No. 02-1290

IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND AMERICANS FOR TAX REFORM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Postal Service is amenable to suit as a "person" under federal antitrust laws when it engages in commercial activities outside the scope of its limited statutory monopoly where Congress has previously passed reform legislation authorizing the Postal Service to "sue and be sued."

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INTEREST OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a national, nonprofit public interest law and policy center that advocates free enterprise principles and government accountability. WLF is particularly interested in the regulation and proper operation of the U.S. Postal Service, having participated in relevant proceedings before the Postal Rate Commission, the President's Commission on the U.S. Postal Service, and the Federal Trade Commission.

The Allied Educational Foundation ("AEF") is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has regularly appeared as amicus curiae in this Court.

Americans for Tax Reform ("ATR") is a national, nonprofit and nonpartisan coalition of taxpayers and taxpayer groups who oppose all federal and state tax increases. As a free market, taxpayer advocacy organization, ATR believes consumers of mail service are better served by a market open to competition than by a government monopoly.

Amici are strongly opposed to the abuse of the Postal Service's governmental status for the purpose of employing unfair, anti-competitive practices in its non-monopoly business. They believe that the Postal Service should be subject to the antitrust laws with respect to their commercial operations as Congress intended.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, its members, and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

With the passage of the Postal Reorganization Act of 1970, Congress ushered out the old Post Office Department and transformed it into the United States Postal Service ("USPS"). In the process, USPS emerged as a competitor in the mail delivery business having the same "liability . . . as that of any other business." *Loeffler* v. *Frank*, 486 U.S. 549, 556 (1988).

While the new Postal Service continues to serve certain public purposes and be subject to certain governmental reins, it no longer retains the "sovereign" character it used to have. When Congress launched USPS into the commercial world and "'endow[ed] it with authority to "sue and be sued," that agency [became no] less amenable to judicial process than a private enterprise under like circumstances would be.'" *FDIC* v. *Meyer*, 510 U.S. 471, 481 (1994) (citing *FHA* v. *Burr*, 309 U.S. 242, 245 (1940)) (emphasis omitted).

This comprehensive waiver of sovereign immunity fit perfectly, indeed essentially, with the Congressional objective of making USPS run more like a business, and be accountable for its successes and failures in the marketplace. Complying with the laws of competition is, of course, a key component of business accountability, and the Sherman Act establishes the principal standards of fair competition.

If Congress had truly intended to catapult this new economic behemoth into the marketplace absent any accountability under the Sherman Act, it could easily have done so in at least two obvious ways. It could have qualified USPS's sue-and-be-sued-clause, located at 39 U.S.C. § 401(1). Alternatively, it could have simply preserved the old Post Office's blanket antitrust immunity in an express statutory provision, like those found in 39 U.S.C. § 410, that specifically govern application of certain "government" laws to the Postal Service.

Both the Congressional record and this Court's precedents plainly demonstrate that the Ninth Circuit was correct in declining to narrow the broad scope of Congress's waiver of sovereign immunity. The Ninth Circuit was similarly correct in explaining that USPS's residual sovereign character can be sufficiently respected by allowing it to argue that specific activities remain immune if they are related directly to the statutory monopoly to deliver the mail. Because courts have considerable experience differentiating sovereign activities from commercial ones, such a distinction is both practical and consistent with intent of the Postal Reorganization Act.

Thus, the Ninth Circuit decision should be affirmed in order to carry out the reforms enacted by Congress, protect private sector competition from this economic leviathan it has introduced into the market, and preserve the governmental interest by perpetuating immunity for specific conduct in appropriate cases.

ARGUMENT

I. THE EVOLUTION OF THE POSTAL SERVICE HAS BROUGHT IT CLEARLY WITHIN THE ORIGINAL MEANING OF THE SHERMAN ACT.

A. Waiver of Sovereign Immunity and *FDIC* v. *Meyer*.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). This Court has outlined a two-step inquiry for use in determining whether a federal entity enjoys immunity in a particular area of the law. *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). The first step involves determining whether there has been a "waiver of sovereign immunity." *Id.* If such a waiver is found, then the court must analyze whether "the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.*

Sovereign immunity is not an inviolate principle admitting of only rare and narrowly-tailored exceptions. To the contrary, this Court has previously held that "waivers by Congress of governmental immunity . . . of federal instrumentalities should be liberally construed." *FHA* v. *Burr*, 309 U.S. 242, 245 (1940). Clear and direct waivers, such as the sue-and-be-sued clause located in the Postal Reorganization Act of 1970, demonstrate "the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned." *Id.* Further, "when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *Id.*

In that vein, this Court has found that Congress subjected USPS to a broad, not narrow waiver of sovereign immunity. It has held that 401(1) constitutes a general waiver of the Postal Service's sovereign immunity, *Loeffler* v. *Frank*, 486 U.S. 549, 554-56 (1988), thus satisfying the first requirement of *Meyer*. See generally *Davric Marine Corp.* v. *USPS*, 238 F.3d 58, 61 (1st Cir. 2001); *Global Mail Ltd.* v. *USPS*, 142 F.3d 208, 210 (4th Cir. 1998); *United States* v. *Q Int'l Courier, Inc*., 131 F.3d 770, 775 (8th Cir. 1997).

The second step of Meyer involves determining "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Meyer*, 510 U.S. at 484. Here, the applicable law is the Sherman Act, which prohibits "*[e]very* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (emphasis added). These prohibitions apply to any "person," which the Act defines as "corporations and associations existing under or authorized by the laws of . . . the United States." *Id.* § 7.

When the Sherman Act was passed, the United States did not routinely engage as a market-participant as it does now

through numerous nontraditional, or hybrid, entities such as USPS. Thomas R. La Greca, Comment, *The Federal Government's Antitrust Immunity—Trade As I Say, Not As I Do*, 56 St. John's L. Rev 515, 532 (1982). This Court, however, has not hesitated to apply the Sherman Act when the government does participate significantly in private sector activities. See*, e.g.*, *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Petitioner's brief leads with a citation to *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-06 (1941), in which this Court held "that Congress did not intend the statutory term 'person' as used in the antitrust laws to include the United States." Br. for Pet. at 6. While *Cooper Corp.* indeed held that the United States was not a "person" for purposes of the Sherman Act, this holding is not dispositive of this case. After all, it is precisely the personality of USPS that is at issue here.

If this Court concludes that USPS is indistinguishable in all circumstances from the United States *qua* sovereign, then USPS's claim of blanket, status-based immunity must be vindicated. If, however, this Court accepts the view that Congress intended to give USPS a non-sovereign side to its personality (i.e., outside the context of delivering first class and international mail), then *Cooper Corp.*'s methodology, including the observation that there is "no hard and fast rule of exclusion," becomes more relevant than its ultimate holding. *Cooper Corp.*, 312 U.S. at 604-05.

In *Cooper Corp.*, this Court held that a determination of immunity entails review of a number of factors, including "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute." *Id.* at 605. Thus, in the absence of such a "hard and fast rule of exclusion," the Court must undertake a case-by-case analysis, examining whether the word "person" embraces the governmental entity in question or not. *Id.* at 604-05.

Citing the current version of the Lanham Act, 15 U.S.C. § 1127, Petitioner asserts that whenever Congress has intended the definition of "person" to embrace government entities, "it has expressly so provided." Br. for Pet. at 9. This, however, is not so. The Lanham Act language cited by Petitioner merely ratified existing judicial interpretations of Congressional intent. Also, as this Court plainly stated, "there is no hard and fast rule" for determining whether an entity enjoys status-based immunity under the Sherman Act. *Cooper Corp.*, 312 U.S. at 604-05. Because Congress did not expressly immunize USPS from antitrust liability, this Court must consider the *Cooper Corp.* factors to judge whether the Postal Service is a "person" under the Sherman Act.

At its base, this case simply entails determining whether USPS, when participating in for-profit market activities that are outside the scope of its limited statutory monopoly, should be permitted to violate antitrust laws to gain competitive advantage. Applying the *Cooper Corp.* factors to USPS, as the remainder of this brief will now do, reveals that it may not do so because it is a "person" within the meaning of the Sherman Act.

B. The Postal Reorganization Act of 1970.

The United States Postal Department originally began as a fully sovereign entity, not unlike the military or the Library of Congress. But much has changed since 1775, when "[Benjamin] Franklin was named the first Postmaster General by the Continental Congress." *USPS* v. *Council of Greenburgh Civic Assocs.*, 453 U.S. 114, 121 (1981). By the mid-1960's, Congress became concerned with the Postal Department's ponderous size, inefficiencies, and mounting debt, and spent considerable time discussing methods to remedy the problem.[2] After extensive debate, Congress

[2] Senator McGee cited a former Postmaster General as saying: "It doesn't make a damn bit of difference to me whether Congress enacts a

passed the Postal Reorganization Act of 1970 ("PRA"), Pub. L. No. 91-375, 84 Stat. 719 (codified as amended in Title 39 of the United States Code), which reorganized the Department "as an independent establishment in the executive branch and purposely insulated [it] from direct control by the President, the Office of Management and Budget, and the Congress." Statement of President Gerald Ford, 116 Cong. Rec. 27599 (Aug. 6, 1970). In essence, Congress "wished to make the delivery of the mail a self-supporting enterprise." *Standard Oil Div.* v. *Starks*, 528 F.2d 201, 202 (7th Cir. 1975).

The PRA preserved a limited statutory monopoly for the USPS over the delivery of first class and international mail, and provided USPS with the opportunity to compete in the private sector for goods and services. See 39 U.S.C. § 401, *et seq*. See also *Air Courier Conf. of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 519 (1991) (recognizing that Congress conferred a limited legal monopoly on the Postal Service for mail delivery in and from the United States).

The PRA also provided "the authority to operate the postal service efficiently and economically, with freedom of financing, choice of modes of transportation, opportunities for modernization and for variations in service to meet changing needs." 116 Cong. Rec. 19844 (1970) (Statement of Rep. Dulski). This Court has recognized that, on numerous occasions, Congress has "indicated that it wished the Postal Service to be run more like a business than had its predecessor." *Franchise Tax Bd.* v. *USPS*, 467 U.S. 512, 519-20 (1984). As Senator Boggs stated succinctly, "With the enactment of this legislation, Congress will take steps to get out of the postal business." 116 Cong. Rec. 26958 (1970) (Statement of Sen. Boggs).

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rate increase or not. I can get all the money I need out of the Treasury." 116 Cong. Rec. 21709 (1970) (Statement of Sen. McGee).

Competition in the private sector entails legal, as well as economic, accountability. Thus, Congress provided USPS a two-edged sword: the ability both to "sue and be sued." 39 U.S.C. § 401(1). Congress surely recognized that, as an economic leviathan, USPS's activities would inevitably implicate antitrust laws. Yet, Congress chose not to exempt USPS from antitrust liability, but only limited USPS's amenability to private suit in two respects: (1) the applicability of the Federal Tort Claims Act, and (2) certain procedural matters relating to the conduct of suits involving a governmental entity. See *id*. § 410. "These specific and isolated limitations indicate beyond doubt that the waiver to sue and be sued applied to all other litigation." *Standard Oil*, 528 F.2d at 203. While "Congress knows well enough how to draw such statutes," and specified in great detail which "government" laws would continue to apply to USPS, it nonetheless chose not to insulate it from liability if USPS wielded its enormous market power in an anti-competitive fashion.

The notion that the new USPS shed much, if not most, of its government character is no latter-day, revisionist sentiment. In enacting the PRA, Congress specifically declared that its purpose was to authorize the operation of the postal service in "a business-like way," H.R. Rep. No. 01-1104 (1970), *reprinted at* 1970 U.S.C.C.A.N. 3649, 3660, and it attempted to make the delivery of the mail a self-supporting enterprise. See 39 U.S.C. § 2401. The Postal Service was even given authority to employ its own attorneys, which would no doubt prove essential, given the predictable tidal wave of litigation that would ensue from the USPS's "right" to sue and be sued. *Id.* § 409(d). It was thus endowed with powers commensurate with "the autonomy that the USPS was to enjoy." *Standard Oil*, 528 F.2d at 203.

By enacting the PRA, Congress also "established the Postal Service as a quasi-public entity that was to *compete on essentially level ground* with private enterprise." *Davric*, 238 F.3d at 61 (emphasis added). Accordingly, there is a

presumption that USPS "is not less amenable to judicial process than a private enterprise under like circumstances would be," *Burr*, 309 U.S. at 245, and therefore "we must presume that the Service's liability is the *same as that of any other business*." *Franchise Tax Bd.*, 467 U.S. at 521 (emphasis added). Over 100 years ago, this Court advised that a government, by "giving to the [public corporation] the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the [corporation], and waives all the privileges of that character. *Bank of the United States* v. *Planters' Bank of Georgia*, 22 U.S. (9 Wheat) 904 (1824).

While the USPS is hardly alone in being forced to defend itself against copious litigation, by stipulating that USPS may sue and be sued, Congress intentionally "launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,'" *Burr*, 309 U.S. at 245, thus "cast[ing] off the cloak of sovereignty and assum[ing] the status of a private commercial enterprise." *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n.5 (1986). Accordingly, when the old Postal Department's fully sovereign character was terminated, it thus gained "the status of a private commercial enterprise . . . fit[ting] within the common meaning of the world 'person,' just as does any other private corporation." *Flamingo Indus. (USA) Ltd.* v. *USPS*, 302 F.3d 985, 992 (9th Cir. 2003).[3]

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[3] *See also* 15 U.S.C. § 7 ("The world 'person,' or 'persons,' wherever used in [Title 15 of the United States Code] shall be deemed *to include* corporations . . . .") (emphasis added); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 782 (2000) ("[T]he presumption with regard to corporations is just the opposite of the one governing [sovereigns]: they are presumptively covered by the term 'person' . . . .") (citing 1 U.S.C. § 1) (emphasis omitted).

Just as Congress ratified USPS's amenability to suit under the Lanham Act in response to USPS's insistence on immunity, Congress is currently

C. The Sherman Act of 1890.

Although monopolies and contracts in restraint of trade were already illegal at common law in the late 1800's, several factors constrained enforcement. First, state courts had no authority to regulate states engaged in interstate commerce. William Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221, 246 (1955). Second, some argued that because there was no federal common law, federal courts could not enforce the common law's restraints on monopolies without an anti-trust statute. 21 Cong. Rec. 3152 (1890) (Statement of Sen. Hoar). Finally, contracts in restraint of trade "could only be brought before the courts by parties to them." Letwin, *supra* at 243.

The Sherman Act resolved these issues by allowing the federal courts to enforce the common law anti-monopoly rules, and by allowing third parties to challenge anti-competitive agreements that harmed their businesses. For this reason, Senator Sherman stated that the Act "does not announce a new principle of law, but applies old and well-recognized principles of common law to the complicated jurisdiction of our State and Federal Government." 21 Cong. Rec. 2456 (1890) (Statement of Sen. Sherman). It was anticipated that the Act would be applied to anti-competitive

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considering doing the same for the Sherman Act. Senate Bill 1285, the Postal Accountability and Enhancement Act of 2003, was introduced in the Senate on June 18, 2003, shortly after certiorari was granted in this case. In general, of course, pending legislation is of limited to non-existent value in construing prior legislative intent, and the same is true here. However, given Congress's track record of codifying the prior judicial interpretation that USPS was amenable to suit under the Lanham Act, and the fact that the bill was introduced shortly after certiorari in this case was granted, no inference should be drawn here other than that some in Congress may now wish to make Congressional intent explicit. *See, e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 260 (1994) (explaining that Congress expressly included amendatory language in a statute to make clear its original intent when it first adopted the statute).

agreements wherever they existed—whether privately or governmentally created.

In the course of debating the Act, Senator Sherman decried the evils of a monopoly, whether government-created or private, that "control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist." *Id.* at 2457 (Statement of Sen. Sherman). In short, the object of the Act was "to declare unlawful trusts and combinations in restraint of trade and production." *Id.* at 2456.

Senator Sherman recognized that monopolies could arise just as easily from governmental grants as they could from private contracts, and that the Act's purpose was simply to prevent their existence—in any possible form—from harming the "humble" businessman. *Id.* at 2569.

> Whether actions taken pursuant to the power of a state were to be included or excluded from Sherman Act prohibitions is never explicitly mentioned in the legislative debates. One could argue that if the legislative history reveals anything it is that the purpose of the act is to strike down arrangements which have anticompetitive effects.

Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U. L. Rev. 71, 83 (1974-75).

This plain and exceptionally broad language of the statute would seem to exclude any broad carve-out for anti-competitive behavior in the marketplace by preventing "*[e]very* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (emphasis added). Focusing on Congress's prominent use of the word "every," this Court has stated that "[l]anguage [in the federal antitrust laws] more comprehensive is difficult to conceive. On its

face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse . . . " *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), *superseded on other grounds*, *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491 (1993).

Importantly, while this Court has indeed held that the United States *qua* sovereign is exempt under the Sherman Act, see *Cooper Corp.*, 312 U.S. at 606, it has never ruled that a federal, quasi-governmental, or hybrid, entity is immune when it acts as a market participant, as USPS does.

D. *United States* v. *Trans-Missouri Freight Association.*

Shortly after passage of the Sherman Act, this Court acknowledged that governmental actors could cause, and also be liable for causing, anti-competitive harms. In *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), this Court "for the first time authoritatively declare[d] the intended scope of the provisions of the so called Anti-Trust Act of 1890." William D. Guthrie, *Constitutionality of the Sherman Anti-Trust Act of 1890,* 11 Harv. L. Rev. 80, 80 (1898). *Trans-Missouri* involved the question of whether the Sherman Act applied to a public railroad. The majority held that it did, refusing to "read[] into the act a limitation which Congress had declined or omitted to insert," and explained that "the language was plain and unlimited." *Id.* at 82.

While such a holding may seem unremarkable in our current economic environment, it is important in light of the fact that railroads in the late 1800's were generally public, not private corporations, regulated and often owned by governments. See*, e.g.*, *Swan* v. *Williams*, 2 Mich. 427 (Mich. 1852), *available at* 1852 WL 3103 (holding as constitutional the power of the Territorial Legislature of Michigan to charter the Pontiac Railroad Company). For example, just three years before *Trans-Missouri*, this Court

explained that Congress "may create corporations as appropriate means of executing the powers of government, as, for instance . . . a railroad corporation for the purpose of promoting commerce among the states." *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 529 (1894).

Hence, the Sherman Act was clearly applied with full force to the Trans-Missouri Railroad, a company with public obligations, duties, and ownership. This Court explained that because railroads were public corporations, they were given special government "privileges, among which [was] the right to take the private property of a citizen [through eminent domain] . . . donees of large tracts of public lands, and gifts of money by [governments]." *Trans-Missouri*, 166 U.S. at 332. These powers are not unlike those given to USPS by the PRA. More specifically:

> It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things. But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct, so that its business should be carried on with as much reference to the proper and fair interests of the public as possible.

Id. at 322. Thus, an entity with a "public character," which engaged in commercial activity, was at least as amenable to suit for anticompetitive behavior as any private entity. After all, the Act's intent was to prevent such behavior wherever it occurred, whether by a private or public corporation, and regardless of the public character.

E. *City of Lafayette* v. *Louisiana Power & Light Co.*

Almost 80 years after holding that the Sherman Act applied to a public corporation, this Court had an opportunity specifically to address whether the Sherman Act also applied to a non-federal governmental unit. In *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978), this Court considered whether a municipality that acted anti-competitively would be subject to the strictures of the Sherman Act. Chief Justice Burger's opinion for the Court explained in stark terms the type of competitive damage governmental actors could perpetrate on the business markets through anti-competitive actions. He explained that Congress intended to deal "comprehensively" with such damage, even if caused by a governmental actor:

> [It is] remarkable to suggest that the same Congress which 'meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,' would have allowed these petitioners to complain of such economic damage while baldly asserting that any similar harms [government] might unleash upon competitors or the economy are absolutely beyond the purview of federal law. To allow the defense asserted by the petitioners in this case would inject a wholly arbitrary variable into a 'fundamental national economic policy.'

Id. at 389, 419-20 (citations omitted) (citing *Carnation Co.* v. *Pacific Conf.*, 383 U.S. 213, 218 (1966)).

The Court's rationale in *City of Lafayette* applies foursquare to USPS, and provides the key to upholding the Ninth Circuit's decision below. In *City of Lafayette*, the Court warned that governmental entities, such as municipalities:

> act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious

> distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.

Id. at 408. Thus, when "act[ing] as owners and providers of services," a municipality—or other governmental entity—would undoubtedly qualify as a "person" under the Sherman Act. *Id.*

This Court recognized that if a governmental entity were insulated from antitrust challenge, it could wreak non-sovereign, self-interested havoc in the market place, thereby undermining the objectives of the antitrust laws. To the extent government entities such as "municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Id*. The concerns animating the Court's holding in *City of Lafayette* apply in spades to USPS—a massive commercial player that Congress has unleashed into the marketplace with the purpose and effect of forcing it to behave like a business.

By competing in the same arena as private businesses, USPS is properly forced to take on liability like that of the private sector, and obliged to respect the same constraints. As this Court recognized many years ago, "when a government becomes a partner in any trading company, it divests itself . . . of its sovereign character, and takes that of a private citizen . . ." *Planters' Bank*, 22 U.S. at 907. By taking on the same character as its competitors, the Postal Service is obligated to obey the rules that deny it an unfair competitive advantage.

II. AN ENTITY THAT CAN SUE AND BE SUED IS PRESUMPTIVELY LIABLE UNDER THE SHERMAN ACT.

This Court has made clear that "there can be no doubt that Congress has full power to endow [a government corporation] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process." *Burr*, 309 U.S. at 244. Thus, the Ninth Circuit correctly stated that, in light of the sue-and-be-sued clause in the PRA, USPS's "waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Flamingo*, 302 F.3d at 992.

Absent express language to the contrary, an entity is presumed not to be immune from antitrust laws. This Court has repeatedly confirmed the "heavy presumption against implicit exemptions from the antitrust laws." *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 157-58 (1983) (citing *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)). See also *City of Lafayette*, 435 U.S. at 398 (holding that there is a clear "presumption against implied exclusions from coverage under the antitrust laws.") Such a presumption remains "unless it appears that the antitrust and regulatory provisions are plainly repugnant." *Id.*

Hence, a presumption exists that when a governmental-sponsored enterprise or other hybrid governmental creation acts as a market participant, it must abide by the same rules and regulations as its market competitors. As this Court said over a century ago:

> It is, we think, a sound principle, that when a government becomes a partner in any [private] company, *it divests itself . . . of its sovereign character, and takes that of a private citizen.* Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with

> whom it associates itself, and *takes the character which belongs to its associates*, and to the business which is to be transacted.

Planters' Bank, 22 U.S. at 907 (emphases added). In short, when USPS voluntarily decides to compete in the private sector, with private companies, it should not—absent specific textual language—expect to be immune from the same laws that bind its competitors.

So heavy is this presumption in favor of non-immunity, that a governmental entity may still be subject to antitrust liability even absent a sue-and-be-sued clause. This Court has consistently maintained that "[i]n the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability like unto indispensable words of early common law." *Keifer & Keifer* v. *Reconstruction Fin. Corp*., 306 U.S. 381, 389 (1939) (holding that the Regional Agricultural Credit Corporation was not immune from suit). When this Court ruled against government immunity in *Keifer*, notwithstanding the absence of a sue-and-be-sued clause, it explained that "Congress has provided for not less than forty [governmental-sponsored enterprises] . . . and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor . . ." *Id.* at 391.

If a governmental-sponsored enterprise ("GSE") may be liable even absent a sue-and-be-sued clause in its charter, then when Congress deliberately subjects an entity to liability, there is, *a fortiori*, no legal or logical basis to infer that Congress actually intended to immunize that entity. In fact, the presumption is precisely to the contrary. "When Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed

that restrictions on that authority are to be implied." *Burr*, 309 U.S. at 242.[4]

Specifically, this Court has made plain that a "sue-and-be-sued" clause may not lightly be reined in—it can only be limited where "necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of the Congress to use the 'sue and be sued' clause in a narrow sense." *Id.* at 245. Because this Court has found that Congress intended USPS to "be run more like a business than its predecessor . . . we must presume that the Service's liability is the same as that of any other business." *Franchise Tax Bd.*, 467 U.S. at 520. In other words, this Court has expressly declined the invitation to limit the waiver of sovereign immunity infused in USPS's sue-and-be-sued clause. And here, as was the case in *Franchise Tax Bd.*, "[n]o showing has been made to overcome that presumption." *Id.*

This case presents no new, good reason for the Court to scale back that waiver of immunity. As the Ninth Circuit held, USPS has no blanket immunity from the antitrust laws because it does not possess blanket sovereign status. See *Flamingo*, 302 F.3d at 993. Where USPS's activities have a

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[4] Another indication of Congressional intent regarding liability is where the money will come from to satisfy an adverse judgment. For instance, in *Oklahoma Mortgage Co. v. GNMA*, 831 F. Supp. 821 (W.D. Okla. 1993), the court explained that Ginnie Mae did not have funds under its control that were separate from U.S. Treasury funds. As a result, any judgment against Ginnie Mae would have been satisfied from the U.S. Treasury, and thus any judgment against it was tantamount to a judgment against the United States. Because claims against the United States are barred by sovereign immunity, absent an express waiver, claims against Ginnie Mae were likewise barred. The PRA states that "a judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service." 39 U.S.C. § 409(e). Hence, a claim against USPS is not tantamount to a claim against the United States.

sovereign character, those activities may be immune from antitrust challenge. However, where the activity is of a commercial character, USPS must face the music like any other business.

III. HYBRID GOVERNMENT ENTITIES HAVE CONDUCT-BASED IMMUNITY WHEN ACTING WITHIN THE SCOPE OF THEIR STATUTORY MONOPOLY.

A. The Contours of Conduct-based Immunity.

This Court has held that "there can be no doubt that Congress has full power to endow [a government corporation] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process." *Burr*, 309 U.S. at 244. See also General Accounting Office, Report No. 97-141, *U.S. Postal Service Issues Related to Corporate Governance* 2 (Aug. 1977) (explaining that USPS has a "corporation-like organization.") Congress has often exercised this power not only to protect governmental entities from private litigation, but also to intentionally expose them to civil liability at the hands of citizens and businesses.

The Ninth Circuit held that USPS "can be sued under federal antitrust laws because Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation." *Flamingo*, 302 F.3d 993. The Ninth Circuit tempered the impact of its conclusion by acknowledging that, even bereft of blanket "status-based" immunity, USPS would nonetheless remain privileged under a more limited "conduct-based" theory of immunity. *Id.*

Conduct-based immunity applies when an entity possesses both sovereign and nonsovereign attributes. See, *e.g.*, *Name.Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 581-82 (2d Cir. 2000) (holding that a nonsovereign contractor enjoyed immunity from antitrust law to the degree it was exercising a Congressionally-mandated monopoly). GSEs are

hybrid entities with "mixed" sovereign profiles. Under prevailing case law, GSEs have been shielded from antitrust immunity only to the extent that the GSE acts pursuant to a statutory monopoly. However, if a GSE acts outside the zone of its monopoly, it does so without the benefit of such immunity, and must observe the same rules—and be subject to the same challenges—as its competitors.

Though the availability of conduct-based immunity was not the dispositive factor for the Ninth Circuit, it nonetheless provides the most logical resolution to the problem at hand. When USPS acts pursuant to its Congressionally-mandated monopoly (delivering first class and international mail), it retains its sovereign character and is shielded from liability under the Sherman Act. However, when USPS acts outside of the scope of its monopoly—e.g., selling stuffed eagles or t-shirts, delivering overnight parcels, filling money orders, allowing remittance of payment for online auctions, and, perhaps, even negotiating with suppliers over the acquisition of run-of-the-mill supplies—it no longer acts pursuant to its Congressional monopoly, and deserves no special protection under the Sherman Act.[5]

USPS's argument that it should enjoy absolute immunity from antitrust laws—even when it engages in activity unquestionably outside of its statutory monopoly—is entirely untenable. It repudiates the very purposes and effects of the reform Congress imposed on USPS. While these reforms liberated USPS to a great extent, they also tethered it to the rules of the market place.

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[5] *Amici* take no position on the question of whether USPS's procurement of mail bags—the underlying activity challenged by Respondents—is within USPS's core, limited statutory monopoly. *Amici* respectfully submit that the answer to that question requires the development of the record below.

B. The Commercial Activities of GSEs Are Indistinguishable From Those of Private Firms or Associations.

The federal government serves the interest of the public through a wide spectrum of entities that are chartered by Congress. At one end of the spectrum are entities performing only sovereign, non-commercial activities pursuant to direct, President control and Congressional oversight and appropriations. An example of such an entity would be a branch of the Armed Forces. The other end of the spectrum would include hybrid entities such as GSEs that are chartered by Congress for limited commercial purposes. GSEs are often privately owned, though their commercial activities are limited only to those expressly mandated in their charter. Examples of GSEs include the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the SLM Corporation ("Sallie Mae").

To be sure, courts have held that some governmental entities, such as the Navy, are not "persons" under the Sherman Act.[6] But none of the cases relied upon by Petitioner involves a GSE that engages in commercial behavior outside of the realm of its limited statutory monopoly.

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[6] *See, e.g., Rex Sys., Inc.* v. *Holiday*, 814 F.2d 994 (4th Cir. 1987) (holding that the Navy was not a person under the Sherman Act and thus suit could not be brought against it in connection with its procurement). See also *Sea-Land Serv. Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981) (holding that Alaska Railroad was not a "person"); *Jet Courier Serv., Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221 (6th Cir. 1983) (holding that Federal Reserve Bank is not a "person"); *Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980) (holding that Army and Air Force Exchange Service is not a "person").

Making a distinction between commercial and non-commercial activities is a determination with which this Court is very familiar. For instance, under the Foreign Sovereign Immunities Act ("FSIA"), Congress established a framework for exercising jurisdiction over a foreign state. See 28 U.S.C. § 1602. The FSIA states that a "foreign state shall be immune" from suit unless it engages in activity which is specified in one of the prescribed exceptions. *Id.* § 1604. One such exception is the so-called "commercial exception," which provides immunity for any "act performed in the United States in connection with a commercial activity of the foreign state elsewhere." *Id.* § 1605(a)(2).

The FSIA defines "commercial activity" by reference to its "nature" rather than its "purpose." *Id.* § 1603(d). However, this Court has made clear that commercial activity is determined based upon "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade or commerce.'" *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992). Thus, "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.*

It is beyond question that the "nature" of USPS's activities undertaken outside the sphere of its monopoly is "commercial," per this Court's definition in *Republic of Argentina*. In fact, it would be ludicrous to argue that engaging in retail sales of stuffed animals or framed artwork on a commercial ".com" website, or even the sponsorship of a professional cycling team, do not constitute acts of a commercial nature. Just as a foreign sovereign that chooses to engage in commercial activity does not enjoy immunity from suit, a GSE that engages in commercial activity outside the scope of its monopoly likewise should not benefit from such immunity either.

Briefly reviewing the commercial natures and activities of prominent GSEs such as Fannie Mae,[7] Freddie Mac,[8] or Sallie Mae,[9] helps demonstrate the folly of exempting all GSEs from antitrust liability. There can be little doubt, for instance, that if Fannie Mae violated antitrust laws, it would be subject to liability thereunder. After all, it operates in the highly competitive banking market, and wields market power sufficient to force a much smaller private institution entirely out of the market.

Sallie Mae likewise competes in a highly competitive industry and ranks among the 60 largest corporations in the U.S. based on assets. There is little doubt that Sallie Mae would be similarly liable for antitrust violations. In fact, in a recent private action against Sallie Mae under the Sherman Act, Sallie Mae never argued that it is exempt based upon its status as a GSE. See *College Loan Corp.* v. *SLM Corp.,* No. 02-1377-A (E.D. Va. Oct. 14, 2002) (unpublished). On the contrary, it is Sallie Mae's official policy "to comply strictly with U.S. antitrust laws." Sallie Mae Code of Business

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[7] Congress created Fannie Mae's predecessor in 1938. The goal was to ensure the liquidity of mortgage lending by banks, and to create a more vibrant secondary mortgage market. Fannie Mae was originally owned by the federal government, became partially-privatized in the 1950s, and then fully-privatized in 1968. Though privately owned, Fannie Mae's activities are still limited by statute.

[8] Freddie Mac was established in 1970. Initially, its ownership was limited to Savings and Loan Associations that were members of the Federal Home Loan Bank Board. In 1988, the ownership restrictions were limited and Freddie Mac became publicly traded. Freddie Mac competes for essentially the same business as Fannie Mae. Though Freddie Mac and Fannie Mae are privatized companies, they nonetheless have residual ties to the federal government, which Congress is currently considering severing altogether. John D. McKinnon & Dawn Kopecki, *U.S. Pressed on Mortgage-Firm Ties*, Wall Street J., Sept. 10, 2003 at A2.

[9] Sallie Mae, which is also privately owned, primarily purchases student loans.

Conduct, *available at* http://www.salliemae.com/about/business_code.html#4 (last visited Aug. 6, 2003).

Like USPS, a GSE may compete against private actors in a way that other governmental entities do not. They also demonstrate the broad range of quasi-governmental activity in the marketplace. By way of example, the difference between a typical GSE and a sovereign entity is analogous to the difference between the Federal Reserve and the Federal Home Loan Bank System ("FHLBS"). One commentator has noted that while both provide loans:

> The Fed is the lender of *last* resort, providing discount window loans to member institutions only after they have exhausted other sources of liquidity. By contrast, the Federal Home Loan Bank System describes itself as a "lender of *first* resort for its members," offering funds at a lower cost than member institutions are likely to obtain elsewhere.

Jay Cochran & Catherine England, *Neither Fish nor Fowl: An Overview of the Big-Three Government-Sponsored Enterprises in the U.S. Housing Finance Markets*, 10-11 (2001), *available at* http://www.mercatus.org/pdf/materials/9.pdf. While USPS actively competes for business in the areas outside its limited statutory monopoly, it does not do so—indeed, it has no incentive whatsoever—to do so within its monopoly.

While acting within the scope of its monopoly, USPS's actions are not unlike those taken by federal entities such as the Navy, Library of Congress, or Federal Reserve. However, when acting outside the scope of its monopoly, it is more comparable to GSEs such as Freddie Mac, Sallie Mae, or the FHLBS, which exhibit both sovereign and nonsovereign characteristics. Because "a governmental agency engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association,'" *Global Mail*, 142 F.3d at 216, USPS is properly deemed a Sherman Act

"person" when engaging in commercial activity as a market participant.

IV. USPS MIGHT USE ITS SIZE AND COMMERCIAL FREEDOM TO HARM ITS COMPETITORS AND EXPAND THE SCOPE OF ITS MONOPOLY.

A. USPS's Expanding Corporate Empire.

"[T]he language and the legislative history of the PRA make clear that Congress intended USPS to be a . . . competitor . . . competing head-to-head with a host of private courier services." *Global Mail,* 142 F.3d at 208. In addition to simply competing with private couriers, however, USPS has greatly expanded the scope of its commercial activities, choosing to compete with a host of private enterprises outside the parameters of its statutory monopoly. Such expansion has resulted in the concomitant expansion of USPS's corporate empire.

For instance, according to Fortune Global 500, USPS is currently the 24th largest business in the world. In its 2002 *Annual Report,* USPS utilized the Fortune 500 rankings to demonstrate that, for purposes of comparison, it was the 12th largest business in the United States, exceeding all but 11 United States companies in revenue during that year. See U.S. Postal Serv., *Annual Report*, *2002*, at 19 (2003).

While much of USPS's revenue is derived from its monopoly industry, billions of dollars are also derived from its non-monopoly industry, in which USPS directly competes with private sector companies. For instance, it has abandoned its <usps.gov> website, redirecting customers who attempt to access it to its commercial <usps.com> website.[10] It currently

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[10] "The Internet is divided into several 'top level' domains: .edu for education; .org for organizations; .gov for government entities; .net for networks; and .com for "commercial" which functions as the catchall domain for Internet users." *Panavision Int'l, L.P.* v. *Toeppen*, 141 F.3d

sells framed art, cycling gear, jerseys, telephone cards, t-shirts, stuffed animals, coolers, and even allows the payment for these retail sales via credit card. See generally United States Postal Serv., *at* http://www.usps.com. (last visited Sept. 14, 2003). It is thus understandable why one court explained that "a governmental agency engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'" *Global Mail,* 142 F.3d at 216.

In USPS's April 2002 *Transformation Plan*, its leaders expressed a desire to branch out into even more competitive markets such as retail sales, warehousing, and financial services. Such corporate ambitions, admirable from a free market standpoint, would be unquestionably disturbing if USPS were allowed to proceed with such expansion plans, basking in the light of its complete antitrust immunity.

B. Using Monopoly Powers to Expand a Monopoly.

The most serious assertion Petitioner makes is the one that it does not make explicitly: USPS should be allowed to engage in activities outside its monopoly that violate antitrust laws. If condoned by this Court, such a categorical privilege would hardly constitute the "essentially level ground" Congress envisioned in adopting the PRA. *Davric*, 238 F.3d at 61.

Owing to the sheer size and influence of USPS, it is not hard to conceive of the methods by which it could exploit this newly found right-to-monopolize, thus expanding its influence and revenues while engaging in behavior which

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1316, 1318 (9th Cir. 1998). "Commercial entities generally use the '.com' top-level domain, which also serves as a catchall top-level domain." *Interactive Prods. Corp.* v. *a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 691 (6th Cir. 2003). That USPS has abandoned its former ".gov" domain name in favor of using the ".com" version indicates that USPS perceives its activities to be commercial in nature. *See* 28 U.S.C. § 1603(d).

would bring swift legal action if carried out by any of its competitive rivals. For example, assuming USPS's argument is correct, it can begin to offer financial services, and do so knowing that it may participate in blatant anticompetitive behavior that stifles competition. It can engage in price fixing or market allocations, all without regulatory check from the Postal Rate Commission, and without judicial check under the antitrust laws.

Antitrust immunity would also allow USPS to create a strategic alliance with a competitor, as was recommended in the recently-released report from the President's Postal Commission. President's Comm. on the U.S. Postal Serv., *Embracing the Future: Making The Tough Choices To Preserve Universal Mail Service* (July 31, 2003) *available at* http://www.treas.gov/offices/domestic-finance/usps/pdf/report.pdf. By so doing, USPS, along with any strategic partner, could use their combined market power to create competitive damage to another competitor. By its own admission, USPS would not be subject to antitrust liability for any such behavior, while anomalously, its strategic partner would. Another anomaly would result from the fact that USPS—it is indeed operated under a boon of antitrust immunity—would be attempting to win contracts from private companies which do not enjoy such immunity.

Clearly, USPS embodies all of the features of a private corporate entity, particularly when engaging in commercial activities in its non-monopoly arena. It is thoroughly unsettling to think that a major commercial powerhouse with annual sales of approximately $70 billion, and which is ranked on the Global Fortune 100 list as the 24th largest company in the world, describing itself as "the hub of a $900 billion mailing industry," could simply take any anti-competitive action it deemed desirable. U. S. Postal Serv., *United States Postal Service Transformation Plan* i (Apr. 2002) *available at* http://www.usps.com/strategicdirection/transform.htm. It is beyond cavil that such actions are

precisely the sort of "unlawful combinations" that the Sherman Act was designed to prevent. 21 Cong. Rec. 2457 (1890) (Statement of Sen. Sherman).

Finally, with blanket immunity, USPS could take income from its statutory monopoly in order to operate at a loss in other markets, utilizing cross subsidies from its statutory monopoly to support the dumping of goods into these other markets. USPS also may be tempted to employ anticompetitive practices to extend its monopoly beyond those defined limits. With complete antitrust immunity, USPS would have a strong incentive to award contracts for performance *within* its statutory monopoly based on what those same customers bought or sold from USPS in areas *outside* of its limited monopoly. See generally IRET Congressional Advisory, Advisory No. 159, *Antitrust Law and the Postal Service* (Aug. 25, 2003). Such complete immunity would surely frustrate Congress's intent to allow private actions to function as a check on USPS's activities, preventing it from straying outside its carefully-prescribed parameters.

This Court has stated that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). As such, it is vital that the Act be applied as it was intended, to reach all entities—private or quasi-governmental—that have the capability of undermining the free market system.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should therefore be affirmed.

Respectfully submitted,

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