak for the District Court's, the Respondents', and any officer's or employees' past and future violations. As shown by its failure and refusal to act in accordance with due process law, on the behalf of and in concert with the USPS, the 2:22 Court *unequivocally* did acts in furtherance of the conspiracy that deprived Petitioner of his 14th Amendment rights, *defrauded* the Court and *defrauded* the United States.

On February 13, 2023, Petitioner filed a "Notice of Appeal", Third Circuit Case No. 23-1298, of the 2:22-cv-03349 Court's Order and judgments.

A review of Third Circuit Case No. 23-1298 shows, Petitioner made the Panel fully aware of the germane issues on appeal, including 39 U.S.C. §§401(1), 409(e), & (g)(1), the unassailable set of Federal procedural laws enacted by Congress that waive any doctrine of sovereign immunity from the USPS and "such agency or any officer or employee" "acting on the behalf of or in concert with" the USPS "in any violation of Federal law" and prohibits the DOJ/USAO from furnishing legal representation to said parties. Moreover, Petitioner appropriately presumed that the Panel would rule in accordance with the ***binding*** decisions already decided by the previous panel in *Licata* which are *unequivocally* consistent with Congress's set of unassailable procedural laws.

The record of Third Circuit Case No. 23-1298 shows, the Panel failed and refused to inspect the record of the 2:11 and 2:22 Courts to ensure that Third Circuit's ***binding*** precedents and Federal law was applied correctly. *And*, the Panel

themselves failed and refused to adhere to the doctrine of stare decisis on the issues already decided by the previous panel in *Licata*. Instead, the Panel upon which review is sought **crafted the most frivolous and meritless opinion that passively and cunningly attempted to provide a cloak for the 2:11 and 2:22 Courts' violations.** In fact, the Panel turned a “blind-eye” to the germane issues on appeal regarding the Respondents’ ***fraud*** and the 2:11 and 2:22 Court’s numerous violations of Federal procedural laws that: 1) deprived the district court of its *inherent* jurisdiction; and, 2) deprived Petitioner of his clearly established Constitutional Rights, *inter alia*. (Appx. *infra*. 1a)

In addition to refusing to adhere to the doctrine of stare decisis, the record of Third Circuit Case No. 23-1298 shows, the Panel upon which review is sought *intentionally* violated the Third Circuit’s own Internal Operating Procedures I.O.P. Rule 9.1, *inter alia*, by disregarding and thereby overruling the decisions on issues already decided by the previous panel in *Licata*, without the approval of a majority of the en banc court. (Appx. *infra*. 1a)

Third Circuit Internal Operating Procedures: “Objectives. (2) To insure decisional stability and avoid intra-circuit conflict of decisions by providing a means for the panel system to operate efficiently and at the same time provide that a holding of a precedential opinion of the court may not be overruled without the approval of a majority of the en banc court”.

And, I.O.P. Rule 9.1 — CHAPTER 9. EN BANC CONSIDERATION 9.1 Policy of Avoiding Intra-circuit Conflict of Precedent. It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent

panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so. (Appx. *infra*. 31a)

Subsequently, in accordance with the Third Circuit's own Internal Operating Procedures, no subsequent panel overrules the holding in a precedential opinion of a previous panel, therefore, the approval of a majority of the en banc court is **mandatory**, not discretionary. As such, the Panel's Order and Opinion not only lacks legitimacy in its own court, but has categorically created an *intra-circuit* conflict.

Furthermore, by *any* and *all* accounts, the individual judges or judicial officers who participated on the Panel in Third Circuit Case No. 23-1298 have implicated themselves as violators of the law and placed themselves onto the "glue trap" of the Federal procedural laws that govern the USPS and "any officer" acting on the behalf of the USPS in violations of Federal laws. Consequently, these individual judicial officers, along with the Respondents, the judicial officer who presided over 2:22-cv-03349, the USAO for the EDPA and its assistant U.S. Attorneys who violated Petitioner's rights and **defrauded** the Court, *inter alia*, will be named as defendants and summoned in their "individual capacities" under 39 U.S.C. §409(e), with all doctrines of sovereign immunity waived, in a forthcoming law suit, in an impartial and just Federal court.

In accordance with 18 U.S.C. §242 Deprivation of Rights Under Color of Law: "Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. For the purpose of Section 242, acts under "color of law"

include acts not only done by federal... officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers... as well as judges... and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin."

Moreover, by disregarding the germane issues on appeal, thereby failing and refusing to adhere to the doctrine of stare decisis and overruling the **binding** decisions already decided by the previous panel in *Licata* — while — failing and refusing to act in accordance with the Third Circuit's Internal Operating Procedures which makes it **mandatory** that the Panel gets the approval of a majority of the en banc court in order to overrule the decisions on issues already decided by the previous panel in *Licata*, at minimum, must be deemed as an erratic change of law or **unlawful** "legislation from the bench" of the Panel.

Petitioner's application and request for Justice Alito to stay the enforcement of the mandate issued by the Panel upon which review is sought is truly fundamental. By law, the Panel must either — adhere to the **binding** decisions already decided by the previous panel in *Licata* — *or* — act in accordance with the Third Circuit's I.O.P.'s and acquire the **mandatory** approval of a majority of the en banc court in order for the Panel to overrule the **binding** decisions made by the previous panel.

However, the culmination of the 2:11 Court's acts of deprivation and **fraud**, the 2:22 Court's attempt to execute the 2:11 Court's VOID judgments with its own

VOID judgments “topped off” with the imposition of a filing injunction against Petitioner, and the Panel upon which review is sought having AFFIRMED both District Courts’ **unlawful** acts, shows, at all times relevant, the goal of the parties involved was to deprive Petitioner of his Constitutional and Federal rights by depriving the District Court of its *inherent* jurisdiction, disregarding Third Circuit **binding** precedents, Acts of Congress and Federal procedural law, for the sole purpose of silencing Petitioner’s claims. This culmination also shows, such **unlawful** acts or “favors” were *not* “in connection with duties performed on the behalf of the United States”. But rather, “on the behalf of and in concert with” the USPS, and fellow colleagues, officers, and employees of the Third Circuit and the District Court for the Eastern District of Pennsylvania.

It is both **unlawful** and un-Constitutional for “such agency or any officer or employee” to engage in silencing the valid legal petition of United States citizens in the Federal courts. It is dangerous and amounts to an aristocracy that is worst than any known form of criminal organization. And, much more dangerous because, such acts may be construed as acts of modern-day slavery.

Therefore, it is in the interest of justice that Justice Alito takes action to eradicate such **unlawful** behavior in the Third Circuit.

CONCLUSION:

In light of the forgoing, it is of *extraordinary* importance for Justice Alito to grant this application and exert his authority to compel the Third Circuit and the Panel to **not only** rule in accordance with Congress’s intent and the *unassailable*

Federal procedural laws, but to *either* — adhere to the doctrine of stare decisis and the ***binding*** decisions made by the previous panel in *Licata* — *or* — act in accordance with the Third Circuit’s Internal Operating Procedures and acquire the ***mandatory*** approval of a majority of the en banc court in order for their Order and Opinion, that overruled decisions already decided, to gain any legitimacy.

Moreover, the record shows, the Respondents, their ***unlawful*** counsel, and the judicial officers of the District Court for the EDPA have created an ongoing cancerous conundrum of lawlessness, which has infected the Panel upon which review is sought and will test the proverbial “immune system” of the Third Circuit’s en banc court. In other words, the en banc court is faced with resolving this unequivocal *intra-circuit* conflict and their resolution ***must*** be in accordance with Federal procedural law, Congress’s intent, *inter alia*. Failure to do so will implicate the en banc court for violations of Federal law on the behalf of and in concert with the USPS.

This categorical *intra-circuit* conflict ***must*** be resolved and “*the Court has a responsibility to correct VOID judgments*”. (SCOTUS holding on void judgments)

Consequently, it is also imperative that Justice Alito imposes a stay and/or injunction on the Panel’s mandate to prevent any other agency, officer or employee from aiding and abetting the USPS evade justice, thereby engaging in violations of Federal law, under the *false pretense* that “*such agency or any officer or employee*” are protected by any doctrine of sovereign immunity, thereby placing themselves onto the “glue trap” of Congress’s Federal procedural laws that govern the USPS


and specifically waive any and all doctrines of sovereign immunity from “such agency or any officer or employee”.

The denial of this application, without more, is not an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

Subsequently, by imposing a STAY and/or INJUNCTION against the Panel’s MANDATE, Justice Alito will not only encourage the resolution of the unequivocal *intra-circuit* conflict, but will also encourage the correction of a “slew” of errors and violations of Federal law committed by a “slew” of Federal officers and employees. And thus, resolution of the issues presented will prevent a “slew” of Federal officers and employees from facing civil action and criminal charges in another court of another district which, by law, must be impartial and must render just rulings.

For the foregoing reasons, Petitioner *Pro Se*, Frederick Foster, humbly and respectfully requests the Honorable Justice Alito to grant this application.

Date: October 22, 2024


_____/s/
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CERTIFICATE OF SERVICE

I hereby certify, in accordance with Supreme Court Rule 29.5(b) that the parties to the proceeding, were served by email and pre-paid U.S. Mail for delivery within three days, in accordance with Supreme Court Rule 29.3 on this, the 22nd day of October, 2024.

Respectfully submitted,



/s/
Frederick Foster, Petitioner *Pro Se*
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Philadelphia, PA 19131
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SUPREME COURT OF THE UNITED STATES

Frederick Foster,

Petitioner,

vs.

United States Postal Service, et al,

Respondents.

On Application to Justice Alito for a Declaration to
the United States Court of Appeals
for the Third Circuit

APPLICATION APPENDIX

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October 6, 2024

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October 6, 2024

Respectfully submitted,


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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1298

FREDERICK FOSTER,
Appellant

v.

JOEL H. SLOMSKY; LANDON Y. JONES; WILLIAM M. MCSWAIN; UNITED STATES ATTORNEY OFFICE FOR EASTERN DISTRICT OF PENNSYLVANIA; UNITED STATES DEPARTMENT OF JUSTICE; JANINE CASTORINA; CHRISTOPHER A. LEWIS; JONATHAN S. GOLDMAN; KATHERINE P. BARECCHIA; UNITED STATES POSTAL OFFICE; PITNEY BOWES INCORPORATED; JOHN AND JANE DOES 1 - 10; ZANE D. MEMEGER; GREGORY B. DAVID; ANNETTA FOSTER GIVHAN; MARGARET L. HUTCHINSON

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. Civ. No. 2:22-cv-03349)
District Judge: Honorable Joshua D. Wolson

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 25, 2024

Before: KRAUSE, MATEY, and CHUNG, Circuit Judges

(Opinion filed: April 11, 2024)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Appellant Frederick Foster, proceeding pro se, appeals orders of the District Court dismissing his complaint, denying reconsideration, and imposing a pre-filing injunction on him. For the following reasons, we will affirm.

In November 2011, Foster sued the United States Postal Service (“USPS”), the Pitney Bowes corporation, and others, alleging violations of the Postal Accountability and Enhancement Act (“PAEA”), among other related claims. Foster’s claims centered on the accusation that USPS and Pitney Bowes stole an idea for secure digital communications that he had previously presented to them and had unsuccessfully attempted to patent. The District Court dismissed the claims, and the Court of Appeals for the Federal Circuit affirmed. See Foster v. Pitney Bowes Corp., 549 F. App’x 982 (Fed. Cir. 2013) (per curiam). Foster also unsuccessfully sought to litigate his claims with the Postal Regulatory Commission; the Court of Appeals for the D.C. Circuit denied his petition for review of that agency’s adverse decision. See Foster v. Postal Regul. Comm’n, 738 F. App’x 1 (D.C. Cir. 2018) (unpublished memorandum decision).

In August 2022, Foster filed a new civil action asserting that the judgments in his prior proceedings were void because they were procured through wide-ranging “fraud on the court.” See generally Am. Compl., ECF No. 8. He named a slew of defendants, including the district judge who oversaw his prior case, the judge’s law clerks, various members of the United States Attorney’s Office (“USAO”), USPS, Pitney Bowes, and private attorneys who had participated in the prior litigation. As he had done in his prior case, Foster moved to disqualify the USAO from representing the government

defendants, arguing that such representation was barred by statute. The District Court denied the motion, citing the Federal Circuit's rejection of the same argument in Foster's prior proceeding.¹

The various defendants then moved to dismiss Foster's complaint for a lack of subject-matter jurisdiction and failure to state a claim. The District Court dismissed the complaint, concluding that Foster's claims were barred by sovereign immunity, judicial privilege, and issue preclusion. When Foster moved for reconsideration of that decision, the District Court denied his motion and ordered him to show cause why he should not be enjoined from pursuing the same issues in future filings. Foster filed a memorandum in opposition. The District Court rejected his arguments and imposed an injunction requiring Foster to seek leave of Court before filing any documents related to his underlying claims. Foster appeals.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's dismissal of Foster's complaint and may affirm on any basis supported by the record. See Host Int'l v. MarketPlace PHL, LLC, 32 F.4th 242, 247 n.3 (3d Cir. 2022) (citations omitted); Free Speech Coal., Inc. v. Att'y Gen., 677 F.3d 519, 529–30 (3d Cir. 2012). To survive a motion to dismiss, a complaint must allege facts sufficient to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Pleadings of pro se litigants are construed liberally,

¹ Foster filed and then withdrew a premature appeal from the order denying his motion for disqualification. See C.A. No. 22-3105. We then denied his petition for a writ of mandamus that sought to compel the District Court to disqualify the USAO and to void the judgment in his prior action. See C.A. No. 22-3209.

but “pro se litigants still must allege sufficient facts in their complaints to support a claim.” See Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 244–45 (3d Cir. 2013).

Foster’s complaint primarily seeks relief from the judgment in his prior action based on his allegations that the judge, his staff, and the attorneys involved all committed fraud on the court. In assessing such claims, we “employ a demanding standard . . . requiring: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court.” Herring v. United States, 424 F.3d 384, 390 (3d Cir. 2005). Moreover, “the fraud on the court must constitute egregious misconduct such as bribery of a judge or jury or fabrication of evidence by counsel.” Id. (cleaned up).

Foster’s complaint does not meet that demanding standard. The purportedly fraudulent acts that he identified in his complaint amount to nothing more than legal arguments made by his litigation opponents and rulings made by the judge that he believes are erroneous. The mere fact that Foster disagrees with them does not render them fraudulent or deceptive. Besides, during the prior litigation, Foster vigorously opposed the arguments and rulings that he now asserts are fraudulent. Having had and availed himself of that opportunity, he is not due relief from the resulting judgment on that basis now. Cf. Mazzei v. The Money Store, 62 F.4th 88, 94 (2d Cir. 2023) (collecting cases expressing an “unwillingness to find fraud on the court where the alleged fraud could have been redressed in the underlying action”).

Aside from his plea to void the prior judgment, though, Foster sought other relief. To the extent that the first eleven “counts” of the complaint sought damages from the

judge, the judicial clerks, the attorneys, and the parties to the litigation, we agree with the District Court that “[t]hese counts all arise from communications that someone made in the regular course of judicial proceedings that were pertinent and material to the relief sought. The judicial privilege bars them.” ECF No. 56 at 6; see also Capogrosso v. N.J. Sup. Ct., 588 F.3d 180, 184 (3d Cir. 2009) (per curiam); Gen. Refractories Co. v. Fireman’s Fund Ins. Co., 337 F.3d 297, 312 (3d Cir. 2003).

We also agree with the District Court that Foster’s “Count XII” is precluded because it seeks to relitigate issues or claims that were or could have been adjudicated in the prior litigation. See ECF No. 56 at 6–7 (citing, inter alia, Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc., 571 F.3d 299, 310 (3d Cir. 2009)). In that count, Foster sought damages from USPS and Pitney Bowes for the same alleged misappropriation of his concept for secure digital delivery that was at issue in his prior action. See Am. Compl. 138–141, ECF No. 8. We agree with the District Court that, even assuming Foster identified different sources of law for his claim, he is precluded from relitigating issues that were previously decided on the merits. See, e.g., Mem. Op. 14, Foster v. Pitney Bowes Corp., No. 2:11-cv-07303, at ECF No. 50 (E.D. Pa. Feb. 8, 2013) (“Any injury Plaintiff may have incurred as a result of [his invention] becoming public knowledge was a consequence of Plaintiff submitting a patent application for the invention and not taking steps to prevent publication.”), aff’d, 549 F. App’x 982 (Fed. Cir. 2013); see also Doe v. Hesketh, 828 F.3d 159, 171 (3d Cir. 2016).

Foster also challenges the District Court’s denial of his motion to disqualify the USAO from representing USPS and related government defendants.² As described above, the District Court’s denial of Foster’s motion cited to “the reasons stated by the Federal Circuit” in ruling on the same issue during the prior action. ECF No. 25 at 1 (citing Foster, 549 F. App’x at 988 (“Although 39 U.S.C. § 409(g)(1) does prohibit the DOJ from representing USPS in certain limited situations, none of these situations apply here.”)). This was not an abuse of discretion. See United States v. Bellille, 962 F.3d 731, 738 (3d Cir. 2020) (explaining that questions of attorney withdrawal are committed to a district court’s sound discretion). To the extent that Foster also challenges the district judge’s refusal to disqualify himself under 28 U.S.C. § 455, we agree that Foster did not present any reasonable basis for disqualification. See Order, ECF No. 61 (citing, inter alia, Selkridge v. United of Omaha Life Ins. Co., 360 F.3d 155, 167 (3d Cir. 2004)).

Foster’s appeal also encompasses the District Court’s denial of his motion for reconsideration, which we review for an abuse of discretion. See United States v. Kalb, 891 F.3d 455, 459 (3d Cir. 2018). The District Court correctly concluded that Foster’s motion contained only “arguments that he raised in his responsive brief or arguments that he could have raised but did not. Mr. Foster does not cite any change in law, new evidence, or actual error of law. Nor does his Motion demonstrate any manifest injustice from the Court’s ruling, other than he disagrees with it.” ECF No. 59 at 2; see also Kalb,

² That earlier order merges with the final judgment and is reviewable at this stage. See Fed. R. App. P. 3(c)(4); In re Westinghouse Sec. Litig., 90 F.3d 696, 706 (3d Cir. 1996).

891 F.3d at 467 (“[A]rguments [that] could as well have been made earlier . . . [are] not a proper basis for reconsideration.” (citation omitted)).

Finally, Foster challenges the District Court’s order enjoining him from future filings, which we also review for an abuse of discretion. See Brow v. Farrelly, 994 F.2d 1027, 1032 (3d Cir. 1993). Before imposing a filing injunction, a district court must (1) ensure that the situation presents “exigent circumstances, such as a litigant’s continuous abuse of the judicial process by filing meritless and repetitive actions”; (2) allow the litigant “to show cause why the proposed injunctive relief should not issue”; and (3) “narrowly tailor[]” the filing injunction “to fit the particular circumstances of the case before [that] [c]ourt.” Id. at 1038. Each of these steps was met here. The District Court issued an order directing Foster to show cause why a filing injunction should not issue and attached its proposed injunction. See ECF Nos. 59 & 59-1. Foster responded to that order. See ECF No. 62. The District Court then entered the injunction, coupled with a narrative statement of Foster’s repeated “meritless motions and successive cases.” ECF No. 63 at 1–2. The injunction restricted only Foster’s ability to file documents on the existing dockets or any new case related to the same underlying claims, while also providing that Foster could seek leave of court to make such new filings if they are not frivolous or do not seek relief previously denied. See id. at 3. The injunction is thus narrowly tailored to the circumstances of the case before the District Court, and there was no abuse of discretion.

For the foregoing reasons, we will affirm the District Court's judgment and imposition of the filing injunction.³

³ Appellees' motion for leave to file a supplemental appendix is granted. Appellant's motion to proceed on the original record is denied. To the extent that Appellant has sought to correct typographical errors in his briefs, we grant that relief and have considered the corrected briefs. We have reviewed and considered Appellant's other pending motions filed in this Court and, in light of our decision, they are denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK D. FOSTER,

Plaintiff,

v.

JOEL H. SLOMSKY, et al.,

Defendants.

Case No. 2:22-cv-03349-JDW

MEMORANDUM

Like a punch-drunk boxer, Frederick Foster just doesn't know when to quit. Mr. Foster has spent the past decade bouncing from forum to forum, getting knocked out at each one. Refusing to accept that he lost fair and square, Mr. Foster now asserts that his losses were due to fraud. Because sovereign immunity, judicial privilege, and collateral estoppel bar his claims, the Court must ring the bell and declare another TKO against him.

I. FACTS

This action stems from a complaint Mr. Foster filed *pro se* in the Eastern District of Pennsylvania in 2011. In that case, Mr. Foster alleged that the Postal Service illegally shared with Pitney Bowes his proposal for a "secure digital delivery service." The court dismissed his claims. *See Foster v. Pitney Bowes Corp.*, No. 11-7303, 2012 WL 2997810 (E.D. Pa. July 23, 2012); *Foster v. Pitney Bowes Corp.*, No. 11-7303, 2013 WL 487196 (E.D. Pa. Feb. 8, 2013). Over the next nine years, the Federal Circuit, the Postal Regulatory

Commission, and the D.C. Circuit also dismissed Mr. Foster's claims. *See Foster v. Pitney Bowes Corp.*, 549 F. App'x 982 (Fed. Cir. 2013) (per curiam), *cert. denied* 135 S. Ct. 182 (2014), *reh'g denied*, 135 S. Ct. 776 (2014); *Foster v. Pitney Bowes Corp.*, Docket No. 15-1339 (D.C. Cir. August 22, 2019).

Now, Mr. Foster primarily seeks to have the judgements of the Eastern District of Pennsylvania set aside as void because the judge, law clerks, lawyers, and previous defendants conspired to commit fraud upon the Court. Mr. Foster also seeks to relitigate his 2011 case under the guise of fraud and conspiracy claims and to get what he deems an adequate response to his 2020 Civil Rights and Civil Liberties Complaint. The Government¹ and Private² Defendants in the present action have moved to dismiss Mr. Foster's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

¹ The "Government Defendants" are the United States Attorney's Office for the Eastern District of Pennsylvania, the United States Department of Justice ("DOJ"), the United States Postal Service, Postal Service Attorney Janine Castorina, AUSA Gregory B. David, former AUSA Annetta Foster Givhan, former AUSA Margaret Hutchinson, AUSA Landon Y. Jones, former U.S. Attorney William McSwain, former U.S. Attorney Zane David Memeger, the Honorable Joel H. Slomsky, and the John and Jane Doe law clerks. The Court notes that, in his amended complaint (ECF No. 8), Mr. Foster includes a count against the Office Of Inspector General, the Office Of Professional Responsibility, and U.S. Attorney General Merrick Garland, although he does not name them as defendants. The Court also notes that Mr. Foster improperly attempts to add AUSA Peter Carr as a defendant in his objection to the motions to dismiss.

² The "Private Defendants" are Pitney Bowes, Inc. ("Pitney Bowes"), Blank Rome LLP ("Blank Rome"), Christopher A. Lewis, Jonathan S. Goldman, and Katherine P. Barecchia.

II. LEGAL STANDARD

Where a defendant files a motion to dismiss pursuant to Rule 12(b)(1) before it answers the Complaint or otherwise presents competing facts, a District Court must apply the same standard of review it would use when considering a motion to dismiss under Rule 12(b)(6). *See Const. Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). A complaint cannot survive a motion to dismiss under Rule 12(b)(6) unless it contains “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016).

III. ANALYSIS

As a preliminary matter, the Court notes that the federal laws that Mr. Foster cites as his causes of action either do not create causes of action or are inapplicable. *See* FED. R. CIV. P. 17, 60 (no cause of action); R. Prof'l Conduct 8.3-8.4 (same); 28 U.S.C. §§ 455, 547 (same); 39 U.S.C. §§409, 3691 (same); U.S. CONST. art. I, §8, cl. 7 (same); 18 U.S.C. §1505 (creating a cause of action for obstruction of proceedings before departments, agencies, and committees, not U.S. Courts); 18 U.S.C. §1031 (creating a cause of action for major fraud related to government contracts, not fraud in civil cases); 42 U.S.C. §§1983, 1985 (creating a cause of action for those who violate another's constitutional rights while acting under the color of *state law* – not federal law); *Bivens* (creating limited³ causes of action against federal actors, which are not applicable to this case). However, because the

³ *See Ford v. Garland*, No. 22-2393-KSM, 2022 WL 4133294 at *2 (E.D. Pa. Sept. 12, 2022).

Court affords *pro se* plaintiffs great leniency in their pleading, the Court addresses other substantive issues with Mr. Foster's complaint without consideration for what his specific cause of action may be.

A. Sovereign Immunity

To the extent Mr. Foster's claims are against federal agencies⁴ and employees in their official capacities, sovereign immunity bars those claims. Counts I, II, III, IV, V, VI, VII, and XI allege fraud, misrepresentations, and deprivations of due process during Mr. Foster's 2011 case. Count IX alleges that the DOJ, other governmental offices, and the Attorney General inadequately responded to Mr. Foster's Civil Rights and Civil Liberties Complaint dated September 7, 2020, and, therefore acquiesced in his deprivation of due process. And Counts X and XII reassert Mr. Foster's claims from 2011, fashioning them as fraud claims.

Mr. Foster's counts against the Government Defendants that sound in tort must comply with the Federal Tort Claims Act ("FTCA"). Under the FTCA, a plaintiff may only sue the United States, not specific governmental agencies or officers in their official capacity. *See* 28 U.S.C. §§ 1346(b), 2674; *see also Dalessio v. U.S. Dep't Hous. & Urban Dev.*, 528 F. Supp. 3d 341, 346 (E.D. Pa. 2021). And the FTCA's waiver of sovereign immunity does not apply to claims arising out of "misrepresentation [or] deceit." 28 U.S.C. § 2680(h).

⁴ Mr. Foster asserts that he is also suing United States Federal Agencies in their individual capacity. That's nonsensical, as any damages judgement against the agency must necessarily come from the government's coffers. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

Sovereign immunity also bars Mr. Foster's due process and other constitutional claims. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 484-85 (1994). Because the United States has not waived sovereign immunity for the types of claims at issue, the Court lacks subject matter jurisdiction. *See id.* at 475.

B. Judicial Privilege

To the extent Mr. Foster's claims are against federal employees in their individual capacities and the Private Defendants for their actions during the 2011 case, judicial privilege bars those claims. "The judicial privilege provides absolute immunity for communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought, whether made by 'a party, a witness, an attorney, or a judge.'" *Church Mut. Ins. Co. v. All. Adjustment Grp.*, 102 F. Supp. 3d 719, 730 (E.D. Pa. 2015), *aff'd*, 708 F. App'x 64 (3d Cir. 2017), (quoting *Schanne v. Addis*, 121 A.3d 942, 947 (Pa. 2015))(internal quotations omitted). The judicial privilege covers all tort actions based on statements made during judicial proceedings. *See id.*

Counts I, II, III, V, and VII allege that Judge Slomsky and his law clerks issued void judgements, failed to recuse, prevented another judge from inspecting the record, allowed unlawful entries of appearance by the DOJ, and allowed fraudulent misrepresentations to the Court. Count IV alleges that that various government and private defendants committed fraud in allowing the DOJ to enter its appearance for United States Postal Service. Counts VI, X, XI, and XII allege that various government and private defendants made fraudulent misrepresentations of law and material

misrepresentations to the Court. And Count VIII alleges that the Private Defendants knew of the fraud committed by various government defendants and acquiesced to it. These counts all arise from communications that someone made in the regular course of judicial proceedings that were pertinent and material to the relief sought. The judicial privilege bars them.

C. Collateral Estoppel

To the extent that Mr. Foster seeks to relitigate his 2011 complaint, collateral estoppel bars his claims. Collateral estoppel prevents subsequent litigation of an issue of fact or law that had been determined and resolved in a prior court proceeding. *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001). The doctrine applies when (1) an issue decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 310 (3d Cir. 2009).

The Government and Private Defendants assert that collateral estoppel bars counts X and XII. In addition to the fraud related claims already discussed, these counts assert the alleged waste and abuse of United States resources, the Postal Service's failure to meet the modern needs of the general public as required by the Postal Accountability and Enhancement Act, the Postal Services' violations of Article I, Section 8, Clause 7, of the

Constitution (the "Postal Clause"), and the Postal Service and Pitney Bowes push for privatization. Mr. Foster had a full and fair opportunity to litigate these issues in his previous cases. Judge Slomsky and the Postal Regulatory Commission rejected his claims, and Courts of Appeals affirmed those decisions. This Court will not disturb those judgements.

Furthermore, to the extent that Mr. Foster may have sufficiently repackaged his claims so as not to be barred by collateral estoppel, the Court notes: 1) the Postal Clause does not create a private right of action; 2) the Postal Clause does not contain any prohibition against privatizing postal services; and 3) it is not the Court's role to oversee or judge management decisions of the Postal Service.

IV. CONCLUSION

This fight is over. Mr. Foster's claims lack merit, and the Court has no power to hear many of them in any event. It's time for Mr. Foster to hang up his gloves. The Court will grant the various Motions. And, because nothing that Mr. Foster could put in an amended pleading would cure the problems with his claims, the Court will dismiss his claims with prejudice. An appropriate Order follows.

BY THE COURT:

/s/ Joshua D. Wolson

JOSHUA D. WOLSON, J.

December 27, 2022

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1298

FREDERICK D. FOSTER,
Appellant

v.

JOEL H. SLOMSKY; LANDON Y. JONES; WILLIAM M. MCSWAIN; UNITED STATES ATTORNEY OFFICE FOR EASTERN DISTRICT OF PENNSYLVANIA; UNITED STATES DEPARTMENT OF JUSTICE; JANINE CASTORINA; CHRISTOPHER A. LEWIS; JONATHAN S. GOLDMAN; KATHERINE P. BARECCHIA; UNITED STATES POSTAL OFFICE; PITNEY BOWES INCORPORATED; JOHN AND JANE DOES 1 - 10; ZANE D. MEMEGER; GREGORY B. DAVID; ANNETTA FOSTER GIVHAN; MARGARET L. HUTCHINSON

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 2-22-cv-03349)
District Judge: Honorable Joshua D. Wolson

PETITION FOR REHEARING

BEFORE: CHAGARES, *Chief Judge*, and JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, *Circuit Judges*

The petition for rehearing filed by appellant Frederick D. Foster in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court en banc. It is now hereby **ORDERED** that the petition is **DENIED**.

BY THE COURT

/s/ Paul B. Matey
Circuit Judge

Dated: June 11, 2024
Amr/Cc: All counsel of record

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK FOSTER,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 11-7303
v.	:	
	:	
PITNEY BOWES INC,	:	
UNITED STATES POSTAL SERVICE,	:	
and JOHN DOES 1-10,	:	
	:	
Defendants.	:	

OPINION

Slomsky, J.

July 23, 2012

I. INTRODUCTION

This case involves a dispute over intellectual property. On November 23, 2011, Plaintiff Frederick D. Foster, proceeding *pro se*, filed a Complaint against Defendants Pitney Bowes Corporation (“Pitney Bowes”), United States Postal Service (“USPS”) and John Does 1-10 (“John Does”). (Doc. No. 1.) Plaintiff asserts five claims: (1) a violation of 39 U.S.C. § 404a of the Postal Accountability and Enhancement Act (“PAEA”);¹ (2) misrepresentation and fraud; (3) conversion; (4) unjust enrichment; and (5) misappropriation of trade secrets. (Doc. No. 1-1 ¶¶ 44-66.) The Complaint seeks compensatory and punitive damages in excess of \$150,000. (Id. ¶ 66.)

On March 9, 2012, Defendant USPS filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a

¹ In the Complaint, Plaintiff quotes from 39 U.S.C. § 404a, but incorrectly cites it as 39 U.S.C. § 403.

claim. (Doc. No. 14.) On April 30, 2012, Plaintiff filed a Response to the Motion to Dismiss. (Doc. No. 20.)² On July 2, 2012, the Court held a hearing on Defendant USPS's Motion.

For reasons that follow, the Court will grant Defendant USPS's Motion to Dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).³

II. STATEMENT OF FACTS

The Court recites the facts in the light most favorable to Plaintiff. On or about May 7, 2007, Plaintiff submitted a patent application to the United States Patent and Trademark Office. (Doc. No. 1 ¶ 23.) He described his concept as the "Virtual Post Office Box/Internet Passport powered by Global Registration and Verification" ("VPOBIP"). (*Id.* ¶ 21.) VPOBIP was designed to verify identity on the Internet. (*Id.*) VPOBIP is a system where, for a fee, individuals and businesses would present identification documents to their local post office. (*Id.*) Once their identity was verified by USPS, they would receive a virtual Post Office Box and their email messages would contain a VPOBIP badge. (Doc. No. 1, Ex. B at 2.) The VPOBIP badge

² On May 7, 2012, Plaintiff filed supplemental exhibits in support of his response. (Doc. No. 23). Among these documents are excerpts from a USPS manual on supply practices, excerpts from a 2004 USPS statement on postal operations, and an article from the American Postal Workers Union. (*Id.*)

In deciding a motion to dismiss, a court may properly consider the complaint, exhibits attached thereto, documents referenced therein, matters of public record, and undisputably authentic documents if the complainant's claims are based upon these documents. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010); *Kernaghan v. BCI Communications, Inc.*, 802 F. Supp. 2d 590, 593 n.2 (E.D. Pa. 2011). The Court has examined these documents and will consider them to the extent that they relate to the claims alleged in the Complaint.

³ Because the Court is dismissing Plaintiff's claims against Defendant USPS for lack of subject matter jurisdiction, the Court will not address USPS's Motion to Dismiss for failure to state a claim under Rule 12(b)(6). See *McCurdy v. Esmonde*, No. 02-4614, 2003 WL 223412, at *4 (E.D. Pa. Jan. 30, 2003) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)) ("Without jurisdiction the court cannot proceed at all in any cause.").

apparently would make the user seem more trustworthy to other members of the online community. (Id.) The aim of the VPOBIP system was to diminish the amount of Internet fraud as more people used the software. (Id.)

On or about May 25, 2007, Plaintiff mailed a description of VPOBIP to USPS's Senior Vice President of Strategy and Transition, Linda Kingsley ("Kingsley"). (Doc. No. 1 ¶ 23.) Kingsley assigned the proposal for review to Linda Stewart ("Stewart"), Vice President of Strategic Planning. (Id. ¶¶ 23-24.) Kingsley also instructed Plaintiff to submit his concept through the USPS Innovations Initiative Database, which he did on or about June 11, 2007. (Id. ¶ 23.)

Plaintiff had several conversations with representatives from USPS, including Stewart and the Manager of Strategic Business Initiatives, Thomas Cinelli ("Cinelli"). (Id. ¶ 24.) Cinelli told Plaintiff that his proposal would be presented to USPS's stakeholders,⁴ including Defendant Pitney Bowes. (Id.) The stakeholders approved a VPOBIP pilot program. (Id. ¶ 25.)

Cinelli forecasted that the profit from the VPOBIP program would exceed \$10 million. (Id.) Cinelli therefore informed Plaintiff that the Postal Regulatory Commission ("PRC") would also need to give its approval. (Id.) Plaintiff then began to communicate with the PRC and other government agencies. (Id. ¶ 26.)

In September 2009, the PRC suggested that Plaintiff contact John Campo ("Campo"), President of Postal Relations at Pitney Bowes. (Id. ¶ 28.) On October 1, 2009, Plaintiff contacted Campo by phone and email. In his email, Plaintiff described the VPOBIP system,

⁴ USPS maintains that, as a federal agency, it does not have stakeholders. (Doc. No. 14 at 2.)

including his notice of patent rights, and explained his intent to partner with USPS. (Id. ¶ 29.)

The Complaint does not allege any further conversations between Plaintiff and Pitney Bowes or USPS.

In March or April 2011, Pitney Bowes launched “Volly.com,” an online verification system that contains features which Plaintiff argues are a direct copy of VPOBIP. (Id. ¶ 30.) Thereafter, Plaintiff commenced the instant litigation against Defendants USPS, Pitney Bowes and John Does.

III. STANDARD OF REVIEW

When reviewing a motion to dismiss under Rule 12(b)(1), a court must determine whether the motion is a facial or factual challenge. See In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 243 (3d Cir. 2012) (citing Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)). “A facial attack challenges only the court’s subject matter jurisdiction. A factual attack allows the court to question the plaintiff’s facts after the defendant files an answer.” Machon v. Pa. Dep’t of Pub. Welfare, No. 11-4151, 2012 WL 592323, at *4 (E.D. Pa. Feb. 23, 2012) (citing Mortensen, 549 F.2d at 891). Here, no answer has been filed by Defendant USPS. Therefore, the Rule 12(b)(1) motion is a facial attack on the Court’s subject matter jurisdiction.

“In reviewing a facial challenge, which contests the sufficiency of the pleadings, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.” In re Schering Plough Corp., 678 F.3d at 243 (citing Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000) (internal quotations omitted)).

IV. DISCUSSION

A. Postal Accountability and Enhancement Act Claim

Plaintiff argues that Defendant USPS has violated the Postal Accountability and Enhancement Act (“PAEA”), specifically 39 U.S.C. § 404a, which states in subsection (a)(3):

[T]he Postal Service may not . . . obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

39 U.S.C. § 404a(a)(3).

Defendant argues that in order to recover for a violation of 39 U.S.C. § 404a, an individual must first satisfy the procedural requirements of 39 U.S.C. § 3662. Section 3662 states, in pertinent part:

Any interested person . . . who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601 . . . may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

39 U.S.C. § 3662 (emphasis added). After receiving an adverse ruling from the Postal Regulatory Commission (“PRC”), an individual may appeal that ruling to the United States Court of Appeals for the District of Columbia. 39 U.S.C. § 3663 (“A person . . . adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may . . . institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia.”). Because Plaintiff has not followed the procedures set forth in Sections 3662 and 3663, which ultimately vest jurisdiction over claims arising under Section 404a in the United States Court of Appeals for the District of Columbia and not this Court, Defendants assert

that this Court lacks subject matter jurisdiction over Plaintiff's claim under the PAEA.

In response to this argument, Plaintiff refers to the provision of the PAEA that grants district courts "original but not exclusive jurisdiction over all actions brought by or against the Postal Service." 39 U.S.C. § 409. Plaintiff claims that Section 409 establishes a general rule that violations of the PAEA are to be heard in any federal court. (Doc. No. 20 at 4.) To support his argument, Plaintiff notes that the language of 39 U.S.C. § 3662, cited above, is permissive and not mandatory because the use of the word "may" in Section 3662 implies that he is not required to submit a complaint to the PRC, and may instead file a claim in the first instance in federal court. (Id. at 5.)

As a rule of statutory construction, the word "'may' is permissive," whereas the word "'shall' is mandatory." LeMay v. U.S. Postal Serv., 450 F.3d 797, 799 (8th Cir. 2006) (citing Anderson v. Yungkau, 329 U.S. 482, 485 (1947); Braswell v. City of El Dorado, Ark., 187 F.3d 954, 958-59 (8th Cir. 1999)). However, Congressional intent plays a role in construing Section 3662, especially when Congress has exhibited a "fairly discernible" intent in a "particular legislative scheme" to withhold jurisdiction from the court. In this situation, the court must follow Congress' intent. Ismailov v. Reno, 263 F.3d 851, 854 (8th Cir. 2001) (quoting Block v. Cnty. Nutrition Inst., 467 U.S. 340, 349 (1984)). In order to determine whether Congress intended Section 3662 to grant the PRC exclusive jurisdiction over certain claims, it is instructive to examine the history of the statute.

Prior to the enactment of the PAEA, Congress passed the Postal Reform Act of 1970 ("PRA"). The PRA created the USPS as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. The PRA permitted suit to be

brought against USPS and granted the United States district courts “original but not exclusive jurisdiction” over such actions. 39 U.S.C. §§ 401, 409.

The PRA also established the Postal Rate Commission to hear all claims contesting postal rates and services. The Postal Rate Commission was created as way to give USPS “unfettered authority and freedom . . . to maintain and operate an efficient service.” Sen. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970). The Postal Rate Commission’s jurisdiction was established in 39 U.S.C. § 3662, titled “Rate and Service Complaints.” Originally, the Section read:

[I]nterested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe.

39 U.S.C. § 3662 (repealed 2006).

Under this former version of Section 3662, courts routinely held that it delegated jurisdiction exclusively to the Postal Rate Commission for claims involving rates or services, even though it contained the word “may” and was permissive on its face. See LeMay v. U.S. Postal Serv., 450 F.3d 797, 800 (8th Cir. 2006) (“After undertaking a review of the PRA’s legislative history, we hold the remedy provided by Section 3662 is exclusive.”); Bovard v. U.S. Post Office, 47 F.3d 1178, 1995 WL 74678, at *1 (10th Cir. Feb. 24, 1995) (“[t]he language of Section 3662 makes clear that a postal customer’s remedy for unsatisfactory service lies with the Postal Rate Commission.”); Azzolina v. U.S. Postal Serv., 602 F.Supp. 859, 864 (D.N.J. 1985) (“[P]laintiff does not have a private right of action to bring service-related complaints in federal district court”); Tedesco v. U.S. Postal Serv., 553 F. Supp. 1387, 1389 (W.D. Pa. 1983) (“A close reading of the [PRA] strongly suggests that Congress intended that complaints regarding postal

service be resolved outside of court.”).

In 2006, Congress passed the PAEA, which expanded the power of the Postal Rate Commission and renamed it the “Postal Regulatory Commission.” See 151 Cong. Rec. 3013 (2005) (statement of Sen. Susan Collins). The reach of 39 U.S.C. § 3662 was expanded “to ensure that the Postal Service management ha[d] both greater latitude and stronger oversight.” 151 Cong. Rec. 3013 (2005) (statement of Sen. Susan Collins). Currently, Section 3662 grants the PRC jurisdiction over claims arising out of five specific sections of the PAEA. The enumerated sections all relate broadly to the duties and limitations of the postal service.⁵ See 39 U.S.C. § 101(d) (duty to apportion postal rates on a fair and equitable basis); 39 U.S.C. § 401(2) (duty to create rules and regulations to effectuate the PAEA); 39 U.S.C. § 403(c) (prohibition against unreasonable discrimination amongst mail users); 39 U.S.C. § 404a (prohibition against acts of unfair competition); 39 U.S.C. § 601 (requirements for mail service).

The history of the PAEA reveals that Congress thought it important for the postal service to have strong internal oversight. The Act was meant to strengthen the PRC’s power, and to increase the kinds of claims that may be brought before the PRC. Although the word ‘may’ appears in Section 3662, it is clear from the statute’s history that Congress intended a plaintiff to

⁵ Plaintiff emphasizes that Section 3662 is titled “Rate and Service Complaints.” Since his claim does not concern a rate or service violation, he contends that Section 3662 does not apply here. (Doc. No. 20 at 4.) Plaintiff has brought his claim, however, under Section 404a, a section that is specifically listed in Section 3662. Moreover, Plaintiff overlooks the fact that when a statute is complex, “headings and titles can do no more than indicate the provisions in a most gen[e]ral manner.” Bhd. of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528 (1947). “[H]eadings and titles are not meant to take the place of the detailed provisions of the text.” Id. By listing certain provisions of Title 39 in Section 3662, Congress clearly established the kinds of claims that are to be heard by the PRC. Narrowing the scope of Section 3662 to only include rate and service complaints would, in effect, nullify the PAEA.

exhaust the PRC process before challenging an adverse ruling in the United States Court of Appeals for the District of Columbia.⁶ Because Plaintiff has not filed a claim with the PRC, his claim under Section 404a must be dismissed for lack of subject matter jurisdiction. Even if he had preserved such a claim, he is required to appeal an adverse ruling to the United States Court of Appeals for the District of Columbia, which would have subject matter jurisdiction over his suit.

B. Tort Claims

USPS is an agency of the federal government. See 39 U.S.C. § 201. To assert a tort claim against the federal government, a plaintiff must comply with the provisions of the Federal Tort Claims Act (“FTCA”). In his Complaint, Plaintiff alleges that USPS committed the following torts: misrepresentation and fraud (Count II), conversion (Count III), unjust enrichment (Count IV), and misappropriation of trade secrets (Count V). (Doc. No. 1-1 ¶¶ 50-64.)

Plaintiff’s claim of misrepresentation and fraud will be dismissed because the FTCA specifically prohibits a party from filing a claim of misrepresentation against the federal government. See 28 U.S.C. § 2680(h) (“The provisions of this chapter . . . shall not apply to . . . misrepresentation . . .”).⁷

⁶ Although there is little case law on the subject of the jurisdiction of a district court since the passage of the PAEA, in 2009 the Western District of Washington held that the language of Section 3662 is mandatory and that district courts lack jurisdiction to hear a claim arising under one of the enumerated sections. See McDermott v. Potter, No. 09-0776, 2009 WL 2971585 (W.D. Wash. Sept. 11, 2009) *aff’d sub nom. McDermott v Donahue*, 408 F. App’x 51 (9th Cir. 2011).

⁷ Under Pennsylvania common law, misrepresentation and fraud are synonymous. Aubrey v. Sanders, 346 F. App’x 847, 849 (3d Cir. 2009) (defining the elements of

Plaintiff's claim of conversion will also be dismissed. The Third Circuit has held that conversion includes "the deliberate taking of another's personal property with the consent of that person to use it for one purpose, but with the intent of using it for another in conflict with that person's interest." Cenna v. United States, 402 F.2d 168, 170 (3d Cir. 1968). This form of conversion, however, amounts to misrepresentation and also falls under the FTCA's statutory exclusion. See id. at 171 (holding that a claim of tortious conversion can be made if a party intentionally deceives another, but such a claim would be excluded under the FTCA). Here, Plaintiff argues that Defendants intentionally deceived him by leading him to believe they were interested in implementing the VPOBIP system, while secretly using his concept to create Volly.com. This form of conversion amounts to misrepresentation and, as noted above, is specifically excluded by the FTCA. See 28 U.S.C. § 2680(h).

Plaintiff's claims of unjust enrichment and misappropriation of trade secrets are not specifically excluded by the FTCA. However, before proceeding to federal court, the FTCA requires a plaintiff to file a complaint with USPS. See 28 U.S.C. § 2675(a) ("[T]he claimant shall have first presented the claim to the appropriate Federal agency."). In this case, Plaintiff is required to present his claim to USPS's Torts Claims Examiner for review before undertaking a court action against the federal government. (See Doc. No. 14 at 12-13.) Because Plaintiff has failed to exhaust his administrative remedies as required by the FTCA, Plaintiff's claims for unjust enrichment and misappropriation of trade secrets must be dismissed.

misrepresentation and fraud to include "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.").

V. CONCLUSION

For the foregoing reasons, the Court will grant Defendant United States Postal Service's Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

An appropriate Order follows.

APPENDIX E

STATUTORY PROVISIONS

1. 14th Amendment of the U.S. Constitution — Citizenship Rights, Equal Protection Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. 39 U.S.C. §401(1) — “Subject to the provisions of section 404a, the Postal Service shall have the following general powers: (1) to sue and be sued in its official name...”
3. 39 U.S.C. §409(a) — “Except as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.”
4. 39 U.S.C. §§404a(a)(1), (2), & (3) — **Specific limitations** “(a) Except as specifically authorized by law, the Postal Service may not— “(1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive

advantage for itself or any entity funded (in whole or in part) by the Postal Service; “(2) compel the disclosure, transfer, or licensing of intellectual property to any third party (such as patents, copyrights, trademarks, trade secrets, and proprietary information); or “(3) obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

5. 39 U.S.C. §§409(d)(1) — “(d)(1) For purposes of the provisions of law cited in paragraphs (2)(A) and (2)(B), respectively, the Postal Service — “(A) shall be considered to be a ‘person’, as used in the provisions of law involved; and “(B) shall not be immune under any other doctrine of sovereign immunity from suit in Federal court by any person for any violation of any of those provisions of law by any officer or employee of the Postal Service.”

6. 39 U.S.C. §§409(e) — “To the extent that the Postal Service, or other Federal agency acting on behalf of or in concert with the Postal Service, engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18, the Postal Service or other Federal agency (as the case may be) — “(A) shall not be immune under any doctrine of sovereign immunity from suit in Federal court by any person for any violation of Federal law by such agency or any officer or employee thereof;”

(these provisions of the operative words “shall not be immune under any other doctrine of sovereign immunity from suit in Federal court by any person” are consistent with §§401 and 409(a), 2006 PAEA Bill Summary, and this Third Circuit’s binding precedents enunciated in *Licata*, the DC Circuit in *Lopez* and PRC Order 2460.)

7. 39 U.S.C. §§409(g)(1) — “Notwithstanding any other provision of law, legal representation may not be furnished by the Department Of Justice to the Postal Service in any action, suit, or proceeding arising in whole or in part under...Subsection (d) or (e) of this section. The Postal Service may, by contract or otherwise, employ attorneys to obtain any legal representation that it is precluded from obtaining from the Department of Justice under this paragraph”. (Subsection (d) pertains to Respondent USPS and (e) pertains to any agency or employee acting on the behalf or in concert with Respondent USPS in violations of Federal laws.)
8. Third Circuit Internal Operating Procedures — “Objectives. (2) To insure decisional stability and avoid intra-circuit conflict of decisions by providing a means for the panel system to operate efficiently and at the same time provide that a holding of a precedential opinion of the court may not be overruled without the approval of a majority of the en banc court.”
9. Third Circuit Internal Operating Procedures I.O.P. Rule 9.1 — CHAPTER 9. EN BANC CONSIDERATION 9.1 Policy of Avoiding Intra-circuit Conflict of Precedent. It is the tradition of this court that the holding of a panel in a

precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.

APPENDIX F

No. 93-5637

United States Court of Appeals, Third Circuit

Licata v. U.S. Postal Service

33 F.3d 259 (3d Cir. 1994)

Decided Aug 24, 1994

No. 93-5637.

Argued May 5, 1994.

Decided August 24, 1994.

Burtis W. Horner (argued), Stryker, Tams Dill, Newark, NJ, for appellant.

Michael Chertoff, U.S. Atty., Susan H. Handler-Menahen (argued), Asst. U.S. Atty., Newark, NJ, for appellee.

Appeal from the United States District Court for the District of New Jersey.

Before: SLOVITER, Chief Judge, HUTCHINSON, Circuit Judge, and DIAMOND, District Judge.

– Hon. Gustave Diamond, United States Senior District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

SLOVITER, Chief Judge.

Stephen Licata appeals the district court's dismissal of his suit, which it treated as alleging a breach of contract, against the United States Postal Service for lack of subject matter jurisdiction. We conclude that we must reverse in light of Congress's specific grant to the district courts of original jurisdiction over such claims.

I. [3] *FACTS AND PROCEDURAL HISTORY*

Because the district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1) before the Postal Service filed an answer, we review only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court. *See Haydo v. Amerikohl Mining Inc.*, 830 F.2d 494, 495-96 (3d Cir. 1987); *Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983).

According to the complaint, the Postal Service has established a program which encourages employee participation by awarding 10% of the total economic benefit of any implemented suggestion, up to a maximum award of \$35,000. Licata, a machinist employed by the Postal Service, submitted a suggestion in July 1989 for a modified roller for one of the Service's package sorters. Licata's suggestion was implemented at the local level and research indicated that if implemented nationwide, the modified roller could save the Service \$500,000 in the first year. Although the modification was formally disapproved for national implementation in June 1991, Licata claims that the Service continued to authorize the manufacture and use of the rollers without paying him his share of the savings.

On March 31, 1993, Licata filed suit in the District Court for the District of New Jersey seeking \$35,000 damages, as well as interest, costs, and attorney's fees. He alleged jurisdiction under 39 U.S.C. § 409(a) (1988) and 28 U.S.C. § 1339

(1988). Both parties and the district court read the complaint to allege some kind of common law breach of contract claim. App. at 16 n. 3, 73-74, 159. The Service filed a Motion to Dismiss or, in the Alternative, for Summary Judgment prior to filing an answer, arguing that the district court lacked subject matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted, or that summary judgment should be entered based on the affidavit and exhibits attached to the motion.

The district court dismissed the complaint for lack of subject matter jurisdiction, reasoning that section 409(a) was insufficient to maintain jurisdiction without a cause of action, and that if the claim sounded in contract it was barred by the Tucker Act. See *Licata v. United States Postal Serv.*, No. Civ.A. 93-1386, 1993 WL 388974, at *3-4 (D.N.J. Sept. 22, 1993). This timely appeal followed. We exercise plenary review over questions of subject matter jurisdiction. See *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044 (3d Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 440, 126 L.Ed.2d 373 (1993).¹

¹ Because of our interpretation of section 409(a), we need not address whether jurisdiction would be proper under 28 U.S.C. § 1339.

II. [8] *DISCUSSION A.*

Section 409 of the Postal Reorganization Act of 1970, entitled "Suits by and against the Postal Service," provides:

(a) Except as provided in section 3628 of this title [governing appeals of postal ratemaking], the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28.

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39 U.S.C. § 409(a) (1988).

When interpreting a statute we look first to its plain meaning, and if the language is unambiguous no further inquiry is necessary. See *Sacred Heart Medical Ctr. v. Sullivan*, 958 F.2d 537, 545 (3d Cir. 1992). The plain meaning of the first sentence of section 409(a) grants the district court "jurisdiction" over Licata's complaint, since it is an "action brought . . . against the Postal Service" and does not fall within the exception at the beginning of the sentence. Thus we agree with the Eighth Circuit that the words of section 409(a) "are a clear and unequivocal grant of jurisdiction to the district courts . . . [and that] the words of the first sentence of Section 409(a) convey a meaning as plain as any we can recall seeing." *Continental Cablevision v. United States Postal Serv.*, 945 F.2d 1434, 1437 (8th Cir. 1991). Indeed, we cannot imagine how Congress could grant jurisdiction more plainly.

Nor is there anything in our precedents that prevents us from attributing to section 409(a) its plain meaning. We have described section 409(a) as a "general grant of jurisdiction to the district courts," *Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1217 n. 2 (3d Cir. 1992), and, consistent with the Supreme Court's approach, have had no qualms about reviewing judgments against the Postal Service when jurisdiction was predicated on section 409(a). See *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 514, 104 S.Ct. 2549, 2551, 81 L.Ed.2d 446 (1984) (permitting suit against Postal Service for refusing to comply with administrative order to withhold state taxes and noting jurisdiction was predicated on § 409(a)); *Pearlstine v. United States*, 649 F.2d 194, 195 n. 2 (3d Cir. 1981) (reviewing district court order on award of costs and attorney's fees against Postal Service and noting jurisdiction was based on § 409(a)).

Indeed, most courts of appeals to consider the question have found that section 409(a) is what it seems to be — a grant of jurisdiction to the district courts for suits in which the Postal Service is a party. *See, e.g., Continental Cablevision*, 945 F.2d at 1437; *American Postal Workers Union v. United States Postal Serv.*, 830 F.2d 294, 313 n. 33 (D.C.Cir. 1987); *Insurance Co. of North America v. United States Postal Serv.*, 675 F.2d 756, 757-58 (5th Cir. 1982); *Kennedy Elec. Co. v. United States Postal Serv.*, 508 F.2d 954, 955 (10th Cir. 1974); *White v. Bloomberg*, 501 F.2d 1379, 1384 n. 6 (4th Cir. 1974); *see also* 2 *Government Contracts* § 8:226, at 153 (Thomas R. Trenker et al. eds., 1992) ("With respect to contracts with the U.S. Postal Service, the Postal Reorganization Act confers jurisdiction on the District Courts."); 1 James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.62[7], at 700.7 (2d ed. 1994) ("Under § 409, the district court has jurisdiction of actions by or against the Postal Service whether or not they arise under the statutes affecting postal matters, but this section by its terms applies only in cases in which the Postal Service is a party." (footnote omitted)).

Despite the clear language and considerable precedent, there is a split of authority in the circuits as to whether section 409 provides an independent basis for subject matter jurisdiction. *See Hexamer v. Foreness*, 981 F.2d 821, 823 (5th Cir. 1993) (noting split).² The Service relies primarily on *Peoples Gas, Light Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1189 (7th Cir. 1981), which held that the purpose of section 409(a) was "to remove any barrier that might otherwise exist by reason of the doctrine of sovereign immunity. [It] permit[s] the Postal Service, an independent executive establishment created by Congress, to sue and to be sued."

²⁶² *Peoples Gas* also stated that neither section 409(a) nor 28 U.S.C. § 1339 "provides an independent basis for jurisdiction. To each of these provisions there must be added a substantive legal framework to afford subject matter jurisdiction"

and concluded that section 409(a) "form[s] no basis for [such] a cause of action." *Id.*; *see also Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985) (adopting the holding of *Peoples Gas* without discussion). We decline to follow *Peoples Gas*, for we do not find its reasoning persuasive.

² The district courts of this circuit are also divided over the meaning of section 409(a). Compare *Hudak v. United States Postal Serv.*, No. Civ.A. 94-0007, 1994 WL 45134, at *1 (E.D.Pa. Feb. 15, 1994) and *Borough of Berlin v. United States*, No. Civ.A. 93-1649 (JEI), 1993 WL 172365, at *2 (D.N.J. May 20, 1993) and *Jones v. United States Postal Serv.*, No. Civ.A. 89-399-CMW, 1990 WL 5198, at *2 (D.Del. Jan. 26, 1990) and *Pearlstine v. United States*, 469 F. Supp. 1044, 1046 (E.D.Pa. 1979) with *Licata*, 1993 WL 388974, at *3-4 and *Tedesco v. United States Postal Serv.*, 553 F. Supp. 1387, 1388 (W.D.Pa. 1983).

We believe the Postal Service conflates the issues of subject matter jurisdiction, sovereign immunity, and a valid cause of action. Section 409(a) does not speak to sovereign immunity. It is 39 U.S.C. § 401(1) that waives the Service's sovereign immunity by providing that it may "sue and be sued in its official name." *See Loeffler v. Frank*, 486 U.S. 549, 556, 108 S.Ct. 1965, 1969, 100 L.Ed.2d 549 (1988) ("By launching the Postal Service into the commercial world, and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's cloak of sovereignty and given it the status of a private commercial enterprise." (quotations omitted)); *Franchise Tax Bd.*, 467 U.S. at 517, 104 S.Ct. at 2552 (describing 39 U.S.C. § 401(1) as the "statutory waiver of sovereign immunity" for the Postal Service).³

³ Although we believe the statutory language alone is sufficient to overcome the Service's argument, we note that the scant legislative history of this provision "refute[s] any argument that a literal construction of [section 409(a)] is so

absurd or illogical that Congress could not have intended it." *Conroy v. Aniskoff*, ___ U.S. ___, ___, 113 S.Ct. 1562, 1566, 123 L.Ed.2d 229 (1993). Prior to the Postal Reorganization Act of 1970, the Post Office Department was a part of the President's cabinet. As Congress contemplated altering its status to a government corporation, a number of bills were circulated regarding postal reform and almost all contained jurisdictional provisions similar to section 409(a) as well as separate "sue and be sued" provisions. See H.R. 17070, 91st Cong., 2d Sess. §§ 111(1), 113(a) (1970); H.R. 4 [Rep. No. 91-988], 91st Cong., 2d Sess. §§ 205(2), 208(a) (1970); H.R. 11750, 91st Cong., 1st Sess. §§ 205(2), 208(a) (1969); see also *Bills to Improve and Modernize the Postal Service, to Reorganize the Post Office Department, and for Other Purposes: Hearings on H.R. 17070 and similar bills Before the House of Representatives Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 64 (1970) (describing H.R. 17070, H.R. 4 and H.R. 11750 as containing "procedures for suits to which the Postal Service is a party" which were "[t]he same in substance"). The Committee report accompanying H.R. 17070, the bill eventually passed, reinforces our reading that section 409(a) grants federal courts jurisdiction whenever the Postal Service is a party. See H.R.Rep. No. 1104, 91st Cong., 2d Sess. 26 (1970), reprinted in 1970 U.S.C.A.N. 3649, 3674 ("This section details procedures for suits to which the [Service] is a party. **Subsection (a)**. — The United States District Courts are given original nonexclusive jurisdiction over suits by or against the Postal Service. . . ."); see also H.R.Rep. No. 988, 91st Cong., 2d Sess. 29 (1970). The Conference Committee adopted this provision without discussion. See H.R.Conf.Rep. No. 1363, 91st Cong., 2d Sess. 9 (1970). See generally Robert A. Saltzstein Ronald E. Resh, *Postal Reform: Some Legal and*

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Practical Considerations, 12 Wm. Mary L.Rev. 766, 766-69 (1971) (tracing history of the Postal Reorganization Act).

Further, we believe that the Postal Service's argument, relying on *Peoples Gas*, that subject matter jurisdiction is absent without a cause of action is "seriously flawed" because "whether or not 'a cause of action' exists goes to the merits, not to the question of subject-matter jurisdiction." *Continental Cablevision*, 945 F.2d at 1438. In the seminal case of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), the Supreme Court held that the district court erred in dismissing a complaint for want of jurisdiction when it was in reality ruling on the viability of the lawsuit. The Court held:

Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

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Id. at 682, 66 S.Ct. at 776. The fact that section 409(a) does not provide a cause of action or that Licata will not prevail on the merits is irrelevant to the district court's jurisdiction over the suit. See *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1280-81 (3d Cir. 1993).⁴

⁴ Also irrelevant to the jurisdictional question is whether a private right of action exists under the Postal Reorganization Act, see *Gaj v. United States Postal Serv.*, 800 F.2d 64, 68-69 (3d Cir. 1986), or whether the Administrative Procedures Act applies to the Postal Service, see *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 523 n. 3, 111 S.Ct. 913, 917 n. 3, 112 L.Ed.2d 1125 (1991), issues raised by the Postal Service on appeal.

Thus, after reviewing the language and history of the statute, we hold that absent some other statutory bar, section 409(a) grants district courts subject matter jurisdiction over actions to which the Postal Service is a party.

B.

Nor do we agree with the district court's alternative holding that the Tucker Act precludes subject matter jurisdiction over this suit.

The Tucker Act is one of the few places in the federal statutes which provides both jurisdiction and a waiver of sovereign immunity for non-tort actions against the United States and it generally requires recourse to the Court of Federal Claims. See *Bowen v. Massachusetts*, 487 U.S. 879, 910 n. 48, 108 S.Ct. 2722, 2740 n. 48, 101 L.Ed.2d 749 (1988); *Hahn v. United States*, 757 F.2d 581, 585-86 (3d Cir. 1985). Specifically, the "Big" Tucker Act grants the "Court of Federal Claims . . . jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States," 28 U.S.C. § 1491(a)(1) (Supp. IV 1992), while the "Little" Tucker Act grants concurrent jurisdiction to the district courts for such claims not exceeding \$10,000 in value, 28 U.S.C. § 1346(a)(2) (1988).⁵

⁵ The district court did not have jurisdiction over this suit under the Little Tucker Act because Licata sought the sum of \$35,000 in his complaint.

However, it is well settled that a claim brought against the Postal Service in its own name is not a claim against the United States and thus is not governed by the Tucker Act. See *Continental Cablevision*, 945 F.2d at 1440 ("This is . . . not an action for damages against the United States, so the Tucker Act does not apply. The Postal Service is a legal entity separate from the United States itself." (parentheses omitted)); *Jackson v. United States Postal Serv.*, 799 F.2d 1018, 1022 (5th Cir. 1986) ("the district courts enjoyed concurrent jurisdiction over suits against the [Postal Service] *in eo nomine* for breach of a [Postal Service] contract, regardless of the amount involved"); *White v. Bloomberg*, 501 F.2d 1379, 1384 n. 6 (4th Cir. 1974) ("a suit may be maintained against the Postal Service without joining the United States as a party, and . . . the district courts have jurisdiction over suits against the Postal Service for amounts over \$10,000"); *Butz Eng'g Corp. v. United States*, 499 F.2d 619, 627-28 (Ct.Cl. 1974) ("the Postal Service could always be sued in district court" on a contract claim); cf. *United States v. Connolly*, 716 F.2d 882, 885 n. 4 (Fed.Cir. 1983) (in banc) ("Congress made it clear in the Postal Reorganization Act of 1970 that the Postal Service was essentially to be separate from the government. Indeed, the Act provides that the Postal Service is empowered to sue and be sued in its own name, 39 U.S.C. § 401(1), and that the district courts have original jurisdiction over virtually all such actions, 39 U.S.C. § 409(a)." (citations omitted)), *cert. denied*, 465 U.S. 1065, 104 S.Ct. 1414, 79 L.Ed.2d 740 (1984).

The Federal Circuit, the court of appeals that probably spends the most time mastering the intricacies of jurisdiction under the Tucker Act, has noted the unusual position of the Postal Service in that "in contradistinction to other federal entities, [it] may sue and be sued on contract claims in courts other than the Court of Federal Claims." *Benderson Dev. Co. v. United States Postal Serv.*, 998 F.2d 959, 962 (Fed.Cir. 1993) (citing *Pearlstine v. United States*, 469 F.

Supp. 1044, 1046 (E.D.Pa. 1979)). It concluded that *264 the interaction between the Tucker Act and section 409(a) was such that if a "dispute between [plaintiff] and the Postal Service lies in contract, [then it should] be resolved by the district court in the exercise of its everyday jurisdiction over contract matters affecting the Postal Service." *Benderson Dev.*, 998 F.2d at 963. Thus, we conclude that the Tucker Act does not deprive the district court of jurisdiction over suits against the Postal Service.⁶

⁶ In the course of the oral argument, the court *sua sponte* raised the possibility that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-13 (1988 Supp. IV 1992), would bar the district court's jurisdiction. Although we are free to reach subject matter jurisdiction issues, and indeed are obliged to, even if they were not considered by the district court, if it is clear that the court lacked jurisdiction, this is not such a case. In the first place, the parties did not raise nor did they brief the applicability of the Contract Disputes Act. Therefore, if the Service believes it appropriate, it is free to raise this issue in the district court, or, of course, that court may raise the issue *sua sponte*.

In the second place, the Contract Disputes Act's only express limitation on district court jurisdiction is effected by its amendment of the Little Tucker Act to withdraw the district court's concurrent jurisdiction over those contract claims for sums not exceeding \$10,000 that would otherwise be subject to the CDA. See 28 U.S.C. § 1346(a)(2). Two circuits, after careful consideration, have held that where there is an independent basis for district court jurisdiction (as there is for claims against the Postal Service), both the Contract Disputes Act and the Tucker Act are irrelevant. See *In re Liberty Constr.*, 9 F.3d 800, 801-02 (9th Cir. 1993) (contract claims against the Small Business Administration "may be entertained by the district courts, regardless of the amount

sought, so long as there exists a basis for jurisdiction independent of the Tucker Act"); *Marine Coatings v. United States*, 932 F.2d 1370, 1377 (11th Cir. 1991) (although the CDA waives sovereign immunity "there is no need to apply [the CDA] if another method of bringing suit is available"); *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir.) ("Because the proviso [added by the CDA] is an integral part of § 1346(a)(2), we conclude that it restricts only the jurisdiction that is granted in the first part of § 1346(a)(2)."), *cert. denied*, 474 U.S. 931, 106 S.Ct. 265, 88 L.Ed.2d 271 (1985); see also 2 *Government Contracts*, *supra*, § 8:226, at 153 (plaintiff may chose whether to file claim against Postal Service in district court or under the CDA). *But see Hayes v. United States Postal Serv.*, 859 F.2d 354, 356 (5th Cir. 1988) (CDA prohibits any district court jurisdiction over contracts covered by the CDA); *Jackson v. United States Postal Serv.*, 799 F.2d 1018, 1022 (5th Cir. 1986) (same). Indeed, in *Hayes*, 859 F.2d at 356-57, the Fifth Circuit held that the CDA applied to a suggestion program claim by a postal employee and thus that claim had to be pursued in the Claims Court (now the Court of Federal Claims). However, in a suit by the same postal employee, the Claims Court held that the suggestion program was not a "procurement of services" and therefore the CDA was inapplicable and there was no jurisdiction. See *Hayes v. United States*, 20 Cl.Ct. 150, 153 (1990), *aff'd mem.*, 928 F.2d 411 (Fed.Cir. 1991). Of course, such a result would not follow were we to agree with the Ninth and Eleventh Circuits that the CDA is not exclusive.

It follows that we must reverse the district court's Rule 12(b)(1) dismissal without precluding the Postal Service from either raising new Rule 12(b)(1) objections if appropriate on remand or proceeding to press its Rule 12(b)(6) motion. See Fed.R.Civ.P. 12(b)(6). We caution that our

decision rests only on subject matter jurisdiction. We do not imply that we have found Licata's claim viable, or that we have rejected the Service's arguments that go to that issue.⁷

⁷ The Postal Service urges us to affirm the district court, *inter alia*, because Licata's claim was an aspect of a collective-bargaining agreement and therefore the complaint failed to state a claim upon which relief could be granted. It appears that much of its argument rests on affidavits and exhibits introduced in the district court, as distinguished from the facts alleged in the complaint. This would

necessarily require a summary judgment decision, something we are not prepared to rule on in the first instance.

III. [24] *CONCLUSION*

For the foregoing reasons, we will reverse the order of the district court dismissing plaintiff's suit for lack of subject matter jurisdiction and remand for proceedings consistent with this opinion.

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APPENDIX G

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1341

September Term, 2017

FILED ON: DECEMBER 11, 2017

RAMON LOPEZ,

PETITIONER

v.

POSTAL REGULATORY COMMISSION,
RESPONDENT

On Petition for Review of an Order
of the Postal Regulatory Commission

Before: ROGERS, KAVANAUGH, and WILKINS, *Circuit Judges*.

J U D G M E N T

This petition for review of a decision of the Postal Regulatory Commission (“PRC” or “Commission”) was briefed and argued by counsel for the Commission and appointed *amicus curiae* for Petitioner Ramon Lopez. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that Lopez’s petition for an order directing the Postal Service to restore mail service to Lopez’s address be dismissed as moot and his damages claim be transferred to the District Court for the Southern District of Florida.

In 2011, Lopez submitted an administrative complaint to the PRC pursuant to 39 U.S.C. § 3662, alleging that the Postal Service had wrongly suspended mail delivery to his home in Florida. A. 2. Lopez also asserted that the Postal Service’s failure to deliver mail to that address prevented him from receiving utility bills and caused him to incur unnecessary expenses. *Id.* In his complaint, Lopez requested two forms of relief: (1) an order directing the Postal Service “to immediate[ly] restore mail service” to his home address and (2) an order directing the Postal Service to pay Lopez at least \$2,500 in compensatory damages and filing costs. A. 3. In accordance with its regulations, the Commission construed Lopez’s complaint as a service inquiry and forwarded it to the Postal Service for investigation. *See* 39 C.F.R. § 3030.13. The Commission ultimately dismissed Lopez’s complaint as moot after the Postal Service represented that it would resume delivery to his house, and subsequently did so. A. 44-45, 50.

The Commission also concluded that 28 U.S.C. § 2680(b) barred Lopez's demand for compensatory damages, and thus denied his claim. Petitioner now asks us to find that the Commission acted arbitrarily and capriciously by dismissing his request as moot. He also asks this Court to sever his damages claim and transfer it to the District Court for the Southern District or Middle District of Florida, pursuant to 28 U.S.C. § 1631. *See* 28 U.S.C. § 1346(b)(1). The Court addresses each issue in turn below.

Lopez first argues that the Commission erred by dismissing his complaint as moot because dismissal was based on the Postal Service's voluntary cessation of its allegedly wrongful conduct, which "ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). In response, the Commission contends that, as an executive agency, it is not bound by the voluntary-cessation exception to the mootness doctrine and therefore properly dismissed Lopez's first claim for relief, relying on the Postal Service's representation that it would resume mail service.

The Court need not decide whether an agency must apply the voluntary-cessation doctrine: Even assuming Article III standards apply, Lopez can show no injury in light of the restoration of his mail service. *Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 631 (D.C. Cir. 2002) ("A case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." (citation and internal quotation marks omitted)). Even if the Court were to hold that the Commission should have issued an order directing the Postal Service to immediately restore mail service to Lopez's Florida address, that decision would provide Lopez no relief because the Postal Service has already resumed mail service as requested.

Nevertheless, Petitioner and *amicus curiae* argue that concerns about voluntary cessation render this case ripe for review. The Court does not agree. The voluntary cessation of allegedly illegal conduct does not necessarily deprive a court of jurisdiction, but the voluntary cessation of conduct will render a case moot if "there is no reasonable expectation that the alleged violation will recur," and intervening events have eradicated the effects of the alleged violation. *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citations, quotation marks, and alteration omitted). The facts in this case do not fit within the voluntary-cessation exception. In its April 2012 letter to Lopez, the Postal Service stated that it would "resume delivery to [Lopez's Florida address] effective immediately," and "will continue to deliver mail to that address indefinitely," unless there are clear indications that the property is vacant (such as accumulation of the mail outside the house). A. 44. Although Lopez and *amicus curiae* assert that the allegedly wrongful conduct could recur, particularly because the conduct was allegedly motivated by discrimination against Lopez, the Postal Service has stated only that it reserves the right to take future action that it is legitimately empowered to take. *See id.* (citing U.S. Postal Serv., Regulation Handbook, M-41, City Delivery Carriers Duties & Resps., § 241.15 (2001)). Accordingly, the Court will dismiss as moot Lopez's petition for an order directing the Postal Service to restore mail service to his address.

Lopez next argues that neither the Commission nor this Court has jurisdiction to address

his damages claim. For this reason, Lopez and *amicus curiae* ask the Court to transfer the claim to the District Court for the Southern or Middle District of Florida, pursuant to 28 U.S.C. § 1631. While the Commission agrees with Lopez on the jurisdictional question, it nonetheless urges this Court to deny Lopez’s damages claim rather than transfer it for review by a district court. The Court agrees that it does not have jurisdiction to decide the issue. *See* 28 U.S.C. § 1346(b)(1) (establishing “exclusive jurisdiction” over certain civil claims against the U.S. government in the district court). We must next decide whether to transfer or deny Lopez’s damages claim.

Section 1631 provides:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, *if it is in the interest of justice*, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631 (emphasis added). The Commission contends that transfer is not warranted for three reasons: (1) Lopez’s claim is barred by the Federal Tort Claims Act (“FTCA”)’s postal exception, 28 U.S.C. § 2680(b); (2) even if the claim were not barred, Lopez has not established that Florida law would permit Lopez to recover the damages sought; and (3) the claim suffers from two fatal defects – Lopez did not sue the correct party and failed to satisfy the FTCA’s presentment requirement. The Commission asserts that because Lopez’s damages claim is barred on these grounds, transfer would not be “in the interest of justice.” 28 U.S.C. § 1631. Because each of the Commission’s arguments fails, the Court cannot agree that transfer is inappropriate here.

First, Lopez’s damages claim is not plainly barred by the FTCA’s postal exception,¹ as evidenced by the fact that several courts have found that the Postal Service is not entitled to sovereign immunity for the intentional mis-transmission of mail. *See, e.g., Colbert v. USPS*, 831 F. Supp. 2d 240, 243 (D.D.C. 2011) (“In th[e] narrow window of intentional mis-transmission, [the Postal Service] is not entitled to sovereign immunity.”); *LeRoy v. U.S. Marshal’s Serv.*, No. 06-cv-11379, 2007 WL 4234127, at *1 n.2 (E.D. La. Nov. 28, 2007) (noting that a postal employee’s “refusal to deliver plaintiff’s mail to him was an intentional act, not “the loss,

¹ Pursuant to 28 U.S.C. § 2680(b), the FTCA’s waiver of sovereign immunity does not apply to claims “arising out of the loss, miscarriage or negligent transmission of letters or postal matter.” “[M]ail is ‘lost’ if it is destroyed or misplaced[.]” *Dolan v. USPS*, 546 U.S. 481, 487 (2006). Mail is also “lost” if it is stolen by a postal employee. *See, e.g., Levasseur v. USPS*, 543 F.3d 23, 24 (1st Cir. 2008). “[M]ail is . . . ‘miscarried’ if it goes to the wrong address.” *Dolan*, 546 U.S. at 487. Mail is “negligently transmitted” when the Postal Service commits negligence during and related to “the process of conveying [letters or postal matter] from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter.” *Dolan v. USPS*, 377 F.3d 285, 288 (3d Cir. 2004), *rev’d on other grounds*, 546 U.S. 481 (2006).

miscarriage, or negligent transmission of letters or postal matter”) (quoting 28 U.S.C. § 2680(b)). Thus, although Lopez does not specify that his claim arises out of an intentional mis-transmission of his mail, if it did – which is plausible – Lopez’s claim may be viable.

Second, although the Court agrees with Petitioner and *amicus curiae* that the question of whether Florida law provides a legal basis for the damages sought is better left for the transferee court to resolve, Lopez has made an adequate showing that Florida law plausibly would provide a remedy. *See* Amicus for Pet’r’s Reply 23. For instance, *amicus curiae* notes that, under Florida law, an individual may bring conversion claims against or seek damages from mail carriers that intentionally fail to deliver her mail. *Id.* Thus, the Commission’s argument on this point is unpersuasive.

Finally, the procedural defects the Commission identifies are insufficient to warrant dismissal of Lopez’s damages claim. While the Commission is correct that Lopez has not sued the correct party – *i.e.*, he has sued the Commission rather than the United States – we decline to find this defect fatal, particularly when the case involves a *pro se* litigant. *See Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999) (“Courts must construe *pro se* filings liberally.”). In addition, we cannot agree that Lopez has failed to satisfy the FTCA’s presentment requirement. *See* 28 U.S.C. § 2675. Pursuant to section 2675, Lopez filed a claim with the Commission that sufficiently described his injury and included a sum-certain damages claim. *GAF Corp. v. United States*, 818 F.2d 901, 917 (D.C. Cir. 1987) (describing the presentment requirement); *see* A. 2-3 (Lopez’s written complaint). That Lopez presented his demand as a claim for relief under the Postal Accountability and Enhancement Act is of no relevance given Lopez’s status as a *pro se* litigant and because it was clear what relief Lopez sought.

For these reasons, the Court declines to dismiss Lopez’s damages claim, and instead will transfer the claim to the District Court for the Southern District of Florida.²

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this judgment and the portion of the original file pertaining to Petitioner’s damages claim to the United States District Court for the Southern District of Florida. The Clerk is further directed to withhold issuance of the mandate with respect to Petitioner’s restoration of mail service claim until seven days after the resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

PER CURIAM

² FTCA claims may be brought “only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.” 28 U.S.C. § 1402(b). *Amicus curiae* correctly states that venue would thus be proper in either the Southern District of Florida, where the property at issue is located, or the Middle District of Florida, where Lopez is currently incarcerated. Because Petitioner has not indicated a preference, the Court opts to transfer the claim to the Southern District of Florida because that is where the acts on which Lopez’s claim is based occurred.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX H

ORDER NO. 2460

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Tony Hammond, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Nanci E. Langley

Complaint of Center for Art and Mindfulness, Inc.
and Norton Hazel

Docket No. C2015-1

ORDER DENYING RECONSIDERATION OF
COMMISSION ORDER NO. 2377

(Issued April 23, 2015)

On April 1, 2015, the Center for Art and Mindfulness, Inc. and Norton Hazel (collectively Complainants) filed a motion for reconsideration of Commission Order No. 2377, issued March 4, 2015.¹

I. BACKGROUND

The factual background prior to this decision is set forth in Order No. 2377.² In summary, Complainants filed a complaint asserting claims concerning the sale and

¹ Brief in Support of Motion for Reconsideration of Commission Order of Center for Art and Mindfulness, Inc. and Norton Hazel, April 1, 2015 (Motion for Reconsideration).

² Order Granting Motion to Dismiss, March 4, 2015 (Order No. 2377).

closure of the Atlantic Street Station post office in Stamford, Connecticut. The Commission found, as a threshold issue, that it lacked subject matter jurisdiction to consider the claims set forth in the complaint. Order No. 2377 at 2. The Commission dismissed the complaint on the grounds that it failed to meet the statutory requirements of 39 U.S.C. § 3662(a). *Id.* at 5-7.

Complainants' Motion for Reconsideration. Complainants assert that reconsideration is required where the Commission failed to apply precedent concerning the leasing of property by the Postal Service and made a factual error regarding the disposition of Complainants' claims before the Federal District Court of Connecticut. Motion for Reconsideration at 4-5. In addition, Complainants state that the Commission failed to discuss all of the jurisdictional arguments made in their amended complaint. *Id.* at 9-12. Complainants contend that the Commission has jurisdiction to hear claims relating to the discrimination and undue preference, breach of contract, conflict of interest, and violation of Postal Service policies concerning the sale of the Atlantic Street Station property. *Id.* at 5-11. Complainants do not request reconsideration of the dismissal of their claim relating to the closure of the Atlantic Street Station post office. *Id.* at 12.

Postal Service's answer in opposition. In its opposition, the Postal Service contends that the Motion for Reconsideration should be dismissed where the Commission "considered Complainants' arguments and correctly applied past precedent when dismissing the Complaint."³ The Postal Service provides a point-by-point refutation of the arguments made by Complainants, stating that there were no factual errors in the Commission's decision, no prior precedent misapplied, and that the Commission correctly dismissed the complaint. *Id.* at 4-18.

³ United States Postal Service Answer in Opposition to Complainants' Motion for Reconsideration, April 8, 2015, at 1 (Opposition).

II. COMMISSION ANALYSIS

As set forth in Order No. 2377, the Commission has limited jurisdiction to hear rate and service complaints as prescribed by 39 U.S.C. § 3662(a). Although the complaint set forth five separate claims relating to the sale and closure of the Atlantic Street Station property, Order No. 2377 found that none of the claims satisfied the jurisdictional requirements under 39 U.S.C. § 3662(a).

In consideration of the claims set forth by Complainants' complaint, amended, and current Motion for Reconsideration, the Commission concludes that none of the asserted grounds for reconsideration have merit. Complainants' Motion for Reconsideration is a re-argument of facts and theories on which the Commission has already ruled. Therefore, the Commission will only address the Complainants' arguments that the Commission failed to apply "PRC and Third Circuit precedent that hold that the leasing of property is a non-postal service subject to its jurisdiction, contrary to the position taken in its Order No. 2377" and that the Order had "factual errors about the status and posture of the claims in the case before the Federal Court." Motion for Reconsideration at 4-5.

Order No. 2377 did not opine on jurisdiction under 39 U.S.C. § 3662(a) relating to the leasing of property by the Postal Service as that issue was not raised or relevant to the claims before the Commission. Rather, Order No. 2377 applied established and clear precedent regarding claims relating to the sale of real property in dismissing the complaint. Complainants read an implication into the Commission's statement regarding the ultimate disposition of the claims dismissed by the Federal District Court of Connecticut. The Commission's recitation of that disposition by the Federal District Court took no position on the merits of those claims or the basis for their dismissal, and clearly stated that the claims before the Federal District Court had no bearing on the Commission's decision. Order No. 2377 at 3, n.6.

Complainants' Motion for Reconsideration provides no basis for the Commission to alter its prior conclusion that the Commission does not have jurisdiction under 39 U.S.C. § 3662 to hear claims relating to the Postal Service's sale of the Atlantic

Street Station property. Therefore, the Complainants' Motion for Reconsideration is denied.

It is ordered:

The Motion for Reconsideration by the Center for Art and Mindfulness, Inc. and Norton Hazel is denied.

By the Commission.

Ruth Ann Abrams
Acting Secretary

Commissioner Goldway dissenting.

DISSENTING OPINION OF COMMISSIONER GOLDWAY

I dissent from this opinion because I believe a reasonable interpretation of the law gives the Commission jurisdiction to consider the well-being of the communities and the general public who submit complaints of discrimination or poor service, or appeals of post office closings.

The Commission's decision is unduly myopic. The Commission should do all it can in such cases to support communities' interests in their historic central post offices, and to ensure that the public art and architecture, paid for by taxpayers, which the Postal Service inherited from the Postal Service Department in 1970, should be preserved and accessible to all for the foreseeable future. The Postal Service and the Commission must recognize the public's stake as an essential third party beneficiary in all such proceedings. In general, in recent years, the Commission has chosen to narrowly interpret our authority to review complaints.

The Postal Service's current policy of disposing of historical central post offices, many in key downtown locations, without fully exploring the potential for dual- or multi-use or cooperative development, is economically short-sighted. This failure of vision is bad business for both the Postal Service and for the American communities it serves.

Further, the Postal Service's recent record of selling off its historic buildings is blemished by its inability to protect the public's right of access to great works of civic art and architecture. Post Offices that have been transferred to private ownership are locked. Public artwork that is part of the fabric of our nation has been removed or is now inaccessible to the public. My home town of Venice, California is only one example of how access to iconic civic assets is being lost.

Ruth Y. Goldway

APPENDIX I

Legislation

Home > Legislation > 109th Congress > HR.6407

Citation | Subscribe | Share/Save | Site

H.R.6407 - Postal Accountability and Enhancement Act

109th Congress (2005-2006)

LAW

Sponsor: [Rep. Davis, Tom \[R-VA-11\]](#) (Introduced 12/07/2006)

Committees: [House - Government Reform](#)

Latest Action: 12/20/2006 Became [Public Law No. 109-435](#). (All Actions)

Tracker:

Introduced	Passed House	Passed Senate	To President
Became Law			

More on This Bill
[CBO Cost Estimates \(1\)](#)

Subject — Policy Area:
 Government Operations and Politics
[View subjects](#)

- Summary (2)
- Text (6)
- Actions (13)
- Titles (9)
- Amendments (0)
- Cosponsors (3)
- Committees (1)
- Related Bills (2)

Summary: H.R.6407 — 109th Congress (2005-2006)

[All Information](#)

There are 2 summaries for H.R.6407. [Public Law \(12/20/2006\)](#) [Bill summaries](#) are authored by [CRS](#).

Shown Here:

Public Law No: 109-435 (12/20/2006)

Postal Accountability and Enhancement Act - **Title I: Definitions; Postal Services** - (Sec. 101) Amends federal law provisions concerning the Postal Service to add definitions, including the terms post competitive product, market-dominant product, and rates.

(Sec. 102) Removes provisions empowering the Postal Service to provide nonpostal services, except that the Postal Service may provide nonpostal services which were offered as of January 1, 2006 a specified review by the Postal Regulatory Commission (PRC) (formerly the Postal Rate Commission, see section 601).

Requires the PRC to review each nonpostal service offered by the Postal Service and determine whether that service shall continue and, if so, to designate whether the service shall be regulated as : dominant, competitive, or experimental product.

Title II: Modern Rate Regulation - (Sec. 201) Directs the PRC to establish a modern system for regulating rates and classes for market-dominant products (all first-class mail, parcels, and cards, per standard mail, single-piece parcel post, media mail, bound printed matter, library mail, special services, and single-piece International mail). Requires the system to, among other things: (1) include limitation on the percentage changes in rates; and (2) require the Postal Service to provide public notice, and the PRC to provide an opportunity for review of, rate adjustments at least 45 days before implementation. Requires the PRC, as part of the regulations, to establish rules for workshare discounts (discounts provided to mailers for presorting, barcoding, etc.) to ensure that such discounts exceed the cost that the Postal Service avoids as a result of workshare activity (with exceptions). Requires the Postal Service to report to the PRC whenever it establishes a workshare discount rate.

(Sec. 202) Directs the Postal Service Board of Governors to establish rates and classes for products in the competitive category of mail (priority and expedited mail, bulk parcel post and bulk international mailgrams).

Directs the PRC to promulgate (and from time to time revise) regulations to: (1) prohibit the subsidization of competitive products by market-dominant products; (2) ensure that each competitive product's attributable costs; and (3) ensure that all competitive products collectively cover what the Commission determines to be an appropriate share of Postal Service institutional costs.

(Sec. 203) Authorizes the Postal Service, under specified terms and conditions, to conduct market tests of experimental products, requiring notice to the PRC of the nature and scope of each test. Prohibit market test from exceeding 24 months, but allows the PRC to extend such period for up to 12 additional months. Allows the PRC to limit the amount of revenues the Postal Service may obtain from a geographic market as necessary to prevent market disruption.

Authorizes the PRC, following specified criteria, to change the lists of market-dominant products and competitive products by adding or removing products, or transferring products between lists. Prohibit transfer from the market-dominant category of products covered by the postal monopoly Requires the Postal Service to notify the PRC whenever it requests to add a product or to transfer a product to category Prohibits a product that involves the carriage of letters, printed matter, or packages from being offered by the Postal Service unless it has been assigned to the market-dominant or competitive category of mail.

(Sec. 204) Requires the PRC to report annually to the President and Congress on PRC operations under this title, including an estimate of the costs incurred by the Postal Service in providing certain

Requires annual reports from the Postal Service to the PRC which: (1) analyze Postal Service costs, revenues, and rates; and (2) provide product information and measures of quality of service afforded. Postal Service in connection with such product. Requires such report information to: (1) be audited by the Postal Service Inspector General; and (2) include information relating to workshare discount. Requires the PRC to make annual determinations of Postal Service compliance with regulatory requirements and to evaluate annually whether the Postal Service has met certain goals.

Requires that the Postal Service file with the PRC certain audit and funding reports required under the Securities Exchange Act of 1934.

(Sec. 205) Repeals provisions concerning postal service and rate complaints procedures and an annual report on international services provided by the Postal Service. Establishes new complaint procedure which require the PRC to begin proceedings on, or dismiss, complaints within 90 days, and treating as dismissed complaints not acted on within such period. Authorizes the PRC to: (1) order the Postal Service to take appropriate action to achieve compliance; and (2) order fines in cases of deliberate noncompliance. Authorizes appellate review on petition by persons adversely affected by any PRC final order or decision.

Title III: Modern Service Standards - (Sec. 301) Directs the Postal Service to establish (and from time to time revise) a set of service standards for market-dominant products to: (1) enhance the value services to both senders and recipients; (2) preserve regular and effective access to postal services in all communities; (3) reasonably assure Postal Service customers delivery reliability, speed, and (4) provide a system of performance measurements for each market-dominant product. Requires the Postal Service to develop and submit to Congress a plan for meeting such standards. Directs Postal Service to report annually to Congress on how postal decisions have impacted or will impact rationalization plans. Prohibits the Postal Service from closing or consolidating any processing or facilities without using specified procedures for public notice and input. Requires the plan to include: (1) plans to expand and market retail access to postal services through the use of vending machines, Internet, etc.; and (2) comprehensive plans for reemployment assistance and early retirement benefits for Postal Service employees displaced as a result of the automation of functions, the closing or consolidation of facilities, or other reasons as the Postal Service determines.

Title IV: Provisions Relating to Fair Competition - (Sec. 401) Establishes in the Treasury a revolving Postal Service Competitive Products Fund to be available to the Postal Service without fiscal year the payment of: (1) costs attributable to competitive products; and (2) all other costs incurred by the Postal Service, to the extent allocable to competitive products. Provides for deposits into, and administration of, the Fund. Requires reports from the Postal Service to the Secretary of the Treasury and the PRC with respect to Fund administration and uses.

(Sec. 402) Requires the Postal Service to: (1) compute its assumed federal income tax (which would be the taxable income of a corporation) on competitive products income for each year; and (2) transfer the amount of the assumed tax to the above Fund to the Postal Service Fund the amount of the assumed tax.

(Sec. 403) Prohibits the Postal Service from: (1) establishing anti-competitive rules or regulations; (2) compelling the disclosure, transfer, or licensing of intellectual property to any third party, or (3) obtaining information from a person that provides any product, and then offering any postal service that uses or is based in whole or in part on such information, without the person's consent.

(Sec. 404) Subjects all Postal Service: (1) activities to federal laws prohibiting the conduct of business in a fraudulent manner, and (2) conduct with respect to competitive products to federal antitrust and unfair competition standards. Eliminates Postal Service sovereign immunity protection. Requires that buildings constructed or altered by the Postal Service be constructed or altered in compliance with the nationally recognized model building codes and with other applicable nationally recognized codes. Requires the Postal Service to: (1) consider local zoning or land use regulations and building codes when constructing or altering buildings; and (2) represent itself in most legal proceedings (currently representation is provided through the Department of Justice).

(Sec. 405) Makes the Secretary of State responsible for foreign policy related to international postal services and other international delivery services and empowers such Secretary to conclude pacts, treaties, conventions, and amendments, subject to exception and limitation. Provides for the application of customs laws with respect to such services.

Title V: General Provisions - (Sec. 501) Revises qualification requirements with respect to members of the Postal Service Board of Governors. Requires the President to consult with specified congressional leaders in selecting individuals for Board nomination. Reduces from nine to seven years the term of appointment.

(Sec. 502) Limits annual combined net increases in the amount of obligations issued for capital improvements and operating expenses.

(Sec. 503) Revises provisions concerning the private carriage of letters (letters carried outside of normal mail service by a private carrier) to allow such private carriage in three new circumstances: (1) when the amount paid to a private carrier is at least six times the rate then currently charged for the first ounce of a single-piece first-class letter; (2) when the letter weighs at least 12 and 1/2 ounces; or (3) when the carriage is within the scope of current Postal Service regulations that purport to permit private carriage by suspension of the operation of current law.

(Sec. 505) Requires a party wishing to terminate a collective bargaining agreement involving Postal Service employees to serve written notice to any other party to such agreement at least 90 days in advance. Provides that if all such parties fail to reach a new agreement, the Director of the Federal Mediation and Conciliation Service shall within 10 days appoint a national mediator who is a member of the National Academy of Arbitrators. Authorizes the use of arbitration boards in certain circumstances. States that nothing in this Act shall restrict, expand, or otherwise affect any rights, privileges, or benefits under existing bargaining agreements.

(Sec. 506) Authorizes the Postal Service to establish one or more programs to provide bonuses and other rewards to Postal Service officers and employees. Authorizes the Board of Governors, notwithstanding any other provision of law, to allow up to 12 Postal Service officers or employees to receive total compensation up to 120 percent of the total annual compensation payable to the Vice President. Requires that payment information to be included in currently-required annual Postal Service comprehensive statements.

Title VI: Enhanced Regulatory Commission - (Sec. 601) Replaces the Postal Rate Commission with the PRC. Sets forth the term (six years) and qualifications of the five Commissioners.

Requires the PRC to designate a PRC officer to represent the public interest in all public proceedings of the PRC.

(Sec. 602) Provides PRC authority to administer oaths, examine witnesses, receive evidence, issue subpoenas, and order the taking of depositions and responses to written interrogatories.

(Sec. 603) Authorizes appropriations out of the Postal Service Fund for: (1) the PRC; and (2) the Postal Service Office of Inspector General. Repeals federal provisions which subject the annual PRC budget to disapproval by the Board of Governors.

(Sec. 605) Amends the Inspector General Act of 1978 to establish an Office of Inspector General in the PRC.

Title VII: Evaluations - (Sec. 701) Requires a report from the PRC to the President and Congress, at least every five years, concerning: (1) the operation of amendments made by this Act; and (2) recommendations for improving the effectiveness or efficiency of U.S. postal laws.

(Sec. 702) Requires a report from the PRC to the President and Congress on universal postal service and the postal monopoly in the United States, including the monopoly on the delivery of mail in rural mailboxes.

(Sec. 703) Requires a report from the Federal Trade Commission to the President, Congress, and the PRC identifying federal and state laws that apply differently to the Postal Service with respect to competitive category of mail and to private companies providing similar products.

(Sec. 704) Requires a report from the Postal Service Inspector General to Congress and the Postal Service on improving workplace safety and reducing workplace-related injuries nationwide. Directs the Inspector General, after receiving such report, to submit to Congress its plans for achieving such goals.

(Sec. 705) Directs the Government Accountability Office to study and report to Congress, the Board of Governors, and the PRC on: (1) Postal Service accomplishments involving recycling activities; and (2) additional opportunities for the Postal Service to engage in recycling initiatives.

(Sec. 706) Requires a study and report to the President and Congress on the extent to which women and minorities are represented in supervisory and management positions within the Postal Service. Requires the Postal Service to take measures as necessary to incorporate certain affirmative action and equal opportunity criteria into the performance appraisals of senior supervisory or managerial employees.

(Sec. 707) Requires studies and reports on: (1) the number and value of contracts and subcontracts the Postal Service has with women, minorities, and small businesses; (2) the quality of information provided by the Postal Service in determining the direct and indirect postal costs attributable to periodicals and any opportunities for improving periodical handling efficiencies; and (3) the adequacy and fairness of the process by which postage deficiency assessments under specified provisions are determined and appealable.

(Sec. 710) Requires a study and report on options and strategies for the long-term structural and operational reforms of the Postal Service. Authorizes appropriations.

(Sec. 711) Requires a study and report on a specified provision of the Domestic Mail Manual to determine whether it contains adequate safeguards to protect against abuses of rates for nonprofit mail delivery or deception of consumers.

Title VIII: Postal Service Retirement and Health Benefits Funding - Postal Civil Service Retirement and Health Benefits Funding Amendments of 2006 - (Sec. 802) Relieves the Postal Service of its obligation to contribute matching amounts to its employees' civil service retirement. Provides for a mechanism and an amortization schedule regarding the handling of any surplus or supplemental liability of the Postal Service regarding the Civil Service Retirement and Disability Fund. Transfers from the Postal Service to the Treasury certain retirement obligations related to military service of former Postal Service employees. Makes Office of Personnel Management (OPM) determinations on surplus or supplemental liability subject to PRC review if the Postal Service so requests.

(Sec. 803) Transfers responsibility for paying the government's contribution of the health benefits of postal annuitants, effective in FY2017, from the Postal Service to the Postal Service Retiree Health Fund (established by this section) up to the amount contained in the Fund, with any remaining amount to be paid by the United States Postal Service.

Establishes in the Treasury the Postal Service Retiree Health Benefits Fund, to be administered by OPM. Requires the Postal Service, beginning in 2007, to compute the net present value of the future required and attributable to the service of Postal Service employees during the most recently ended fiscal year, along with a schedule of annual installments which provides for the liquidation of any net surplus by 2056. Directs the Postal Service, for each year, to pay into the above Fund such net present value and the annual installment due under the amortization schedule. Makes OPM actuarial cost subject to PRC review.

(Sec. 804) Repeals a provision of the Postal Civil Service Retirement System Funding Reform Act of 2003 related to the disposition of savings accruing to the Postal Service.

Title IX: Compensation for Work Injuries - (Sec. 901) Makes a Postal Service employee ineligible for compensation or continuation of pay for the first three days of temporary disability (thereby establish three-day waiting period). Allows the employee to use annual leave, sick leave, or leave without pay for such three-day period, but provides that if the disability exceeds 14 days or is followed by permanent disability, the employee may have such leave reinstated or receive pay for the time spent on leave without pay.

Title X: Miscellaneous - (Sec. 1001) Authorizes the Postal Service to employ police officers for all buildings and areas owned, occupied, or under the charge or control of the Postal Service (including outside the property), and to give such guards, while so employed, specified powers.

(Sec. 1002) Repeals federal postal law concerning the transportation of mail by surface carrier. Eliminates restrictions on the length of Postal Service mail transportation contracts.

(Sec. 1003) Provides for reduced-rate treatment of some forms of mail, including: (1) mail given preferred status over regular-rate mailings; and (2) copies of a publication published within a county but distributed outside such county on postal carrier routes originating in the county of publication.

(Sec. 1004) Expresses the sense of Congress that the Postal Service should: (1) ensure the fair and consistent treatment of suppliers and contractors in its current purchasing policies and any revised replacement of such policies; and (2) implement commercial best practices in Postal Service purchasing policies to achieve greater efficiency and cost savings by taking full advantage of private-sector partnerships, as recommended in July 2003 by the President's Commission on the United States Postal Service.

(Sec. 1005) Amends federal law relating to contracts for transportation of mail by air to modify certain definitions.

Requires that, when the Postal Service determines a new hub point, mail tender from that hub during the year after the change be based on the passenger and freight shares to the destinations of the hub(s).

Modifies requirements regarding equitable tender with respect to nonpriority bypass mail on a city pair route in the State of Alaska for carriers providing scheduled bush passenger service.

(Sec. 1006) Regulates the time limit for appeals to the PRC from a determination of the Postal Service to close or consolidate any post office.

(Sec. 1007) Amends the Postal Reorganization Act to give the Postal Service, with respect to an officer or employee of the former Post Office Department, the same authorities and responsibilities it has with respect to an officer or employee of the Postal Service.

(Sec. 1008) Requires the Postal Service to prescribe regulations for the safe transportation of hazardous material. Prohibits mailing materials that do not meet such requirements.

(Sec. 1009) Requires the Postal Service to: (1) assign a single ZIP code to serve each of Auburn Township, Ohio; Hanahan, South Carolina; and Bradbury and Discovery Bay, California; and (2) revert service hours in the Fairport Harbor Branch of the post office in Painesville, Ohio, to those in effect on a specified date.

(Sec. 1010) Revises procedures concerning the reimbursement to a mailer of fees determined to be unlawful.

Authorizes the Postal Service to establish size and weight limitations for mail matter in the market-dominant competitive categories of mail consistent with PRC regulations.

Authorizes the Postal Service Board of Governors to establish reasonable and equitable classes of mail and rates of postage and fees. Requires that one or more classes be maintained for letters subject to inspection and that the rate for each such class be uniform throughout the United States, its territories, and possessions.

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