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.	)	
	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants make two broad arguments in support of their motion for summary judgment: first, that plaintiffs' constitutional challenge to the Pinellas County charitable solicitations ordinance has already been resolved in the suit brought by for-profit professional fundraising consultants, American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 32 F. Supp. 2d 1308 (M.D. Fla. 1998), rev'd on other grounds, 221 F.3d 1211 (11th Cir. 2000) ("American Charities"), and (2) that the Ordinance does not violate either the First Amendment or the Commerce Clause because it was enacted to serve the County's interests in preventing fraud and informing the public regarding charities that solicit contributions in the County. Neither argument suffices.

Even more fundamentally, the County has submitted no competent evidence in support of its motion for summary judgment; it has filed only newspaper clippings, articles, letters, a videotape, pleadings and briefs from the American Charities case, and various materials regarding charitable regulation in other jurisdictions—all of which are inadmissible hearsay and none of which meets the standard for evidence at summary judgment. See Fed. R. Civ. P. 56(c). Even if the materials were properly before the Court, they provide no support for this Ordinance. Because the Ordinance significantly impairs First Amendment rights, the burden is on the County to establish its

constitutionality. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816 (2000); Elrod v. Burns, 427 U.S. 347, 362 (1976). The County's total failure to submit evidence supporting its regulation of charitable solicitation is therefore fatal to its defense of the Ordinance, confirms that there is no genuine dispute of material fact, and compels a grant of summary judgment in favor of the plaintiffs.

I. THE AMERICAN CHARITIES DECISION DID NOT RESOLVE THE CLAIMS ADVANCED BY THE PLAINTIFF CHARITIES HERE.

The County attempted at an early stage of this litigation to convince this Court that the charities' claims here merely repeat those advanced by the plaintiff professional fundraising consultants in American Charities. This Court rejected the County's motion to dismiss, correctly recognizing that "the identities and interests of the plaintiffs are different in each case, and the legal claims are far from identical." Order at 2 (dated Aug. 3, 2001). The County's effort to resurrect this same argument is no more persuasive at summary judgment.

Although both lawsuits present constitutional challenges to the same Ordinance, the similarities between the two actions begin and end there. American Charities was brought solely on behalf of professional fundraising consultants, whereas this case is brought solely on behalf of charities that solicit charitable contributions nationwide, including in Pinellas County. The County maintains that the distinction is irrelevant because the legal standards that apply to charities are the same as for professional fundraisers. Defendants' Memorandum of Law in Support of Its Motion for Summary Judgment 4 ("Defendants' Mem."). Plaintiffs do not contend, however, that the relevant *case law* changes depending on the identity of the plaintiffs, but rather, that the facts, burdens, and evidence are different, as this Court has already recognized. See Order at 2 (Aug. 3, 2001). The challenged Ordinance itself distinguishes between charitable organizations and professional fundraising consultants, and there are different filing requirements and forms, with

divergent impacts, for each. The legitimacy of the distinct burdens that are imposed on each thus presents distinct legal issues. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Consolidate or Reassign and to Defendant's Motion to Dismiss (June 27, 2001).

The key issue in American Charities was whether professional fundraising consultants, who had no contact whatsoever with Pinellas County, could be compelled to register there. In contrast, plaintiffs here do not object to registration alone, but to the excessively burdensome and intrusive reporting requirements that must be satisfied to obtain the County's approval. Although the American Charities complaint alleged that the Ordinance was unduly burdensome *as applied to professional fundraising consultants* under First Amendment and Commerce Clause theories, no evidence supporting these claims was presented to the district court when it granted summary judgment to the County. The American Charities plaintiffs argued only that the Ordinance *on its face* was unduly burdensome as to the consultants, and they did so without the benefit of a factual record. As the court specifically pointed out in rejecting plaintiffs' Commerce Clause claim:

> Plaintiffs, who bear the burden of proof, have not come forth with any relevant evidence that the burden on professional fundraisers is "clearly excessive" to this benefit [of regulation]. Instead, Plaintiffs merely hypothesize about the burden they may incur *if* other localities enact a similar ordinance. This type of guesswork, however is mere speculation and serves only to cloud the precise issue before the Court.

32 F. Supp. 2d at 1317; see also id. at 1325 (rejecting First Amendment burdensomeness claim for the same reason). Accordingly, the Eleventh Circuit's affirmance, without discussion, of that portion of the decision rejecting the professional fundraisers' First Amendment and Commerce Clause claims was necessarily and correspondingly limited in scope. See American Charities, 221 F.3d at 1214.

II. THE COUNTY HAS FAILED TO SUSTAIN ITS BURDEN OF PROVING THAT THE ORDINANCE IS NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST, AS REQUIRED BY THE FIRST AMENDMENT.

What is remarkable about the County's effort to defend its Ordinance is that it ignores entirely the existence of the extensive factual record that has been developed in this case regarding the particular burdens and costs that the Ordinance and required forms impose on charities; the absence of benefits from the Ordinance as it actually operates; the unbridled discretion exercised by defendants in administering the County's licensing scheme; and the chilling effect, significant self-censorship of speech, and substantial interference with interstate commerce that have followed in the Ordinance's wake. Not only is the Complaint extremely detailed in describing plaintiffs' particular objections, but plaintiffs provided a virtual blueprint of their case when they filed the Declaration of Joseph Zillo a year ago in support of their opposition to the motion to dismiss. Since then, both sides have engaged in extensive document discovery, and plaintiffs have taken the depositions of defendant Sheryl Lord and four other County employees.

In the face of this particularized factual record, the County defends the Ordinance without citation to competent evidence, without discussion of the particular provisions of the Ordinance that plaintiffs have cited as especially burdensome, and at such a level of abstractness that it is difficult for plaintiffs to know how to respond. Part of the problem is that defendants misunderstand both the nature of plaintiffs' challenge—it is both facial and as-applied—and the case law governing facial challenges in the First Amendment context. Defendants argue that plaintiffs can maintain only a facial, and not an as-applied, challenge to the Ordinance because neither Public Citizen nor Greenpeace is currently licensed in Pinellas County. Defendants' Mem. 7 & n.1. But defendants offer no reason or authority why the record in this case does not support an as-applied challenge, and they overlook the fact the plaintiffs include charities that have registered in the County, charities that

have had permits denied by the County, and charities that have been coerced to censor their speech and restrict their solicitation activities in the County to avoid the burdens of registration. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment 2-3 ("Plaintiffs' Mem.").

Furthermore, the County incorrectly states the legal standard that governs this type of facial challenge. Defendants cite United States v. Salerno, 481 U.S. 739 (1987) and other cases, and argue that plaintiffs must prove that there is "no conceivable basis" by which the Ordinance may be upheld. Defendants' Mem. 7. But that is not the proper test for a First Amendment challenge such as this. Because the First Amendment needs "breathing space," the Supreme Court has allowed "'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" Broadrick v. Oklahoma, 413 U.S. 601, 611, 612 (1973) (citation omitted); see also Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956-59 (1984); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798-801 (1984). When, as here, an ordinance "sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected," Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992), it is unconstitutionally overbroad. The County is therefore simply wrong when it asserts that a facial challenge does not look to "worst case scenarios." Defendants' Mem. 28. In the First Amendment context, plaintiffs may challenge a statute "on the ground that it *may conceivably be applied* unconstitutionally to others, in other situations not before the Court." Dimmitt v. City of Clearwater, 985 F.2d 1565, 1571 (11th Cir. 1993) (emphasis added).

A. The County Has Failed to Make the Required Factual Showing.

Both sides agree that the County must prove that the Ordinance serves a substantial governmental interest and that it is narrowly tailored to serve that interest without unnecessarily

interfering with First Amendment freedoms. See Defendants' Mem. 8. The County attempts to make that showing by way of platitudes and inadmissible, irrelevant evidence to the effect that there is a risk of fraud and deception in charitable solicitation—a general proposition that plaintiffs do not debate. The issue here is not whether *some* narrowly tailored regulation of charities may be justified, but whether this particular Ordinance is a reasonable means of advancing the County's interests.

The majority of the newsclippings introduced by defendants do not even relate to the current ordinance. Defendants' Exhibits 3-8 discuss the ordinance that was in effect in Pinellas County in the early 1970s; the Ordinance challenged here was promulgated in December 1993, and there is no showing that the two ordinances are the same. Exhibit 7 discusses the problems with Florida's regulation of charities prior to the adoption of its 1992 statute. The remaining clippings discuss general recurring issues relating to charitable solicitation, such as the amount of money charities spend on program services versus fundraising or administrative expenses.[1] None of these exhibits—even if they were admissible, which they are not—explains how this particular Ordinance serves the general governmental interest in preventing fraud, much less demonstrates that it is narrowly drawn. Nor do they show that Pinellas County residents receive any public information or other benefit from the Ordinance that they do not already possess by virtue of the Florida

[1] Other exhibits regarding proposed federal legislation (Exhs. 12-13), an amicus brief supporting a Utah charitable solicitations law challenged by a professional fundraiser (Exh. 16), and a seven-year-old Illinois Report regarding the registration of professional fundraisers in that state (Exh. 17) have nothing to do with the Pinellas County Ordinance. The County's submission of the amicus brief filed in American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10th Cir.), cert. denied, 531 U.S. 811 (2000), is not only irrelevant, but an improper attempt to submit an additional brief to this Court, in violation of Local Rule 3.01(b) & (c). See also American Charities, 32 F. Supp. 2d at 1313 (refusing to consider this same amicus brief filed by the County in support of its motion for summary judgment in that case).

registration process and IRS regulation. See Plaintiffs' Mem. 13-19.[2]

The only exhibit that purports to defend the Ordinance against plaintiffs' challenge is a letter dated April 18, 2002 from James Kelly, a Florida regulator, to Carl Brody, counsel to defendants, which states in conclusory fashion: "While the state law provides certain protections, there is no doubt that the Pinellas County local ordinance affords distinct protection to your residents not included under state law." Defendants' Exh. 18. Not only is the letter inadmissible hearsay, but it does not explain the basis for Mr. Kelly's conclusion. Mr. Kelly states that he is responding to Mr. Brody's letter—which has not been submitted to either the Court or to plaintiffs—"concerning [the] county's litigation with Public Citizen, Inc.," but he does not even indicate whether he has read the complaint or any of the evidence submitted in support of it.[3]

Other exhibits submitted by the County bolster, rather than undermine, plaintiffs' position that the County's regulatory scheme serves only to catch trivial omissions on the part of charities, but does nothing to prevent or detect fraud. See Plaintiffs' Mem. 15-18. Exhibit 20 is a letter from the FBI requesting documents from the County's files regarding a nonprofit organization and a professional solicitor that were being prosecuted for mail fraud and money laundering. As the attached County logs reflect, the only one of these entities against which the County had taken

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[2] Indeed, it is ironic that the County cites the "vast variance" in the amount of money going to individual charities, Defendants' Mem. 5, as justification for the Ordinance, when the County contributes to the problem by administering a counterproductive regulatory scheme that serves only to increase charities' administrative expenses to the detriment of program services. See Browning Affid. ¶ 5. But if it were truly important, which it is not, for the County to furnish its residents a (misleading) ratio of program services to total revenue, it could do so directly from the information provided on both the Florida website and in the Florida Gift Givers' Guide. See Plaintiffs' Mem. 19 n.11.

[3] The letter also appears to be an effort to introduce an unsworn expert witness opinion into evidence without following the requirements of Federal Rule of Civil Procedure 26(a)(2)(B) and without disclosing the identity of the witness to plaintiffs in discovery, so that plaintiffs could interview or depose the witness. See Defendants' Answers to Plaintiffs' Interrogatories Nos. 25, 27 (attached as Exhibit 1 to the Notice of Filing Additional Exhibits in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment ("Notice of Filing Additional Exhibits")).

enforcement action was Kidwish USA, Inc. The County revoked its permit for three years in 1999 for failure to timely meet the burdensome and pointless requirement of filing the six-month reporting form, a failing which has nothing to do with fraud and yet accounts for the bulk of the permit revocations in the County. See Plaintiffs' Mem. 13 & n.6.

The County's pursuit of the charitable organization Holy Land Foundation ("HLF"), as discussed in the videotape of the WFLA Channel 8 (February 2002) broadcast news story (Exh. 19), presents even stronger evidence of both the Ordinance's failure to serve any anti-fraud purpose and the excessive discretion given to County officials to use the licensing scheme as a means to censor unpopular speech and speakers. In December 2001, the federal government froze the assets of the Muslim charity, asserting that the group was engaged in fundraising for the Islamic Resistance Movement known as Hamas—an action that HLF has challenged. See Neely Tucker, Muslim Charity's Lawsuit Raises 'Distressing' Issues, Judge Says, Wash. Post., Apr. 23, 2002, at A4 (attached as Exhibit 2 to the Notice of Filing Additional Exhibits). After the federal government's action, a Channel 8 reporter contacted officials in Pinellas County, where HLF was licensed, and asked them "What are you going to do about it?" Lord Depo. 106.[4] Under the Ordinance, "if probable cause exists to suspect a violation of this article," the Department "may investigate any person to determine whether such person has violated any provision of this article." PC Code § 42-276(b). County officials concede that they had no evidence at this time suggesting that HLF had committed fraud or was otherwise in violation of the Ordinance. Lord Depo. 207; Wood Depo. 63-64. Nevertheless, because they were "outraged" and "furious" that "we would allow an organization that's connected to terrorists to solicit donations in Pinellas County and grant them some credibility by giving them a license," Wood Depo. 17, 19, and because it "doesn't sit real well" to tell the media

[4] Cited deposition excerpts are attached as Exhibit 6(A)-(C) to the Notice of Filing Additional Exhibits.

there was nothing the County could do, Lord Depo. 110, County officials set about to "find some way that we could eliminate them soliciting funds, at least under our auspices, in Pinellas County." Wood Depo. 19.

Since the Ordinance affords a veritable smorgasbord of conceivable bases to deny or revoke permits for the determined and unfettered County regulator, see Plaintiffs' Mem. 22, it is not surprising that the County found one. County officials decided to check the coin boxes that HLF had left with convenience stores around the County, and, as it "turned out," Lord Depo. 107, the canisters were not in compliance with the Ordinance because they lacked the required disclosures that "registration does not imply endorsement" and that the public can contact the Department of Consumer Protection for further information. Videotape (Exh. 19); Wood Depo. 19; see PC Code § 42-309. County officials immediately seized the canisters—what Chief Investigator Wood called a "local freeze of their assets," Wood Depo. 20—without advance notice, a hearing, or any apparent authority under the Ordinance. Thereafter, the County revoked HLF's permit for three years. Id.; Videotape. This flurry of activity by the County, of course, had nothing to do with whether HLF had perpetrated fraud upon County residents. The County did nothing more than seize coin boxes that lacked a mandated disclosure, conducted no further investigation, Krick Depo. 65, failed to maintain the status quo pending further review, and did not grant HLF the rights that due process requires.[5]

And even assuming that some valid purpose is served by the omitted disclosure, the County

[5] Indeed, as the County admits, none of the stated bases for any of the County's 29 or more permit revocations or 45 or more permit denials was because the applicant or permit holder had engaged in fraud in connection with a charitable solicitation or had misused funds—still further evidence of the Ordinance's substantial overbreadth. Defendants' Response to Plaintiffs' First Request for Admissions, Nos. 1 & 2 (attached as Exhibit 3 to the Notice of Filing Additional Exhibits); see also Exhibits 4 & 5 (lists of organizations that have had permits denied or revoked by Pinellas County). Plaintiffs' Request for Admissions is attached as Exhibit 3 to the previously filed Notice of Filing Excerpts from Discovery.

should have denied HLF a permit from the outset because the New Permit Application ("NPA") requires that charities attach to their application the wording imprinted on any canisters or a sample label. NPA ¶ 29(I). But since it is the County's practice to take the voluminous information submitted by charities and do no more than "put it in the file," Plaintiffs' Mem. 15-16 & n.8, even this readily detectable violation of the Ordinance (the County had a list of the canisters' locations, Lord Depo. 110), did not surface until the media and political pressures demanded action. The County then took advantage of the unbounded discretion afforded by the Ordinance and selectively enforced its provisions to rid itself of a charity that it deemed an embarrassment to the County.

The bottom line is that the County has submitted no admissible evidence demonstrating that the Ordinance serves any legitimate governmental interest or that it is narrowly drawn. Yet the Supreme Court has insisted, even in cases involving intermediate First Amendment scrutiny, that the government compile an extensive factual record demonstrating that any restriction on speech is narrowly tailored. See, e.g., Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 195-225 (1997); Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994); see also Plaintiffs' Mem. 17. It is insufficient for the County to wrap itself in the dual mantras of fraud and public disclosure. This Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986). Instead, the County must establish "the fit between the asserted interests and the means chosen to advance them." Turner, 520 U.S. at 213.[6]

[6] Even restrictions on commercial speech, which is afforded less protection than the speech here, see Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980), will be struck down if they provide "only ineffective or remote support for the government's purpose." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980); see also Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173, 188 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) Ibanez v. Florida Dep't of Bus. & Prof'l Reg'n, 512 U.S. 136, 146 (1994); Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

The County offers no explanation, for example, why it is not sufficient to require simply the identification of any charity proposing to solicit in the County, accompanied by proof of registration in Florida, and for the State or the County to prosecute vigorously any instances of fraud. See Plaintiffs' Mem. 17. County officials could assist residents inquiring about such charities either by referring them directly to the wealth of information made available by the State (such as the Florida Gift Givers' Guide, the Florida website, or the Florida hotline), as well as to other publicly available resources, see id. at 18-19, or by consulting the resources themselves to aid residents. "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). Where, as here, the government's interests are only "peripherally promoted" and can be served by less intrusive measures, the Ordinance cannot stand. Munson, 467 U.S. at 961; Schaumburg, 444 U.S. at 636.

B. The Case Law Cited by Defendants is Irrelevant.

On pages 9-21 of its brief, the County cites various judicial decisions as allegedly supporting particular provisions of the Ordinance. There are several flaws with its discussion. First, the principal problem is that the County ignores those provisions of the Ordinance that plaintiffs have challenged as invasive, unduly burdensome, or otherwise improper, see Plaintiffs' Mem. 7-13, and focuses instead on the most benign, as if their existence somehow negates the Ordinance's multiple defects.[7] Second, none of the cases cited addresses whether a local charitable ordinance can stand when, as here, its arguably legitimate registration provisions duplicate what is already required

[7] See, e.g., Defendants' Mem. 14-15 (citing Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1548 (11th Cir. 1993), to support the Ordinance's identification requirement); id. at 15 (citing Famine Relief Fund v. West Virginia, 905 F.2d 747, 752 (4th Cir. 1990), to support the requirement that the charity describe its mission); id. at 13 (citing Holy Spirit Ass'n for Unification of World Christianity v. Hodge, 582 F. Supp. 592, 597-98 (N.D. Tex. 1984), to support the provision authorizing a permit denial when the application contains false material information).

under federal and State law—especially when the information provided to the State is readily accessible by County officials and residents alike. Plaintiffs' Mem. 5-6, 18-19 & n.10. And finally, many of the cited decisions are either distinguishable or support plaintiffs' challenge.

For example, the County claims that the Eleventh Circuit's decision in Church of Scientology supports several Ordinance provisions, but the only requirements the court sustained as narrowly tailored were those that required identification of the charity applicant, proof of tax-exempt status, and the names of other cities in Florida in which the charity has registered. Defendants' Mem. 14-15; see 2 F.3d at 1546, 1548. If that were all that was required by the County, its application would consist only of Questions 1-3 & 29(E) on the current form. (Question 29(D) is much broader than a request for the names of other Florida cities in which the charity is licensed).

The Fourth Circuit ruled in Famine Relief Fund that a State may require charities to describe their missions, to conduct oversight of fundraising activities, and to prohibit undisclosed conflicts of interest, see Defendants' Mem. 15-16 (citing 905 F.2d at 752), but the Eleventh Circuit refused to uphold several similar provisions in the Clearwater ordinance, Code § 100.03(1)(d)-(i). See 2 F.3d at 1521-22, 1546. Even assuming that a regulator could require submission of some of this information, the validity of such requirements would turn on precisely how invasive or burdensome they were. See NAACP v. Button, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). For example, it may not be unusual for a State to attempt to ferret out conflicts of interest, but the County's disclosure requirements on that score are exceptionally burdensome. See PC Code § 42-292(a)(7); NPA ¶ 27; Plaintiffs' Mem. 7-8. Nor does Famine Relief Fund provide support for the excessively onerous PC Code § 42-292(a)(12), which requires the charity to provide estimates of the receipts and expenses

of its solicitation, to project the proportion of contributions that will go toward the object of the solicitation, and to outline a distribution plan for contributions, see id. § 42-292(a)(12)(c)-(e); NPA ¶¶ 14-20, 22, as well as to submit advance copies of solicitation materials, PC Code § 42-292(a)(12)(f) & (g); NPA ¶ 29(H). See Plaintiffs' Mem. 9-12. The Fourth Circuit's entire discussion regarding disclosure requirements was also *dicta* because the court ultimately enjoined the entire law as imposing an invalid prior restraint. See 905 F.2d at 753-54.

The decision in Holy Spirit, cited at Defendants' Mem. 13, supports plaintiffs' challenge to the Ordinance, rather than the County. There the court invalidated a substantial portion of a local ordinance, including provisions authorizing denial of a permit that are also present in the Pinellas County Ordinance, such as the catch-all ground that the applicant "has otherwise violated any of the terms of the permit or this division." 582 F. Supp. at 597-98; cf. PC Code § 42-276(e). The court also struck down requirements that the applicant provide detailed information about its methods of handling and disbursing funds, a detailed financial statement or audit, and other required financial information. 582 F. Supp. at 601-602; cf. PC Code § 42-292(a)(9) & (12); NPA ¶¶ 14-20 & 29(A).[8]

The ruling in Gospel Missions of America v. Bennett, 951 F. Supp. 1429 (C.D. Cal. 1997), far from justifying the Ordinance, see Defendants' Mem. 17-18, strongly supports plaintiffs' position. See Plaintiffs' Mem. 8-9, 11. The court's statement that "disclosure requirements that specifically relate to the planned charitable solicitation are constitutional," 951 F. Supp. at 1450, refers back to its discussion at page 1444 in which it sustained three provisions giving regulators authority to investigate statements made by charities and to inspect their books. Plaintiffs have no

[8] The decision in Heritage Publ'g Co. v. Fishman, 634 F. Supp. 1489, 1500 (D. Minn. 1986), which upheld a similar catch-all provision, cannot be evaluated without knowing what else the statute requires. More to the point, however, the decision is irrelevant because the challenge was brought by a professional fundraiser, and the court explicitly predicated its analysis on the fact that "a state may regulate a profession to insure that individuals working within it maintain high standards. Id. at 1499; see also id. at 1500.

objection, in principle, to giving the County such authority to investigate, see PC Code § 42-276—so long as that authority is not linked to the issuance of permits and is delimited so as to avoid abuse.[9] Indeed, one reason this regulatory scheme is so pointless is that the County does nothing with the abundant information it collects. See Plaintiffs' Mem. 15-18. Gospel Missions also provides no support for what the County broadly terms the Ordinance's "reporting requirements," Defendants' Mem. 17, which unreasonably demand that charities update *all* changes to their registration materials within 15 days and that new permit holders file six-month financial reports. See PC Code § 42-295(b)(1)(a) & (4); Plaintiffs' Mem. 12-13. The remaining cases cited by defendants involve regulations of professional fundraisers and are irrelevant.[10]

III. THE COUNTY HAS NOT ADDRESSED PLAINTIFFS' CLAIM THAT THE ORDINANCE IMPOSES AN INVALID PRIOR RESTRAINT ON SPEECH.

For the most part, the County does not discuss plaintiffs' arguments regarding why the Ordinance imposes an impermissible prior restraint on speech. A few corrections of misstatements

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[9] In light of the fact that it is a violation to fail to comply with any requirement of the Ordinance, see PC § 42-276(e), the County's open-ended authority to investigate is problematic because it means that the County may deny, suspend, or revoke a permit based on a failure to comply fully with a highly discretionary and costly request for "all financial records." Id. § 42-276(d); see Giani, 199 F.3d at 1252 (striking down a Utah provision authorizing a request for "any additional information the division may require" as conferring unbridled discretion when coupled with the authority to deny an incomplete permit application).

[10] The decisions in Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1485 (6th Cir. 1995), Special Programs, Inc. v. Courter, 923 F. Supp. 851, 860 (E.D. Va. 1996), and Indiana Voluntary Firemen's Ass'n v. Pearson, 700 F. Supp. 421 (S.D. Ind. 1988), uphold requirements that a professional solicitor disclose his professional status at the time of the solicitation—a requirement not at issue here. The Tenth Circuit's opinion in Giani upheld registration and disclosure requirements imposed on professional fundraising consultants in Utah. The decision also offers little guidance because it makes only passing reference to the actual requirements and does not mention whether the plaintiff presented evidence that they were unduly burdensome. See 199 F.3d at 1248; see also Giani, 23 F. Supp. 2d 1303, 1307 (D. Utah. 1998) (noting that the information required is "relatively simple and readily available to the consultant"). Moreover, Giani also specifically noted that the law did not authorize a content-based review of charitable mailings, 199 F.3d at 1247, in contrast to this Ordinance. See Plaintiffs' Mem. 11-12. The court did strike down certain statutory provisions as conferring excessive discretion on regulators, see 199 F.3d at 1250-1253, but even there, the opinion, though helpful to plaintiffs, is of limited relevance because the validity of a licensing scheme ultimately turns on the degree of discretion afforded regulators and the inclusion of the safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965).

by the County are in order, however. First, the County is incorrect to read the Ordinance as providing that if no permit is issued in the required time period, the application is "automatically accepted." Defendants' Mem. 11 (citing PC Code § 42-293(a)(1)). What that provision states is that the County is required to grant a permit within 30 days from the date of its "proper" filing. As plaintiffs have shown, that 30-day time period in practice often drags out over months while County officials and applicants haggle over minutia. See Plaintiffs' Mem. 24-26 & nn. 17-18. Significantly, like this one, the ordinance in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227-29 (1990), required that a license be issued within 30 days of receipt of the application, but the Court nonetheless invalidated the ordinance because it, like the Ordinance here, failed to set time limits for other events that might occur during the approval process. Finally, the Ordinance, like those struck down in Redner v. Dean, 29 F.3d 1495, 1500-01 (11th Cir. 1994), and Artistic Entertainment, Inc. v. City of Warner Robins, 223 F.3d 1306, 1311 (11th Cir. 2000) (per curiam), fails to guarantee charities the right to begin (or continue) solicitation after the passage of a brief interval. If County officials fail to issue a permit as required under PC Code § 42-293(a), the charity is prohibited from soliciting in the County—a classic prior restraint. See id. § 42-291(a); id. § 42-331.

Second, the Department is not limited to denying a permit to the five mandatory grounds for denial listed in PC Code § 42-293(c). Section 42-276(e), which defendants call a "failsafe provision," Defendants' Mem. 11, states that "[t]he director may deny, suspend, or revoke the charitable solicitations permit of any person for any violation of this article." See Plaintiffs' Mem. 22. Indeed, the director routinely denies and revokes permits on grounds other than those listed in § 42-293(c). For example, the revocation of HLF's permit was for failure to include required disclosures on its coin boxes, and the County regularly revokes permits for failure to file the six-month financial reports. See Part II(A), supra. It is also quite common for the County to deny initial

or renewal permits because the charity has contracted with an unlicensed commercial co-venturer or professional fundraiser—a violation of PC Code § 42-321(c) that is not listed among the mandatory grounds for denial in § 42-293(c). See Bailey Decl. ¶¶ 8-11; Copilevitz Decl. ¶ 37.

The Ordinance provides no guidance regarding when it is appropriate to deny or revoke a permit where the applicant or permit holder has violated one of its provisions—leaving these decisions to subjective judgment calls as to whether one of the Ordinance's many provisions has been violated and to discretionary choices as to whether to act in the event of a violation. See Plaintiffs' Mem. 22-24 & nn. 13-16. The County is also free to pick and choose whether and when to harass a charity not to its liking. See discussion of HLF, supra, at 8-10. The County does not even appear to dispute that its officials exercise such discretion. See Defendants' Mem. 6 ("[T]he Department provides as much leeway as possible to assist permit holders in maintaining their license."); see also id. at 28; Church of Scientology, 2 F.3d at 1523 (problematic for regulators to "exercise their personal judgment . . . to decide whether a given response was adequate"). As the Supreme Court has recognized: "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." Thornhill v. Alabama, 310 U.S. 88, 97 (1940); see also International Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809, 822-23 (5th Cir. 1979).

Finally, the County claims that the FW/PBS standard applies here rather than the Freedman standard, see Defendants' Mem. 12 n.2, without articulating what relevant difference there is between the two.[11] At a minimum, both decisions require that the licensor make a decision whether

[11] The County is also wrong to assert that the Ordinance is a content-neutral "non-censorship licensing scheme." See Defendants' Mem. 12 n.2., 20. As the district court observed in Telco Communications, Inc. v. Barry, 731 F. Supp. 670, 682 (D. N.J. 1990), the requirement that charities submit solicitation materials places the government "in a censor's position even though it does not require that the solicitation text be approved" by the government. See also Plaintiffs' Mem. 11-12.

to issue a permit within a brief and specified time period during which the status quo is maintained and that expeditious judicial review be made available. Neither safeguard has been satisfied here. See Plaintiffs' Mem. 24-26 & nn. 17-19; see also Church of Scientology, 2 F.3d at 1548 n.46.

IV. THE COUNTY HAS FAILED TO NEGATE PLAINTIFFS' SHOWING THAT THE ORDINANCE'S BURDENS ON INTERSTATE COMMERCE ARE EXCESSIVE IN RELATION TO THEIR LOCAL BENEFITS.

The County seeks to defend the Ordinance against plaintiffs' Commerce Clause challenge by yet another perfunctory invocation of its interest in protecting "the public's safety, health and welfare." Defendants' Mem. 24. The principle that state and local governments may not regulate interstate commerce so as to interfere substantially with its flow "is not to be avoided by 'simply invoking the convenient apologetics of the police power.'" Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 779-80 (1945); see also Service Machine & Shipbuilding Corp. v. Edwards, 617 F.2d 70, 74 (5th Cir.), aff'd, 449 U.S. 913 (1980) ("[A]n assertion of a permissible local interest is not a talisman."); Plaintiffs' Mem. 29. Indeed, by submitting no evidence whatsoever that the Ordinance confers any local benefits, the County has "virtually defaulted in its defense of the regulations as a safety measure." Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 (1978).

Any analysis under Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), of the relative benefits and burdens of a law that has incidental effects on interstate commerce is necessarily fact-bound and dependent on the law at issue. Each case cited by the County is distinguishable because in each, the courts found on the records before them either that the burdens on interstate commerce were minimal or that the burdens were not excessive in light of the challenged law's demonstrated local benefits. See Defendants' Mem. 25-27. In Ray v. Atlantic Richfield Co., 435 U.S. 151, 179-80 (1978), the Court upheld a tug-escort requirement for the Puget Sound because the record did not show that the requirement "impede[d] the free and efficient flow of interstate and foreign

commerce," for the cost of the tug escort was minimal. Similarly, in Maine v. Taylor, 477 U.S. 131, 140-51 (1986), the Court upheld a ban on the importation out-of-state minnows because a detailed evidentiary record established both the necessity of the ban to protect Maine's fisheries and the absence of nondiscriminatory alternatives. The Court upheld a statute banning the retail sale of milk in non-returnable plastic bottles in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-73 (1981), because Minnesota's interest in promoting conservation and easing solid waste disposal problems was "substantial," there was no available approach with "a lesser impact on interstate activities," and the burden imposed on interstate commerce was "relatively minor." In Northwest Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 526 (1989), the Court sustained a regulation of natural gas production because it was not clearly excessive in relation to Kansas's substantial interest in preventing waste and protecting property rights, and the record showed no availability of less burdensome alternatives. Indeed, in Ferndale Labs., Inc. v. Cavendish, 79 F.3d 488, 495-96 (6th Cir. 1996), the court upheld a registration requirement for pharmaceutical distributors because it could "discern no needless obstruction of interstate commerce" where applicants were required only to complete a modest two-page form that was "not onerous" and did not "require the applicant to change its business practices in any way." None of these rationales holds true for this Ordinance.

For every decision the County cites upholding a burden on interstate commerce, there is one striking down a regulation under Pike as unduly burdensome, as failing sufficiently to promote the asserted local interests, or because less restrictive alternatives to the challenged regulation existed. In addition to the cases cited in Plaintiffs' Mem. 27-30 & n.20, see, e.g., U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1070-71, 1072 (8th Cir. 2000) (invalidating local ordinance requiring that all solid waste collected within city be deposited at one local station because benefits were

"illusory" and effects on interstate commerce "far from trivial"); ANR Pipeline Co. v. Schneidewind, 801 F.2d 228, 238 (6th Cir. 1986) (concluding that "the burdens of expense, delay, and administrative hassle of 'advance approval' securities regulation far outweigh the benefits, if any, of Michigan's interests in protecting consumers and investors"), aff'd on other grounds, 485 U.S. 293 (1988); Service Machine, 617 F.2d at 75-76 (invalidating worker registration ordinance because its benefits were "illusory," it impeded the "free flow of commerce," and less burdensome alternatives existed).

The County does not deny that its Ordinance imposes substantial burdens on the free flow of goods, services, and information through interstate commerce, but claims that it imposes no "incidental burdens" on interstate commerce for purposes of analysis under Pike, citing New York State Trawlers Association v. Jorling, 16 F.3d 1303, 1308 (2d Cir.1994). According to the County, under Pike: "Incidental burdens are burdens on interstate commerce that exceed the burdens on intrastate commerce." Therefore, the County concludes, there are no incidental burdens on interstate commerce here because "the burden on interstate and intrastate commerce are [sic] identical." Defendants' Mem. 24-25. Jorling, of course, did not express the law of this Circuit, but, as construed by the County, would be inconsistent with Pike and its progeny because it misinterprets what is meant by "incidental burdens" on interstate commerce. By "incidental" burdens on interstate commerce, Pike was referring to those burdens that are the result of evenhanded, rather than discriminatory or protectionist, regulation. For an evenhanded regulation, which is not per se invalid, courts examine the overall burdens of the regulation on both interstate and intrastate commerce to determine whether they exceed the local benefits. See Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) ("[T]he critical consideration is the overall effect of the statute on both local and interstate activity."). For that reason, the Eleventh

Circuit voided a ban on the importation of out-of-county waste under Pike, even though the local law "treat[ed] interstate waste and intrastate waste on an equal basis." See Diamond Waste, Inc. v. Monroe County, 939 F.2d 941, 944 (11th Cir. 1991). In other words, if Minnesota in Clover Leaf Creamery had imposed a law requiring that all milk must be sold in the State in purple containers, the law would fail a Pike analysis regardless of the fact that the burdens on interstate and intrastate retailers would be the same.[12]

In any event, this Ordinance exacts a real, not hypothetical, toll on interstate commerce that exceeds that imposed on local commerce. National out-of-state charities have to navigate and comply with the regulations of 40-odd States, as well as local jurisdictions such as Pinellas County, while local charities that do not solicit nationwide need only concern themselves with complying with Florida's and Pinellas County's registration and reporting requirements. The burdens are even more profound if they are aggregated with those that are or could be imposed by other local governments. See Diamond, 939 F.2d at 944-45 & n.10. The unfortunate fact is that ordinances such as Pinellas County's do lead to the "balkanization" of charitable solicitation activity nationwide, see Defendants' Mem. 25 (quoting Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1015 (9th Cir. 1994), with charities forced to pull or alter their charitable appeals in those jurisdictions with the most burdensome and expensive regulations, or substantially change their solicitation and recordkeeping practices to conform to those regulations. This is precisely what the

[12] The County's approach is also contrary to Supreme Court analysis because if a facially neutral statute has the *effect* of burdening interstate commerce more heavily than intrastate commerce, then it is treated as discriminatory and virtually per se invalid, without resort to Pike. See Brown-Forman, 476 U.S. at 579 (when a state statute's "effect" is to favor in-state economic interests over out-of-state interests, it is usually per se invalid); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350-53 (1977) (striking down facially neutral statute that had the "practical effect" of discriminating against Washington apples). As Justice O'Connor recognized in her concurrence in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 405 (1994) (citation omitted), "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to . . . the people of the State enacting such statute." Yet if the County were correct, then no state regulation would ever be invalidated under Pike.

Commerce Clause prohibits—and was meant to prevent. See Plaintiffs' Mem. 29-30.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court deny defendants' motion for summary judgment and grant plaintiffs' motion for summary judgment.

Date: June 10, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 10th day of June, 2002, he caused to be served by first-class U.S. mail, postage prepaid, (1) one copy of the Memorandum in Opposition to Defendants' Motion for Summary Judgment; and (2) one copy of the Notice of Filing Additional Exhibits in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment upon counsel for defendants:

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