

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PUBLIC CITIZEN, INC., *et al.*,)
)
 Plaintiffs,)
)
 v.) Civil Action No. 8:01-CV-943-T-23TGW
)
 PINELLAS COUNTY, *et al.*,)
)
 Defendants.)
 _____)

DECLARATION OF LANE BROOKS

I, Lane Brooks, state the following facts under oath of my own personal knowledge and am competent to testify to the following:

1. I am the Director of Development and Marketing for Plaintiffs Public Citizen Foundation, Inc. (“PCF”), a 501(c)(3) organization, and Public Citizen, Inc. (“PCI”), a 501(c)(4) organization (collectively referred to as Public Citizen unless otherwise noted). I have held this position since March 1998.

2. I have been involved in fundraising for nonprofit organizations since 1982. I have served as the Associate Director of Development for the Denver Center of the Performing Arts from 1982 to 1994, the Director of Development for the National Gay and Lesbian Task Force from 1994 to 1995, and most recently, as the Director of Development for Opera America from 1995 to 1998. I have a college degree in broadcast journalism.

3. As Director of Development at Public Citizen, I oversee ten employees who raise funds from individual donors and philanthropic foundations, help sell our publications, run a fuel-buying cooperative for the Washington, D.C. area, and answer the questions and requests of

our members. I also work with Joseph Zillo, the Chief Operating Officer (“COO”) of Public Citizen, and his staff to ensure that the COO has sufficient information about the organization’s solicitation efforts to enable Public Citizen to comply with state regulations of charitable solicitations.

I. Overview: Public Citizen’s Recruitment and Charitable Solicitation Efforts

4. Public Citizen seeks new members and first-time donations primarily through direct mail solicitations, which we send across the country. We also use the mail to ask existing members to renew their memberships and to make “appeals” to our members asking them to make special donations to Public Citizen. In Fiscal Year 2000, Public Citizen raised almost \$4.8 million from direct mail solicitations nationwide; in Fiscal Year 2001, we raised \$2.6 million. In addition, Public Citizen uses an outside firm to contact select current members by telephone, requesting them to renew their memberships. We do not seek new members or first-time contributions via telephone solicitations, although we do use a professional solicitor to solicit contributions from existing members by telephone.

5. Public Citizen has approximately 319 current members residing in Pinellas County (“County”), Florida. As discussed in the Second Declaration of Joseph Zillo, Public Citizen has ceased sending mailings to non-members residing in the County in order to avoid having to comply with the burdensome registration and reporting requirements imposed on charitable organizations that solicit contributions from non-members residing in the County. See Pinellas County Ordinance (“Ordinance”), Pinellas County Code §§ 42-266 to -344. As a result, we have excluded thousands of Pinellas County residents from our mailings each year.

6. These mailings, which are sent to hundreds of thousands of individuals across the

country, educate the reader regarding the projects, causes, and issues that Public Citizen's divisions are pursuing. In addition to the descriptions of current Public Citizen activities, each mailing generally provides individuals with at least one means of making their support of Public Citizen's work known to the decisionmakers and public officials involved with the highlighted issues. In other words, our mailings actively encourage our current and prospective members to become engaged in the political process. For example, Public Citizen's January 2001 mailing, attached hereto as Exhibit A, described Public Citizen's position on campaign finance reform and urged the recipients to sign and return two petitions addressed to their Senators encouraging those Senators to support campaign finance reform. Recipients of the mailing were encouraged to return the petitions even if they did not make a contribution to Public Citizen. That mailing (including all of its variations) was sent to 163,412 individual non-members nationwide.

7. Sometimes our mailings include educational inserts. For example, Public Citizen's April 2001 mailing, attached hereto as Exhibit B, described Public Citizen's view that Congress should enact a comprehensive Medicare prescription drug benefit program and urged recipients to sign and return petitions addressed to their two Senators and their House representative. The mailing included an informational insert that provided the corporate profits, CEO compensation, and money spent lobbying Congress for each of several leading drug companies. That mailing was sent to 80,123 individual non-members nationwide.

8. In Fiscal Year 2000, we sent out a total of 4,670,608 pieces of mail recruiting new members nationwide. (That does not mean we sent mail to 4,670,608 different individuals, as some individuals received more than one piece of mail). I estimate, based on past experience when Public Citizen sent public information packages into Pinellas County prospecting for new

members that we would have sent .445% of our total public information mail into Pinellas County, but for the fact that we ceased our mailings to non-members in the County. Based on that estimate, in Fiscal Year 2000 alone Public Citizen suppressed approximately 20,784 mailings to County residents. Public Citizen's total number of pieces of direct mail prospecting for new members declined in Fiscal Year 2001 to 1,545,554; I therefore estimate that we suppressed 6,878 pieces of direct mail in the County in the past fiscal year. Public Citizen continues to forbear sending public informational mailings into the County at a level that is closer to Fiscal Year 2000 because our total number of mailings is increasing again this year.

9. Public Citizen also endeavors to recruit new members and solicit contributions through its Internet website. See <http://www.citizen.org> (home page); <https://www.citizen.org/join> (join page). The website can be accessed world-wide by anyone with a computer and an Internet connection. The website is not geared or directed in any way toward the residents of Pinellas County—or indeed, toward the residents of any particular state or locality. As of May 2002, Public Citizen had received contributions through its website from three Pinellas County residents, in the amount of \$170. None of these donors had contributed previously to Public Citizen or had been specifically targeted by our website.

10. Although the Ordinance requires a charity that has received a charitable contribution from a County resident as a result of an Internet solicitation to register in the County, see Pinellas County Code § 42-310, Public Citizen decided, based on the recommendation of our COO, not to register because of the burden and expense that registration under the Ordinance entails. We would not even have been aware of the fact that we had received these contributions from County residents, but for the fact that in connection with this

lawsuit, an employee in our Development Department ran a special, time-consuming search to determine whether any resident of Pinellas County had contributed money to Public Citizen through our website.

II. The Burdens of the Pinellas County Ordinance

A. Demands for Financial and Fundraising Planning Information

11. As discussed in the Second Declaration of Joseph Zillo, Pinellas County requires charities seeking to obtain or renew a charitable solicitations permit to submit their IRS Form 990s for the previous tax year. Pinellas County Code § 42-292(a)(9); Charitable Solicitation New Permit Application (“New Permit Application”) ¶ 29(A). These Form 990s include extensive financial information regarding charities’ sources of revenue, assets, liabilities, program services expenditures, management and general expenses, and fundraising expenses. See Exhibit A to the Second Declaration of Joseph Zillo. However, Pinellas County demands additional financial information not sought by the IRS, calling for estimates of Public Citizen’s future financial performance at a level of detail that either Public Citizen does not maintain or that is proprietary and sensitive. See New Permit Application ¶¶ 14-17.

12. Without dwelling on each of the hardships that compliance with these various financial reporting requirements would entail (which are discussed in the Second Declaration of Joseph Zillo), I would like to emphasize the disadvantages that disclosure of *anticipated* revenue, contributions, and fundraising expenses for the coming year, as well as copies of the direct mail and verbal scripts we plan to use, would impose on Public Citizen in terms of its standing in the highly competitive field of nonprofit fundraising. (The requirement that charities provide advance copies of their solicitation materials is discussed in greater depth in Section B,

below).

13. It is important to understand that employees in my Department work with the Directors of Public Citizen's five main substantive divisions and the President of Public Citizen to identify issues and projects on which Public Citizen is currently working or which are likely to be informative and persuasive to current and potential members. The Development Department then outlines a time frame and a strategy for developing materials conveying that information, printing the materials, and mailing "packages" containing the materials—along with solicitations for charitable contributions—throughout the year, usually with the assistance of outside advisors. Both the materials we develop and our fundraising strategy itself are the product of many hours of employee and consultant time.

14. Because the creative efforts of our employees and consultants are sensitive, costly, and valuable to Public Citizen (and to our competitor nonprofit organizations), we object to being forced to furnish detailed projections, planning information, or copies of anticipated solicitation materials on these topics—especially because, according to the Ordinance, any information we provide Pinellas County is available to the public. See Pinellas County Code §§ 42-270, 42-279(b) (citing Florida Public Records Law, Fla. Stat. ch. 119). Our investment in these efforts would be significantly diminished if other nonprofit organizations, fundraising consultants, and solicitors were privy to our strategy for recruiting and retaining members and for raising funds for the coming year.

15. First, consider the requirement that a charity report its *expected* gross revenue, *expected* contributions, *projected* program services, *anticipated* management and general expenses, and *expected* fundraising expenses. See New Permit Application ¶¶ 14-17. Public

Citizen develops a budget each year for the broader categories of expected revenues and expenses for the coming year, but we consider this information to be proprietary and highly confidential. To furnish information about our fiscal and fundraising planning for the coming year would expose the internal operations of the organization and its solicitation strategy to other charities, as well as to the rest of the world, because all of the information is made public by the County. Such information is highly sensitive in the competitive field of charitable solicitations. Suppose that in a given year Public Citizen decides to make a major and expensive push to recruit new members. If forced to disclose our expected revenues, contributions, and expenses for the next year, as well as the direct mail and scripts we anticipate using, our competitors would see the marked increase in our fundraising expenses and any change in solicitation materials, and would have a window into our strategy and planning for the year and could adjust theirs accordingly. Nonprofit organizations develop their fundraising strategies over the course of each year, and only after expending tremendous resources and after consulting with in-house employees and outside consultants. The value of this effort would be seriously compromised if other nonprofit organizations, fundraising consultants, and solicitors were privy to our fundraising and other fiscal planning for the coming year.

16. Second, the County apparently requires charities to report their expected contributions from Pinellas County so that the registration fee may be determined. New Permit Application ¶ 14. The requirement that charities report their “expected” contributions is troublesome enough for charities, given that the information, as explained above, is proprietary. But the reporting obligation is also impracticable because Public Citizen, a nonprofit organization that solicits contributions across the country, does not, as a matter of course, keep

track of or monitor its contributions on a county-by-county basis, or even on a state-by-state basis. Thus, even if we were to project contributions for the coming year based on contributions during the previous year from Pinellas County residents, either our COO or I would have to direct an employee in the Development Department to take substantial time out from his or her other responsibilities to conduct a special and quite complicated search for Pinellas County zip codes in our contributions lists in order to compile a report for Pinellas County of information that we do not otherwise track. The only reason I can provide the number of Public Citizen members residing in Pinellas County in this declaration is because an employee of the Development Department was directed to conduct such a special search.

17. Not only is this extraordinarily detailed financial data proprietary and time-consuming to compile, but, in my opinion as a professional development officer, this minutiae is of no use to the County or to its residents in evaluating our organization or comparing it to others, especially in light of the extensive information about Public Citizen that is publicly available on our website, such as our IRS Form 990s, see <http://www.citizen.org> (home page); <http://www.citizen.org/about/articles.cfm?ID=5165> (Form 990s), and from many other sources.

18. Third, even if Public Citizen were to collect and break down its anticipated expenses, a good deal of which relate to solicitation costs, down to the level of detail required by Pinellas County—which it currently does not—this information is of no particular use for individuals concerned with fundraising effectiveness (*i.e.*, the amount of money that actually goes towards an organization’s programmatic work). In my experience as a development officer, the manner in which an organization tabulates “solicitation” costs and expenses varies widely

from one organization to the next and even more so, from one *type* of charity to the next (consistent with generally accepted accounting principles). The information the County seeks is maintained by charities in such an idiosyncratic way that it is of little use in helping potential donors compare one organization's fundraising costs, efficiency, and performance level to another. For this reason, there is no industry-wide commonly-accepted figure for what an organization's "cost of fundraising" percentage should be.

19. Take, for example, the County's requirement that a charity state "what percentage of gross charitable contributions is due to the professional firm" if contributions are received by the charity, and, if not a percentage, that the charity "state the agreed system of payment and amount due to the professional solicitor." New Permit Application ¶ 5A. Aside from the fact that the requirement is redundant, as both the State of Florida and Pinellas County require that charities file copies of their contracts with their professional fundraisers, Public Citizen does not pay its fundraising consultant or its telephone solicitor based on a percentage of contributions. Rather, it pays its fundraising consultant a monthly retainer fee and its professional solicitor an agreed-upon fee per completed telephone call. Given that many charities will not be able to provide a fixed percentage, it is difficult to see how a potential donor residing in Pinellas County would be able to compare Public Citizen's retainer fee and per-call solicitation expenses to those of another charity with a different size budget or to the percentage due professional firms that another charity is able to report.

20. Thus, providing the details regarding the anticipated costs of fundraising and planned disbursement of contributions to the County's specifications, which exceed the specifications of the IRS, will not enable individuals to gauge accurately an organization's

cost-effectiveness regarding its fundraising.

21. It bears mention in this regard that for each registered charity, the Pinellas County Department of Consumer Protection website provides for public viewing the percentage of a contributor's funds that purportedly will go to the charity's program services—a program ratio—which the County generates by dividing the charity's program services expenses by its total revenue. I understand that this percentage is also routinely provided by the County to Pinellas County residents who call the County requesting information about a particular charity. This program ratio, too, will not help members of the public who are not familiar with nonprofit fundraising practices to evaluate accurately an organization's efficiency with respect to fundraising or the effectiveness of its program services. There is no benchmark against which to judge the percentage that is generated. To compare the program ratios for different types of nonprofit organizations is much like comparing apples and oranges, and thus, the percentage, if provided in a vacuum, as Pinellas County does, is quite misleading to members of the public.

22. For example, as noted above, I have experience fundraising for operas that operate on a nonprofit basis. Operas tend to rely on large donations from a small number of donors. As a result, fundraising costs for operas are quite low, and the percentage of total revenue that will be devoted to program services is likely to be high. Advocacy groups such as Public Citizen, however, engage in vigorous grass-roots fundraising and rely on a large number of very small donations. As a result, Public Citizen's fundraising costs are much higher, and the percentage of revenue devoted to program services correspondingly lower, than that of an opera. If a lay person unfamiliar with the nonprofit industry were to compare the program service percentages for an opera and Public Citizen, however, he or she might assume that the opera

performed its mission better and/or was a more efficient fundraiser than Public Citizen. That assumption, however, would be unfounded because it fail to take into account both the differences in the nature of these nonprofit groups and the necessary differences in fundraising approaches.

23. In addition, it is much harder for a § 501(c)(4) organization to raise contributions than a § 501(c)(3) organization because only donations to the latter are tax-deductible. As a result, PCF can raise money from larger donors more easily than PCI, because donors who make large contributions usually prefer that they be tax-deductible. Thus, a § 501(c)(4) organization has to raise many small contributions to fund its mission, which makes fundraising more difficult and more expensive because the organizations' grass-roots fundraising effort must be broader and reach a greater number of people. Because a § 501(c)(4)'s fundraising expenses tend to be higher than a § 501(c)(3)'s, its program ratio often will be lower. Yet again, the County lumps all of these organizations together indiscriminately and generates a program ratio without any such context, potentially leading a resident to believe, without basis, that a particular § 501(c)(3) organization is more efficient or performs its mission better than a particular § 501(c)(4) organization.

24. The only way the percentage figure generated by the County would be of value to a member of the general public would be if the percentages of *like* organizations were compared—*e.g.*, the percentages spent on program services for two similar advocacy organizations—and even then, there are differences between like organizations that might skew a comparison of program ratios. Similarly, a reliance on the percentage figure alone would fail to take into account that the management and overhead expenses associated with certain types of

nonprofit organizations—a museum, for example—are relatively high and thus may lead to a lower percentage of revenue going to program services than, say, an advocacy group. This does not mean, however, that the museum is inefficient or performs its mission poorly.

25. There is an additional skewing effect on the program ratio that is important to mention. Public Citizen, like many nonprofit organizations, receives some very sizeable contributions throughout a given year as a result of foundation grants or bequests. Under IRS tax rules, these contributions must be reported in the year the grants are awarded or the bequests made, even though the charity may not actually receive the money or spend it until the following year. As a result, the charity’s program ratio could be seriously affected in both years. In Year 1, the revenue would be higher and the expenses comparatively lower, producing a higher program ratio. In Year 2, revenue would be relatively lower but expenses higher, as the grant or bequest money is spent; hence, the program ratio would be lower in that year.

26. In short, while Pinellas County relies on figures that Public Citizen and other charities have reported on their Form 990s (total revenue and program services expenses) to generate a program ratio, Public Citizen does not believe that the County’s decision to disseminate a program ratio produces information that is useful or beneficial to members of the public deciding whether to contribute to a charity.

B. Demands for Solicitation Materials

27. Pinellas County’s Ordinance and New Permit Application seek other information that is sensitive, difficult and costly to gather, and that is of significant proprietary value to Public Citizen. Pinellas County’s requirement that we submit the wording of verbal solicitations and “any written or printed material(s) used in solicitation,” New Permit Application ¶ 29(H), as

a condition of obtaining a permit, and then as a condition of renewing the permit, is particularly problematic for Public Citizen. See Pinellas County Code § 42-292(a)(12)(f) & (g); New Permit Application ¶ 29(H); Charitable Solicitation Renewal Application, List of Required Attachments, ¶ I. The requirement is both unreasonable and impracticable for several reasons.

28. First, as discussed in the Second Declaration of Joseph Zillo, the requirement that we submit our written solicitations materials and verbal scripts *in advance* of receiving or renewing a permit not only forces us to make public proprietary information, but it opens us and other charities up to the potential for censorship by the County. There is nothing in the Ordinance that would guard against the County using its authority to review the wording of our phone scripts and solicitations letters and then to withhold or revoke a permit (or sanction Public Citizen for a violation of the Ordinance) unless that wording is to the County's liking. That the County claims to review these materials to gauge their "consistency" with charities' registration materials only heightens this concern.

29. Second, our solicitations materials are voluminous and always changing throughout the year, making it quite burdensome to keep the County up-to-date. Each year, Public Citizen sends out more than twenty waves of mailings across the country, but that does not mean that we send out only twenty different letters per year. Our mailings take three basic forms: public information packages that prospect for new members, packages asking current members to renew their memberships, and packages making appeals to current members. Public Citizen sends out multiple versions of each mailing, varying either the letter, the inserts, the outer or return envelopes, or some combination of the above. We send out these multiple versions of these mailings to test their relative effectiveness. Ultimately, we may settle on the

version(s) that prove to be the most successful in generating contributions or other responses from recipients. There were five variations of the January 2001 mailing attached as Exhibit A, for example. To compile these hundreds of variations of our written solicitation materials for Pinellas County would require considerable staff effort. In addition, Public Citizen uses as many as seven or eight different telephone scripts in a year.

30. And it is not as if we would have to provide copies of our written solicitation materials and telephone scripts to the County only once a year. The Ordinance requires a permit holder to report any changes in the information provided to the County within 15 days of the change, Pinellas County Code § 42-295(b)(4), a requirement that would apply whenever we changed a solicitation letter or a telephone script that may be used in Pinellas County.

31. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____.

Lane Brooks
Director of Development
Public Citizen