

**UNITED STATES COURT OF APPEALS**  
**FOR THE SECOND CIRCUIT**

August Term, 2008

(Argued: March 20, 2009                      Decided: August 20, 2009)

Docket No. 07-4825-cv (L); 07-4826-cv (Con)

-----X

BERTRAM COOPER,  
Plaintiff-Appellee,

-v.-

07-4825-cv  
07-4826-cv

U.S. POSTAL SERVICE, JOHN E. POTTER,  
as Postmaster General, RONALD G.  
BOYNE, as Postmaster, Manchester,  
Connecticut Post Office,  
Defendants-Appellants,

FULL GOSPEL INTERDENOMINATIONAL  
CHURCH INC., DR. PHILIP SAUNDERS  
HERITAGE ASSOCIATION, INC., SINCERELY  
YOURS INC.,  
Intervenors-Defendants-  
Appellants,

GARY CHIPMAN, KIMON KARATH, LESLIE  
STRONG,  
Intervenors.

-----X

Before:                      JACOBS, Chief Judge, WESLEY, Circuit Judge,

1                   and CROTTY, District Judge.\*

2  
3  
4           This case raises an Establishment Clause challenge to  
5 religious displays in a contract postal unit operated by a  
6 church in Manchester, Connecticut. Contract postal units,  
7 or "CPUs," are postal facilities operated by private  
8 entities on private property (such as general stores or  
9 private homes) pursuant to contracts with the United States  
10 Postal Service. Plaintiff Bertram Cooper, a Manchester  
11 resident, sued the United States Postal Service, the  
12 Postmaster General, and the Postmaster of Manchester, for  
13 declaratory and injunctive relief alleging discomfort with  
14 encountering religious materials displayed at the Manchester  
15 CPU. The Full Gospel Interdenominational Church, which  
16 operates the CPU pursuant to a revenue-sharing contract with  
17 the government, intervened as a Defendant. On cross-motions  
18 for summary judgment, the district judge concluded that (i)  
19 the CPU is a state actor, (ii) the contractual relationship  
20 between the government and the Church is permissible under  
21 the Establishment Clause, and (iii) the religious displays  
22 at the CPU violated the Establishment Clause. Accordingly,

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\* The Honorable Paul A. Crotty of the United States District Court for the Southern District of New York, sitting by designation.

1 the district court ordered removal of the religious  
2 displays. Relief was stayed pending this appeal.

3 We conclude that Cooper had standing to raise the  
4 Establishment Clause challenge and that an Establishment  
5 Clause violation occurred, but as to relief, we require no  
6 more than that the postal counter be free of religious  
7 material, and that visual cues distinguish the space  
8 operating as a postal facility from the space functioning as  
9 purely private property. We vacate the judgment of the  
10 district court and remand for further proceedings consistent  
11 with this opinion.

12 JEFFREY A. SHAFER, Benjamin W.  
13 Bull, Jordan W. Lorence, Matthew  
14 S. Bowman, Alliance Defense  
15 Fund, Washington, D.C., Joseph  
16 P. Secola, Secola Law Offices,  
17 Brookfield, Connecticut, for  
18 Appellant.  
19  
20

21 AARON S. BAYER, Kevin M. Smith,  
22 Alex J. Glage, Wiggin and Dana  
23 LLP, New Haven, Connecticut,  
24 Daniel Mach, American Civil  
25 Liberties Union Foundation,  
26 Washington, D.C., David McGuire,  
27 Connecticut Civil Liberties  
28 Union Foundation, Hartford,  
29 Connecticut, for Appellees.  
30

31 Murad Hussain, Ronald L.  
32 Johnston, Arnold & Porter LLP,  
33 Los Angeles, California, Ayesha  
34 N. Khan, Alex J. Luchenitser,

1 Americans United for Separation of Church and State, for Amicus  
2 Curiae Americans United for  
3 Separation of Church and State.  
4

5  
6 Jeffrey I. Pasek, Cozen  
7 O'Connor, New York, New York,  
8 Theodore R. Mann, Jewish Social  
9 Policy Action Network,  
10 Philadelphia, Pennsylvania, for  
11 Amicus Curiae Jewish Social  
12 Policy Action Network.  
13

14 Steven M. Freeman, Steven C.  
15 Sheinberg, Anti-Defamation  
16 League, New York, New York, for  
17 Amicus Curiae Anti-Defamation  
18 League.  
19

20 DENNIS JACOBS, Chief Judge:

21 This case raises an Establishment Clause challenge to  
22 religious displays at a contract postal unit operated by a  
23 church in Manchester, Connecticut. Contract postal units,  
24 or "CPUs," are postal facilities operated by private  
25 entities on private property (such as general stores or  
26 private homes) pursuant to contracts with the United States  
27 Postal Service. Plaintiff Bertram Cooper ("Cooper"), a  
28 Manchester resident, alleged discomfort with encountering  
29 religious materials displayed at the Manchester CPU and sued  
30 the United States Postal Service ("USPS"), the Postmaster  
31 General of the United States (John E. Potter ("Potter")),

1 and the Postmaster of Manchester, Connecticut (Ronald G.  
2 Boyne ("Boyne")) for declaratory and injunctive relief. The  
3 Full Gospel Interdenominational Church (the "Church"), which  
4 operates the CPU pursuant to a revenue-sharing contract with  
5 the United States government, intervened as a Defendant.<sup>1</sup>  
6 The Manchester CPU is a purpose-built storefront with postal  
7 facilities on one side and the Church's outreach and  
8 ministry efforts on the other, with some spillover.

9 On cross-motions for summary judgment, the district  
10 judge initially decided that the religious displays at the  
11 CPU violated the Establishment Clause, ordered removal of  
12 the religious displays from the premises, and issued a  
13 permanent injunction preventing the Church--and proprietors  
14 of other CPUs--from displaying religious materials in  
15 contract postal units. On a motion to amend the judgment,  
16 the district court concluded that Cooper lacked standing to  
17 challenge Postal Service policies as to other CPUs and the  
18 decision was amended to apply only to the Manchester CPU.

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<sup>1</sup> The term "Church" refers collectively to the intervenor-defendants who consist of: (1) the Full Gospel Interdenominational Church; (2) the "Dr. Phillip Saunders Heritage Association" (a Connecticut not-for-profit created by the Church to hold and manage its real estate); and (3) Sincerely Yours, Inc. (the not-for-profit entity incorporated to operate the CPU).

1 The injunction is stayed pending this appeal.

2 On appeal, the Church argues that the grant of partial  
3 summary judgment to Cooper was error because the displays:  
4 (i) were erected without involvement or encouragement by the  
5 USPS, (ii) do not violate regulations governing the  
6 appearance of CPUs, and (iii) constitute private speech.

7 Cooper, in turn, contends that the CPU is a state actor  
8 because (i) the USPS delegated to it an exclusively public  
9 function and (ii) the extensive and detailed contracts which  
10 accompany participation in the CPU program sufficiently  
11 involve the state in the CPU's activities. Cooper argues  
12 that as state action, the religious displays violate the  
13 Establishment Clause. Cooper stopped using the CPU when he  
14 entered a nursing home, but the suit has continued on behalf  
15 of three intervenors who are similarly aggrieved.

16 We now affirm in part and reverse in part. We conclude  
17 that Cooper had standing to raise an Establishment Clause  
18 challenge and that an Establishment Clause violation  
19 occurred at the Manchester CPU, but that any such violation  
20 is limited to the area of the CPU performing the public  
21 function; all other areas of the CPU remain the province of  
22 the private entity. Accordingly, by way of remedy, we

1 require that the postal counter be free of religious  
2 material, and that visual cues distinguish the space  
3 operating as a postal facility from the space functioning as  
4 the private property of the Church.

5

6 **I**

7 **(A) The Post Office**

8 Article I, Section 8 of the Constitution provides that  
9 "Congress shall have power . . . [t]o establish Post Offices  
10 and post Roads." Congress has delegated the power to create  
11 Post Offices to the USPS, 39 U.S.C. § 404(a)(3), awarded the  
12 USPS a monopoly over the carriage of letter mail, see  
13 Private Express Statutes, 18 U.S.C. §§ 1693-1699; Air  
14 Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO,  
15 498 U.S. 517, 519 (1991), and forbidden the establishment of  
16 post offices without authority from the Postal Service, 18  
17 U.S.C. § 1729.<sup>2</sup> Congress has also directed the Postal  
18 Service to "serve as nearly as practicable the entire  
19 population of the United States." 39 U.S.C. § 403(a). That

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<sup>2</sup> Services like UPS and Federal Express operate pursuant to an exception to the monopoly which allows private carriers to provide services for "extremely urgent letters." See 39 C.F.R. § 320.6.

1 directive includes "establish[ing] and maintain[ing] postal  
2 facilities of such character and in such locations, that  
3 postal patrons throughout the Nation will, consistent with  
4 reasonable economies of postal operations, have ready access  
5 to essential postal services." 39 U.S.C. § 403(b)(3). This  
6 entails "a maximum degree of effective and regular postal  
7 services to rural areas, communities, and small towns [even]  
8 where post offices are not self-sustaining." 39 U.S.C.  
9 § 101(b).

10

11 **(B) CPUs**

12 In order to comply with the Congressional mandate, the  
13 USPS uses both traditional post offices (or "classified"  
14 post offices) as well as CPUs, postal facilities operated by  
15 private parties on private property pursuant to revenue-  
16 sharing contracts with the government. The CPUs furnish  
17 postal services to places where it is not otherwise  
18 geographically or economically feasible to build and operate  
19 official "classified" post offices. Originally called  
20 "contract stations," CPUs have been used by the Postal



1 Service since the 1880s.<sup>3</sup>

2 The "Glossary of Postal Terms" defines a CPU as:

3 A postal unit that is a subordinate unit  
4 within the service area of a main post  
5 office. It is usually located in a store  
6 or place of business and is operated by a  
7 contractor who accepts mail from the  
8 public, sells postage and supplies, and  
9 provides selected special services (for  
10 example, postal money order or registered  
11 mail). . . .

12  
13 United States Postal Service Glossary of Postal Terms,  
14 Publication 32, May 1997 (Updated With Revisions Through  
15 July 5, 2007) at 27.<sup>4</sup> Five thousand CPUs across the country  
16 are in locations as diverse as private homes, gas stations,  
17 seminaries, groceries, gift shops, and hardware stores. See  
18 Defendants' Statement Pursuant to Local Rule 56 of the  
19 Southern District of New York ("Local Rule 56(a)1  
20 Statement"), ¶ 6, December 27, 2004; Postal Accountability  
21 and Enhancement Act § 302 Network Plan, June 2008, at 42-  
22 43.<sup>5</sup> Several are operated by faith-based entities. See

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<sup>3</sup> See USPS Postal History, Post Offices and Facilities, Stations and Branches, available at:  
[http://www.usps.com/postalhistory/\\_rtf/StationsBranches.rtf](http://www.usps.com/postalhistory/_rtf/StationsBranches.rtf).

<sup>4</sup> The Glossary is available at:  
<http://www.usps.com/cpim/ftp/pubs/pub32.pdf>

<sup>5</sup> The Network Plan is available at:  
[http://www.usps.com/postallaw/\\_pdf/PostalServiceNetworkPlan.pdf#search='post offices cpu'](http://www.usps.com/postallaw/_pdf/PostalServiceNetworkPlan.pdf#search='post offices cpu').

1 Defendants' Local Rule 56(a)1 Statement, ¶ 16.

2

3 **(C) Postal Regulations**

4 According to postal regulations, a CPU "must not be  
5 located in, or directly connected to, a room where  
6 intoxicating beverages are sold for consumption on the  
7 premises." Standard Operating Procedures for Contract  
8 Postal Units. Beyond that, instruction is provided by the  
9 Contract Postal Unit Operations Guide, a training and  
10 operations manual for proprietors of CPUs:

11 The appearance of your [CPU] reflects not  
12 only on you as a businessperson, but also  
13 on the Postal Service. Your unit should  
14 be organized and clean, conveying a  
15 professional image to your customers. It  
16 is very important to the success of your  
17 unit that our customers can recognize you  
18 as an official United States Post Office  
19 contract unit. The Postal Service has  
20 dedicated exterior and interior signage  
21 that will help you establish this  
22 identity.  
23

24 CPUs are regulated by these few guidelines, which are  
25 mainly words of encouragement. Classified post offices, on  
26 the other hand, are governed by exacting regulations. Among  
27 them are limitations on the presence of religious displays,  
28 messages and symbols. For example, the Postal Operations

1 Manual ("POM") provides that "[e]xcept for official postal  
2 and other governmental notices and announcements, no  
3 handbills, flyers, pamphlets, signs, posters, placards, or  
4 other literature may be deposited on the grounds, walks,  
5 driveways, parking and maneuvering areas; exteriors of  
6 buildings and other structures; or on the floors, walks,  
7 stairs, racks, counters, desks, writing tables, window  
8 ledges, or furnishings in interior public areas on postal  
9 premises [of classified post offices]." POM § 124.55.<sup>6</sup>  
10 "Bulletin boards and other posting space in Post Office  
11 lobbies and other public access areas may not be used for  
12 posting or display of . . . [r]eligious symbols . . . ."  
13 Id. Seasonal holiday displays are tightly regulated (as set  
14 out in the margin<sup>7</sup>). No such regulations govern CPUs.

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<sup>6</sup> This section of the POM is available at:  
<http://www.nalc.org/depart/cau/pdf/manuals/POM/pomcl.pdf>.

<sup>7</sup>

- a. [Seasonal] Displays should relate to the business of the Postal Service, such as promoting the use of postal products and services and encouraging customers to send greetings and gifts.
- b. The Postal Service must avoid the appearance of favoring any particular religion or religion itself.
- c. Symbols identified with a particular religion, including but not limited to nativity scenes, crosses, or the Star of

1           **(D) The Manchester CPU**

2           For more than 15 years, the Postal Service has relied  
3           on CPUs to supplement postal service in Manchester,  
4           Connecticut. Prior to 2001, the CPU was located in the  
5           "Community Place," an outreach organization. When Community  
6           Place suspended operation in 2001, the USPS solicited bids.  
7           There were two bidders: Manchester Hardware, Inc., and the  
8           Full Gospel Interdenominational Church. The Postal Service  
9           assigned scores to each based on location, premises, and  
10          ability to provide services. The Church earned a  
11          suitability score of "97" to Manchester Hardware's "91," and  
12          the CPU contract was awarded to the Church on November 21,  
13          2001. The Church then incorporated a not-for-profit  
14          business, Sincerely Yours, Inc. ("SYI"), for the purpose of  
15          operating the CPU. The sole business of SYI is the  
16          operation of the CPU; other than offering USPS products and  
17          services, it serves no commercial function.

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David, shall not be displayed on postal property. . . .

d. Printed expressions "Season's Greetings" and "Happy Holidays" should be used in lieu of "Merry Christmas" or "Happy Hannukkah."

POM § 124.57 (emphasis added); see also POM § 124.56.

1           The standard CPU contract requires that "all Contract  
2 Postal Units . . . reflect a uniform image." For example,  
3 the contract specifies that "[a]mbient lighting shall be at  
4 least 80 footcandles anywhere at the service and/or work  
5 counter areas," and individual CPU owners/entities must  
6 "[c]learly indicate any [and] all deviations from [the]  
7 noted . . . requirements on submitted drawings/documents so  
8 they may be evaluated along with the balance of the  
9 proposal." In order to achieve the desired "uniform image,"  
10 the USPS--per the CPU contract--agrees to pay for (among  
11 other things) the construction of postal service counters  
12 and other build-out requirements, all according to detailed  
13 specifications. The USPS paid for the construction of such  
14 items at SYI.

15           All money collected at the CPU is the property of the  
16 Postal Service, and SYI is paid for its share of contractual  
17 earnings at the end of the relevant accounting period: 18%  
18 of sales of USPS products and services, and 33% of post  
19 office box rental fees. Employees of SYI are trained by the  
20 USPS, and "must be professionally attired, wear name tags,  
21 and project a favorable image of the supplier as the  
22 operator of the Contract Postal Unit," but SYI retains the

1 authority to hire and fire all SYI employees.

2 The USPS "reserves the right, without prior notice, to  
3 conduct audits and customer surveys and to review and  
4 inspect the supplier's performance and the quality of  
5 service at any time during the operating hours of the  
6 [CPU]." The USPS also appoints a "Contracting Officer's  
7 Representative" (or "COR") as a liaison between the USPS and  
8 the CPU, to ensure compliance with the CPU contract and  
9 governing regulations, and to provide general oversight.  
10 Defendant Ronald Boyne--the Manchester Postmaster (and a  
11 Church member)--was appointed to this position at SYI. At  
12 his deposition, he testified that one of his  
13 responsibilities was to ensure that SYI projected a  
14 "positive image" of the USPS and complied with all postal  
15 regulations. When asked to name items which would not  
16 present a "positive image" or were not permitted to be  
17 displayed or sold in a CPU, Boyne replied that through his  
18 COR training he learned that only two items were prohibited  
19 by regulation: alcohol and pornography.

20 As for the displays at the CPU, the contract states  
21 that SYI "will be posting advertisements for local non-  
22 profit community outreach agencies such as MARC, Inc., Heart

1 Association, Flu Clinics, Cancer Agencies, etc.” Religious  
2 displays are not mentioned.

3 SYI opened in June 2002. It is located on Main Street  
4 in Manchester and is marked with various signs identifying  
5 it as the “Sincerely Yours, Inc. Contract Postal Unit.” The  
6 exterior of the building (which faces the street) has one  
7 such sign along with the familiar eagle logo of the Postal  
8 Service.

9 The interior of the CPU contains (among other things) a  
10 postal counter manned by SYI employees, a waiting area for  
11 customers, post office boxes, and a shelving unit containing  
12 official USPS postal supplies, paperwork, and mailing boxes.  
13 SYI offers a variety of postal services including Express,  
14 Priority, and First Class domestic mail; international mail;  
15 insurance, certification, and delivery confirmation  
16 services; Post Office Box rentals; and sales of stamps,  
17 stationery, and other packaging products. The prices for  
18 these products and services are set by the USPS.

19

20 **(E) The Religious Displays**

21 Also located in the CPU are religious materials:  
22 displays informing customers about prayer requests; prayer

1 cards; a box--located on the postal counter--into which  
2 postal service customers can deposit prayer requests; a  
3 framed advertisement for "World-Wide Lighthouse Missions"  
4 (the missionary organization to which the SYI CPU's profits  
5 are donated); a donation box for the World-Wide  
6 organization; pamphlets and flyers advertising the mission,  
7 which include biblical passages and religious messages; a  
8 World-Wide Lighthouse Missions donation jar on the postal  
9 counter; a television monitor displaying Church-related  
10 videos on one side of the postal counter; various 8 1/2" x  
11 14" photographs of Church events; and pictures of "Wally"--a  
12 cartoon character who conveys religious messages.

13 A sign in the middle of the postal counter bears the  
14 official USPS logo and a disclaimer:

15 The United States Postal Service does not  
16 endorse the religious viewpoint expressed  
17 in the materials posted at this Contract  
18 Postal Unit.  
19

20 **(F) Cooper's Objections to the CPU**

21 Plaintiff Bertram Cooper is a 77-year-old (former)  
22 resident of Manchester, Connecticut.<sup>8</sup> Cooper used the SYI

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<sup>8</sup> While this appeal was pending, Mr. Cooper moved out of Manchester and into a nursing home in West Hartford, Connecticut. Because the move created potential



1 CPU because it was closer to his home than the next  
2 available post office. As Cooper's affidavit recounts, the  
3 religious displays at SYI made him "very uncomfortable," and  
4 when he registered a complaint, he "was told that [he] could  
5 go somewhere else if [he didn't] like it." The complaint  
6 alleges that he "reasonably perceive[d] SYI's religious  
7 expression to be governmentally-sponsored and supported  
8 religious activity."

9  
10 **(G) The Lawsuit**

11 Cooper filed his complaint on October 3, 2003, seeking  
12 declaratory and injunctive relief against the USPS, the  
13 Postmaster General, and the Postmaster of Manchester,  
14 Connecticut. The Church intervened as a defendant. The  
15 district court's Memorandum and Order deciding the parties'  
16 cross-motions for summary judgment (issued April 18, 2007),  
17 concluded that:

18 (1) for the purposes of First Amendment and  
19 Establishment Clause jurisprudence, the SYI CPU is  
20 a state actor;  
21

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jurisdictional problems, this Court's June 18, 2008 order  
allowed other Manchester residents to intervene as  
appellees. They are Gary Chipman, Kimon Karath, and Leslie  
Strong.

1 (2) the contractual relationship between the USPS  
2 and the Church does not violate the Establishment  
3 Clause; and

4  
5 (3) the religious displays at the SYI CPU violate  
6 the Establishment Clause.  
7

8 Initially, the District Court granted Cooper's request for a  
9 declaratory judgment covering all CPUs nationwide:

10 To the extent that [SYI], and all other  
11 individuals or entities, in the course of  
12 operating [CPUs] . . . act in a manner  
13 that proselytizes or advances religion,  
14 including, but not limited to, the  
15 posting of religious displays that  
16 proselytize or advance religion, such  
17 conduct violates the First Amendment to  
18 the United States Constitution.  
19

20 On Cooper's request for an injunction, the district court  
21 directed that: (i) SYI remove all religious displays and  
22 "cease from acting in a manner that proselytizes or advances  
23 religion;" (ii) the USPS provide notice to all CPUs that  
24 "they shall not act in a manner that proselytizes or  
25 advances religion"; and (iii) the USPS institute adequate  
26 monitoring procedures to ensure compliance with the order.

27 Both the Postal Service and the Church moved to alter  
28 or amend the judgment. By order dated August 28, 2007, the  
29 district court rejected the Church's offer to cure the  
30 Establishment Clause violation by removing the two large  
31 signs and one small sign containing the words "United States

1 Post Office," and by adding a sign indicating that SYI was a  
2 "private entity."

3 The Postal Service argued that the findings were  
4 insufficient to support relief against the USPS generally  
5 and to any CPU other than SYI. The district court amended  
6 its decision, commenting that it could "find[] nothing in  
7 the record indicating the Plaintiff has suffered a concrete  
8 and particularized injury that is either actual or imminent  
9 at any CPU other than the SYI CPU." The relief was narrowed  
10 accordingly.

11 All Defendants appealed, but the USPS dropped out,  
12 leaving the Church alone as Appellant.

13

14

## II

15 Article III of the Constitution limits the judicial  
16 power of the United States to the resolution of cases and  
17 controversies. U.S. Const. art. III, § 2. This limitation  
18 is effectuated through the requirement of standing. Valley  
19 Forge Christian Coll. v. Ams. United for Separation of  
20 Church and State, Inc. ("Valley Forge"), 454 U.S. 464, 471-  
21 72 (1982). "The question of standing is not subject to  
22 waiver . . . : 'We are required to address the issue even if

1 the courts below have not passed on it, and even if the  
2 parties fail to raise the issue before us.'" United States  
3 v. Hays, 515 U.S. 737, 742 (1995) (quoting FW/PBS, Inc. v.  
4 Dallas, 493 U.S. 215, 230-31 (1990)). It is axiomatic that  
5 "[t]here are three Article III standing requirements: (1)  
6 the plaintiff must have suffered an injury-in-fact; (2)  
7 there must be a causal connection between the injury and the  
8 conduct at issue; and (3) the injury must be likely to be  
9 redressed by a favorable decision." Kendall v. Employees  
10 Ret. Plan of Avon Prods., 561 F.3d 112, 118 (2d Cir. 2009).  
11 The injury requirement is the linchpin in Establishment  
12 Clause cases: "[A]t an irreducible minimum, Art. III  
13 requires the party who invokes the court's authority to  
14 'show that he personally has suffered some actual or  
15 threatened injury as a result of the putatively illegal  
16 conduct of the defendant.'" Valley Forge, 454 U.S. at 472  
17 (quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S.  
18 91, 99 (1979)). A demonstration of a "generalized  
19 grievance" is insufficient; the plaintiff must demonstrate a  
20 "'distinct and palpable injury' . . . that is likely to be  
21 redressed if the requested relief is granted." Id. at 475  
22 (quoting Gladstone, 441 U.S. at 100).

1 Standing is often a tough question in the Establishment  
2 Clause context, where the injuries alleged are to the  
3 feelings alone.<sup>9</sup> This is often the case in religious  
4 display cases where the fact of exposure becomes the basis  
5 for injury and jurisdiction. As the Eighth Circuit has  
6 observed, “[n]o governing precedent describes the injury in  
7 fact required to establish standing in a religious display  
8 case . . . .” ACLU Nebraska Found. v. City of Plattsmouth,  
9 358 F.3d 1020, 1028 (8th Cir. 2004).

10 Several times, the Supreme Court has considered the  
11 problem of standing in the Establishment Clause context, but  
12 so far the Court has announced no reliable and handy  
13 principles of analysis. For example, in Valley Forge, the  
14 Supreme Court concluded that plaintiffs lacked standing to  
15 bring their Establishment Clause claim challenging the  
16 conveyance, at no cost, of 77 acres of federal property to a  
17 Christian college. The Third Circuit had earlier concluded  
18 that the challengers “had standing merely as ‘citizens,’

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<sup>9</sup> A broad swath of litigants can demonstrate standing under Flast v. Cohen, 392 U.S. 83 (1968), which permits litigants to raise claims on the ground that their “tax money is being extracted and spent in violation of specific constitutional protections.” Id. at 106. The issue is far more difficult where, as here, the alleged injuries are non-economic and taxpayer status is not the basis for jurisdiction.

1 claiming 'injury in fact' to their shared individuated right  
2 to a government that 'shall make no law respecting the  
3 establishment of religion.'" 454 U.S. at 470 (quoting 619  
4 F.2d 252, 261 (3d Cir. 1980)). But the Supreme Court  
5 reversed because:

6 They fail[ed] to identify any personal  
7 injury suffered by them as a consequence  
8 of the alleged constitutional error,  
9 other than the psychological consequence  
10 presumably produced by observation of  
11 conduct with which one disagrees. That  
12 is not an injury sufficient to confer  
13 standing under Art. III, even though the  
14 disagreement is phrased in constitutional  
15 terms. It is evident that respondents  
16 are firmly committed to the  
17 constitutional principle of separation of  
18 church and State, but standing is not  
19 measured by the intensity of the  
20 litigant's interest or the fervor of his  
21 advocacy. That concrete adverseness  
22 which sharpens the presentation of  
23 issues, is the anticipated consequence of  
24 proceedings commenced by one who has been  
25 injured in fact; it is not a permissible  
26 substitute for the showing of injury  
27 itself.

28  
29 Valley Forge, 454 U.S. at 485-86 (quotations, citation, and  
30 emphasis omitted). This passage explains what standing is  
31 not, without saying what standing is in these kinds of  
32 cases. Lower courts are left to find a threshold for injury  
33 and determine somewhat arbitrarily whether that threshold  
34 has been reached. Chief Justice Rehnquist recognized that

1 the question of standing in the Establishment Clause context  
2 is vexed: “[T]here are serious arguments on both sides of  
3 this question, the Courts of Appeals have divided on the  
4 issue, and the issue determines the reach of federal courts’  
5 power of judicial review of state actions.” City of Edmond  
6 v. Robinson, 517 U.S. 1201, 1203 (1996) (dissenting in the  
7 denial of certiorari; joined by Justices Scalia and Thomas).  
8 In short, there is uncertainty concerning how to apply the  
9 injury in fact requirement in the Establishment Clause  
10 context.

11 Cooper alleged that the discomfort he suffered when he  
12 viewed the religious displays at SYI was so great that he  
13 was inclined to drive to another postal unit. The initial  
14 question is whether that amounts to a sufficiently “distinct  
15 and palpable” injury for standing purposes. Our leading  
16 case on Establishment Clause standing is Sullivan v.  
17 Syracuse Housing Authority, 962 F.2d 1101 (2d Cir. 1992), in  
18 which the Syracuse Housing Authority (the “Authority”)  
19 contracted for a faith-based entity to operate a religious  
20 after-school program in the community center of the public  
21 housing development where the plaintiff lived. The district  
22 court dismissed the case for lack of standing, but the

1 Second Circuit found a cognizable "spiritual First Amendment  
2 injury" and reversed. Id. at 1108. The touchstone of the  
3 analysis was whether Sullivan had a "direct and personal  
4 stake" in the controversy. Id. Relying on Sierra Club v.  
5 Morton, 405 U.S. 727 (1972), and Valley Forge, we concluded  
6 that the Authority's conduct deprived Sullivan of his right  
7 to use and enjoy the community center, that Sullivan  
8 "[found] the alleged establishment of religion offensive,"  
9 and that the Authority's actions essentially established  
10 religion "in a place functionally analogous to Sullivan's  
11 own home." Sullivan, 962 F.2d at 1108.<sup>10</sup> Under those  
12 circumstances, Sullivan's allegations amounted to a  
13 sufficiently "direct and personal stake" in the dispute to  
14 confer standing, and the case was reinstated and remanded to  
15 the district court.

16 Applying Sullivan, we must conclude that Cooper has  
17 alleged a sufficiently "direct and personal stake" in the  
18 controversy to confer standing. Cooper claims that he was  
19 made uncomfortable by direct contact with religious displays

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<sup>10</sup> Separately, the Circuit also concluded that Sullivan's status as a parent whose child had been taught religious songs in the after-school program gave him an additional, independent ground sufficient to support standing. Sullivan, 962 F.2d at 1109.



1 that were made a part of his experience using the postal  
2 facility nearest his home, and that upon complaint, he was  
3 advised to alter his behavior. Under Sullivan, these  
4 allegations state an injury in fact sufficient to support  
5 standing.

### 7 III

#### 8 (A) State Action

9 The Due Process Clause of the Fourteenth Amendment  
10 provides: "[N]or shall any State deprive any person of life,  
11 liberty, or property, without due process of law." U.S.  
12 Const. amend. XIV, § 1. By its terms, "private action is  
13 immune from the restrictions of the Fourteenth Amendment,"  
14 and the Amendment "offers no shield" against private  
15 conduct, "'however discriminatory or wrongful.'" Jackson v.  
16 Metro. Edison Co., 419 U.S. 345, 349 (1974) (quoting Shelley  
17 v. Kraemer, 334 U.S. 1, 13 (1948)). The Amendment applies  
18 only to state action. Id.; see also Civil Rights Cases, 109  
19 U.S. 3 (1883). The Fourteenth Amendment, in turn,  
20 incorporates the First Amendment, so "[t]he Fourteenth  
21 Amendment, and, through it, the First . . . Amendment[], do  
22 not apply to private parties unless those parties are

1 engaged in activity deemed to be 'state action.'" Nat'l  
2 Broad. Co., Inc. v. Commc'ns Workers of Am., AFL-CIO, 860  
3 F.2d 1022, 1024 (11th Cir. 1988).

4 "Actions of a private entity are attributable to the  
5 State if 'there is a sufficiently close nexus between the  
6 State and the challenged action of the . . . entity so that  
7 the action of the latter may be fairly treated as that of  
8 the State itself.'" United States v. Stein, 541 F.3d 130,  
9 146 (2d Cir. 2008) (quoting Jackson, 419 U.S. at 351). The  
10 "close nexus" test "'assure[s] that constitutional standards  
11 are invoked only when it can be said that the State is  
12 responsible for the specific conduct of which the plaintiff  
13 complains.'" Id. at 146-47 (quoting Blum v. Yaretsky, 457  
14 U.S. 991, 1004 (1982)). However, "Supreme Court cases on  
15 this issue 'have not been a model of consistency.'" Id. at  
16 147 (quoting Edmonson v. Leesville Concrete Co., 500 U.S.  
17 614, 632 (1991) (O'Connor, J., dissenting)). "Not  
18 surprisingly, therefore, there is no single test to identify  
19 state actions and state actors. Rather, there are a host of  
20 facts that can bear on the fairness of an attribution of a  
21 challenged action to the State." Horvath v. Westport  
22 Library Ass'n, 362 F.3d 147, 151 (2d Cir. 2004) (quotations

1 and citations omitted).

2 "A nexus of state action exists . . . when the state  
3 exercises coercive power, is entwined in the management or  
4 control of the private actor, . . . or when the private  
5 actor operates as a willful participant in joint activity  
6 with the State or its agents, is controlled by an agency of  
7 the State, has been delegated a public function by the  
8 state, or is entwined with governmental policies." Stein,  
9 541 F.3d at 147 (quotations, citations, and emphases  
10 omitted). However, "conduct by a private entity is not  
11 fairly attributable to the state merely because the private  
12 entity is a business subject to extensive state regulation  
13 or 'affected with the public interest.'" Cranley v. Nat'l  
14 Life Ins. Co. of Vermont, 318 F.3d 105, 112 (2d Cir. 2003)  
15 (quoting Jackson, 419 U.S. at 350). "A finding of state  
16 action may not be premised solely on the private entity's  
17 creation, funding, licensing, or regulation by the  
18 government." Id.

19

20 1. Government Contracts

21 SYI's contract with the government does not  
22 convert its conduct into state action. The government

1 enters into contracts for all kinds of goods and services  
2 without converting its contractors into state actors;  
3 architects designing federal buildings or engineers building  
4 bridges do not thereby become government actors. See  
5 Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982) (the “[a]cts  
6 of . . . private contractors do not become acts of the  
7 government by reason of their significant or even total  
8 engagement in performing public contracts”). The fact that  
9 “a private entity performs a function which serves the  
10 public does not make its acts state action.” Id. at 842.  
11 The contract itself is insufficient to render all of the  
12 contractor’s conduct state action, and the CPU contract here  
13 is not enough by itself to make SYI a state actor. See id.

## 14 15 2. The “Public Function” Test

16 Since the contract alone does not convert the CPU  
17 into a state actor, we must explore whether and to what  
18 extent the CPU is a “state actor” while performing its  
19 contractual tasks. One way that a private entity may be  
20 considered a state actor for constitutional purposes is by  
21 “exercis[ing] powers that are ‘traditionally the exclusive  
22 prerogative of the State.’” Blum v. Yaretsky, 457 U.S. 991,

1 1005 (1982) (quoting Jackson, 419 U.S. at 353). "State  
2 action may be found in situations where an activity that  
3 traditionally has been the exclusive, or near exclusive,  
4 function of the State has been contracted out to a private  
5 entity. For example, only the State may legitimately  
6 imprison individuals as punishment for the commission of  
7 crimes." Horvath, 362 F.3d at 151.

8 In West v. Atkins, the Supreme Court concluded that the  
9 conduct of a private medical doctor attending to prison  
10 inmates pursuant to a government contract was "fairly  
11 attributable to the State" for the purposes of 42 U.S.C.  
12 § 1983. 487 U.S. 42, 57 (1988).<sup>11</sup> The approach is  
13 functional:

14 The fact that the State employed [the  
15 doctor] pursuant to a contractual  
16 arrangement that did not generate the  
17 same benefits or obligations applicable  
18 to other 'state employees' does not alter  
19 the [state action] analysis. It is the  
20 physician's function within the state  
21 system, not the precise terms of his  
22 employment, that determines whether his  
23 actions can fairly be attributed to the  
24 State.

25  
26 Id. at 55-56 (emphasis added). State action analysis is

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<sup>11</sup> The inmate brought a § 1983 action against the doctor alleging an Eighth Amendment violation on the ground that the doctor failed to provide adequate treatment for an ankle injury.

1 thus guided by the nature of the services supplied.

2 SYI is a state actor under this public function test.  
3 Congress granted to the USPS the exclusive duty to create  
4 and operate Post Offices with responsibility to accept and  
5 process mail, sell postal products, and, of course,  
6 participate in the safe carriage of mail. See 39 U.S.C.  
7 § 404(a)(3). As to safe carriage, Congress has conferred to  
8 the Postal Service a complete monopoly. See, e.g., 18  
9 U.S.C. § 1693. That monopoly entails the sale of postage  
10 for letters, acceptance of mail for transmission, and the  
11 marking and processing of mail for delivery: all functions  
12 performed by SYI and other CPUs. Accordingly, we conclude  
13 that SYI is a state actor under the public function test  
14 because it performs--at least in some parts of the facility--  
15 --"activit[ies] that traditionally ha[ve] been the exclusive,  
16 or near exclusive, function of the State." Horvath, 362  
17 F.3d at 151.

18 That is not to say, however, that all of SYI serves a  
19 public function, any more than selling shovels becomes a  
20 public function when a CPU is located in a hardware store.  
21 SYI is an independent, separate and distinct not-for-profit  
22 entity incorporated for the Church's private use and

1 purposes. The extent of state action correlates directly  
2 with the performance of the public function, which here is  
3 limited to those areas where the business of the CPU is  
4 conducted. This is so notwithstanding that signage at the  
5 portal identifies the shop (or home or seminary) as a place  
6 where federal postal services are rendered. In sum, SYI is  
7 a state actor pursuant to the public function test, but only  
8 as to those areas of its facility where the public function  
9 takes place, namely the postal counter, the postal boxes,  
10 and the shelving unit that stores and displays postal  
11 materials.

12 Having determined that at least part of SYI is  
13 operating as a state actor under the public function test,  
14 we consider whether that state action violated the  
15 Establishment Clause. We conclude that it does.

16

17

#### IV

18 The Establishment Clause of the First Amendment  
19 provides that "Congress shall make no law respecting an  
20 establishment of religion." U.S. Const. amend. I. But the  
21 "Amendment contains no textual definition of 'establishment'  
22 and the term is certainly not self-defining." McCreary

1 County, Ky. v. ACLU of Ky., 545 U.S. 844, 874-75 (2005).  
2 "In the absence of precisely stated constitutional  
3 prohibitions, we must draw lines with reference to the three  
4 main evils against which the Establishment Clause was  
5 intended to afford protection: 'sponsorship, financial  
6 support, and active involvement of the sovereign in  
7 religious activity.'" Lemon v. Kurtzman, 403 U.S. 602, 612  
8 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668  
9 (1970)). One "'significant factor in upholding governmental  
10 programs in the face of Establishment Clause attack is their  
11 neutrality towards religion.'" Good News Club v. Milford  
12 Cent. School, 533 U.S. 98, 114 (2001) (quoting Rosenberger  
13 v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839  
14 (1995)). "'In distinguishing between indoctrination that is  
15 attributable to the State and indoctrination that is not,  
16 [the Court has] consistently turned to the principle of  
17 neutrality, upholding aid that is offered to a broad range  
18 of groups or persons without regard to their religion.'" Id.  
19 (quoting Mitchell v. Helms, 530 U.S. 793, 809 (2000)  
20 (plurality opinion)).

21 Did the presence of the religious displays here violate  
22 the Establishment Clause? It is clear that for certain



1 displays, in certain places, the government's "religious  
2 object is unmistakable" and a violation apparent. McCreary,  
3 545 U.S. at 869. We conclude that an Establishment Clause  
4 violation occurred, but given the fact that the state action  
5 is limited to a part of the premises, the violation--and the  
6 remedy--are limited in the same way and to the same extent.

7

8 (A) The Government Contract

9 The Supreme Court "has never held that religious  
10 institutions are disabled by the First Amendment from  
11 participating in publicly sponsored social welfare  
12 programs." Bowen v. Kendrick, 487 U.S. 589, 609 (1988).  
13 "It long has been established . . . that the State may send  
14 a cleric . . . to perform a wholly secular task." Roemer v.  
15 Bd. of Pub. Works of Md., 426 U.S. 736, 746 (1976). The  
16 analysis is governed by the principle of neutrality: "the  
17 government may not favor one religion over another, or  
18 religion over irreligion, religious choice being the  
19 prerogative of individuals." McCreary, 545 U.S. at 875-76.

20 With respect to the CPU program, the government has  
21 espoused a neutral position: it will contract for CPU  
22 services with both religious and secular entities; and, as

1 to religious entities, the government makes no distinctions  
2 between faiths or sects. The fact that a CPU is located in  
3 a religious facility, or sponsored by a religious entity, or  
4 that its revenues benefit a particular faith, does not  
5 offend the Establishment Clause. Any violation must arise  
6 from the specific conditions of SYI's structure and space,  
7 and its religious displays.

8

9 (B) The Lemon Test

10 The primary means of evaluating an Establishment Clause  
11 challenge to a religious display remains the beleaguered  
12 Lemon test, articulated by the Supreme Court in Lemon v.  
13 Kurtzman, 403 U.S. 602 (1971). "Under [the] Lemon [test],  
14 government action that interacts with religion must: (1)  
15 have a secular purpose, (2) have a principal effect that  
16 neither advances nor inhibits religion, and (3) not bring  
17 about an excessive government entanglement with religion."  
18 Westchester Day School v. Vill. of Mamaroneck, 504 F.3d 338,  
19 355 (2d Cir. 2007) (citing Lemon, 403 U.S. at 612-13); see  
20 also Agostini v. Felton, 521 U.S. 203, 218 (1997).

21 Both parties submit that the Lemon test is the  
22 appropriate test for evaluating the Establishment Clause

1 challenge here (and the District Court agreed), though a  
2 review of relevant case law demonstrates that Lemon is  
3 difficult to apply and not a particularly useful test in  
4 determining what is permissible under the Establishment  
5 Clause.<sup>12</sup> Still, "it is not our role to provoke the Supreme  
6 Court into reconsidering its precedent by an aggressive (or  
7 fanciful) ruling on a vital subject." Landell v. Sorrell,  
8 406 F.3d 159, 177 (2d Cir. 2005) (Jacobs, J., dissenting  
9 from the denial of rehearing en banc). Accordingly, we  
10 proceed to a straightforward application of the Lemon test.

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<sup>12</sup> In 2000, the Supreme Court denied certiorari in an Establishment Clause case, but Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the denial, expressing frustration with the Lemon test. See Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from the denial of certiorari) ("Like a majority of the Members of this Court, I have previously expressed my disapproval of the Lemon test. I would grant certiorari in this case if only to take the opportunity to inter the Lemon test once for all.") (citations omitted). Other Justices and courts have expressed similar frustrations. See Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (lamenting "the sisyphian task of trying to patch together the blurred, indistinct, and variable barrier described in Lemon v. Kurtzman") (quotations omitted); Roark v. S. Iron R-1 School Dist., --- F.3d ---, No. 08-1847, 2009 WL 2045683, at \*4 (8th Cir. July 16, 2009) (observing that "the Lemon test has had a 'checkered career'") (quoting Van Orden v. Perry, 545 U.S. 677, 700 (2005)); Access Fund v. U.S. Dep't of Agric., 499 F.3d 1036, 1042 (9th Cir. 2007) ("We recognize that the Lemon test has hardly been sanctified by the Supreme Court.").

1           We first ask whether there is a secular purpose for  
2 displaying religious material on the postal counter. We  
3 cannot think of one. The express and admitted purpose of  
4 the religious material is to raise awareness for the mission  
5 sponsored by the Church and to spread the Church's Christian  
6 message. We have no trouble concluding that the displays on  
7 the postal counter soliciting prayer requests and  
8 advertising the mission express a distinctly religious  
9 purpose, and that they fail spectacularly under the first  
10 inquiry of Lemon. Having failed at the first juncture,  
11 there is no need to proceed further in the Lemon test,  
12 although it is no great stretch to say that the religious  
13 materials on the postal counter would also have a principal  
14 effect of advancing religion (and might arguably entangle  
15 the government excessively with religion). The religious  
16 displays on the postal counter clearly fail the Lemon test.

17           Nevertheless, the analysis is complicated by a  
18 disclaimer on the postal counter:

19                   The United States Postal Service does not  
20                   endorse the religious viewpoint expressed  
21                   in the materials posted at this Contract  
22                   Postal Unit.

23  
24 While the presence of this disclaimer informs our review,  
25 the precise impact of a disclaimer on Establishment Clause

1 analysis is not at all clear, and this Circuit has not  
2 directly addressed the issue.

3 Supreme Court jurisprudence on disclaimers is not  
4 determinative. In County of Allegheny v. ACLU, 492 U.S. 573  
5 (1989), the Supreme Court reviewed the constitutionality of  
6 [i] a crèche inside of a courthouse, and [ii] a menorah and  
7 Christmas tree displayed outside of a city building. It was  
8 a split decision: the crèche was unconstitutional, but the  
9 menorah/Christmas tree display was not. The presence of a  
10 disclaimer, however, did not save the crèche:

11 The fact that the crèche bears a sign  
12 disclosing its ownership by a Roman  
13 Catholic organization does not alter  
14 [the] conclusion [that the display  
15 violates the Establishment Clause]. On  
16 the contrary, the sign simply  
17 demonstrates that the government is  
18 endorsing the religious message of [the]  
19 organization . . . .

20  
21 Id. at 600. However, in Rosenberger v. Rector and Visitors  
22 of Univ. of Va., 515 U.S. 819 (1995), the Supreme Court  
23 permitted the use of public university student-activity  
24 funds to print a newspaper for a religious student group.  
25 Justice O'Connor's concurrence took note of an "explicit  
26 disclaimer" as a justification for the outcome. Id. at 852  
27 (O'Connor, J., concurring). The Ninth Circuit has likewise

1 noted that the perception of impermissible religious  
2 endorsement was "less likely . . . because of the [presence  
3 of] express disclaimers that [a religious] activity [was]  
4 not school-sponsored." Hills v. Scottsdale Unified School  
5 Dist. No. 48, 329 F.3d 1044, 1056 (9th Cir. 2003). "[A]  
6 disclaimer arguably distances [government] officials from  
7 'sponsoring' [religious] speech . . . ." Lassonde v.  
8 Pleasanton Unified School Dist., 320 F.3d 979, 984 (9th Cir.  
9 2003). The Sixth Circuit has also cited the presence of a  
10 disclaimer as a basis for permitting the display of a Latin  
11 cross in a public square during the Christmas season.  
12 Pinette v. Capitol Square Review & Advisory Bd., 30 F.3d  
13 675, 679 (6th Cir. 1994) ("Of course, the display at issue  
14 here is not a government sponsored display; it is, in fact,  
15 privately funded and privately maintained, and carries an  
16 express disclaimer of any government support."). Id.

17 However useful the disclaimer is, the law does not  
18 unambiguously allow us to draw the conclusion that the  
19 disclaimer prevents or cures a violation.

20  
21 **V**

22 As a general matter, federal courts have leeway to

1 fashion appropriate relief, and “[a]ppellate tribunals have  
2 accorded district courts broad discretion to frame equitable  
3 remedies [for constitutional violations] so long as the  
4 relief granted is commensurate with the scope of the  
5 constitutional infraction.” Todaro v. Ward, 565 F.2d 48, 54  
6 n.7 (2d Cir. 1977). Especially in the Establishment Clause  
7 context, courts must endeavor to craft remedies that  
8 correspond to the violations. See Bowen v. Kendrick, 487  
9 U.S. 589, 620 (1988) (“The District Court . . . identif[ied]  
10 certain instances in which it felt [federal] funds were used  
11 for constitutionally improper purposes [under the  
12 Establishment Clause], but . . . the court did not  
13 adequately design its remedy to address the specific  
14 problems it found . . . .”); see also Mitchell v. Helms, 530  
15 U.S. 793, 865 (2000) (O’Connor, J., concurring)  
16 (“[E]xtensive violations . . . will be highly relevant in  
17 shaping an appropriate remedy . . . . I know of no case in  
18 which we have declared an entire aid program  
19 unconstitutional on Establishment Clause grounds solely  
20 because of violations on [a] minuscule scale . . . .”)  
21 (quotations and citations omitted).

22 Here, the district court ordered SYI to “remove . . .

1 any and all religious displays, prayer cards,  
2 advertisements, donation solicitations, and  
3 telecommunication videos or broadcasts that proselytize or  
4 advance the religion of the [Church]." The Postal Service  
5 was also directed to prohibit SYI from posting such  
6 materials as long as it was "in the course of operating the  
7 [CPU]." However, the removal of all religious messages  
8 would render the premises a single-use post office, and  
9 would prevent the second legitimate use to which the  
10 premises are dedicated. This remedy does not correspond to  
11 the scope of the violation and the resulting harm.

12 The gravamen of the complaint is that Mr. Cooper was  
13 made to feel that he was an unwilling participant in a faith  
14 not his own when he entered a space dedicated to two  
15 separate functions, only one of which was apparent from the  
16 outside. Ordinarily, when CPUs are housed in churches or  
17 synagogues or monasteries or mosques, customers are alerted  
18 to the facility's religious status by cues such as  
19 ecclesiastical architecture, schedules of religious  
20 services, and religious iconography or statuary. SYI gives  
21 no visual cues to alert its customers to its function as a  
22 Christian outreach facility. So a customer walking into SYI



1 might become bewildered as to whether a chapel has been made  
2 into a post office, or a post office has been made into a  
3 chapel.

4 The district court erred by extending the violation--  
5 and then the remedy--to the entire facility. The Manchester  
6 CPU is not a classified post office and need not be  
7 regulated as such, but the public function it performs is in  
8 tension with its (otherwise permissible) sectarian message.  
9 A direct, effective and complete remedy for the violation is  
10 one that limits the public function to designated public  
11 spaces and returns the remainder of the facility to SYI's  
12 private purposes. This can be accomplished short of  
13 frustrating either the postal function or the other lawful  
14 purposes which the Church pursues on the premises.

15 Since the extent of the state action (and the extent of  
16 the Establishment Clause violation) is limited to that part  
17 of the CPU fulfilling the Postal Service's mandated public  
18 function, a sufficient remedy need extend no further or  
19 elsewhere. Here, the public functions include the  
20 acceptance of mail, the processing of mail and packages for  
21 delivery, and the sale of postal goods and services. These  
22 are performed or fulfilled at the postal counter, in the

1 post office boxes, and on the shelving housing postal  
2 products; so the postal counter and the surfaces of the post  
3 office boxes and shelving units are zones in which the  
4 function of religious outreach is out of place. The postal  
5 counter, post office boxes and shelving units must therefore  
6 be free of prayer cards and messages and must be cleared of  
7 religious material. Since the disclaimer is helpful in  
8 differentiating the public space and function from the  
9 private one, it should remain.

10 In order to differentiate the primary area serving the  
11 public function from the remainder of the space operating as  
12 a private ministry, SYI is directed to create and install a  
13 barrier in front of the postal counter that is a visual cue  
14 and gives a sense of passage from one area of the space into  
15 another, thereby delineating space exclusively dedicated to  
16 the public function from space dedicated to other things.  
17 Separation and visual cues will not keep the video from  
18 being seen and overheard by postal patrons, but the source  
19 will unambiguously emanate from a zone distinct from the  
20 post office functions. We need not prescribe the  
21 specifications of the barrier, but it would do to use such  
22 things as stanchions with hanging ropes (of the kind used in

1 a theater), or a low railing. Once the postal counter is  
2 cleared and visual cues installed, no more is required to  
3 cure the Establishment Clause violation.

4

5

#### **CONCLUSION**

6 For the foregoing reasons, the judgment of the district  
7 court is vacated and the case remanded for the creation of  
8 an injunction consistent with this opinion.