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.	)	
	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In their opposition brief, defendants rely on misinterpretations of legal precedents, citations to the district court's decision in American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 32 F. Supp. 2d 1308 (M.D. Fla. 1998), and unsupported claims regarding Pinellas County's practices in administering its Ordinance. This reply responds to each of these assertions. Moreover, in neither its motion for summary judgment nor its opposition to plaintiffs' summary judgment motion has the County submitted any admissible evidence that justifies the registration and reporting burdens imposed on charities or demonstrates that the Ordinance is narrowly tailored to serve any substantial governmental interest. The County's failure to come forward with such evidence confirms yet again that the County has failed to carry its burden under the First Amendment, that there is no triable issue of material fact, and that plaintiffs are entitled to judgment as a matter of law.[1]

[1] As indicated in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment 4 n.2, ("Plaintiffs' SJ Mem."), Mr. Brody has represented that the County intends to repeal the provision in the Ordinance governing Internet solicitation, PC Code § 42-310. He has subsequently represented that the County Board of Commissioners is likely to take that action during its scheduled meeting on July 16, 2002. Plaintiffs' counsel has advised Mr. Brody that plaintiffs will seek leave from this Court to file a short memorandum of law addressed solely to the validity of the Internet provision if it is not repealed by then.

I. THE COUNTY HAS FAILED TO DEMONSTRATE THAT THE ORDINANCE IS NARROWLY TAILORED.

A. Duplication of Registration and Reporting Requirements

Defendants respond to the charities' objection to the Ordinance as duplicative by claiming that the State has "codified" its support for the Pinellas County Ordinance and that both State regulators and the State legislature have "acknowledged" the utility of this particular Ordinance. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment 2, 11 (citing Fla. Stat. ch. 496.421 and Defendants' Exh. 18) ("Defendants' Opp. Mem."). Such a claim is unsupportable. Section 496.421 expresses no opinion regarding this Ordinance, but simply provides that "more stringent" local provisions are not preempted by the State statute. Duplicative provisions, of course, are not "more stringent." James Kelly's inadmissible and conclusory expression of support for the Ordinance (Exh. 18) has already been addressed in the Memorandum in Opposition to Defendants' Motion for Summary Judgment 7 & n.3 ("Plaintiffs' Opp. Mem."). More to the point, whether state officials condone the Pinellas County Ordinance is irrelevant. The plaintiff charities challenge this Ordinance because it violates the United States Constitution, not because it is preempted by the Florida statute—and no endorsement by a state official can save it.[2]

B. Additional Requirements Imposed by Pinellas County

1. Burdensome and Invasive Personnel-Related Information

The County argues that the Ordinance's request for personal information does not unduly burden charities because (1) charities' employees have no constitutionally protected privacy interest

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[2] The series of disclosures mandated by the County that are identical, or virtually identical, to those compelled by Florida impose a heavy burden on charities' exercise of their First Amendment rights. See Plaintiffs' SJ Mem. 5-6. The County does not articulate what purpose is served by requiring charities to provide on the County's own forms the same contact information, similar financial disclosures, contracts with professional fundraisers, disclosures regarding convictions and enforcement actions, documentation of the charity's tax-exempt status, and other information required by Florida and readily available to the public.

in their Social Security numbers; and (2) the County does not, in practice, insist that charities provide drivers' license or Social Security numbers or personal contact information. See Defendants' Opp. Mem. 2-3, 5. Neither argument has merit.

The County's first point is a non sequitur. Plaintiffs assert no constitutional right to privacy in their employees' Social Security numbers or in any of the rest of the personal information required by the County. Rather, plaintiffs object to providing highly personal information that is open to the public and is frequently subject to abuse (as the County itself has recognized in literature it distributes to its residents, see Pinellas County Identity Theft Flyer (Exhibit 1 to the Notice of Filing Exhibits)), as a condition of obtaining a permit to engage in constitutionally protected speech. Objections to laws requiring charities to disclose certain types of information routinely have been sustained without regard to whether the information enjoys independent constitutional protection—whether it be disclosure of the percentage of contributions turned over to the charity, see Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 795-98 (1988), or the names, addresses, and telephone numbers of charity employees or board members, see Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1521, 1546 (11th Circ. 1993), Gospel Missions of America v. Bennett, 951 F. Supp. 1429, 1443, 1450 (D.C. Cal. 1997).

The Fourth Circuit's decision in Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993), bolsters our objections. Observing that "the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous," id. at 1354, the court invalidated a requirement that Social Security numbers be provided when registering to vote *not* because voters had an independent constitutional right to privacy in that information, id. at 1348, but because the voter's "fundamental right to vote is substantially burdened to the extent the statutes at issue permit the public disclosure of his SSN." Id. at 1354. Many charities balk at the County's

highly unusual requirement that they provide dates of birth, drivers' license or federally issued identification numbers, and personal contact information. See Second Zillo Decl. ¶¶ 27-30; Second McPeake Decl. ¶ 23; Copilevitz Decl. ¶ 18; Tigner Decl. ¶ 11(b). The County has offered no justification, and certainly no evidence, to support this burden.

Second, the County claims that the Ordinance does not insist upon the filing of Social Security numbers, and makes the additional inexplicable point that the County authorizes applicants to provide their "federal identification number" in lieu of their officers' and employees' drivers' license number. Defendants' Opp. Mem. 3 & n.1. The Ordinance is clear. PC Code Section 42-292(a)(5) states that the applicant must provide the "date of birth, mailing address, physical street address, telephone number and *either the driver's license number and the state of issue or the federally issued identification number of the individuals listed pursuant to subsection (a)(1) of this section.*" (emphasis added).[3] Social Security numbers are used as drivers' license numbers in many states, and in these states, requiring filing of drivers' license numbers is tantamount to requiring filing of Social Security numbers. See Plaintiffs' SJ Mem. 7 & n.3. The Ordinance provides that charities may supply the designated individuals' "federally issued identification number" instead, but no such number (other than, conceivably, a Social Security number) exists. See Lord Depo. 34-35 (applicants must provide date of birth and drivers' license or Social Security number for the listed individuals) (Exhibit 1(A) to the Notice of Filing Exhibits with Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Notice of Filing Reply Exhibits")).

Similarly, the County asserts that for corporate applicants, only the "responsible person"

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[3] PC Code § 42-292(a)(1)(d) provides that if, as here, the applicant is a corporation, the applicant must provide the names of "all officers, directors, and stockholders having either direct, managerial, supervisory or advisory responsibilities for the solicitation of charitable contributions." These are the individuals for whom the charity must provide the information specified in § 42-292(a)(5).

must provide any information, and moreover, that corporate addresses and telephone numbers are acceptable. Defendants' Opp. Mem. 5. Again, this unsupported claim is contradicted by the Ordinance, see PC Code § 42-292(a)(1)(d) & (5), and the application form itself, which directs charities to provide personal information regarding officers who would be employed by a corporation, such as the "chief elected, executive, or operative officer," the treasurer, etc., see NPA ¶¶ 7-11, as well as attach a list of its officers and directors, with similar information. NPA ¶ 29(F). The plain reading of the Ordinance and forms is confirmed by the County's own correspondence denying permits to charities that failed to respond to its demand for names, addresses, and telephone numbers for all officers and directors. See Exhibit 2 to the Notice of Filing Reply Exhibits.[4]

More fundamentally, even if the County were willing to accept substitutes—and it has produced no evidence that it is—the chilling effect on free speech would remain. Charities have no way of knowing what the County's "actual" practice is, which, because it varies from one County employee to the next, is anyone's guess. See Plaintiffs' SJ Mem. at 22-23 & n.15. The only "instruction" that the County provides to charities is the Ordinance itself, which validates the disclosure requirements spelled out on the forms. Krick Depo. 29-30 (Exhibit 1(B) to the Notice of Filing Reply Exhibits); see also Tigner Decl. ¶ 11. Accordingly, charities attempt to provide whatever the County's forms ask for, especially because they are risk-averse and protective of their reputations. See Plaintiffs' SJ Mem. 3. This is an overrarching point that applies to all of the County's unsupported contentions that its "actual" requirements are more reasonable than those spelled out in the Ordinance and forms.

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[4] It is also the County's policy, as expressed in its Standard Operating Procedures, that "All application questions are to be answered (no blank spaces) and all required attachments must be included." (Exhibit 3 to the Notice of Filing Reply Exhibits); see also Lord Depo. 33 ("What's requested of them in the application needs to be submitted, and I would like to say my staff follows that practice, yes.") (Exhibit 1(A)).

The County's responses to plaintiffs' objections to Questions 24 and 27 on the NPA are similarly unpersuasive. The County claims, again, without citation to evidence, that it enforces Question 27 "in a reasonable manner requiring that only substantive conflicts be disclosed" (whatever that means) and accuses plaintiffs of failing to provide adequate deposition excerpts to the Court on this point. Defendants' Opp. Mem. 3-4. In fact, plaintiffs provided deposition excerpts from County employees regarding Question 27, see Plaintiffs' SJ Mem. 23 n.15, and those excerpts reflected that no two County regulators shared the same view regarding what is required, so there is no "practice" on which defendants can rely. The authorizing Ordinance provision, PC Code § 42-292(a)(7), is at least as broad as Question 27. There simply is no reason why a charity would know that Question 27 is more limited than what is written, and the County offers no defense of the question as written. The County cites American Charities as if the court passed on this issue, see Defendants' Opp. Mem. at 3, but the plaintiffs in that case did not raise, and the court did not address, the validity of this requirement.

Nor does the County justify Question 24. The County characterizes it as one designed to disclose conflicts that may be present within an organization. Defendants' Opp. Mem. 4. Yet Question 24 does not seek conflict-of-interest information; rather, it asks the charity to perform the herculean tasks of investigating the complete employment history and current and past affiliations of its directors, officers, and certain employees, and then determining which of these other organizations has been registered in the County—for what possible reason, the County does not say.

2. Financial Reporting Information

The County claims that plaintiffs' challenge to the required financial disclosures is an attempt "to get a second bite at the apple" and cites, yet again, American Charities, 32 F. Supp. 2d at 1323. See Defendants' Opp. Mem. 5-6. There can be no "second bite," when charities never had

a first. The American Charities decision does not control here for the reasons stated in Plaintiffs' Opp. Mem. 2-3 and because the challenged financial disclosures *do not even apply to professional fundraising consultants,* who were the plaintiffs in American Charities. Thus, these requirements were not, and could not have been, addressed in that case.[5]

Remarkably, the County contends that Church of Scientology refutes this challenge because this Ordinance intersects the largely invalid Clearwater ordinance only in the two identification requirements that were upheld. See Defendants' Opp. Mem. 5; see 2 F.3d at 1521, 1546 (citing Code § 100.03(1)(a) & (b)). What the County overlooks is that the court struck down, inter alia:

- Section 100.03(1)(d), which required a description of the charitable purpose for which funds are solicited and the intended uses of the funds toward that purpose, which corresponds to PC Code §§ 42-292(a)(11) & (12), and NPA ¶¶ 21-22;

- Section 100.03(1)(e) & (f), which required disclosure of names, mailing addresses, and telephone numbers for all individuals authorized to disburse the proceeds of the solicitation or in control of the solicitation of funds, which corresponds to PC Code § 42-292(a)(1)(d) & (5), and NPA ¶¶ 7-11 & 29(F);

- Section 100.03(1)(g) & (h), which required disclosure of the time period within which the solicitation of funds is to be made and a description of the methods and means by which solicitation is to be accomplished, which corresponds to PC Code § 42-292(a)(12), and NPA ¶¶ 12-13. (NPA ¶¶ 29(C), (H), (I), & (K) impose additional requirements regarding the methods and means of solicitation).

- Section 100.03(1)(i), which required an estimated schedule of salaries, wages, fees, commissions, expenses and costs in connection with the solicitation of funds and their disbursement, and an estimated percentage that the costs of solicitation comprise of total collections, which corresponds to PC Code §§ 42-292(a)(12), 42-295(b)(1) & (3), and NPA

[5] The application for professional fundraising consultants asks that they provide their expected gross revenue, but does not include demands for the other information sought in Questions 14-20 on the charities' NPA. See Department of Consumer Protection Charitable Solicitation New Permit Application for Professional Solicitor/Fundraiser/Consultant/Counsel (provided on the Department of Consumer Protection website). The link to these forms is too long to reprint here, but they can be located by visiting http://www.co.pinellas.fl.us and then following the Department of Consumer Protection, Regulatory, and Charitable Solicitation links. Even if the mandated financial disclosures were identical (which they are not) the burdens of compliance for charities would be greater than for for-profit professional fundraisers.

¶¶ 14-20 & 29(A);[6]

! Section 100.03(1)(m), which required disclosure of the names of officers and certain employees who had been convicted of crimes involving moral turpitude in the last seven years, along with information about the offenses, which is similar to, but somewhat broader than, PC Code § 42-292(a)(3), and NPA ¶ 25; and

! Section 100.03(8), which required that at the end of each annual registration period, the charity file a retrospective statement reporting total funds collected and listing all expenses incurred in collecting those funds. This annual financial reporting requirement corresponds to PC Code §§ 42-292(a)(9) & 42-295(b)(1) and the Charity Report of Results and Renewal Application Forms (Second Zillo Decl., Exhs. H & I), which require similar retrospective financial statements.

See Church of Scientology, 2 F.3d at 1522-23, 1546-47, 1551. The court concluded that there was nothing in the record to suggest that any regulation more extensive than the narrow identification requirements was necessary to control fraudulent conduct by charities. Id. at 1546. Nothing in this record justifies a different result.

Equally indefensible is the County's effort to distinguish Church of Scientology on the speculation that the court would have upheld the Clearwater ordinance if it had not sought to regulate solicitation directed at charities' memberships. Defendants' Opp. Mem. 6. Without doubt, the Eleventh Circuit found this aspect of the ordinance troubling. See 2 F.3d at 1522. But, as the court acknowledged, an organization soliciting only from its own members could omit from the

[6] The County's contention that the financial disclosures required by Clearwater were broader than those demanded here is wrong. See Defendants' Opp. Mem. 6 & n.4. Clearwater's required disclosure of salaries, wages, and commissions roughly corresponds to the Pinellas County requirement that charities disclose the compensation for officers, directors, etc. NPA ¶ 18. Clearwater's required disclosure of expenses and solicitation costs is matched and exceeded by the County requirement that charities provide a detailed disclosure of administrative and fundraising expenses. NPA ¶¶ 16-17. Clearwater required the percentage of funds that went to solicitation costs; the County requires the inverse, the proportion of the contribution going to the object of the solicitation, PC Code § 42-292(a)(12)(d), which the County generates using the answers to NPA ¶¶ 14 & 15. See Plaintiffs' SJ Mem. 19 n.11. The County also requires financial information not sought by Clearwater, such as gross revenues, contributions, program services, and net assets or fund balances. NPA ¶¶ 14-15, 19-20. And for most financial disclosures, the County requires the new applicant to make financial *projections,* information that is confidential, proprietary, and difficult for charities to determine. See Plaintiffs' SJ Mem. 9-10.

public registration form several items of information, id. (organizations soliciting own members may omit information required in § 100.03(1)(d)-(i)), and yet the court invalidated these requirements. Nor was the court's holding limited in any other way to regulation of charities' solicitation of their own members. See id. at 1545-47, 1551 (striking down Clearwater requirements governing both public and private solicitations).

3. Demands for Solicitation Materials

With respect to the County's demands that charities submit solicitation materials in advance of obtaining a permit, the County claims (1) that it does not review solicitation materials for content; and (2) that it will accept "representative" samples of solicitation materials, rather than all printed or verbal solicitations to be used in the County. Defendants' Opp. Mem. 7-8. The first claim is demonstrably false, and the second is unsupported and irrelevant. Again, the County fails to present any evidence or provide any explanation for why, as an alternative to requiring advance submission of solicitation materials, the County may not simply "vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." Riley, 487 U.S. at 800.

The County argues that this objection "is a ridiculous claim, as the American Charities Court previously found, because the County Ordinances makes no value judgment on the solicitous documents." Defendants' Opp. Mem. 7. But the plaintiff fundraising consultants in American Charities did not challenge, and the district court did not address, the constitutionality of the requirement that charities submit copies of their printed solicitation materials and verbal scripts. The County admitted in discovery that it evaluates the content of the required solicitation materials, see Plaintiffs' SJ Mem. 11-12, and it has submitted no evidence retracting these prior admissions. And what purpose would the requirement serve if the County did not review the materials?

Defendants also entirely miss the point of Plaintiffs' SJ Mem. 12 n.5, which describes how the County delayed the issuance of one permit *for an entire year* because the County wanted the caller to state a few sentences earlier in the script that s/he worked for a professional solicitor. See Defendants' Opp. Mem. 8. Plaintiffs' are not bringing a claim on behalf of that solicitor (LAS, LLC), but simply cite the example as uncontradicted evidence that the County engages in improper content review. Furthermore, the example refutes the County's brash declaration that the Ordinance does not allow any adverse decision to be made against an applicant because of the script—a point plaintiffs do not even need to prove. Id.[7]

With respect to the *quantity* of solicitation materials required, the issue is somewhat beside the point because the County is not entitled to require even a "sample" of these materials as a condition of obtaining a permit. Nevertheless, nothing in the plain language of the Ordinance and forms limits the requirement to "samples" of these materials, see PC Code § 42-292(a)(12)(f) & (g); NPA ¶ 29(H); see also Plaintiffs' SJ Mem. 12. As has been the case with the County's other efforts to make its practices appear reasonable, the County has submitted no evidence supporting its claimed narrowing of the Ordinance. There is no reason that charities would know if the County has adopted a practice that deviates from the Ordinance and hence no reason that they would not be chilled in the exercise of their First Amendment rights.

[7] The decisions in Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), and Telco Communications, Inc. v. Barry, 731 F. Supp. 670 (D.N.J. 1990), are indistinguishable. In both cases, the regulators claimed, as the County does here, that they did not engage in content review, see 885 F.2d at 1233; 731 F. Supp. at 682-83, but the courts nonetheless struck down the requirements that solicitors file copies of their solicitation materials. The Fourth Circuit rightly recognized that "bureaucratic review" of solicitation scripts is "rife with the potential for abuse. The Commissioner's power to suspend or revoke a license . . . provides him substantial leverage over charitable solicitations." 885 F.2d at 1233. And indeed, while LAS, LLC held its ground until the County relented, another organization might well succumb to the County's efforts to "persuade" it to revise its script or printed materials to suit the County's sensibilities.

4. Updating and Interim Reporting Requirements

Defendants attempt to defend the six-month reporting requirement and the fifteen-day updating requirement as necessary for charities "to keep their application current." Defendants' Opp. Mem. 8. The County offers no explanation for why it would be insufficient for charities to update their applications annually with their renewals—which satisfies every other jurisdiction in the country—and to notify the County only of limited *material* changes to their registrations within fifteen days, such as changes to organizational contact information. See Plaintiffs' Mem. 12-13.

5. Narrow Tailoring

Plaintiffs have addressed at length why the Ordinance is not narrowly tailored to serve the interests proffered by the County. See Plaintiffs' SJ Mem. 13-19; Plaintiffs' Opp. Mem. 10-11. The County responds by again claiming that plaintiffs are seeking a "second bite of the apple" because of the American Charities decision. Defendants' Opp. Mem. 9. The court in American Charities did not have the benefit of the factual record plaintiffs have presented here. The County cannot continue to hide behind the American Charities decision as an excuse for its failure to rebut the evidentiary showing plaintiffs have made.

The County also maintains that the requirement that any regulation of charitable solicitation be "narrowly tailored" is relaxed in practice and notes that Ward v. Rock Against Racism, 491 U.S. 781 (1989), sustained the challenged sound amplification guideline. Defendants' Opp. Mem. 9. Ward is of no help to the County. There the city's regulation, which, unlike this Ordinance, imposed no prior restraint on speech, see 491 U.S. at 795 n.5, was sustained as a valid time, place, and manner restriction on speech. The Court found that the city's substantial interest in limiting sound volume was "served in a direct and effective way" by the requirement that the city's sound technicians modulate the sound during performances. Id. at 800. Here, by contrast, the Ordinance

is not tailored to serve any significant governmental interest and is "substantially broader than necessary" to advance the County's goals. Id. As a time, place, and manner regulation, the sound guideline was also required to, and did, leave open ample alternative channels of communication. Id. at 802. Here by contrast, the Ordinance leaves open no alternative channels, for if a charity does not have a permit, it is forbidden from soliciting by *any* means in the County.[8]

The County maintains that the Ordinance is narrowly tailored because (1) registration verifies that solicitors will not commit fraud and instills public confidence in smaller charities; (2) the Ordinance is obviously working because there have been no complaints about charities from the public; and (3) the videotape discussing the County's handling of the Holy Land Foundation (Defendants' Exh. 19) and the Calls & Walk-Ins Chart (Defendants' Exh. 22) validate the Ordinance's existence. Defendants' Opp. Mem. 11-13. None of these need detain the Court long. First, with respect to registration, plaintiffs' expert, Errol Copilevitz, has stated the obvious:

> [T]he mere fact of registration does not ultimately demonstrate 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.

Copilevitz Decl. ¶ 54. Registration alone, unaccompanied by regulatory oversight—and the County evidently does not deny that it engages in none, see Plaintiffs' SJ Mem. 15-18—is insufficient to prevent or detect fraud. Charities with fraudulent intent will ignore the registration requirement, see Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton, --- S. Ct. ---, 2002 WL 1305851, at *9 (2002) ("[I]t seems unlikely that the absence of a permit would preclude criminals

[8] See Feed the Children, Inc. v. Metropolitan Government of Nashville, No. 3:01-1484, slip op. at 24 (M.D. Tenn. Mar. 21, 2002) (Exhibit 2 to the Notice of Filing Exhibits) ("The Charitable Solicitations Ordinance . . . does not appear to allow 'ample alternatives for communication.' Indeed, in the absence of a permit, the ordinance shuts down *all* means of solicitation in Davidson County.").

from knocking on doors and engaging in conversations not covered by the ordinance."), while others may register, but their registrations alone will not help deter or detect their fraudulent activities. The County's own Exhibit 20, regarding *the federal government's*, not the County's, investigation of several organizations suggests that registration in the County is no deterrent to fraud, and, in fact, that registration there makes no difference one way or the other. If this regulatory regime prevents fraud at all, it "is little more than fortuitous." Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 966 (1984).

Plaintiffs do not contend, however, that registration has no value, but only that what limited value can be extracted from the mere fact of registration is already afforded by the *State's* registration requirement. County regulators or citizens who believe that registration lends accountability or credibility can easily check with Florida to determine whether a given charity is licensed. Plaintiffs' SJ Mem. 18-19. Even a modest County identification requirement might not have been objectionable. But the County must show some further need to justify such extensive registration and reporting requirements as these. As the Supreme Court reiterated just last week:

> Despite recognition of these interests [in preventing fraud and crime] as legitimate, our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. We "must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation.'"

Watchtower, 2002 WL 1305851, at *6 (citations omitted). There is no reason for this County to exceed by such lengths its interest in having charities identify themselves.

Second, defendants contend that the fact that the County has received zero complaints regarding fraud or misuse of funds in charitable solicitation shows that the Ordinance works and that now, because of County "oversight," the problem is "gone." Defendants' Opp. Mem. 10-11. This contention, lacking any factual support, is absurd on its face and could be cited by any regulator to

justify a regulation predicated on nothing more than a hypothesized problem (*e.g.,* look there is no problem, so the law must be working). See Watchtower Bible, 2002 WL 1305851, at *10 ("[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden.") (Breyer, J., concurring) (citation omitted).

Third, the County cites the Holy Land Foundation videotape as demonstrating the "real world" utility of the Ordinance. Defendants' Opp. Mem. 11. But as explained in Plaintiffs' Opp. Mem. 8-10, the only "real world" utility suggested by the County's pursuit of that charity is that County regulators pick and choose when to deny or revoke the permits of unpopular organizations. As for the chart of walk-in visits and telephone calls provided by defendants in Exhibit 22, the logs, which have been produced to plaintiffs, confirm only that the Ordinance and forms are unclear and complicated. The County cannot bootstrap the utility of this Ordinance by citing the number of inquiries it receives from organizations trying to comply with it.[9]

Finally, plaintiffs wish to emphasize, so that the point is not lost in disputes over specific requirements, that plaintiffs are not interested in simply excising a few provisions here and there from this regulatory scheme. The *cumulative* burden of these duplicative and onerous registration and reporting requirements on charities is excessive and not justified by any interest advanced by the County. See, e.g., Tigner Decl. ¶ 10 (County seeks more information and detail than do 37 states *combined*). As the Eleventh Circuit observed in ruling that Clearwater's interest in controlling

[9] Plaintiffs append the logs of the 95 "charity walk in" visits for 2001 (through November 2001) (attached as Exhibit 4 to the Notice of Filing Reply Exhibits). Virtually every single walk-in was by an organization attempting to comply with the Ordinance—not a visit by a County resident searching the County's records for information on charities. The telephone logs are too voluminous to file here, but during depositions plaintiffs selected at random the logs from January and November 2001 and attach these here as Exhibit 5. While the telephone logs reflect some calls from members of the public doing a "charity check," the vast majority of calls were from organizations attempting to comply, or asking questions about how to comply, with the Ordinance. There is no reason that the County employee who mans the telephones could not answer the handful of citizen callers by verifying the charities' Florida registration, by checking the information on charities that Florida makes available, or by referring the caller to the Florida website or telephone hotline.

fraudulent conduct by charities was insufficient to justify the city's "far-reaching regulation," this Ordinance is similarly unnecessary in light of "the potent but significantly less intrusive regulatory alternatives available to authorities for dealing with such fraud," such as enforcement of generally applicable penal laws. Church of Scientology, 2 F.3d at 1547.

II. THE COUNTY HAS FAILED TO OVERCOME THE PRESUMPTION AGAINST THE VALIDITY OF THE ORDINANCE'S PRIOR RESTRAINT ON SPEECH.

The County makes much of the choice between the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965), and the three-Justice opinion in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), see Defendants' Opp. Mem. 13-14, but both decisions, at a minimum, require that (1) the licensor must make a decision within a specified and reasonable time period during which the status quo is maintained, and (2) there must be prompt judicial review. This Ordinance fails to satisfy these standards.[10]

The Ordinance's failure to require a prompt decision by regulators during which the status quo is maintained is not debatable—not on its face and not in practice. The County's assertion that the "30-day period is absolute" is simply false. The Ordinance states plainly that the County is required to issue a permit within 30 days only "of its proper filing." PC Code § 42-293(a)(1). If there are deficiencies in the application, the Ordinance authorizes additional time to elapse, contemplating a minimum 60-day period for the administrative processing of applications, id. §§ 42-292(c); 42-293(a)(2) & (3)—an unacceptably long time period. See Plaintiffs' SJ Mem. 25 & n.17; see also Gospel Missions, 951 F. Supp. at 1447 n.16. The handling of Greenpeace's

[10] Perplexingly, the County cites ISKCON Miami, Inc. v. Metropolitan Dade County, 147 F.3d 1282 (11th Cir. 1998), for the proposition that communications between plaintiffs and County residents, which are mostly by mail, are conducted in a "non-public forum" and therefore restrictions on such communications need only be "reasonable." Defendants' Opp. Mem. 13. This decision and others addressing First Amendment rights in nonpublic fora govern the access of speakers to *government property,* such as airports, not mail sent by a private organization to a private individual.

(inadvertent) renewal application in early October 2001 appears to be typical. See Second McPeake Decl. ¶¶ 17-18 & Exhs. H-I. The County wrote first on October 10, 2001 to identify deficiencies, followed up with a notice of intent to deny on November 15, 2001, and then finally denied the application on December 12, 2001—more than two months after it was submitted.[11]

The processing of applications in Pinellas County often drags on even longer than 60 days, however. Mr. Copilevitz, who deals with the County on a regular basis on behalf of numerous clients, attests that "[i]n practice, months can go by while the charity and County employees engage in correspondence, telephone call, and negotiation to iron out the information that the County will accept in order to issue an initial or renewal permit." See Copilevitz Decl. ¶ 36. His assertion is confirmed by the County's own correspondence.[12] Nor are the delays confined to permit denials. The charity described in Copilevitz Decl. ¶ 37 was issued a permit nearly three months after it attempted to renew its registration. Second Copilevitz Decl. ¶ 4 (attached as Exhibit 6 to the Notice of Filing Reply Exhibits). There is not even the semblance of maintaining the status quo: during the

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[11] Contrary to the County's attempt to distinguish the cases, see Defendants' Opp. Mem. 18 n.8, Eleventh Circuit precedents establish that the Ordinance is invalid because it does not guarantee that new applicants may begin soliciting without delay in the (common) event that County regulators do not comply with the time periods set out in the Ordinance. See Plaintiffs' SJ Mem. 26 & n.18; Plaintiffs' Opp. Mem. 15. In each instance, the invalidated law, as here, purported to set a time limit on the regulator's decision to grant or deny the license, and the courts found the deadline illusory because the law, as here, did not explicitly provide that applicants would be permitted to engage in speech if the time limits were not observed. As the Eleventh Circuit recognized: "We cannot depend on the individuals responsible for enforcing the Ordinance to do so in a manner that cures it of constitutional infirmities." Redner v. Dean, 29 F.3d 1495, 1501 (11th Cir. 1994).

The County does not even attempt to address the fact that the Ordinance specifies no time period by which a hearing must be held after a denial of a permit, and no deadline for a decision after the hearing is conducted on either permit denials or revocations—additional fatal flaws in this Circuit. See Plaintiffs' SJ Mem. 25.

[12] See, e.g., County correspondence with—(1) American Target Advertising, Inc. (application submitted before May 20, 1999 and denied Sept. 30, 1999); (2) Defenders of Wildlife (application submitted before Nov. 1, 2001 and denied Mar. 4, 2002; (3) Northeast Animal Shelter (application submitted before June 27, 2001 and denied Oct. 9, 2001); (4) Reach Our Children, Inc. (application submitted before Sept. 12, 2001 and denied Dec. 12, 2001); and (5) Tobacco Free Coalition Pinellas (application submitted before Mar. 8, 2000 and denied Aug. 3, 2000. The County's delay in denying a permit to Sunshine Child Help Program, Inc. was particularly impressive: its application was submitted before June 14, 2001 and denied Jan. 15, 2002. The above correspondence is attached as Exhibit 7 to the Notice of Filing Reply Exhibits.

entire administrative process, charities are prohibited from soliciting. See Plaintiffs' SJ Mem. 26 n.18. Nor is there a "decision by the director" to challenge in court, see PC Code § 42-278, until the Director actually denies or revokes the permit.

With respect to what is meant by prompt judicial review, the County relies on Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999), Defendants' Opp. Mem. 18-19, without addressing the fact that the Eleventh Circuit limited its holding in Boss Capital that prompt "access" to judicial review (as opposed to a prompt "disposition") is sufficient to *business* licensing schemes and has explicitly reserved judgment on what is required for other types of licensing schemes. See Plaintiffs' SJ Mem. 26 n.19 (citing Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 774 (11th Cir. 2000), vacated on other grounds, 122 S. Ct. 914 (2002), which post-dated the court's ruling in American Charities). The logic of Boss Capital plainly does not apply to national nonprofit organizations. As the court reasoned, applicants for adult entertainment licenses, unlike movie distributors who might show a given film in hundreds of theaters around the country, "have every incentive to stick it out and see litigation through to its end." 187 F.3d at 1256. In contrast to a local commercial business, however, a nonprofit organization that engages in direct mail charitable solicitation campaigns nationwide has little financial incentive to challenge a denial of a license in any single jurisdiction. Instead, a charity is likely to be intimidated or coerced into censoring its own speech rather than risk sanctions or injury to its reputation in the jurisdiction—as is borne out by the record here, where multiple charities have ceased to solicit new members in Pinellas County in order to avoid the burdens of compliance and the risk of sanctions. See Plaintiffs' SJ Mem. 2-3. A national charity is therefore situated identically to a film distributor, who, as acknowledged in Freedman, may be "unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest

of the country." 380 U.S. at 59.

Defendants argue that plaintiffs have made no claim of misuse of the Director's discretion under PC Code § 42-276(e) to deny or revoke a permit for any violation of the Ordinance and that such abuse is inconsistent with "the reality of the County's enforcement." Defendants' Opp. Mem. 14-15 & n.7. While this is incorrect, see Plaintiffs' SJ Mem. 12 n.5; Plaintiffs' Opp. Mem. 8-10, 15-16, it is also legally irrelevant. The success of a facial challenge to an ordinance conferring overly broad discretion on the decisionmaker rests not on whether the administrator has actually abused his discretion, "but whether there is anything in the ordinance preventing him from doing so." Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 n.10 (1992). Moreover, that the administration of this Ordinance is not ministerial, as defendants maintain, is evidenced by the first (¶¶ 36-37) and second (¶¶ 3-5) Declarations of Errol Copilevitz regarding the wrangling that often occurs before the County will issue a permit; the months' long delay that often accompanies the processing of applications; the County's handling of LAS, LLC and the Holy Land Foundation; and the admission of the Director and other County employees that they have considerable "latitude" in deciding whether to grant or deny a permit or revoke an existing one. Plaintiffs' SJ Mem. 22-24.

Unfortunately, the list continues. One national charity was initially informed that the County would not renew its permit because the charity's commercial co-venturers would not register, Copilevitz Decl. ¶ 37; Second Copilevitz Decl. ¶ 2, but then the County decided to issue the permit. Second Copilevitz Decl. ¶ 4.[13] The National Wildlife Federation faced the same problem when it attempted to renew its permit. See Bailey Decl. ¶¶ 8-11. Yet the County arbitrarily applied one standard for one charity, and a different one for the other. As for the myriad discrepancies regarding

[13] The Director's decision whether to deny a permit because the charity has a relationship with an unlicensed commercial co-venturer, a violation of PC Code § 42-321(c), is discretionary under § 42-276(e), as it is not one of the five mandatory bases for denial listed in § 42-293(c). See Plaintiffs' Opp. Mem. 15.

how the Ordinance should be interpreted, these are not "minor," but have real consequences—because what a charity must submit and the success of its application turn on which investigator is assigned to its file. See Plaintiffs' SJ Mem. 22-23 & n.15.[14]

The Supreme Court's decision in Thomas v. Chicago Park District, 534 U.S. 316, 122 S. Ct. 775 (2002), does not save this Ordinance. See Defendants' Opp. Mem. 15-16. The Court found that the Chicago ordinance did not confer excessive discretion upon city authorities because the issuance of permits to hold demonstrations in the parks was ministerial, the ordinance authorized denying a permit for only a few specific and objective grounds, and it did not leave the decision "to the whim of the administrator." 122 S. Ct. at 780-81. None of that can be said for the Pinellas County Ordinance. Moreover, the notion that this County "err[s] in favor of applicants" is ridiculous. See Defendants' Opp. Mem. 16. Since 1995, the County has denied 45 or more permits, many of them for failure to submit minutiae that the applicant often has previously submitted, see, e.g., Bailey Decl. ¶ 7, and revoked 30 or more permits, more than half for failure to file a redundant and unnecessary six-month report of results. See Plaintiffs' Mem. 13 & n.6; Plaintiffs' Opp. Mem. 7-8, 9 n.5. By contrast, the district court in Feed the Children preliminarily enjoined the Nashville ordinance for conferring excessive discretion on the Solicitations Board even though it had denied only four permits in five years. See Feed the Children, slip op. at 21 n.5.

III. THE COUNTY MAKES NO EFFORT TO ADDRESS PLAINTIFFS' COMMERCE CLAUSE CHALLENGE.

The County has defaulted its defense of the Ordinance against plaintiffs' Commerce Clause

[14] Compare, e.g., Tootle Depo. 78-79 (requiring a new organization to provide a breakdown of expenses; will not accept total expenses), and Letter from Susanna Tootle to Sunshine Child Help Program, Inc., with subsequent County denial (requiring breakdowns of program services and fundraising expenses) (attached as Exhibit 7 to the Notice of Filing Reply Exhibits), with Stoner Depo. 41 (acceptable to provide total expenses). These deposition excerpts were attached to the Notice of Providing Excerpts from Depositions.

challenge, relying yet again on the district court's ruling in American Charities. Plaintiffs have made a substantial factual showing both that this Ordinance imposes heavy costs and significantly burdens their ability to engage in commerce with County residents and that plaintiffs' commerce with Pinellas County has declined substantially as a direct result of this Ordinance. Plaintiffs also have produced a substantial record demonstrating that the Ordinance confers little in the way of local benefits. None of this evidence has been refuted and none was before the court in American Charities—not with respect to professional fundraising consultants and not with respect to charities. Indeed, that court specifically rejected the Commerce Clause challenge because the plaintiffs there had "not come forth with any relevant evidence that the burden on professional fundraisers is 'clearly excessive' to this benefit. Instead, Plaintiffs merely hypothesize about the burden they may incur *if* other localities enact a similar ordinance." 32 F. Supp. 2d at 1317. The same cannot be said for the charity plaintiffs here. The County should therefore lose its gambit that reliance on American Charities will suffice to save this Ordinance.

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 26, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 26th day of June, 2002, she caused to be served by first-class U.S. mail, postage prepaid, (1) one copy of the Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment; and (2) one copy of the Notice of Filing Exhibits with Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment upon counsel for defendants:

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