

Ian D. Volner

202-344-4814

idvolner@venable.com

February 23, 2007

Mary Ann Gibbons, Esq.
Vice President and General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Room 6004
Washington, DC 20260

Re: Do Not Mail

Dear Mary Ann:

As I am sure you are aware, there is a great deal of concern in the mailing community about the recent – and escalating – state legislative initiatives to pass Do Not Mail legislation. A coalition has been formed to address this issue. While there are tactical and political issues, there is also a fundamental constitutional issue. On behalf of PostCom, I am writing to set forth our views on the constitutional question which should be at least as important to the Postal Service as it is to mailers. In brief, it is our opinion that these statutes would be unconstitutional, and we urge the Postal Service to help us make this argument to the states.

There is no doubt that Do Not Mail statutes have the potential to drastically reduce the volume of mail across a number of classes carried by the Postal service. Much of Standard Mail is “unsolicited” and that is equally true of Bound Printed Matter and some of First Class Mail. Congress, through the enactment of both the Postal Reorganization Act and now the Postal Accountability and Enhancement Act, has created a system of mail delivery that relies on the revenue generated by Standard Mail. Laws allowing postal customers to “opt-out” of the delivery of unsolicited mail could make it impossible for the Postal Service to achieve self-sufficiency. This problem would be compounded by the administrative burden various state Do Not Mail requirements would place on the Postal Service. Complying with divergent standards in various states would saddle the Postal Service with significant costs that would amplify the revenue deficit created by the reduction in mail volume. Essentially, state Do Not Mail statutes would make it impossible for the Postal Service to operate as currently envisioned by Congress.

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Because of the extent of the financial burden these laws would impose on the Postal Service, Do Not Mail laws would violate the Constitution's Supremacy Clause. These statutes would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the prime criteria for determining whether a law violates the Supremacy Clause. *See Perez v. Campbell*, 402 U.S. 637, 649 (1971). The Constitution grants authority over the Postal Service to Congress, and Congress has used this authority to establish the Postal Service and provide a comprehensive scheme for its operation, including the requirement that the Postal Service be self-sufficient. Any state laws that frustrate the purposes of this enterprise are unconstitutional.

In fact, courts have applied this reasoning to state and local laws that would have had a much smaller fiscal impact on the Postal Service than Do Not Mail laws. In *USPS v. Pittsburg*, 661 F.2d 783 (9th Cir. 1981), for instance, the Ninth Circuit held that a city ordinance requiring postal employees to obtain permission from homeowners before crossing their lawns was invalid under the Supremacy Clause. The regulation conflicted with a postal regulation permitting mail carriers to cross lawns unless homeowners objected. The Court explained that the local ordinance frustrated the federal regulation's intent to promote the efficiency of mail delivery, a purpose clearly stated in the Postal Reorganization Act. 786. Requiring the Postal Service "to undertake the nightmarish administrative burden of obtaining express consent from every Pittsburg property owner" would present an "unconstitutional obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*

The same problem is presented by Do Not Mail legislation, but to a much greater degree. The Postal Service could have complied with the ordinance at issue in *Pittsburg* by simply directing its mail carriers to stop using short-cuts across lawns. While this fix would have increased delivery costs, those additional costs are negligible compared to the costs that would be imposed by Do Not Mail statutes, as to which there is no such practical solution.

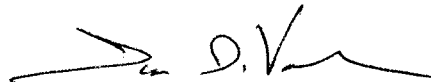
The Supremacy Clause comes into play when a "scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room to supplement it." *Pacific Gas & Electric v. Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983). Congress has legislated regarding all aspects of postal service, including a narrowly tailored system which already allows consumers to decline to receive mail that they regard as offensive. There is simply no room for state regulation of any postal function involving the delivery of mail. Allowing

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states to enact and enforce Do Not Mail statutes would weaken the principle that Congress is exclusively responsible for development of a postal system.

While we believe that these Constitutional arguments are sound, state Do Not Mail laws will nevertheless be enforced until challenged in court. The coalition, of which PostCom is a participant, is therefore seeking to prevent these laws from being enacted. We believe that the Postal Service's voice would be an important ally in this battle. We ask that you instruct the Law Department to assist us in this endeavor. Please contact us with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Volner", with a long horizontal stroke extending to the left.

Ian D. Volner

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