

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED SENIORS ASSOCIATION, INC.,

PETITIONER,

V.

SOCIAL SECURITY ADMINISTRATION,

RESPONDENT.

ON PETITION FOR REVIEW FROM THE FINAL DECISION
OF THE COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION

BRIEF *AMICUS CURIAE* OF
FREE SPEECH DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING
AND PETITION FOR REHEARING *EN BANC*

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INTEREST OF AMICUS CURIAE

This *Amicus Curiae* Brief in Support of the Petitioner is submitted on behalf of the Free Speech Defense and Education Fund, Inc. (“FSDEF”), a nonprofit, nonpartisan educational organization dedicated to the study, education and defense of rights guaranteed under the United States Constitution. Incorporated in 1995 in Maryland, FSDEF is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code.¹ This case presents questions of exceptional importance concerning the constitutional rights of nonprofit public interest organizations to communicate to the American people. The petitions for rehearing and rehearing *en banc* are based upon the failure of the panel to strictly construe 42 U.S.C. §1320(b)-10(a)(1), thereby rendering the statute unconstitutionally overbroad and vague. FSDEF submits that the panel misapplied the deferential agency review standard of Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), and failed to apply the relevant Due Process standards governing statutory vagueness.

ARGUMENT

I. THE PANEL MISAPPLIED THE *CHEVRON* RULE.

On August 25, 2005, a panel of this Court denied the petition for review

¹ FSDEF requested and received the parties’ consents to the filing of this brief *amicus curiae*. See Rule 29(a), F.R.A.P.

filed by United Seniors Association, Inc. (“USA”), seeking reversal “of a decision of the Department of Health and Human Services’ Appeals Board ... upholding a determination by an administrative law judge (ALJ) that **envelopes** mailed by USA violated §1140 of the Social Security Act [42 U.S.C. §1320b-10]” (emphasis added). United Seniors Association, Inc. v. Social Security Administration, 2005 U.S. App. LEXIS 18310, pp. 1-2 (2005) (hereinafter USA v. SSA).

As the panel correctly determined, §1320b-10 does not expressly apply to “envelopes” as such, but rather to “any item constituting an advertisement, solicitation, circular, book, pamphlet, or other communication....” *See* §1320b-10(a)(1). Also, the panel correctly acknowledged that subsection (a)(1) “contain[ed] a latent ambiguity” as to whether envelopes were covered by the statute. “**Usually**,” the panel rightly observed, “[**envelopes**] convey only cursory information to a recipient, [and thus] are **dissimilar** to advertisements, solicitations, books, pamphlets, and circulars, which are used to persuade, educate, or inform a recipient on matters more in depth....” USA v. SSA at 13 (emphasis added). **Only** “in **some** instances,” the panel further observed, would “an envelope ... function like an advertisement.” *Id.* at 13-14 (emphasis added).

Instead of examining the envelopes at issue in this case in accordance with

the doctrine of *eiusdem generis* — either to ascertain **for itself** whether the USA envelopes “conveyed additional information” sufficient to constitute an “advertisement” or other item specified in the statute, or to ascertain whether there was sufficient evidence before the ALJ that the USA envelopes constituted an “advertisement” or other item prohibited by the statute — the panel unqualifiedly “deferred” to “the ALJ’s determination, that **envelopes** are a form of communication that may be prohibited under [§1320b-10(a)(1)],” finding it to be a “reasonable interpretation of the statute.” *See* USA v. SSA at 15.

According to the panel, then, **any** envelope — whether it contains “cursory information” or additional data designed “to persuade, educate or inform” — may be found, at the discretion of an ALJ, to be an “item” prohibited by §1320b-10(a)(1).

According to the panel, it **deferred** to the ALJ interpretation that subsection (a)(1) broadly applies to **any and all** envelopes because Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), commands it. But the Chevron rule of deference does not apply here. That rule permits deference only if “the agency’s answer [to a statutory ambiguity] is based on a **permissible construction** of the statute.” *Id.* at 843 (emphasis added). As the panel conceded, however, the “doctrine of *eiusdem generis*”

dictates that “‘other communication’ should be read to refer only to a communication similar to ‘advertisement, solicitation, circular, book [and] pamphlet,’” and that such a construction does **not permit** inclusion of envelopes in the category of prohibited items. *See* USA v. SSA at 13.

Furthermore, the Chevron rule applies only when a “decision as to meaning or reach of a statute [that] involve[s] reconciling conflicting policies, and a full understanding of the force of the statutory policy ... depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulation.” Chevron at 844. The panel gave deference here not because of the existence of “conflicting policies” or special expertise, but because it read §1320b-10(d) to have “entrusted to the SSA ... the protection of the government’s lines of communication with its citizens on matters related to Social Security.” USA v. SSA at 15. That subsection has **not**, however, placed such broad and open-ended trust in SSA; rather it has entrusted SSA **only** with power to enforce “the **preceding provisions of this section**” (emphasis added). *Compare* §1320b-10(d) *with* Chevron at 840-42.

Having misapplied Chevron, the panel has conferred upon SSA discretionary powers transcending the statutory language, thereby rendering the statute unconstitutionally vague.

II. THE PANEL MISAPPLIED THE VAGUENESS STANDARD.

Addressing USA's vagueness challenge, the panel acknowledged that "[a] statute can be impermissibly vague for **either of two independent reasons ...** [(1)] if it fails to provide people with ordinary intelligence a reasonable opportunity to understand what conduct it prohibits [or (2)] if it authorizes or even encourages **arbitrary and discriminatory enforcement.**" USA v. SSA at 28 (emphasis added). However, the panel **failed to apply the second constitutionally-mandated standard.**

The text of §1320b-10(a)(1) prohibits the use of words, like "Social Security ... in a manner which such person knows or should know would convey, or in a manner which reasonably **could** be interpreted or construed as conveying, the false impression that such item is **approved, endorsed, or authorized by [SSA].**" *Id.* (emphasis added). According to the panel, the "baseline inquiry ... is whether the envelopes reasonably *could* be interpreted or construed, to have conveyed the false impression that **the SSA** approved, endorsed, or authorized USA's envelopes...." USA v. SSA at 19 (italics original, emphasis added).

However, in applying this admittedly "relatively low threshold to support a finding of liability," the panel sustained the ALJ's finding of liability not on the

statutory ground that it appeared that the envelopes were “approved, endorsed or authorized by [SSA],” but merely because the envelopes reasonably **could** be construed as having come from an “**official source**,” or as having imparted an “**official quality**,” or as containing “**something official**.” In doing so, the panel simply **dispensed altogether with the statutory language** — whether the envelopes reasonably could be construed as having been “**approved, endorsed, or authorized [by SSA]**” — concluding that “[t]he repeated references to ‘Social Security,’ the ‘Social Security Alert’ border, the phony handling instructions, and the envelopes’ resemblance to special shipping methods **could** reasonably lead recipients to believe that the envelopes contain **official information** relating to their Social Security benefits....” *Id.* at 22 (emphasis added).

Indeed, the panel, like the tribunals below, relied **not** on evidence presented by any SSA witnesses who might have expertise on SSA issues, but rather by (i) a professor on the payroll of a competing seniors organization, and (ii) a postal inspector whose testimony did not even relate to the statute in question. Under the panel’s “deferential standard of review” — permitting any SSA use of §1320b-10(a)(1) in pursuit of “the protection of the government’s lines of communication with its citizens on matters related to Social Security” (*id.* at 15) — SSA would have the discretion to take action against any

communication containing the “forbidden words” if it supposedly “tend[s] to mislead and confuse elderly recipients into believing [that it] bear[s] **official business.**” *See id.* at 22 (emphasis added). By allowing SSA to stray from the statutory requirement of a finding that the communication seemed to be “**approved, endorsed or authorized [by SSA],** and substituting a “something official” standard, the panel has “delegated ... basic policy matters to [SSA] for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application,” contrary to Due Process standards.² *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (italics original).

Additionally, there are troubling Due Process concerns raised by the panel’s primary reliance upon the “baseline inquiry” which contains no scienter requirement — an element consistently recognized by the Supreme Court as a “mitigat[ion] [of] a law’s vagueness.” *See Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982). Contrary to the Supreme Court’s long-standing admonition “that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*” (*see Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (italics original)), the panel dismissed USA’s vagueness concerns about the statute’s no-fault

² *See* discussion of SSA policy, *supra*, p. 6.

standard as “speculative.” See USA v. SSA at 29. And, ignoring the Supreme Court’s admonition to be especially watchful of any “uncertainty induced by [a] statute [that] threatens to inhibit the exercise of constitutionally protected rights” (see Colautti at 391), the panel stated that it could not envision any threat to the freedom of speech that would not satisfy the statute’s higher fault standard. See USA v. SSA at 27-28. Curiously, however, the panel deliberately chose to invoke the no-fault “baseline” standard in this case, rather than the fault standard upon which the ALJ primarily relied. See *id.* at 18.

Respectfully submitted,

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