

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANATOL ZUKERMAN,
1 Shinglewood
Plymouth, MA 02360,

and

CHARLES KRAUSE REPORTING, LLC,
A D.C. Limited Liability Company,
1300 13th St. N.W.
Washington, D.C. 20005,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
475 L'Enfant Plaza S.W.
Washington, D.C. 20590,

Defendant.

Civil Action No. 15-2131

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Preliminary Statement

1. Plaintiffs Anatol Zukerman and Charles Krause Reporting, LLC (“Plaintiffs”), bring this civil action to vindicate their rights and the rights of all citizens under the Free Speech Clause of the First Amendment and the Equal Protection Clause incorporated into the Fifth Amendment. Defendant United States Postal Service (“USPS”) established a program pursuant to which Zazzle, Inc. (“Zazzle”), prints customer-designed U.S. postage stamps. USPS has permitted Zazzle to promote some causes and silence others without justification. It has, for instance, printed U.S. postage stamps that advocate the campaigns of Ted Cruz, Bernie Sanders, and Jeb Bush for President of the United States, as shown below:



Yet it rejected Plaintiff Anatol Zukerman's request for a stamp of his own design that was critical of the Supreme Court's *Citizens United* decision (558 U.S. 310 (2010)):



Zazzle stated that the proposed stamp was unacceptable because it was “partisan or political in nature.”

2. USPS has unlawfully permitted Zazzle to carry out these delegated governmental functions in a discriminatory manner. By permitting Zazzle to engage in both content and viewpoint discrimination, USPS has violated the Constitution and its own organic statute. Plaintiffs have been injured by these unconstitutional actions and therefore seek declaratory and injunctive relief.

Jurisdiction

3. This Court has jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1339 and 39 U.S.C. § 409, over this action, which seeks to redress deprivations by state actors of rights and

privileges secured by the First and Fifth Amendments to the U.S. Constitution. In addition, declaratory relief is appropriate pursuant to 28 U.S.C. § 2201.

4. Venue is proper in this district because Plaintiff Charles Krause Reporting, LLC, and Defendant USPS reside in the District of Columbia, and events that give rise to the claims in this action occurred, and are continuing to occur, in this district.

Parties

5. Plaintiff Anatol Zukerman, a 78-year-old artist who now resides in Plymouth, MA, was born in Kharkiv, Ukraine. He received professional training in Moscow as an architect. In 1972, he fled the Soviet Union and eventually reached the United States, where he enrolled at the Harvard School of Design in Cambridge, Massachusetts. His paintings and drawings “aim at correcting the wrongs of our world, not at camouflaging them,” Exs. A & B, and they “reflect the politics of a man who has seen the extremes, lived on both sides of the divide during the Cold War and concluded that there must be a better, more humane way for societies to function.” Ex. C. Mr. Zukerman’s work has been shown at galleries throughout the United States. Ex. D.

6. Plaintiff Charles Krause Reporting, LLC, is a D.C. limited-liability company engaged in the operation of an art gallery located at 1300 13th Street N.W., Washington, D.C. 20005 (the “Gallery”). The Gallery specializes in “the work of artists who have sought to influence, or who have been influenced by, the great social and political upheavals of the late 20th and early 21st centuries.” Ex. E. Since 2013, the Gallery has been the sole agent and marketing representative of Mr. Zukerman with respect to his art work.

7. Defendant USPS is a corporation owned by the federal government. USPS is responsible for, among other things, delivering the U.S. mail, printing and selling U.S. postage stamps, and promulgating and enforcing rules relating to the provision of postal services. USPS

has established a program pursuant to which Zazzle prints and sells customized U.S. postage stamps designed by the public.

Background

The United States Postal Service

8. Defendant USPS is the successor to the Post Office Department of the United States. That Department was originally established in 1790, pursuant to Article I, Section 8, Clause 7 of the U.S. Constitution, which provides that “Congress shall have Power . . . To establish Post Offices and post Roads.” Congress delegated the powers and duties of the Post Office Department to USPS in the 1970 Postal Reorganization Act, 39 U.S.C. § 101.

9. Congress directed USPS “to provide and sell postage stamps and other stamped paper, cards, and envelopes and to provide such other evidences of payment of postage and fees as may be necessary or desirable.” 39 U.S.C. § 404(a)(4),

10. “In providing those services,” Congress commanded, “the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.” 39 U.S.C. § 403(c). Title 39 has not “specifically authorized” USPS to make any undue or unreasonable discrimination among users of the mails with respect to customized U.S. postage stamps.

USPS’s Custom-Postage Program

11. From 1790 to approximately 2004, the Post Office Department and then USPS exclusively carried out the statutory function of issuing and selling U.S. postage stamps, including controlling the selection of images and other content that appeared on the stamps.

12. In 2004, USPS established a trial custom-postage program that “allows a customer to personalize postage with pictures or images,” and thus to “make mail more valuable and more meaningful to people.” Ex. F. The trial was converted into a “continuing” program in 2005 and has been in operation since that time.

13. USPS designated Zazzle as a qualified third-party vendor of customized U.S. postage stamps and as a “partner” in the custom-postage program. As a so-called “partner,” Zazzle approves the imagery for, markets, and fulfills orders from the public for customized stamps. Ex. G. On its website titled “Create Mail & Stamps,” USPS invites the public to “[c]apture life’s special moments by turning your pictures into postage. Use our third-party vendors to create unique stamps for any occasion, such as weddings, holidays, or birth announcements.” Ex. H. The same USPS website identifies Zazzle as one of its third-party vendors and offers viewers the following invitation: “Upload your own images to create unique postage in a variety of sizes and denominations.” *Id.* In addition, USPS invites businesses to use the custom-postage program: “Advertising By Mail? The right mailpiece is the secret to gaining business. Our third-party vendors can help you format, design, print, and send the perfect mailing to reach new customers.” *Id.*

Zazzle’s custom-stamp operation

14. Zazzle maintains a website providing information about its service to print and sell custom-made U.S. postage stamps to the public. That website contains Zazzle’s “Acceptable Content Guidelines,” which include language describing what Zazzle will and will not print on custom postage. First, Zazzle says, “[w]e fully respect the rights to free expression, and are thrilled that Zazzle products enable people to express themselves fully in the real world.” Zazzle also states: “Any products that are deemed unacceptable by the rules above, or deemed offensive

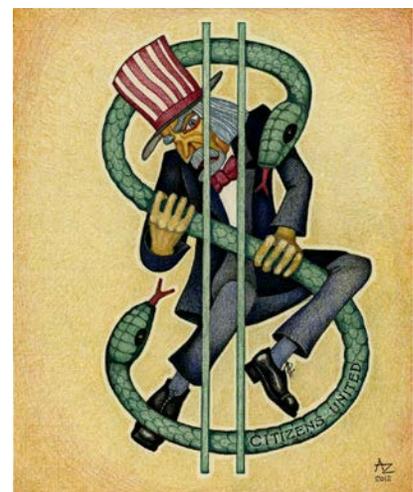
or in bad taste at the sole judgment of Zazzle will have the products cancelled and removed from the Marketplace with or without notice.” Ex. I.

15. Zazzle’s website also points the reader to its “Appropriate Use Guidelines for Zazzle Custom Stamps.” Those Guidelines prohibit users from “designing or creating any Zazzle Custom Stamps customized postage” that includes “any content or design element that in our sole judgment and discretion we believe would be controversial or offensive.” The same site provides “[e]xamples of what is prohibited.” Those examples include images and other content that “[a]dvocate or protest any social, political, legal, moral or religious agenda in a way that may appear controversial to others.” Ex. J.

16. The webpage containing Zazzle’s Appropriate Use Guidelines for Custom Stamps also references Zazzle’s standard User Agreement. Among other things, this contract provides that “[i]n using this Site, you agree to not: upload, download, post, email or otherwise transmit any Content that is . . . socially, politically, legally, morally, religiously objectionable or otherwise objectionable.” Ex. K.

Mr. Zukerman, the Gallery, and Citizens United

17. In July 2013, the Gallery exhibited a group of Mr. Zukerman’s paintings and drawings. The Gallery’s exhibition of Mr. Zukerman’s work, which was called “Truth to Power: Anatol Zukerman’s ‘Responsible’ Art,” included the drawing shown at right (“the Work”). Ex. A. That drawing depicts Uncle Sam being strangled by a snake labeled *Citizens United* and configured as a dollar sign. The show was widely acclaimed; a Washington Post critic described Mr. Zukerman’s art as “notable not only for [its]



vehemence but also for [its] dexterity.” Ex. L.

18. Shortly after the exhibition was over, Charles Krause, the Managing Director of Plaintiff Charles Krause Reporting, LLC, spoke to Mr. Zukerman about ways of further promoting Mr. Zukerman’s art work. Mr. Krause suggested to Mr. Zukerman that, in order both to encourage the sale of the art and to raise awareness about what they perceived as the harm caused by the *Citizens United* decision, Mr. Zukerman should create a custom U.S. postage stamp depicting the Work.

19. Mr. Krause planned to use the custom stamp on Gallery mailings to promote the sale of Mr. Zukerman’s artwork and to advertise the Gallery’s forthcoming exhibition (called “The 1% Exhibit: Visualizing Income Inequality in America”). The Gallery has made preparations for this exhibition to begin in February 2016, and it will include Mr. Zukerman’s art, including the Work, as well as the work of other artists protesting income inequality.

The Discriminatory Conduct Giving Rise to This Action

Mr. Zukerman’s request and Zazzle’s rejection

20. On or about April 27, 2015, Mr. Zukerman submitted a request to Zazzle to print 40 copies of a customized U.S. postage stamp, using the forms Zazzle provided on its website. Mr. Zukerman submitted his proposed stamp design and the required payment of \$49.41 specified on the website. Mr. Zukerman’s design (the “*Citizens United* Stamp”), depicted at right, comprises the Work and the caption “Democracy Is Not for Sale” printed vertically along the left edge. Ex. M.



21. Zazzle replied on the same day with a message that said “Thanks For Your Order!” and “This email confirms we received your order on 4/27/2015.” Zazzle also acknowledged Mr. Zukerman’s payment. *Id.*

22. Later the same day, however, Zazzle emailed Mr. Zukerman an Order Cancellation Notice. *Id.* It stated: “Unfortunately, we are unable to process your order. The designs are in conflict with our content guidelines.” The message then offered “more information about content guidelines for Zazzle Custom Stamps” at a linked webpage, and it stated that Zazzle “had no choice but to cancel the entire order.” *Id.*

23. Mr. Zukerman contacted Zazzle’s Content Management Team to get more information about why his proposed design was in conflict with Zazzle’s content guidelines. Later that same day, Zazzle sent him the following response by email:

Thank you for contacting our Content Management Team regarding your cancelled order. We would love to print everything that our customers submit, however we must abide by all applicable laws and standards as well as our own content guidelines and copyright policies.

Because Zazzle Custom Stamps are real postage, they are subject to special Appropriate Use Guidelines. One of these restrictions prohibits the printing of any postage with content that is primarily partisan or political in nature.

In this instance, your custom stamp design(s) contained an image and text that is politically oriented, so we were unable to fulfill your order.

Ex. M.

Zazzle’s discriminatory conduct favoring some political viewpoints

24. Notwithstanding Zazzle’s stated policy “prohibit[ing] the printing of any postage with content that is primarily partisan or political in nature,” Zazzle has printed custom U.S. postage stamps with images that are “partisan or political in nature.” For example, it has printed

and offered for sale to the public the stamps depicted below, which include images advocating particular political campaigns: the 2016 presidential campaigns of Ted Cruz, Bernie Sanders, and Jeb Bush.



Zazzle's discriminatory conduct is inconsistent with its stated policies

25. USPS has permitted Zazzle to apply its Acceptable Content Guidelines, its Appropriate Use Guidelines for Zazzle Custom Stamps, and its standard User Agreement in a manner that discriminates among viewpoints. USPS has also permitted Zazzle to act in an arbitrary, capricious, and unreasonable manner.

26. Zazzle has stated that it will refuse to print and sell stamps that contain controversial or religious content, or that are menacing or that may be objectionable or offensive to some people. Yet Zazzle has often ignored those guidelines — both before Zazzle rejected Mr. Zukerman's proposed stamp and since — by accepting and printing other designs that violate Zazzle's stated content rules. In fact, by offering certain custom-made stamps on its website, Zazzle has promoted and marketed for sale to the public U.S. postage stamps that "[a]dvocate or protest" a "social, political, legal, moral or religious agenda" that others may consider controversial. Ex. J.

27. For example, Zazzle has accepted, printed, promoted, and marketed stamps advocating or supporting both the Christian religion and atheism, some of which are reproduced below.



Conduct and Inaction of USPS

28. USPS has delegated to Zazzle the performance of the traditional governmental function of printing and selling U.S. postage stamps for use in the U.S. mails. USPS has made Zazzle a state actor in this regard.

29. As a state actor to which USPS has delegated certain governmental functions, Zazzle’s conduct must comply with the Constitution and USPS’s statute. USPS is responsible for ensuring that Zazzle’s conduct is lawful.

30. USPS has failed in its duty to ensure that Zazzle operates in a lawful manner, and Plaintiffs have been injured by USPS’s inaction. Specifically, USPS has failed to protect

Plaintiffs against Zazzle's content and viewpoint discrimination in violation of the Plaintiffs' rights under the First and Fifth Amendments.

31. Rather than issuing regulations or otherwise requiring Zazzle to carry out its custom-stamp program in a manner consistent with the First and Fifth Amendments, USPS chose to promulgate a regulation allowing its third-party vendors, such as Zazzle, to discriminate against speech. That regulation, 39 C.F.R. § 501.7(c)(1), requires the provider — here, Zazzle — to ensure that what it prints is “[c]onsistent with the Postal Service’s intent to maintain neutrality on religious, social, political, legal, moral, or other public issues” In exercising its delegated authority to print customized U.S. postage in a manner consistent with this regulation, Zazzle could and did discriminate against Plaintiffs by refusing to print Mr. Zukerman’s *Citizens United* Stamp because of the content of its message.

What Zazzle prints is not Government speech

32. USPS has delegated to Zazzle the authority to print custom postage stamps designed and submitted by private citizens. The content of such custom postage stamps is private speech, not government speech.

33. USPS does not act as if it considers the content of those stamps to be the speech of USPS or the federal government. Nor does USPS’s agent Zazzle do so. In a portion of Zazzle’s website titled “Appropriate Use Guidelines: The Fine Print,” Zazzle requires its customers to “acknowledge, agree, and warrant you understand that the content and design elements of your Zazzle Custom Stamps are not approved or endorsed in any way by the United States Postal Service.” Ex. J. In addition, those Guidelines state further that “Zazzle Custom Stamps are valid postage for mailing, but the images are not reviewed or approved by the Postal Service.” *Id.*

34. Further, Zazzle requires its customers to “agree to not make any representations which could cause a reasonable person to believe that the content and design elements included in your Zazzle Custom Stamps are provided, approved, or endorsed by the Postal Service.” *Id.*

35. Zazzle makes clear in its advertising to the public that the speech on Zazzle’s custom postage stamps is the private speech and expression of the customers who design those stamps. Indeed, Zazzle states in its Appropriate Content Guidelines on its webpage, “We fully respect the rights to free expression, and are thrilled that Zazzle products enable people to express themselves fully in the real world.” Ex. I.

36. On its website, USPS invites members of the public to “[c]apture life’s special moments by turning [their] pictures into postage,” to “create unique stamps for any occasion, such as weddings, holidays, or birth announcements,” and thus to “make mail more valuable and more meaningful to people.” Ex. H.

37. Zazzle’s and USPS’s own publications and advertising show that USPS does not intend for Zazzle’s custom stamps to be construed as USPS’s own speech. For the same reasons, Plaintiffs allege, on information and belief, that no reasonable person would believe that the content and design elements included in Zazzle custom stamps are provided, approved, or endorsed by USPS, or that they constitute USPS or other government speech.

38. Zazzle markets and promotes on its website stamps containing speech that no reasonable person would believe qualifies as speech of the U.S. Government. For example, it would raise serious constitutional issues under the Establishment Clause were USPS to print, as its own speech, the Christian-message stamps depicted in paragraph 27 above.

39. Moreover, Zazzle has printed each of the stamps depicted below (and promoted each of them on its website), and no reasonable person would presume that any of these constitute government speech:



40. On information and belief, the custom stamps Zazzle prints and sells are not approved, endorsed, or reviewed by USPS. They do not, therefore, constitute government speech. Instead, by authorizing Zazzle to print customers' custom postage stamps, and by inviting and allowing members of the public to express themselves on stamps as long as they are willing to pay a fee, USPS has intentionally made that space generally available for public discourse and has thus created and designated a public customized-U.S.-postage-stamp forum. Once USPS opened the realm of U.S. postage stamps to customized stamps designed by the public, it was obligated to ensure that Zazzle operated the public forum in a constitutional manner by setting rules that are reasonable and both content and viewpoint neutral.

Plaintiffs' Injuries

41. USPS's actions have permitted Zazzle to refuse to print Mr. Zukerman's *Citizen United* Stamp on the grounds that it is "primarily partisan or political in nature" and that it "contained an image and text that is politically oriented." Ex. M. That is unlawful *content* discrimination. In light of the decisions Zazzle made to print and promote partisan and political stamps of others, USPS's actions have also permitted Zazzle to engage in unlawful *viewpoint* discrimination. By depriving Plaintiffs of the *Citizen United* Stamp for these unlawful reasons, USPS has injured and damaged Plaintiffs and continues to injure and damage them, in at least the following ways:

- a. USPS's actions have allowed Zazzle to deprive Mr. Zukerman of the opportunity to use his *Citizens United* Stamp to publicize and promote the sale of his art work, from which he would profit.
- b. USPS's actions have allowed Zazzle to deprive Charles Krause Reporting, LLC, of the opportunity to use Mr. Zukerman's *Citizen United* Stamp to promote its shows and the sale of art from the Gallery and future exhibits, including "The 1% Exhibit: Visualizing Income Inequality in America" scheduled for February 2016, from which it would profit.
- c. USPS's actions have allowed Zazzle to deprive both Plaintiffs of their constitutional rights to free speech and freedom from discrimination under the First and Fifth Amendments, respectively, and of the benefits Congress intended that they should enjoy when it enacted the prohibition against unreasonable discrimination in 39 U.S.C. § 403(c).

These injuries and violations will continue indefinitely unless this Court orders USPS to obey the Constitution and laws of the United States.

42. By engaging in the aforesaid actions and inaction, Defendant USPS has violated its duties to obey the Constitution and the laws of the United States and has violated the rights of Plaintiffs under the Constitution and laws of the United States.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter an order:

- a. Declaring that Defendant USPS has, both directly and through its agent Zazzle, unlawfully engaged in both content and viewpoint discrimination in violation of the First and Fifth Amendments to the U.S. Constitution, and in violation of 39 U.S.C. § 403(c);
- b. Permanently enjoining USPS from continuing to engage in the aforesaid unlawful conduct;
- c. Permanently enjoining USPS from delegating the governmental function of making and selling U.S. postage stamps to any person that engages in content or viewpoint discrimination in performing that function;
- d. Ordering USPS not to permit Zazzle to make and sell U.S. custom postage stamps unless and until it agrees to print, pursuant to its ordinary and usual terms of service, the *Citizens United* Stamp; and
- e. Granting the Plaintiffs all such other relief as the Court deems just and proper.

December 9, 2015

Respectfully submitted,

Plaintiffs Anatol Zukerman and
Charles Krause Reporting, LLC

By: /s/ K. Chris Todd

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