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 ERROL COPILEVITZ

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

1. I am a senior partner in the law firm Copilevitz & Canter, L.L.C., which has offices in Kansas City, Missouri and Washington, D.C. I have been retained by the plaintiffs to render an expert opinion regarding the burdens and benefits of the Pinellas County ("County") charitable solicitations ordinance, Pinellas County Code §§ 42-266 to -344 ("the Ordinance"). I am receiving no compensation other than out-of-pocket expenses for my testimony. I have not served as an expert witness in any other case. This declaration also serves as the expert witness report required by Federal Rule of Civil Procedure 26(a)(2)(B).

I. EXPERIENCE

2. I founded the law firm of Copilevitz & Canter in 1977. The firm is recognized nationally in the nonprofit and fundraising community for its expertise regarding federal, state, and local regulation of charitable solicitation, whether carried out by charitable organizations or the professional firms they retain. The firm's practice has three facets: (1) it provides full-

service representation to nonprofit organizations, handling every type of legal issue they may face; (2) it represents other for-profit entities who work with charities in conducting charitable solicitations, including professional fundraising consultants, professional solicitors, commercial co-venturers, and vending machine operators; and (3) it represents the commercial telemarketing industry.

3. My firm assists more than 200 charitable organizations nationwide to register and comply with the reporting requirements of states and local governments across the country that regulate charitable solicitation, including in Pinellas County, Florida. My firm also aids professional solicitors, professional fundraising consultants, and commercial co-venturers register in jurisdictions that regulate them, though for purposes of this Declaration, I will focus on my work for charitable organizations. My curriculum vitae is attached hereto as Exhibit A.

4. Nonprofit organizations are extensively regulated by federal and state governments and, to a lesser extent, by cities and counties. Currently, forty states, including the District of Columbia, have enacted laws requiring charitable organizations that solicit charitable contributions in their jurisdictions to register and comply with an assortment of regulatory requirements of varying degrees of burdensomeness. Each state imposes its own initial registration requirements, its own annual renewal requirements, and its own registration fee schedule; disseminates its own set of forms to be completed by the applicant; and sets its own requirements as to what types of materials—such as the informational filing that nonprofit organizations are required to file with the IRS, the IRS Form 990 or 990-EZ; proof of tax-exempt status; contracts with professional firms; and the like—that the charity must submit along with its application.

5. For more than 15 years, I have helped assist charitable organizations comply with this ever-growing regulatory burden. My firm also assists charities in complying with federal regulatory requirements. The reason my firm's services were in demand then and remain so now is because of the enormous commitment of time and resources that nonprofit organizations devote to complying with the maze of regulatory requirements for the dozens of jurisdictions in which they are required to register.

6. I am a frequent writer and speaker on issues facing the nonprofit community and the author of various articles, essays, pamphlets, and other publications that relate to the regulation of charitable solicitation. A list of my publications is included in my curriculum vitae in Exhibit A. I also have been consulted on a number of occasions by state regulators considering how to draft laws to regulate issues concerning charitable solicitation. In addition, I have represented charities and professional fundraisers in litigation challenging overreaching charitable solicitation laws.

7. Based on my decades of experience, both as regulatory counsel and litigator, with the regulatory requirements imposed by state and local jurisdictions nationwide, including Pinellas County, Florida, I believe that I am qualified as an expert to render an opinion about the burdens and benefits of the Pinellas County charitable solicitations ordinance. I base this opinion not only on this extensive experience and my familiarity with Pinellas County's regulation of charities, but upon my review of the following: (1) the Ordinance; (2) Pinellas County's various registration, renewal, and reporting forms for charitable organizations; (3) defendants' answers to plaintiffs' first and second sets of interrogatories; and (4) the Second Declaration of Joseph Zillo of Public Citizen; (5) the Declaration of Lane Brooks of Public

Citizen; and the (6) Second Declaration of Ellen McPeake of Greenpeace. The reaction of Public Citizen and Greenpeace to the Ordinance, as described in the above declarations, is typical of that of many charitable organizations.

II. THE BURDENS IMPOSED BY THE PINELLAS COUNTY ORDINANCE

8. I am familiar with the Pinellas County Ordinance and with the forms that the County requires charities to submit. Before discussing particular requirements, let me begin by observing that the County's registration requirements, taken as a whole, are extensive, and the materials required so voluminous, that they can be among the most oppressive and burdensome set of reporting requirements in the country. For the charity that handles its registrations in-house, and, particularly, for the new, unsophisticated, or small charity, the initial registration form, along with its lengthy list of required attachments, is utterly daunting. Indeed, on various occasions, the Ordinance has caused charities to avoid Pinellas County altogether to eliminate the need to register because they have found the County's regulatory scheme to be far more trouble than it is worth. Unless the charity is very experienced in handling registrations, it would take it hours upon hours of staff time to prepare a complete registration package and, in all likelihood, the organization simply would not be able to provide complete and accurate information in response to the questions on this form without hiring an outside accountant or lawyer.

9. As discussed below, there is no countervailing benefit to offset the tremendous costs exacted by the Pinellas County regulatory regime. Much of what is at least arguably legitimate about the County's registration and reporting requirements for charities duplicates what is already required by the IRS and the State of Florida and information readily available in

the public domain. Nothing is gained by compelling the provision of this information at the county as well as the state level. Moreover, the additional reporting requirements imposed by Pinellas County but *not* by Florida are either unduly onerous or seek information to which the County is not reasonably entitled—again without offsetting benefit.

A. Enforcement by Pinellas County and Risk Averseness of Charities

10. Hundreds of local governments across the country have enacted ordinances regulating charitable organizations. Only a handful, however, aggressively enforce them against out-of-state charities. Pinellas County, Florida, is one of those counties. Most of our nation's thousands of local governments leave the regulation of charities to the states. Yet Pinellas County sends multiple letters to charities around the country threatening them with sanctions if they do not register in the County, pay a filing fee, and adhere to the Ordinance's extensive reporting requirements. The vast majority of my nonprofit clients that have received such threats from the County responded by immediately registering in the County or by suppressing further charitable appeals in the County to avoid the need for registration.

11. Charitable organizations are extremely risk-averse entities—much more so than the for-profit professional fundraisers with which they contract. The consequences of a charity being deemed out of compliance with the regulatory requirements of any jurisdiction in which it has members or solicits contributions, are grave. For a charity, public perception is critical to its ability to perform its mission successfully. Most charitable organizations will bend over backwards to comply with a jurisdiction's regulatory requirements—no matter how onerous, unreasonable, or unconstitutional—to avoid the stigma, damage to its reputation in the community, adverse publicity, and possible reprisals from the regulatory authority that

accompany a permit denial or revocation or the status of being "unlicensed" to solicit contributions in a given locale. This is particularly true because many states require registrants to report any instances in which a charitable solicitations permit has been denied by another jurisdiction. In my experience, charities typically attempt to comply *to the letter* with the forms provided by the regulating jurisdiction to avoid any charge that they have been evasive or that they have provided false, incomplete, or misleading information. If they do not believe they are capable of compliance, are intimidated by the registration process, or find it too burdensome, charities are more inclined to cease solicitation in the jurisdiction than to ignore their legal obligations. Indeed, on some occasions, my nonprofit clients have received threatening letters from Pinellas County, and, because they believed that the burdens and costs associated with compliance were too high to justify registration, responded as plaintiff Public Citizen did by suppressing their charitable solicitation in the County.

B. Duplicativeness of the Information Required by Pinellas County

12. The Second Declaration of Joseph Zillo accurately describes the extent to which the Ordinance and accompanying forms force charities to duplicate information they are already required to provide to Florida through their state registration and to the IRS in their annual informational tax filings, the IRS Form 990s. See Second Zillo Decl. ¶¶ 20-25. In considering whether this burdensome duplication is justified, it is important to bear two points in mind.

13. First, Pinellas County will know whether or not a given charity has provided the information required by Florida because the County requires that all charities annually submit proof of registration or an exemption acknowledgment provided by the Florida Department of Agriculture and Consumer Services. Pinellas County Code § 42-292(a)(8); Pinellas County

Charitable Solicitation New Permit Application ("New Permit Application") ¶¶ 28, 29(B). All Pinellas County residents can readily determine whether a charity has complied with state registration requirements and can obtain copies of registration materials through Florida's toll-free telephone number, website, and free paperback guide to charities registered in the state. As in Pinellas County, all registration materials submitted to Florida are open to the public. See Fla. Stat. ch. 119.

14. Second, the State of Florida requires that charities annually submit their tax returns, the IRS Form 990 or the Form 990-EZ. See Fla. Stat. ch. 496.405(2)(a) & .407(2). (In the event that a charity cannot supply these forms, Florida requires that it submit a financial report). These extensive filings are also available from the charities directly and from multiple sources in the public domain. See 26 C.F.R. §§ 301.6104(d)-1(a), -2 (IRS regulations requiring tax-exempt organizations to provide public access to their annual tax returns). Many charitable organizations post their Form 990s on their websites, and the forms also have been available for several years for free from The National Database of Nonprofit Organizations maintained on the GuideStar website, www.guidestar.org, as well as from websites operated by state regulators. See, e.g., http://justice.hdcdojnet.state.ca.us/charitysr/default.asp (California website). For these reasons, even if Pinellas County required nothing more than that charities soliciting contributions from County residents file copies of their Form 990s with the County, such a requirement, while not terribly burdensome standing alone, would be duplicative and serve little purpose.

15. I can conceive of no possible purpose that is served by requiring charities to submit to Pinellas County, as well as the State of Florida, the substantial volume of information described in the Second Declaration of Joseph Zillo.

C. Information Required by Pinellas County But Not by Florida

16. I also agree with the description in the Second Declaration of Joseph Zillo, ¶¶ 27-52, regarding the difficulties with the information that Pinellas County demands on top of what Florida already requires. This additional required information is invasive of privacy, is extremely burdensome to collect and report, and/or is proprietary and confidential.

1. Invasive and Burdensome Personnel-Related Requests

17. I have carefully reviewed the Second Declaration of Joseph Zillo and adopt his contention that several questions on the New Permit Application unreasonably require the applicant charitable organization to provide information that invades the privacy of individuals affiliated with the applicant charitable organization or is impracticable or unduly burdensome to collect. See Second Zillo Decl. ¶¶ 27-32. I have a few additional comments about these requirements.

18. First, the requirement that the charity provide personal information regarding its officers and directors—such as dates of birth, drivers' license or federally issued identification numbers, and residential contact information—is an unusual invasion of privacy. See Second Zillo Decl. ¶¶ 27-30; Second McPeake Decl. ¶¶ 22-23. Because of the personal nature and sensitivity of this type of identifying information, only a few jurisdictions in the country seek this information; most jurisdictions are satisfied with the applicant simply providing a list of its officers and directors. My firm will not provide any residential information to regulatory authorities when we prepare registration materials for our clients. In particular, the requirement that the charity supply a date of birth and a driver's license number, which in many jurisdictions is the same as the Social Security number, poses a serious threat to the charity's officers,

directors, and employees because of the risk of identity theft, fraud, and other types of abuse. Charities object to providing that kind of sensitive information, and my firm is usually able to convince regulators to forgo any demands for it. To compel charities to choose between the privacy of those individuals who work for them and the charities' ability to obtain a permit in Pinellas County, places an unreasonable burden on these organizations' rights of free speech and chills their willingness to speak in the County.

19. Second, I agree with Mr. Zillo that several questions on the New Permit Application, such as Questions 24 and 27, impose burdens that are entirely impracticable because truthful and accurate answers are virtually unknowable. See Second Zillo Decl. ¶¶ 31-32; see also Second McPeake Decl. ¶¶ 22, 24. Take Question 27. It is not uncommon for states to include a question seeking to ferret out conflicts of interest, but this question is remarkably broad, covering not only officers and directors, but all supervisors, managers, and employees. The other entities with which conflicts are to be disclosed are not limited in any way in the question, but cover "any professional assistance firm or agency involved in a current services contract with the applicant," not simply professional fundraising firms, as is more common. Such a disclosure provision is extremely burdensome—if not impossible to answer—because it would force the charity to investigate the relationships among all of its owners, officers, directors, supervisors, managers, and employees as well as the relationships between all of these individuals affiliated with a charity and the countless officers, directors, and employees of the dozens, if not hundreds, of law firms (including ours), professional fundraisers, accounting firms, telephone companies, print shops, mail houses, courier services, custodial service companies, office supply stores, and so on with which a charitable organization contracts for goods and

services.

20. Question 24 on the New Permit Application form is just as unreasonable and unusual. The provision is unduly onerous and impracticable because it requires a charity first to investigate all of the other organizations for which every designated person has ever worked or of which they have ever been a member, without date limitation, and then determine whether any of these organizations has ever been registered in Pinellas County—information that the current applicant charity would have no way of knowing. If a supervisor employed by the applicant was a member of the ACLU five years ago and that organization was registered in Pinellas County, that supervisor's name and his membership in the ACLU would have to be disclosed. I can think of no other jurisdiction that requires this information—information that intrudes upon employees' First Amendment rights of free association—or of any possible legitimate use that might be made of it.

21. As explained above, charities are extremely risk-averse; they are fearful of the consequences of not being fully forthcoming in completing these registration forms. The charities' concerns are heightened by the fact that the New Permit Application must be accompanied by an affidavit swearing under oath as to "the completeness and accuracy of the information in and attached to this application." New Permit Application Certification, at page 6. A new, small, or unsophisticated nonprofit organization would not probably not know where to begin to answer questions like these.

2. Financial Reporting Information

22. In addition to requiring submission of the Form 990s themselves, see New Permit Application ¶ 29(A), Pinellas County calls for projections of the applicant charity's future

financial performance in a highly burdensome degree of detail, requiring estimates of: (a) Expected gross revenue; (b) Expected contributions; (c) Projected program services; (d) Anticipated management and general expenses, broken out into a level of detail not maintained by most organizations; and (e) Fundraising Expenses. New Permit Application ¶¶ 14, 15, 16. There are several problems with these requirements.

23. First, Question 14 asks for the applicant to state its expected contributions and notes that the County's fee schedule is based upon contributions from Pinellas County residents. (The fee schedule is set out on the first page of the New Permit Application). In light of the fee schedule, the question regarding contributions disadvantages national charities that solicit in, but receive only modest contributions from, Pinellas County because it is difficult for national charities to isolate which contributions they receive from any one county in the country. To determine the level of contributions from Pinellas County, the charity would have to conduct an expensive and time-consuming search. Rather than go to that effort, most national charities use their national contribution figures, which immediately place them at the top of the fee schedule, paying a fee of $120, even though their actual level of contributions from the County, if it could be readily determined, might well place them toward the bottom of the scale, which goes as low as $20.

24. Second, whether the information sought is national, state, or local, the level of detail required in Question 16 for management and general expenses is extraordinary, far exceeding the breakdown of expenses required in the already comprehensive Form 990. (See Form 990, Part I (Expenses Section) & Part II). The application form requires applicants to estimate expenses for commissions, costumes, decorations/favors, entertainers, prizes, storage

costs, and a host of other types of expenses that most charities will never separately keep track of. The question is so intimidating that many charities, especially those that are new or unsophisticated, will not be able to complete it accurately and will be forced either to abandon registration in Pinellas County or pay to hire a law firm or an accountant to figure out how to fill it out. I can think of no valid justification for requiring disclosure of expenses in this degree of detail.

25. Third, the financial disclosure questions require that charities provide "projections" of their expected performance, rather than report on their performance in the past fiscal year, which a Form 990 would reflect. The Second Declaration of Joseph Zillo and the Declaration of Lane Brooks fairly describe the burdens associated with requiring such projections. Second Zillo Decl. ¶¶ 35-43; Brooks Decl. ¶¶ 11-17, 20. I agree with them that a charity's fiscal and fundraising planning and solicitation strategy for the coming year is highly sensitive information in the competitive field of charitable solicitation, the product of an enormous commitment of staff resources and the services of outside paid consultants. I also agree with them that information regarding a charity's *anticipated* revenues and expenses are of little value to a member of the public considering whether to contribute to that organization. The Form 990 provides the charity's *actual* levels of contributions and revenues and its *actual* expenses for the preceding year, with detailed breakdowns of expenses.

26. The detail required in Questions 14-20, and Question 16 in particular, serves no valid purpose. If the charity is an established and sizable one that has filed a Form 990, then the County should certainly not require more than the Form 990 (and again, even a requirement that a charity file *only* a Form 990 in the County serves no valid purpose when the form is provided

to Florida and is readily available from so many other sources). If the charity is new or exempt from such filing as a small organization, see Instructions for Form 990 and Form 990-EZ at 1 (Who Must File), available at http://www.irs.gov/pub/irs-pdf/i990-ez.pdf, or if it is exempt as a religious organization, see 26 U.S.C. § 6033(a)(2)(A)(i), then it will find these financial disclosure requirements particularly onerous to satisfy.

3. Fundraising Information and Solicitation Materials

27. The Public Citizen and Greenpeace Declarations also accurately describe the burdens associated with the County's demands for fundraising and solicitation information. See Second Zillo Decl. ¶¶ 44-49; Brooks Decl. ¶¶ 12-15, 27-30; Second McPeake Decl. ¶ 26. Perhaps the most overreaching requirement of the Ordinance is the requirement that an applicant charity submit the wording of verbal solicitations and "any written or printed material(s) used in solicitation." See New Permit Application ¶ 29(H); Pinellas County Code § 42-292(a)(12)(f) & (g); Charitable Solicitation Renewal Application, List of Required Attachments, ¶ I.

28. The requirement is improper and unreasonably burdensome for a few reasons. First, the requirement that a charity applying for a permit submit verbal scripts and written solicitation materials *in advance* of obtaining a permit and, again, in advance of securing a renewal, potentially subjects charities to censorship by the County, based on whether the County likes or dislikes the speaker, its message, or the manner of conveying that message. The risk is amplified because of the fact that the Ordinance contains no guidelines governing the use the County may make of these written solicitation materials and scripts.

29. There is no question but that the County reviews these scripts and solicitation materials for content, which is impermissible, in my view. In fact, the County held up the

renewal of a charitable solicitations permit for one of my clients, LAS, LLC, a professional telephone solicitor, for a year because the County it did not approve of its script. The Ordinance requires that a professional solicitor "immediately identify himself to the listener with his full name and the name of the professional solicitor organization before he solicits any person for a charitable or sponsor contribution." Pinellas County Code § 42-306(b). The County took issue with LAS's script because the script, at the outset, identified the name of the charitable organization for which the caller was soliciting, but did not identify the name of the solicitor until later in the script—though before the request for contributions. There was never any suggestion that there was anything false or misleading about the script, only that the County did not like where in the text the solicitor stated that s/he worked for LAS. See LAS Script and correspondence with Pinellas County, attached as Exhibit B. An attorney in my firm explained to counsel for the County that the script complied with the Ordinance because the solicitor provides potential donors with an opening explanation and description of the organization on whose behalf they are calling and discloses that the caller is a professional solicitor working for LAS before the listener is asked to make a donation. The County attorney disagreed, and as a result, did not renew LAS's charitable solicitations permit for July 2000 - July 2001. However, the County approved a renewal permit for LAS in July 2001 based on that same script.

30. Second, the required submission of scripts and printed solicitation materials is impracticable in any event. Large charities engaged in major national direct mail campaigns produce voluminous written solicitation materials that change frequently throughout the year. It is not uncommon for charities to send multiple waves of direct mail across the country each year, with each packet mailed out containing several inserts. For each wave of direct mail sent out,

there are often many variations, as the charity tests which packet of information is the most successful in generating responses. Charities may use a variety of verbal scripts throughout the year as well. To provide Pinellas County copies of this vast quantity of printed solicitation materials generated for every charity would be extremely burdensome and expensive, aside from being pointless. Compounding the burden is the requirement that a permit holder report any changes in the information provided to the County within 15 days of the change. Pinellas County Code § 42-295(b)(4).

31. Even if the requirement were read to require that a charity provide only a "representative sample" of its direct mail and scripts, which is contrary to the language of the Ordinance and the registration form, such a requirement would serve no useful purpose. The County would have no way of knowing whether the sample truly was representative. Nor would a sample piece of mail or script establish what ultimately was sent or said to the potential contributor. There still would remain no legitimate use for the County to make of these materials. Not surprisingly, this requirement is another unusual one. Only a few jurisdictions in the country require the submission of solicitation materials.

D. Updating and Interim Reporting Requirements

32. I also agree with Mr. Zillo's objections to the County's updating and interim reporting requirements, which again are more onerous than those imposed by other jurisdictions. See Second Zillo Decl. ¶¶ 50-52. The County requirement that the charity notify it in writing within 15 days "whenever the information required by or provided under this division has changed," Pinellas County Code § 42-295(b)(4), is substantially broader and more burdensome than the usual type of updating requirement. Most jurisdictions require that a charity provide an

update prior to its renewal date only if there is a material change, such as a change of name or address of the charity or contracts with new solicitors, rather than report every single change to the initial registration materials, as this Ordinance requires.

33. Yet another burdensome and pointless reporting requirement is that all new permit holders report their financial results or submit their Form 990s six months after obtaining their permit, mid-way through their permit period, along with yet another form. Pinellas County Code § 42-295(b)(1)(a); see Pinellas County Charity Report of Results form. To the best of my knowledge, this six-month reporting requirement is unique in the country and is yet another example of the endless churning of paper the County requires from charitable organizations. All states that require periodic reporting of financial information by charities following their initial registration are content to wait for permit holders to report their financial results at the time of their annual renewals. It is difficult to see how this one County can justify demanding more.

E. Prior Restraint Issues

34. Yet another uncommon and burdensome feature of this Ordinance is the extent of the delay built into the registration process before charities seeking to register may begin charitable solicitations in Pinellas County. The requirement that a charity register before soliciting in the jurisdiction, standing alone, is not that uncommon, although many jurisdictions permit solicitation to begin upon the filing of the application. What is more unusual is that the Ordinance does not provide for a brief period of time, such as the ten days allowed by Florida, see Fla Stat. ch. 496.405(7), after which the applicant charity may begin to solicit *unless* the Department notifies the charity that there is some problem with its application or a violation of the Ordinance. Such a provision preserves the status quo for charities that have been soliciting

in the jurisdiction and ensures that any restriction on speech be for as short a time as possible.

35. In Pinellas County, a permit need not be issued until thirty days from the date of the application's "proper filing." Pinellas County Code § 42-293(a)(1). Thirty days is an atypically long delay to begin with, but in practice, the delay can be significantly longer because every tiny piece of information that might conceivably be missing from the application when first submitted is grounds for the County to claim that the application is incomplete and to postpone the running of the thirty-day period. After the County sends a letter stating its intent to deny a permit, it has fifteen more days to actually deny the permit. See Pinellas County Code § 42-293(a)(3). After a denial, the applicant has fifteen days in which to request a hearing, but the Ordinance specifies no time period in which the hearing must be held or a decision after the hearing made. Id. § 42-293(a)(4).

36. In practice, months can go by while the charity and County employees engage in correspondence, telephone calls, and negotiation to iron out the information that the County will accept in order to issue an initial or renewal permit. The issuance of permits is anything but a ministerial process in this County. I have had a number of clients whose new permit applications or renewal applications have been "pending" almost indefinitely while the County demands that they provide additional information or resolve problems over which the charity has no control. If the negotiation is occurring before the charity has received its initial permit or after its permit has expired, the charity is prohibited from engaging in all forms of communication with County residents that contain a solicitation during all this period, see Pinellas County Code §§ 42-291(a), 42-321(a), even though the charity has substantially complied with the requirements, paid a filing fee, and provided extensive information requested

by the County.

37. It is difficult to convey just how much of a hassle obtaining a permit in Pinellas County can be for my nonprofit clients. For example, my firm is currently experiencing difficulties with the County over its refusal to renew the permit of a major national charity that we represent. At the end of March 2002, this charity applied to renew its permit in the County, which was to expire in April. The County sent the charity a letter after receiving its renewal application informing it that it was unable to issue a permit based on the fact that two of its commercial co-venturers were not licensed in the County. These co-venturers are large national commercial companies that represent that a portion of the proceeds from the purchase of their products will benefit the charity. Neither company has any connection to Pinellas County. My client's permit has already expired, as the County's website search page for the organization indicates, while the County continues to hold up the renewal of its permit. If these two companies continue to refuse to register in the County, which may well occur, then this major charitable organization stands to lose its permit permanently, even though it has done everything within its power to comply with Pinellas County's arduous requirements.

38. If the County suspends or revokes a permit, during which time a charity is again prohibited from soliciting, see id. §§ 42-296(e) & (f), 42-327, the County has thirty days to hold a hearing after such suspension or revocation. Id. § 42-296(c). As in the case of a hearing on a permit denial, the Ordinance sets no deadline by which the Director must issue a final decision on whether to suspend or revoke a permit, leaving the charity potentially in limbo, unable to solicit in the County, for an indefinite period of time while the Director makes her decision.

F. **The Internet Provision**

39. I am also familiar with Pinellas County Code § 42-310, which requires any charitable organization that receives a contribution from a citizen of Pinellas County as a result of an Internet solicitation to register in the County, unless the organization returns the contribution within thirty days. (The New Permit Application also requires that an applicant charity check a box indicating if it solicits on the Internet and to provide its Internet address. See New Permit Application ¶¶ 13, 29(K)). This provision is breathtaking in scope. If a small local charity in Kansas City puts up a website to raise money for a local cause and a citizen of Pinellas County happens to see the website and contribute, then that Kansas City charity is required to register and pay a filing fee in Pinellas County unless it returns the contribution that one of the County's citizens voluntarily chose to make. The provision not only covers out-of-state charitable organizations, but also, apparently, charities based outside the United States.

40. I have reviewed the County's answers to plaintiffs' interrogatories and am aware that the County has stated that a charity can protect itself from this provision by adding a disclaimer on its website that it does not accept contributions from citizens of Pinellas County. See Defendants' Answer to Plaintiffs' Interrogatory No. 19. The Second Declaration of Joseph Zillo ¶ 16 accurately states the flaws with such a proposed safe harbor. To require a charitable organization to add such a disclaimer is to force it to engage in speech that it would never choose for itself. A potential contributor browsing the website would be left wondering why the charity does not want contributions from Pinellas County. Such a disclaimer may also be interpreted by a lay member of the public as a negative signal that the charity is attempting to evade regulatory requirements through use of a loophole.

41. The requirement that charities return these contributions would also be difficult for many charities to police. Depending on the amount of information provided by the contributor, a charity may not even know that a particular contribution comes from Pinellas County unless the charity undertakes a special search or makes a special inquiry of the donor.

42. The effect of this provision is either to silence or unduly burden speech. Charities that otherwise would not be required to register in the County but for the fact that they have received a contribution from a County resident through their websites, must choose either (1) to pull their general charitable solicitations from their websites; (2) add a damaging disclaimer to their websites and return contributions from Pinellas County residents; (3) register, pay a filing fee, and subject themselves to the County's burdensome regulatory jurisdiction, despite their lack of contacts with the County; or (4) break the law, refuse to register, and be subject to penalties and the stigma that attaches to their noncompliance with the law. These choices place charitable organizations in an untenable position.

43. Several of my nonprofit clients have been very concerned about the County's Internet provision, a concern that has been heightened by the fact that some of them received correspondence or telephone calls from the County advising them about the provision and admonishing them that they must put disclaimers on their websites to avoid having to register. Because of their risk aversion, which I previously have discussed, several of my clients have responded to this threat of regulation by the County either by adding the disclaimers or by pulling their charitable solicitations from their website altogether.

44. To the best of my knowledge, Pinellas County is the only jurisdiction that has attempted to compel charities to register based solely on their receipt of contributions as a result

of a general Internet solicitation. The County's attempt to regulate here flies in the face of the set of principles adopted by the National Association of State Charity Officials (NASCO), known as the "Charleston Principles." These are the guidelines that state officials have agreed to follow in regulating when charitable organizations must register as a result of solicitation through the Internet. The Principles are available at http://www.nasconet.org/stories/storyReader$10 and are attached hereto as Exhibit C.

45. Under the Charleston Principles, organizations that use the Internet to solicit would be required to register in their home states. Charleston Principles III.A.1. In addition, a nonprofit that solicits contributions through an interactive website would be required to register in another state only if it "specifically targets persons physically located in the state for solicitation" or if it "receives contributions from the state on a repeated and ongoing basis or a substantial basis." Id. III.B.1.b.(2)(i) & (ii). An "interactive Web site" is one that permits a contributor to make a contribution or purchase a product by electronically completing the transaction, such as with a credit card. Id. III.B.2.a. To "specifically target persons physically located in the state for solicitation" means either to include on a website an express or implied reference to soliciting contributions from that state, or to otherwise affirmatively appeal to residents of the state. Id. III.B.2.b. The Pinellas County provision is not nearly so confined. The Charleston Principles do not even contemplate that it would be a single county, rather than a state, that would seek to regulate Internet solicitation.

III. THE PURPORTED COUNTERVAILING BENEFITS OF THE ORDINANCE

46. The Ordinance states that it serves two main purposes: the prevention of deception, fraud, or misrepresentation and the public's interest in full disclosure. Pinellas

County Code § 42-270. Based upon my experience with federal, state, and local charitable solicitation regimes, it is my opinion that the mere filing of information on charities does not inhibit fraud and that the public disclosure of information in Pinellas County that is already available to County citizens from the State of Florida, confers no additional benefit.

47. The effectiveness of a regulatory regime in rooting out fraud, misuse of funds, and other types of abuse of charitable solicitation is directly tied to the size of the regulatory agency's budget; the size and expertise of its staff; and the agency's willingness to take the initiative to independently verify the information provided by charities, to check the charities' books and records, to initiate investigations to determine whether charities are truthfully representing the uses made of funds received, to prosecute charities that have made misrepresentations or have misused contributions, and to identify those organizations soliciting in the County that have not registered and compel them to do so. From my dealings with Pinellas County, it is clear that the County does not generally undertake either to independently verify information provided by the charities, to check the charities' books, or to initiate its own investigations.

48. In addition, for the County to be able to audit some portion of registering charities' books and records, its staff would require accounting expertise. The IRS and many regulating state jurisdictions possess this type of expertise, but it is unusual to find at the local government level.

49. As for the alleged benefits of public disclosure, I am familiar with the information available to the public, including citizens of Pinellas County, regarding charities' identities, missions, and financial disclosure information. Based on that experience, I can state with

confidence that the Ordinance provides no public information benefit to Pinellas County citizens that they do not already receive from the Florida registration process.

50. As noted above, both Pinellas County itself and its citizens can obtain access to the registration materials, financial disclosures, and other information provided by charities to the State. Both Florida and the County have a telephone number that members of the public can call to check whether an organization is registered, to verify financial information, and to ask other questions. Florida's telephone number, 1-800-HELP-FLA, is toll-free. Both the State and the County operate websites where a member of the public can type in the name of a charity and pull up information stating whether the organization is registered and reporting basic financial information. See www.800helpfla.com (Florida); www.co.pinellas.fl.us (Pinellas County). My staff has used the telephone numbers and websites for both Florida and Pinellas County and have found no material difference in the nature of the information provided. If anything, the general information provided on the State's website regarding charitable solicitation is more comprehensive. Florida's hotline number, unlike the County phone number, is also well-advertised throughout the state because under state law, every printed charitable solicitation or receipt used in Florida must prominently display the following:

> A COPY OF THE OFFICIAL REGISTRATION AND FINANCIAL INFORMATION MAY BE OBTAINED FROM THE DIVISION OF CONSUMER SERVICES BY CALLING TOLL-FREE WITHIN THE STATE. REGISTRATION DOES NOT IMPLY ENDORSEMENT, APPROVAL, OR RECOMMENDATION BY THE STATE.

These solicitations materials must also provide the Florida toll-free number. See Fla. Stat. ch. 496.411(3).

51. Florida provides additional resources not furnished by the County, such as tips on charitable giving and answers to frequently asked questions on its website, as well as a free book

that can be ordered by telephone or off the State's website. This book, called the "Gift Givers' Guide: A Guide to Charitable Giving in Florida," which is printed annually, provides an alphabetical listing of all organizations registered to engage in charitable solicitation in Florida and reports for all charities almost the identical information available on the Florida website: basic financial statistics on the charity and the identity of its professional fundraising consultants and solicitors, if any. This book is attached as Exhibit D. Members of the public may retrieve the information available in this book directly off the Florida website by entering the name of the organization they wish to research on the Gift Givers' Guide search page. See http://www.800helpfla.com/~cs/gift_givers/search.html.

52. There is no reason why a Pinellas County employee, upon receiving an inquiry from a citizen asking whether a particular charity is registered or inquiring about the charity's level of program services, cannot either direct the caller to the resources provided by the State or obtain the information immediately for the caller by accessing Florida's website or looking up the charity in the Florida Gift Givers' Guide.

53. Based on what I have learned from dealing with regulators and nonprofit organizations, I know that in the vast majority, probably 90 percent, of calls made by members of the public to regulatory agencies to check on a charity, the caller simply asks the agency whether the charity is registered or not and nothing more. I do not contend that the answer to this question has no value. At a minimum, learning that a charity is registered reassures the potential donor that a charity has at least established some accountability. The regulating agency knows the identity of the charity and its officers and knows where to find it. And because accountability has value, my nonprofit clients generally do not object to the requirement that

they register in the states (as opposed to cities or counties) in which they solicit.

54. But the mere fact of registration does not ultimately demonstrate that the charity is "legitimate" in the sense that it uses its funds for the purposes it claims. Without an independent evaluation of materials provided by a registering charity—based on information collected from sources outside the charity—an agency will rarely, if ever, be able to detect fraud from the registration materials alone, and so reporting that an nonprofit is "registered" is of only slight value. That limited assurance is already provided by the State of Florida, which makes it easy for its citizens to determine whether a given charity is registered.

55. There is one additional piece of information that the County generates and provides on its own initiative, based on information reported by registering charities, that Florida wisely does not provide. That is the so-called "program ratio," the percentage of funds that the charity purportedly devotes to its program services, which the County calculates based on information provided by the registered charities. I recognize that the plaintiffs do not make an independent constitutional claim against the County's provision of this information, but rather are attempting to show that by providing this program ratio, the County does a disservice to its citizens and charities alike. In fact, the ratio is highly misleading, damages charitable organizations, and is of no value to potential contributors. The program ratio is provided on the County's website for all the charities for which the County has information. I also understand that County employees routinely volunteer this ratio to members of the public who call in to check on a charity's registration.

56. Ironically, the County does not provide the actual ratio it claims to provide. The County website states:

> Pinellas County registers anyone that solicits for charitable/in-kind donations. Before you donate, research them and check the program services amount. This amount is the percentage of money received which directly supports the program purpose. The National Charities Information Bureau recommends the program service amount to be 60 percent of $1.00 donated.[1]

If one looks up a particular charity through the County's search engine, the County provides a percentage that it has calculated for that charity. The County's web page for the charity will contain a statement like this: "__ % of your donation which directly supports this program is based upon the information provided by the organization."

57. In disseminating this ratio, the County is providing members of the public misleading information that the County does not even accurately represent, doing a disservice both to them and to the registered charities. The provision of this ratio has multiple problems. First, the County evidently does not understand what information it is actually providing its citizens. The County calculates the program ratio by taking the amount the charity spends on program services and dividing it by the charity's total revenue. Both the program services and total revenue numbers are provided on the website; dividing the numbers produces the program ratio that the County generates. (A charity's program service expenses is found at line 13 on a Form 990, and its total revenue at line 12).

58. Yet the County claims to be informing its citizens what percentage of their *donation* is going to the charity's program services. To provide that information, the County would have to divide program services (Form 990, line 13) by total *contributions* (Form 990,

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[1] The link for this page of the website is http://bccclw1.co.pinellas.fl.us/servlet/page?_pageid=32&_dad=portal30&_schema=CPA_SITE&_mode=3&_type=site&_fsiteid=1&_fid=98&_fnavbarid=853&_fnavbarsiteid=1&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalledfrom=1&_fdisplayurl=. The page can also be reached by following the Department of Consumer Protection and then the Charitable Solicitation links from the County's home page.

line 1d). Charitable contributions represent are only a subset of a charity's total revenue. A charity may have investments, may sell books and publications, and may have other revenue sources other than charitable contributions. For many charities, their contributions may be significantly lower than their total revenue. Thus, by dividing program services by total revenue rather than by contributions—which is the ratio the County claims it is providing—the County is significantly lowering a given charity's program ratio by increasing the size of the denominator, thereby providing a ratio that casts the charity in a less favorable light.

59. Second, the County's website cites 60 percent as the program services benchmark recommended by the National Charities Information Bureau (NCIB), tacitly recommending to Pinellas County residents that they decline to contribute to any charity with a program ratio lower than 60 percent. The standard provided by NCIB, which has since merged with the Council of Better Business Bureaus Foundation and its Philanthropic Advisory Service to form the BBB Wise Giving Alliance, see http://www.give.org, is only one of many competing standards. What is interesting here, however, is that the ratio the County provides is different than the ratio to which the NCIB standard refers. Contrary to what the Pinellas County website states, the NCIB did not recommend that the program service amount to be 60 percent of $1.00 *donated*. Rather, the standard it proposed was that charities "spend at least 60% of annual *expenses* for program activities." See NCIB Standard No. 6, available at http://www.give.org/standards/ncibstds.asp (emphasis added).

60. In other words, NCIB recommended that charities allocate 60 percent of their total expenses to program services—in other words, that the program service amount be 60 percent of $1.00 *spent* by the charity (not 60 percent of $1.00 donated to the charity). To

provide the NCIB ratio, the County would have to divide program service expenses (Form 990, line 13) by total expenses (Form 990, line 17)—a totally different ratio than what the County provides. Assuming that a charity's total revenue exceeds its total expenses, which is generally, but not always true, a ratio of program services to total expenses will appear more favorable to a charity than program services to total revenue because the denominator will often be smaller. (Of course, if the charity is having a bad year, its expenses may exceed its revenue, producing a smaller program ratio). It is difficult to see how the County can be doing its citizens a service by generating a percentage that it neither explains nor even accurately represents.

61. Aside from the fact that the County does not understand what ratio it is providing, this so-called program ratio, whichever way it is calculated, has little value and is of almost no help to a member of the public deciding whether to contribute to a particular charity. None of the competing standards is based on scientific evidence or research—or any foundation other than public perception. The program ratio and similar "efficiency" measures are meaningless because they fail to take into account factors such as the age of the charity, whether it is endowed or receives large foundation grants, whether government funds are accepted or used, methods of fundraising, size of the organization's overhead costs, whether it is a § 501(c)(3) or a § 501(c)(4) organization, whether it uses staff or outsources functions, and so on. I have reviewed the Declaration of Lane Brooks ¶¶ 21-26, which discusses the problems with relying on a program ratio, and agree with his description of the many flaws with providing such a ratio.

62. There is no benchmark against which a potential contributor can judge the percentage that is generated. There is no way to compare program ratios for different types of nonprofit organizations. The program ratio for a hospital or museum, which have high overhead

expenses, cannot be compared to an advocacy organization, that likely does not. The program ratio for a symphony, which will raise money from a small number of wealthy donors, cannot be compared with a grassroots nonprofit organization that engages in an aggressive nationwide fundraising campaign to obtain many small donations from a large number of people. The program ratios for foundations, which are § 501(c)(3) organizations that receive tax-deductible donations, cannot be compared to § 501(c)(4) organizations that do not; the latter will have to spend more money raising a large number of smaller donations because large donors generally prefer to make tax-deductible contributions. Yet the County indiscriminately lumps all these charities together by providing the program ratio for each, suggesting that it should be compared against a 60 percent benchmark, and then providing its citizens no further context or information.

63. The program ratio also will be significantly skewed by various events. Charities are accrual taxpayers; therefore, they have to report their fundraising expenses in the year accrued even though the income from that effort may not come in until the following year. This means that the program ratio will be skewed in both years. The same problem exists with charities that receive large bequests or foundation grants; these large cash infusions must be reported in the year received even though the money may not be spent until the following year, again skewing the program ratios in both years.

64. Finally, and perhaps the most important point of all, even if this ratio somehow measured a charity's fiscal efficiency, which it does not, the program ratio is not a useful harbinger of how well a charity actually performs its mission. You can have a charity, on the one hand, that approaches 100 percent efficiency in that nearly all dollars contributed are spent on program services, but the charity accomplishes nothing. You can have another charity, on the

other hand, that spends more than 50 percent of its contributions on fundraising, but it discovers the cure to cancer. A local government such as Pinellas County provides no benefit to its citizens or to charities by focusing on efficiency as if that were a useful benchmark against which to judge the charity. It is not. The Supreme Court has recognized the lack of utility of these percentages in several cases now, most recently in Riley v. National Federation of the Blind, 487 U.S. 784 (1988). Charities should not be compelled to comply with an enormously onerous registration scheme like Pinellas County's and pay hefty annual filing fees for the privilege of having the County misuse the information the charities provide. For a persuasive discussion regarding why these program ratios are a poor measure of a charity's success, as well as misleading to the public, see Phyllis Freedman, Fundraising Cost Percentages: Do They Really Matter?, 1 National Federation of Nonprofits, Oct. 1997, at 1, attached hereto as Exhibit E.

IV. CONCLUSION

65. It is difficult enough for even the largest charities to comply with the registration requirements imposed by 40 states. According to the Statistical Abstract of the United States, there are over 3,000 counties, more than 19,000 municipalities, and more than 16,000 townships and towns in this country. See http://www.census.gov/prod/2002pubs/01statab/stlocgov.pdf (tables 413 and 414). If even the smallest fraction of these imposed demanding registration requirements and filing fees along the lines of this Ordinance, then even the largest and most established of charities would soon find themselves closing up shop, and all citizens would be the poorer for it.

66. The burdens imposed by the Pinellas County regulatory regime are excessive in

relation to the purported benefits for County residents. The legitimate information the County collects duplicates what is provided to Florida, all of which is publicly available to County officials and residents alike and key features of which are instantly accessible via telephone or website. Nor does the Ordinance serve its alleged purpose of preventing fraud, given what little effort the Department undertakes to independently verify the information provided or conduct its own investigations. The County's regulatory scheme adds nothing to the broad authority possessed by federal and state regulators to investigate and root out fraud in charitable solicitation.

67. For all the reasons described above, the Pinellas County charitable solicitations ordinance unreasonably burdens the rights of those charities that suffer through its registration and reporting requirements to engage in free speech and interstate commerce and chills the speech and interstate commerce of those charitable organizations that decide to forgo activities in Pinellas County rather than assume the tremendous burdens and costs associated with registration there. As a result, the Ordinance seriously diminishes the exchange of ideas, information, and advocacy of important causes in Pinellas County and interferes with charities' provision of the benefits of membership to Pinellas County citizens, for no discernible purpose.

68. 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 ______________.

____
Errol Copilevitz
Copilevitz & Canter, L.L.C.