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.,*	)	**DISPOSITIVE MOTION**
	)	
Defendants.	)	
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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Public Citizen, Inc. and Public Citizen Foundation, Inc. (collectively "Public Citizen"), Greenpeace, Inc. and Greenpeace Fund, Inc. (collectively "Greenpeace"), the Direct Marketing Association Nonprofit Federation ("Nonprofit Federation"), and the American Charities for Reasonable Fundraising Regulation ("ACFRFR") have moved for summary judgment and contend that the Pinellas County ("County") charitable solicitations ordinance ("Ordinance"), Pinellas County Code § 42-266 et seq. ("PC Code") and its accompanying registration and reporting forms, are unconstitutional both on their face and as applied to plaintiffs and the hundreds of charities represented by ACFRFR and the Nonprofit Federation. This Ordinance is invalid under both the First Amendment and the Commerce Clause—from its registration and reporting requirements, which are among the most oppressive exacted by any jurisdiction in the country, to its impermissible prior restraint on speech. Perhaps most significant of all, this Ordinance does nothing to prevent fraud or to promote the provision of useful information to potential donors—the avowed purposes for which this massive paperwork burden is imposed.

The Ordinance requires every charitable organization to register, pay a filing fee, and obtain a permit before soliciting any charitable contributions in Pinellas County, PC Code §§ 42-291(a), 42-292(a) & (b), unless they limit solicitations to existing organization members. Id. § 42-272(a). Charities are required to register, renew, and report interim results on forms promulgated by the Director of the Department of Consumer Protection ("Department"). Id. § 42-276(c); see Ordinance and forms attached as Exhibits F-J to the Second Declaration of Joseph Zillo.[1] The County may deny, suspend, or revoke a charitable solicitations permit for any violation of the Ordinance and may also issue citations for violations, which are prosecuted as criminal misdemeanors. PC Code § 42-276(e) & (f); id. § 1-8; Fla Stat. ch. 125.69(1). The County also may institute legal proceedings against an offending organization to obtain injunctive and other relief. PC Code § 1-8(e).

As described in their officers' declarations, Public Citizen and Greenpeace both decided to halt all solicitation of nonmembers residing in Pinellas County to avoid the heavy burden and expense of registering there. Public Citizen never sought a permit, but made the decision to suppress its solicitations after the Department threatened enforcement action. Greenpeace had obtained a permit from the County, but decided not to renew it; Greenpeace, too, subsequently received threats of prosecution by the Department. See Second Zillo Decl. ¶¶ 8-12, 18 & Exhs. B-D; Brooks Decl. ¶ 5; Second McPeake Decl. ¶¶ 7-18, 21 & Exhs. B-I. The coerced self-censorship of speech by these plaintiffs has led to a significant reduction of communication into (and ultimately out of) Pinellas County. Second Zillo Decl. ¶¶ 55-57; Brooks Decl. ¶ 8; Second McPeake Decl. ¶¶ 27-28.

Many of the charities represented by the Nonprofit Federation and ACFRFR likewise have

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[1] Declarations are attached to the Notices of Filing Declarations, Vols. 1 & 2; deposition excerpts are attached to the Notice of Filing Excerpts from Depositions; excerpts from defendants' discovery responses are attached to the Notice of Filing Excerpts from Discovery; and other exhibits are attached to the Notice of Filing Exhibits.

received letters from the County threatening enforcement action if they failed to comply with the County's registration and reporting requirements. These charities have responded in various ways to that threat. Those that have chosen to register have incurred significant additional burdens and expenses, while those that have been denied a permit or that have curtailed their solicitation activity have lost vital opportunities to engage both in protected speech and interstate commerce as a direct result of the Ordinance. See Second Cassidy Decl. ¶¶ 3-4; Second Hardin Decl. ¶¶ 3-4; Browning Affid. ¶¶ 4-8; Broaddus Decl. ¶¶ 4-8; Bailey Decl. ¶¶ 5-6. Some charities spend months trying to satisfy the County's every demand for additional information and additional filing fees in an effort to obtain a permit, until they finally give up, forgo the permit, and restrict their solicitation activity in the County. See Bailey Decl. ¶¶ 7-11. As many attest, complying with this County's registration requirements is "more cumbersome and difficult and took more time than that of all or nearly all of the other states or localities requiring that charities register in order to solicit charitable gifts." Broaddus Decl. ¶ 5; Browning Affid. ¶ 5; see also Tigner Decl. ¶¶ 9-10; Copilevitz Decl. ¶¶ 8-9. Nonetheless, many of them attempt to comply with the County's onerous regulatory regime because charities are highly risk-averse and are fearful of adverse public-relations and regulatory consequences if they fail to do so. Browning Affid. ¶ 8; Copilevitz Decl. ¶¶ 10-11, 21; Tigner Decl. ¶ 6. It is therefore no surprise that this one County has been so successful in compelling hundreds of charities across the country to register, issuing permits to 752 organizations, the majority of which are charities, in 2001. Defendants' Answer to Plaintiffs' Interrogatory No. 3; Lord Depo. 22-23.

As discussed below, there is no justification for this heavy toll on protected speech exacted by the County's regulatory and licensing charitable solicitation scheme. The Ordinance and accompanying forms are unconstitutional, both facially and as applied to plaintiffs, because they (1) impose unreasonable burdens on charitable organizations, in violation of the First Amendment;

(2) impose an impermissible prior restraint on speech, also in violation of the First Amendment; and (3) unduly interfere with interstate commerce, in violation of the Commerce Clause.[2] And because the Ordinance restricts free speech, defendants bear the burden of proving its constitutionality. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816 (2000).

I. THE ORDINANCE AND FORMS VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE UNREASONABLY BURDENSOME AND NOT NARROWLY TAILORED TO ADVANCE A SUBSTANTIAL GOVERNMENTAL INTEREST.

In a trio of cases beginning with Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), the Supreme Court held that solicitations for charitable contributions involve speech that is fully protected by the First Amendment. While recognizing that soliciting financial support is "undoubtedly subject to reasonable regulation," the Court admonished that regulation

> must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Id. at 632; accord Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 788, 796 (1988); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 961 (1984). The charitable appeals in which plaintiffs engage certainly fit the Court's description. See Second Zillo Decl. ¶ 55; Brooks Decl. ¶¶ 6-7 & Exhs. A-B (sample mailings); see also Second McPeake Decl. ¶ 27.

Any restriction on the right to engage in charitable solicitations must survive "exacting First

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[2] Plaintiffs also contend that the provision governing solicitation through the Internet, PC Code § 42-310, is substantially overbroad and violates the First Amendment, the Commerce Clause, and the Due Process Clause. Because the County has announced that it will amend the Ordinance to repeal this provision, plaintiffs will not brief these claims, but will seek leave of this Court to address them in the event the provision is not repealed within the time frame estimated by the County. See May 7, 2002 letter from Carl Brody to Bonnie Robin-Vergeer (attached as Exhibit 5 to the Notice of Filing Exhibits). Several declarations submitted by plaintiffs address the problems with the Internet provision.

Amendment scrutiny." Riley, 487 U.S. at 789; accord Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1543 (11th Cir. 1993). The government must establish that its law serves "a sufficiently strong, subordinating interest that the [government] is entitled to protect" and that the limitation is a "narrowly drawn regulation[] designed to serve [that] interest[] without unnecessarily interfering with First Amendment freedoms." Schaumburg, 444 U.S. at 636, 637; see also Riley, 487 U.S. at 789, 792 (restrictions must be "narrowly tailored"); Munson, 467 U.S. at 961.

There is nothing remotely "narrowly tailored" about the Pinellas County scheme. The few arguably legitimate requirements completely duplicate what is already mandated by the IRS, which regulates all tax-exempt entities, and the State of Florida, which requires charities soliciting charitable contributions in the State to register and provide extensive materials. See Fla. Stat. ch. 496.405 & .407. Because all registration materials submitted to Florida are open to the public, see Fla. Stat. ch. 119, that information is available from the State. It is also accessible directly from the charities themselves and other sources in the public domain. As for the additional reporting requirements imposed by the County but *not* by Florida, they are either unduly onerous or seek information to which the County is not reasonably entitled. See Second Zillo Decl. ¶¶ 26-52; Second McPeake Decl. ¶¶ 22-26; Copilevitz Decl. ¶¶ 9-33; Tigner Decl. ¶¶ 9-12.

A. The Ordinance and Forms Duplicate Information That is Provided to Florida and That is Also Publicly Available From Other Sources.

The Ordinance and accompanying registration forms force charities to provide extensive information that they already provide to the IRS in their annual informational tax filings, the IRS Form 990s, as well as to Florida. See Second Zillo Decl. ¶¶ 20-26 & Exh. A (Public Citizen's Form 990s); Second McPeake Decl. ¶¶ 5, 22 & Exh. A (Greenpeace's Form 990s); Copilevitz Decl. ¶¶ 12-15; Tigner Decl. ¶ 7; Second Cassidy Decl. ¶ 9; Second Hardin Decl. ¶ 5.

To begin with, both Florida and Pinellas County require charity applicants to provide copies

of their Form 990s or 990-EZs. See Fla. Stat. ch. 496.405(2)(a) & .407(2); Pinellas County Charitable Solicitation New Permit Application ("NPA") ¶ 29(A)(1); PC Code § 42-292(a)(9). That is only the beginning, however, of the redundant obligations imposed by the County:

- The County requires that the charity submit the organization's name and contact information, the names and contact information for each board member and officer, and a description of the programs and activities that the applicant raises funds to support. See NPA ¶¶ 3, 7-11, 21, 22, 29(F); Second Zillo Decl. ¶ 20. All of this information is provided on the charity's Form 990 and is required by the State of Florida, see Fla. Stat. ch. 496.405(2)(b), (c), (g); Second Zillo Decl. ¶ 20 & Exh. A; Second McPeake Decl., Exh. A, but the County requires that the information be copied onto the County's own form.

- The County requires that charities provide extensive financial information, such as their "expected" gross revenue, "expected" contributions, "projected" program services, "anticipated" management and general expenses, expected fundraising expenses, and other financial data. See NPA ¶¶ 14-20; see also PC Code § 42-292(a)(12)(c)-(e). Leaving aside the problem of requiring a charity to provide *projected* financial information, discussed below in Section (B)(2), nonprofits already provide a highly detailed breakdown of their sources of revenue, assets, liabilities, and expenses on their Form 990s for the past fiscal year, which they submit to the IRS, Florida, and the County. Second Zillo Decl. ¶ 21 & Exh. A; Second McPeake Decl., Exh. A.

- The County requires charities to furnish still more information on its own forms that they already provide to Florida. This includes, for instance, the identity of any professional solicitor, federated fundraiser, fundraising consultant/counsel, commercial co-venturer, or federated fundraising agency (e.g., United Way); the system of payment for the professional organization; and all contracts with such entities. See Fla. Stat. ch. 496.405(2)(e); Second Zillo Decl. ¶ 22 (citing NPA ¶¶ 4, 5, 5A-C, 29(C)).

- The County requires applicants to report prior convictions of the charity or various officers, directors, and employees involving theft, fraud, misrepresentation or misuse of funds, as well as any permit suspensions, revocations, or other enforcement action involving charitable solicitation in Florida or Pinellas County. Second Zillo Decl. ¶ 23 (citing NPA ¶¶ 25 & 26). Florida requires even more comprehensive disclosures. Id. (citing Fla. Stat. ch. 496.405(2)(d)).

- The County requires considerable additional documentation of the applicant's status that the charity already files with the State, such as the IRS Letter of Determination regarding its tax-exempt status and verification of incorporation. See Second Zillo Decl. ¶ 24; NPA ¶¶ 29(E), 29(J); Fla. Stat. ch. 496.405(2)(f).

B. The Information Required by Pinellas County, But Not by Florida, is Unreasonably Burdensome.

1. Burdensome and Invasive Personnel-Related Information

The County also requires charities to report information that either invades the privacy rights of their officers, directors, and employees or is impracticable or unduly burdensome to gather. First, the County asks for personal information regarding the charity's officers and directors, such as dates of birth, drivers' license or federally issued identification numbers—typically, Social Security numbers—and residential contact information.[3] NPA ¶¶ 7-11, 29(F); PC Code § 42-292(a)(5); see Second Zillo Decl. ¶¶ 27-28. Because of the potential for abuse of this type of sensitive information, plaintiffs object to this requirement. Public Citizen, for example, does not release this type of information, except as required by federal statute, taxing authorities, employee benefit plans, or at the specific request of an individual employee. Second Zillo Decl. ¶¶ 29-30; see also Second McPeake Decl. ¶ 23; Copilevitz Decl. ¶ 18; Tigner Decl. ¶ 11(b). Indeed, the County itself publishes a flyer called "Don't Let Someone Steal Your Good Name: Protect Yourself Against Identity Theft," attached as Exhibit 1 to the Notice of Filing Exhibits. This pamphlet urges the public to avoid giving out personal information except to "someone you know or have already done business with."

Second, Questions 24 and 27 on the NPA ask for information that is virtually impossible to provide. Question 27 asks the charity to state whether any person affiliated with the applicant is related to any other person affiliated with either the applicant or any vendor or supplier of the

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[3] Social Security numbers are used as Drivers' License numbers in 24 states. United States General Accounting Office, Report to Subcommittee on Human Resources, Committee on Ways and Means, U.S. House of Representatives, Child Support Enforcement: Most States Collect Drivers' SSNs and Use Them to Enforce Child Support, Appendix II, at 31 (Question 8), available at http://www.gao.gov/new.items/d02239.pdf. By conditioning the availability of a permit upon charities' willingness to provide Social Security numbers for their officers and directors (either directly or by virtue of requiring drivers' license numbers), the County violates federal law. See Pub. L. No. 93-579, § 7 (cited in 5 U.S.C.A. 552a Note).

applicant. See also PC Code § 42-292(a)(7). While it is not uncommon for states to seek to ferret out conflicts of interest, this question is remarkably broad, covering not only officers and directors, but *all* employees, and all types of suppliers and vendors providing goods and services to the organization (not just professional fundraisers, as is more common). See Second Zillo Decl. ¶ 31; Second McPeake Decl. ¶ 24; Copilevitz Decl. ¶ 19; Tigner Decl. ¶ 11(e).

Question 24 is even more unreasonable and unusual. It requires a charity to disclose whether any director, manager, or person with authority to receive and/or disburse solicitation income has ever been *employed by or been a member of another organization registered under the Ordinance,* and if so, the name of both the individual and the organization. (Emphasis added). This provision would be a nightmare to answer because it requires a charity first to determine all of the other organizations for which every designated person has ever worked or of which they have ever been a member, and then determine whether any of these organizations has ever been registered in Pinellas County. Not only would the charity have no way of knowing this information, but if known, its disclosure would intrude upon its employees' First Amendment right of free association. Second Zillo Decl. ¶ 32; Second McPeake Decl. ¶ 24; Copilevitz Decl. ¶ 20; Tigner Decl. ¶ 11(e). See generally Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). No charity has the right to ask its employees which organizations they belong to—whether political, religious, or social—let alone file public reports disclosing these affiliations. It is hardly surprising that no other jurisdiction makes such an intrusive demand. Copilevitz Decl. ¶ 20.

In Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1546 (11th Cir. 1993), the court held that the required disclosure of the names, addresses, and telephone numbers of various individuals employed by the charity was invalid under the First Amendment. The court in Gospel Missions of America v. Bennett, 951 F. Supp. 1429 (C.D. Cal. 1997), likewise

struck down a portion of a Los Angeles ordinance requiring similar information for the applicant's officers and directors—which is far less intrusive than what is required here—because "[s]uch disclosures directly expose the applicant's internal operations to public scrutiny and are unrelated to any legitimate governmental interest, including the City's stated interest in preventing fraudulent solicitations." Id. at 1443; see also id. at 1450.

Charities' concerns about the consequences of not being fully forthcoming in completing these registration forms are heightened by the requirement that the forms be accompanied by an affidavit attesting to "the completeness and accuracy of the information in and attached to this application." NPA at 6; see Copilevitz Decl. ¶ 21. To compel charities to choose between the privacy of those individuals who work for them, and the charities' right to obtain a permit in Pinellas County, unreasonably burdens their First Amendment freedoms of speech and association.

2. Financial Reporting Information

Although plaintiffs' Form 990s provide extensive financial information sufficient for the IRS and most States, the County demands still more highly burdensome and detailed financial disclosures. See NPA ¶¶ 14-20; see also PC Code § 42-292(a)(12)(c)-(e). These requirements are highly problematic for a number of reasons. First, the registration form requires applicants to report projections of their future performance, rather than their performance in the past fiscal year, as the Form 990 does. Such internal income and expense projections are proprietary and highly confidential, the product of an enormous commitment of staff resources and often the services of outside consultants. To compel a charity to furnish this information, as well as copies of the solicitation materials it plans to use, see NPA ¶ 29(H) (discussed in the next subsection), is to expose the charity's internal operations and solicitation strategy to other charities and fundraisers, placing it at a disadvantage in the highly competitive field of nonprofit fundraising. Nor is it evident how

reporting an organization's *anticipated* revenues and expenses would be of value to any County resident considering whether to donate to a particular charity, especially when the Form 990 reports *actual* figures regarding the charity's *actual* performance for the previous year. See Second Zillo Decl. ¶¶ 35-43; Brooks Decl. ¶¶ 11-17, 20; Copilevitz Decl. ¶ 25; Tigner Decl. ¶ 11(c) & (d).[4]

Moreover, it is unclear whether the information sought is national, state, or local, but in any event, charities do not typically keep track of, much less project, expenses in the extraordinary detail, or in the twenty-five different categories, required in Question 16 of the NPA. For example, Public Citizen would not be able to comply with this disclosure requirement without restructuring its accounting system, a step it is unwilling to undertake. Second Zillo Decl. ¶¶ 42-43. As Mr. Copilevitz observes, the question is so intimidating that many charities will be forced either to abandon registration in the County or to pay a law firm or accountant to assist them. Copilevitz Decl. ¶ 24; see also Tigner Decl. ¶ 11(d); Broaddus Decl. ¶ 7. The financial detail that the County requires in Questions 14-20 is in addition to the IRS Form 990 and serves no valid purpose. Copilevitz Decl. ¶ 26.

The Eleventh Circuit found similar extensive reporting requirements unconstitutional in Church of Scientology. The Clearwater ordinance required a number of financial and other disclosures (though not nearly as extensive as required by the County here), including estimates of salaries, wages, fees, commissions, expenses connected with solicitation and disbursement of funds,

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[4] Question 14 of the NPA requires the charity to state its expected contributions, noting that the County's registration fee schedule (on page 1 of the application) is based upon contributions from County residents. Because national charities do not keep records of contributions on a county basis, Public Citizen, Greenpeace, and other national organizations are forced to pay fees on their total national contributions because it would cost them more to isolate which contributions they receive from any one county than they would save in reduced registration fees. See Second Zillo Decl. ¶¶ 39-41, 59; Brooks Decl. ¶ 16; Second McPeake Decl. ¶ 25; Copilevitz Decl. ¶ 23; Tigner Decl. ¶¶ 11(c), 15; Browning Affid. ¶ 7; Bailey Decl. ¶ 7. County employees confirm that larger nonprofit organizations tend to pay the $120 fee rather than break down their contributions to the County level. Tootle Depo. 76; Stoner Depo. 38-40; Krick Depo. 96-99.

and the percentage of total projected collections comprised by solicitation costs. 2 F.3d at 1522. The court recognized that these extensive recordkeeping and disclosure requirements "would burden a great deal of protected expression without serving any legitimate purpose," id. at 1545, that only the limited disclosure requirements regarding identification of the charities were narrowly tailored, and that there was "nothing in the record to suggest that any more extensive regulation is necessary to control fraudulent conduct by charitable organizations than is available to sanction similar activities by other entities." Id. at 1546; see also Gospel Missions, 951 F. Supp. at 1443, 1450.

3. Demands for Solicitation Materials

The Ordinance also requires that the charity submit the wording of "verbal solicitation(s), including any telephone 'pitch,'" and "any written or printed material(s) used in solicitation" with both its initial permit application and each annual renewal. NPA ¶ 29(H); PC Code § 42-292(a)(12)(f) & (g); Charitable Solicitation Renewal Application, List of Required Attachments, ¶ I ("RA") (Second Zillo Decl., Exh. H). This demand is unjustified and infeasible for several reasons.

First, the requirement that a charity submit scripts and written solicitation materials *in advance* of obtaining a permit subjects charities to potential content-review and censorship if the County dislikes the speaker, its message, or its manner of delivering that message. See City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988) (acknowledging the direct threat to speech posed by "a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted"); see also Schneider v. Town of Irvington, 308 U.S. 147, 164 (1939). Indeed, the County admits that it reviews solicitation materials in part so that it can assure itself that "information in the 'pitch' is consistent with information in the application." Defendants' Answer to Plaintiffs' Interrogatory No. 32. County employees review solicitation materials to see if "they track [their] expectations of what the charity would be asking for." Tootle Depo. 71; see also Krick

Depo. 88-90—demonstrating that the County engages in a substantive, standardless, and highly subjective review of such materials. See Second Zillo Decl. ¶¶ 45-47; Second McPeake Decl. ¶ 26; Brooks Decl. ¶ 27-28; Copilevitz Decl. ¶ 28; Tigner Decl. ¶ 12.[5]

Such a requirement has been struck down because the risk of abuse is so high. In Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), the court invalidated a Virginia requirement that solicitors file copies of all campaign solicitation literature, including the text of oral solicitations, as an unconstitutional prior restraint on speech. The requirement, the court explained, provided no guidelines for review and was "rife with the potential for abuse." Id. at 1233 (citation omitted). The court in Telco Communications, Inc. v. Barry, 731 F. Supp. 670 (D.N.J. 1990), struck down a similar New Jersey requirement because it "place[d] the state in a censor's position even though [the statute] does not require that the solicitation text be approved by the state." Id. at 682. The court also noted that requiring solicitors to file the text of oral solicitations is of little use because it does not ensure that the text will be followed. Id. at 683; see also Copilevitz Decl. ¶ 31.

The required submission of scripts and printed solicitation materials is not feasible in any event. Large charities such as plaintiffs produce volumes of written solicitation materials and multiple scripts that change frequently throughout the year. Second Zillo Decl. ¶¶ 48-49; Brooks Decl. ¶¶ 29-30; Second McPeake Decl. ¶ 26; Copilevitz Decl. ¶ 30; Tigner Decl. ¶ 12. Providing copies of this vast quantity of materials each year would be extremely burdensome and costly.

4. Updating and Interim Reporting Requirements

Adding further to the burdens described above is the requirement that a permit holder notify

[5] For example, the County held up for a year the permit sought by LAS, LLC, a professional solicitor, because of the County's insistence that each telephone caller state earlier in the script that s/he worked for a professional solicitor, even though there was no suggestion that the script was false or misleading in any respect or that the disclosure was not made. See Copilevitz Decl. ¶ 29 & Exh. B. This improper content review also establishes that the Ordinance imposes an improper prior restraint, as discussed in Part II, below.

the County in writing within 15 days whenever any information submitted has changed. PC Code § 42-295(b)(4); see Second Zillo Decl. ¶ 49; Brooks Decl. ¶ 30; Copilevitz Decl. ¶ 30. This updating requirement is substantially broader and more burdensome than is typical of other jurisdictions. Copilevitz Decl. ¶ 32.

Equally onerous and pointless is the requirement that all new permit holders report their financial results or submit their IRS Form 990s six months after obtaining their permit. PC Code § 295(b)(1)(a); see Charity Report of Results Form (Second Zillo Decl., Exh. I). Charities are already required to submit their Form 990s with their initial applications, see supra, and are required to submit them again at their annual renewal. See PC Code §§ 42-294(c), 42-295(b)(1)(b); RA, List of Required Attachments, ¶ V. The upshot of the matter is that a nonprofit organization must file a Form 990 with the County *three* times within its first year of activity there. This requirement is unique and yet another example of the endless churning of paper that the County demands. Second Zillo Decl. ¶¶ 50-51; Copilevitz Decl. ¶ 33; Tigner Decl. ¶ 10.[6] All States that require periodic reporting of financial information by charities are content to wait until the time of the charity's annual renewal. It is difficult to see how one County can justify demanding more.

C. The Ordinance and Accompanying Forms are Not Narrowly Tailored to Serve a Substantial Governmental Interest.

The Supreme Court stated in Riley that "government regulation of speech must be measured in minimums, not maximums." 487 U.S. at 790. The County is not entitled to treat these charities as if they were commercial businesses, but must, in this context, regulate "only with narrow

[6] The failure to file this six-month report is one of the most common grounds for permit revocation in the County, and it carries the harsh consequence that the charity is not permitted to solicit in the County for *three* years—even though the failure to file this redundant form has no bearing on whether the charity has engaged in fraud or misused funds. PC Code § 42-296(h); Lord Depo. 150-52; see also Second McPeake Decl. ¶ 13 & Exh. E (County threat to revoke Greenpeace's permit for not filing the interim report).

specificity." Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). The County has not even come close to meeting that requirement. To give the Court a sense of just how oppressively burdensome the County's reporting requirements are, Mr. Tigner compared its application, along with the required attachments, to the Unified Registration Statement ("URS"), now in use in 37 of 40 States requiring registration (not including Florida). The URS aggregates the registration requirements for *all* 37 participating States—without making judgments regarding the validity of these individual requirements—into a standard format accepted by these States in lieu of their own forms. As Mr. Tigner reports, the County seeks more information and more detail than these 37 States *combined*. Tigner Decl. ¶¶ 8, 10; see also Second Cassidy Decl. ¶¶ 8-9.

To pass muster, these heavy restrictions on protected speech must be "narrowly tailored"—that is, not "substantially broader than necessary" to achieve the government's interest. Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989). In other words, "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id. at 799. It is therefore necessary to consider the County's goals. The Ordinance states that its purposes are "to prevent deception, fraud, or misrepresentation in the solicitation, use and reporting of contributions" and to promote "full public disclosure" by persons who solicit contributions. PC Code § 42-270. As we show, the Ordinance is not narrowly tailored to serve either of these goals.[7]

1. Fraud Prevention

[7] See, e.g., FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 254 & n.7 (1986) (plurality opinion) ("Detailed recordkeeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear" and "may create a disincentive for the organization itself to speak"). As a federal court recently observed in preliminarily enjoining a similar local government ordinance: "The Charitable Solicitations Ordinance . . . does not appear to be narrowly tailored" because "the statute affects everyone who wishes to solicit contributions in Davidson County, not just those who are making fraudulent solicitations." Feed the Children, Inc. v. Metropolitan Government of Nashville, No. 3:01-1484, slip op. at 25 (M.D. Tenn. Mar. 21, 2002) (Exhibit 2 to the Notice of Filing Exhibits).

Consider first the County's purported interest in preventing fraud or misuse of charitable contributions. As Mr. Copilevitz explains, the mere filing of information does not inhibit fraud. The effectiveness of a regulatory regime in rooting out fraud, misuse of funds, and other types of abuses is directly tied to the size of the agency's budget; the size and expertise of its staff; and its ability and willingness to independently verify the information provided by charities, check the charities' books and records, initiate investigations to determine whether charities are truthfully representing the uses made of funds received, and prosecute charities that have made misrepresentations or misused funds. Copilevitz Decl. ¶¶ 46-47. In addition, for the County to be able to audit the books of registering charities, its staff must have accounting expertise. Id. ¶ 48.

Given its staff and budget, the County is ill-equipped to assume this role, and indeed, it does not. Only about $150,000 of the Department's budget goes to the regulation of charities: $140,000 in payroll costs and the remainder in office supplies. Defendants' Answer to Plaintiffs' Interrogatory No. 2. Only two employees work full-time on charitable regulation. Defendants' Answers to Plaintiffs' Interrogatory Nos. 1 & 2; Tootle Depo. 17-19; Stoner Depo. 84-86; Krick Depo. 21-22. Neither has experience in accounting, neither has a background regarding the nonprofit sector, and they have little experience in investigating fraud. Tootle Depo. 9, 181-83; Krick Depo. 145-46; see also id. at 17, 83-84; Wood Depo. 101-02. One of them has no college degree. Stoner Depo. 8.

Nor does the County independently verify the information it receives from charities. Rather, it takes the reams of paper submitted and "puts it in the file." See, e.g., Stoner Depo. 20-21, 23, 33-34; Lord Depo. 44, 58. As the Director testified, she could not remember the last time the Department had launched an investigation, requested financial records, or taken other steps to verify information submitted by charities, but she thought that the Department had done so once or twice

in its entire history. Lord Depo. 103. Indeed, the Director acknowledged that the Department does not even review registration materials for potential fraud or initiate fraud investigations without a complaint from a County resident. Id. at 104, 172-74.[8]

The next obvious question, then, is whether the Department receives many complaints. The answer is that the Department has received virtually no complaints involving charities. One of the line investigators has handled only one complaint in her five years at the Department, and that one complaint turned out not to relate to a charity. See Tootle Depo. 113-18, 142. The other investigator has never received a complaint regarding a charity. Stoner Depo. 82-83. In answers to interrogatories, the County stated that it has received only 31 complaints regarding charities since 1990. Defendants' Answer to Interrogatory No. 9. Mr. Wood, the Department's Chief Investigator and the employee responsible for reviewing all complaints made to the Department, see Wood Depo. 25, testified that the Department acts only on written consumer complaints, adding: "I've, maybe, but I doubt it—maybe I've seen five written complaints on charities from November '99 to the present. But I don't even think it's been that high. It's very uncommon to get a written complaint on a charity." Id. at 48-49. No one could recall any occasion on which the Department had received a complaint that a charity had committed a fraudulent practice or misused funds, and indeed, the Department uncovered no instances where a charity provided false or misleading information in its registration materials. See Krick Depo. 116, 153; Wood Depo. 66-67; Letter from Carl Brody to Bonnie Robin-Vergeer ¶ 2, dated May 9, 2002 (admitting Plaintiffs' Requests to Admit Nos. 14 & 15) (Requests for Admissions and Letter attached to the Notice of Filing Excerpts from Discovery).

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[8] Testimony from other County employees confirmed that the Department does not attempt to verify the information provided by charities and that it will investigate or take other action (other than the effort to compel charities to register) only if there is a complaint. See, e.g., Tootle Depo. 60-61, 110-11, 146, 185-87; Stoner Depo. 34-35, 50-53, 66-71, 105; Krick Depo. 89-90; Wood Depo. 47; see also Copilevitz Decl. ¶ 47; Tigner Decl. ¶ 6; Second Cassidy Decl. ¶ 7.

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (citation omitted); see also Edenfield v. Fane, 507 U.S. 761, 770-71 (1993). There simply is no known problem with fraudulent charitable solicitation in Pinellas County, no "harms" that are "real," no "disease" to be cured, and no justification for this onerous regulatory apparatus.

It is difficult to see what purpose is served by any regulation at the county level in Florida since the State already extensively regulates charitable solicitation. But even assuming that some regulation is permissible, the County could adopt a far more narrowly tailored Ordinance that would require charities only to identify themselves, provide the County a copy of their IRS Form 990, and furnish proof that they are registered in Florida. And if the County found fraud or misuse of funds, it could prosecute such offenses, as could the State. See, e.g., Fla. Stat. ch. 496.417; see also Fla. Stat. ch. 817 (criminalizing a wide variety of fraudulent practices). As the Supreme Court recognized in invalidating another alleged anti-fraud ordinance, "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." Schaumburg, 444 U.S. at 637; see also Feed the Children, slip op. at 25 ("Defendants have provided no explanation for why laws prohibiting fraud are insufficient to achieve the same goal.").[9]

As the Second McPeake Declaration ¶¶ 9-18 and the Bailey Declaration ¶¶ 7-10 demonstrate,

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[9] Charities that solicit through the mail are also regulated by the Postal Service, which has broad authority to determine what constitutes "nonmailable matter," which cannot legally be sent through the mails. 39 U.S.C. §§ 3001, 3005. The Postal Service may stop any mail that furthers a scheme for obtaining money or property by false representations. If it determines that a person is using the mails for such purposes, it may take various enforcement actions against the offending person, such as directing the postmaster to return to the sender any mail addressed to the offender. 39 U.S.C. § 3005(a); 39 C.F.R. Part 952. Frauds committed through the mails or by telephone are also federal crimes. See 18 U.S.C. §§ 1341, 1343.

the only thing that this Ordinance achieves, and the only activity in which the defendants are engaged, is a massive increase in paperwork for everyone. The County has a system in place that catches every late filing or failure to fill in any box on a form; what it does not have is a system designed to prevent fraud or other abuses, or even one that catches them after they occur.

2. Public Disclosure

As for the County's alleged interest in "public disclosure," this Ordinance provides no informational benefit to County residents that they do not already have from the Florida registration process and other public disclosures. In considering whether this considerable duplication of effort is justified, three points are important. First, Pinellas County will know whether a charity has complied with Florida's registration requirements because the County *requires* that all charities annually submit proof of registration or an exemption acknowledgment from the State. PC Code, NPA ¶¶ 28, 29(B); § 42-292(a)(8); see Second Zillo Decl. ¶ 25. Second, both County employees and residents can readily determine whether a charity has complied with state registration requirements and can obtain copies of registration materials through Florida's toll-free telephone number, Internet website, and free paperback guide to charities registered in the State. Copilevitz Decl. ¶ 13.[10] Ninety percent of those who call regulators do so to check whether a charity is registered. Copilevitz Decl. ¶ 53. County employees confirm that this is the question typically asked by its residents. Tootle Depo. 136; Stoner Depo. 73. Whatever limited reassurance can be gleaned from the mere fact of registration is already provided by Florida. Copilevitz Decl. ¶ 54. Third, charities' IRS Form 990s are available from Florida, directly from the charities, and from multiple sources in the public domain. Second Zillo Decl. ¶¶ 5, 34; Copilevitz Decl. ¶ 14; see, e.g.,

[10] These resources are described in detail in the Copilevitz Declaration ¶¶ 49-52 & Exh. D (free 2001-2002 Gift Givers' Guide: A Guide to Charitable Giving in Florida).

www.guidestar.org (providing free and extensive information on more than 850,000 charities, including Form 990s); see also 26 C.F.R. §§ 301.6104(d)-1(a), -2 (requiring tax-exempt groups to provide public access to Form 990s).

There is no conceivable interest that is served by requiring charities to resubmit this largely unread substantial volume of information to Pinellas County, just so that it can sit in the County's files as well as the State's. Certainly, the Department employees responsible for administering this Ordinance can provide no justification. They are not even aware of what Florida law requires charities to submit and have very little familiarity with what information is readily available to them in the public domain. Tootle Depo. 248-49, 261; Stoner Depo. 107-111; Krick Depo. 177; Wood Depo. 98-101; Lord Depo. 217-18, 229.[11]

In sum, considered in light of the enormous burdens it imposes, the Ordinance's failure to advance its asserted purposes is fatal under the First Amendment. It cannot stand.

II. THE COUNTY LICENSING SCHEME VIOLATES THE FIRST AMENDMENT BY IMPOSING AN IMPROPER PRIOR RESTRAINT ON SPEECH.

The Ordinance's licensing scheme forbids any solicitation in the County without defendants' approval. The requirement that charities obtain a "license" before they may solicit is the "hammer"

[11] Not only does the Ordinance fail to further the informational needs of County residents, but the County actually misleads consumers in one critical respect. The County has derived a so-called "program ratio"—characterized by the County as the percentage of charitable contributions that the charity purportedly devotes to its program services—which the County claims can be computed by dividing the amount the charity spends on program services by its total revenue. See Copilevitz Decl. ¶ 57; Tootle Depo. 130-31. The ratio is posted on the County's website for each charity on which the County has information. See, e.g., Exhibit 3 to the Notice of Filing Exhibits (sample County website printouts). County employees also volunteer the ratio to members of the public who call to check on a charity's registration. Tootle Depo. 66, 129-30, 137, 153; Stoner Depo. 72; Krick Depo. 124; Wood Depo. 61; Lord Depo. 61. The problems both with the County's calculation of the program ratio and its recommendation that County residents not donate based on a charity's program ratio—however calculated—are described in detail in the Copilevitz and Brooks Declarations. See Copilevitz Decl. ¶¶ 55-64 & Exh. E; Brooks Decl. ¶¶ 21-26. That the County generates this ratio, without understanding or correctly representing what it is, and then touts it as a valuable benefit for its residents, shows how little the County understands about the world it is trying to regulate.

the County uses to compel them to suffer through its unreasonably burdensome regime. See Copilevitz Decl. ¶ 11; Tigner Decl. ¶ 6. The licensing requirement violates the First Amendment as an impermissible prior restraint on speech for three reasons: (1) no prior permission requirement is justified in these circumstances; (2) the Ordinance vests unbounded discretion in the Director; and (3) the Ordinance lacks the required procedural safeguards. If the Court agrees that the Ordinance is unduly burdensome, as argued in Parts I and III, it need not address this prior restraint argument.

A. There is No Basis for the Prior Restraint Imposed by the County.

There is no doubt that the Ordinance effects a prior restraint on speech, as it requires charitable organizations to obtain permission before they may solicit in the County. PC Code § 42-291. When, as here, a law gives public officials "the power to deny use of a forum in advance of actual expression," it constitutes a prior restraint on speech. Ward, 491 U.S. at 795 n.5 (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)); see also Riley, 487 U.S. at 801-02; United States v. Frandsen, 212 F.3d 1231, 1236-37 (11th Cir. 2000). Any system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." Southeastern Promotions, 420 U.S. at 558 (citations omitted). The question whether the County may *regulate* charitable solicitations must be divorced from the question whether the County may require charities *to obtain permission* from the County before they speak. Thus, this Court must determine whether any prior restraint of speech, even under the most carefully crafted of safeguards, is permissible "in light of the characteristic nature and function of the particular forum involved." Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981).

Here there is no "public forum" in which government has the right to referee speech so as to preserve the forum's availability for its intended uses or to avoid scheduling conflicts. Cf. Thomas v. Chicago Park Dist., 122 S. Ct. 775 (2002). The communications at issue here are

between charities and individual County residents—and for these plaintiffs, it is primarily solicitation by mail that is at issue. As the Supreme Court has observed, "a statute that requires . . . a 'license' for the dissemination of ideas is inherently suspect." Munson, 467 U.S. at 964 n.12. There is no justification for the County's requiring charities to obtain permits *in advance* of sending mail to County residents; if any mail contains misrepresentations or is fraudulent in any way, the County is free to take action then, as are the IRS, the U.S. Postal Service, federal prosecutors, and the State of Florida. See Feed the Children, slip op. at 26 (information can be required without a permitting scheme). Indeed, the Ordinance preserves no alternative avenues for communication, *choking off all solicitation entirely* unless and until the charity receives a permit. See id. at 24.

Even assuming that a prior restraint on solicitation activity may be justified in some circumstances, this Ordinance does not pass muster both because the granting of a permit is not a ministerial act, but is highly discretionary, and because the process lacks the procedural safeguards required under Freedman v. Maryland, 380 U.S. 51 (1965).

B. The Ordinance Vests Excessive Discretion in County Officials.

Any law subjecting speech to a prior restraint "without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969). "If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992) (citations omitted).[12]

[12] "[V]irtually any amount of discretion beyond the merely ministerial is suspect" in a scheme involving the licensing of speech. Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1362 (11th Cir. 1999); Miami Herald Publ'g Co. v. City of Hallandale, 734 F.2d 666, 675 (11th Cir. 1984) (same); see also Rescue Army v. Municipal Court, 331 U.S. 549, 583 (1947) (noting constitutionally significant difference between a licensing scheme that merely involves identification and one that entails the exercise of discretion).

Both the terms of the Ordinance and its actual administration confirm that the issuance and revocation of permits in this County is anything but ministerial, but instead entails the exercise of considerable discretion. The Ordinance provides five mandatory grounds for denying a permit. See PC Code § 42-293(c). But the Ordinance also provides that the Director *"may* deny, suspend or revoke the charitable solicitations permit of any person for any violation of this article." Id. § 42-276(e) (emphasis added). The possible bases for denying or revoking a permit are limited only by the imagination. The Ordinance lists twenty-three "prohibited acts," see id. § 42-321 to -344 (Division 4), but the possible bases are even more numerous because they extend to any failure "to comply with the reporting requirements of this article," id. § 42-335; see also id. § 42-326.[13] The Ordinance provides no guidance regarding when it is appropriate for the Director to deny, suspend, or revoke a permit based on a violation that does not fall within the five mandatory grounds listed in § 42-293(c).[14] In addition, as noted above in Part I, Section (B)(3), the County requires the advance submission of solicitation materials without any checks on the uses the County may make of them in the permitting process.

The issuance and revocation of permits in this County is a highly subjective affair dependent on differing interpretations regarding what the Ordinance and forms require, negotiation with charities and their representatives regarding what the County will accept, and the exercise of

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[13] Some of the listed violations involve vague prohibitions or highly subjective judgment calls. See, e.g., id. § 42-340 (violation "to fail to apply contributions for the stated purpose of the solicitation"); id. § 42-343 (violation "to fail to provide complete and timely payment" to a charitable organization of "the proceeds from a solicitation campaign or sales promotion").

[14] When the district court rejected a similar argument in American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 32 F. Supp. 2d 1308, rev'd on other grounds, 221 F.3d 1211 (11th Cir. 2000), it relied in part on the County charitable solicitations board, which could review the Director's decisions. Id. at 1327 (citing PC Code § 42-277). One month later, the County abolished that board, leaving the last word to the Director. See Ordinance No. 98-108, Preamble, §§ 3 & 4 (Dec. 22, 1998), attached as Exhibit 4 to the Notice of Filing Exhibits.

discretion in deciding when to deny or revoke a permit for failure to satisfy the County's requirements.[15] County employees acknowledged that "a lot of it is latitude, as far as the Ordinance, and to some extent, my interpretation of the general information that we request." See Tootle Depo. 80-81. Larry Krick, the investigators' supervisor and the employee with de facto responsibility for permit denials, see Lord Depo. 112, explained how he decides whether to grant a permit:

> Basically, what we would do—it's kind of a hard question to answer. You would have to take the application and look at it. It's one of those situations where if I didn't, if it was just one thing missing and I was not sure if that was critical or not, I'd either consult with the County Attorney or I would take it to my supervisor, who is the Chief Investigator, and get his opinion on it as to what to do at that point.

Krick Depo. 38. Mr. Krick believed that he had in fact issued permits where the missing information "was not critical." Krick Depo. at 39-40. The Director also acknowledged that she had considerable discretion in deciding when to lift a denial or revocation of a permit once the decision to deny or revoke was made. See Lord Depo. 133-34, 154-57.[16] In sum, if the question whether to

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[15] The forms are so complicated and confusing that not only do charities have a difficult time determining what they must provide, see Tigner Decl. ¶ 11; Broaddus Decl. ¶ 6; Second Cassidy Decl. ¶ 6; Bailey Decl. ¶ 5; Second Hardin Decl. ¶ 5, but not even the staff charged with administering the Ordinance interpret them in the same way. For example, *regarding drivers' licenses and dates of birth,* compare Stoner Depo. 16-18 (requires that at least one individual provide a date of birth, but does not insist on drivers' license numbers), with Krick Depo. 33-35 (dates of birth and drivers' license numbers required, but resists stating whether omission would be grounds for denying permit), and Lord Depo. 34-35 (dates of birth and drivers' license or Social Security numbers required). *Regarding Question 16,* compare Tootle Depo. 78-79 (new organization must provide some breakdown of expenses; will not accept total expenses), with Stoner Depo. 41 (acceptable to provide total expenses). *Regarding Question 27,* compare Tootle Depo. 37-40 (requires information regarding relationships between officers of the charity and officers of contractors), with Stoner Depo. 19-21 (requires information regarding whether officers within the charity are related *to each other,* not to outside firms), and Lord Depo. 40-44 (appears to cover employees as well as officers, but ultimately a matter of Mr. Krick's "interpretation"). *Regarding Question 24,* compare Tootle Depo. 40-43 (interprets it as written), with Stoner Depo. 21-23 (requires disclosure of employee's *simultaneous* involvement with applicant and another organization registered in the County), and Lord Depo. 47-48 (asks for disclosure of all current and past relationships). *Regarding Questions 21 & 22,* compare Tootle Depo. 84 & Lord Depo. 77-78 (not sufficient to write "see Form 990"; must complete questions), with Stoner Depo. 42 & Krick Depo. 96 (can write in "see Form 990").

[16] Mr. Copilevitz confirms that, in his experience, the issuance of permits in the County is anything but a ministerial process and that his firm regularly is forced to negotiate with Department employees regarding what they will require in order to issue a permit. Copilevitz Decl. ¶¶ 29, 36-37; see also Tigner Decl. ¶ 11;

issue a permit is "hard," Krick Depo. 38, then there is too much discretion to sustain this licensing scheme.

C. The Procedural Safeguards Required by Freedman v. Maryland are Absent.

The Supreme Court requires that prior restraints be accompanied by the strictest of procedural safeguards both to obviate the dangers of censorship and to prevent an indefinite postponement of the proposed speech. In Freedman v. Maryland, the Court held that (1) any restraint prior to judicial review may be imposed only for a specified brief period during which the status quo must be maintained; (2) a prompt final judicial determination must be assured; and (3) the regulator must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. 380 U.S. at 58-60. Courts repeatedly have held that these procedural safeguards must be present in a charitable solicitation licensing scheme. See Riley, 487 U.S. at 801-02; Church of Scientology, 2 F.3d at 1548 n.46; Famine Relief Fund v. West Virginia, 905 F.2d 747, 753 (4th Cir. 1990); Fernandes v. Limmer, 663 F.2d 619, 628 (5th Cir. Unit A Dec. 1981). None is present here.

As the Supreme Court explained in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (O'Connor, J., joined by Stevens and Kennedy, JJ.), Freedman requires that a license for a First Amendment-protected entity must be issued within "a reasonable period of time" because "undue delay results in the unconstitutional suppression of protected speech." Id. at 228; see also id. at 238 (Brennan, J., joined by Marshall and Blackmun, JJ.); Redner v. Dean, 29 F.3d 1495, 1500 (11th Cir. 1994). Here there is no guarantee of a prompt administrative decision on a new permit or renewal application, nor may the charity begin to solicit after a brief specified period of time *unless* the Department finds a defect in its application. Under even a best-case scenario, when a charity

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Broaddus Decl. ¶¶ 5-7; Bailey Decl. ¶¶ 8-10.

submits a perfect application, the Ordinance gives County authorities 30 days to grant a permit. PC Code § 42-293(a)(1). This is an atypically and unreasonably long delay under the best of circumstances, as it forces law-abiding charities to cease all solicitation activity in the County before the permit issues and delays new initiatives, such as those spawned within hours of September 11. See Copilevitz Decl. ¶ 35; Tigner Decl. ¶ 13.

The administrative process takes even longer than 30 days, however. The 30 days begins to run only from the date of the application's "proper filing." PC Code § 42-293(a)(1). Any missing information, no matter how trivial, is grounds for the County to claim that the application is incomplete and to postpone the running of the 30-day period. Copilevitz Decl. ¶ 35. After the County sends a letter stating its intent to deny a permit, it has 15 additional days to actually deny it. PC Code § 42-293(a)(3). After a denial, the applicant has 15 days in which to request a hearing. Id. § 42-293(a)(4). This means that the Ordinance contemplates the administrative process taking a *minimum* of 60 days if a denial is contemplated, during which time a charity may not solicit.[17] In practice, months often go by while the charity and the County negotiate exactly what the County will insist upon for the charity to receive its permit. Copilevitz Decl. ¶ 36.

In reality, however, even this 60-day period is illusory. First, 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, see PC Code § 42-293(a)(4); id. § 42-296 (no deadline for decision after hearing on a revocation); Copilevitz Decl. ¶¶ 35, 38; Tigner Decl. ¶ 14—defects that doom the entire licensing scheme under Eleventh Circuit authority. See, e.g., Lady J. Lingerie, 176 F.3d at

[17] The minimum of 60 days allotted for the administrative process to unfold is not a reasonably brief time period. See, e.g. Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (per curiam) (holding 50-57 days for completion of the administrative process too long); Cascade News, Inc. v. City of Cleveland, 1992 WL 808790, (N.D. Ohio June 15, 1992) (66 days for the entire administrative review process too long).

1363 (ordinance's failure to set a post-hearing deadline for a *decision* by the zoning board renders it unconstitutional); Redner, 29 F.3d at 1501 (ordinance invalid because no time-limit placed on the board to schedule a hearing). Second, the Ordinance is unusual and invalid because it fails to provide for a brief period of time, such as the ten days allowed by Florida, see Fla. Stat. ch. 496.405(7), after which the charity may begin to solicit *unless* the County notifies the charity that its application is deficient. See Copilevitz Decl. ¶ 34. Such a provision is necessary to preserve the status quo for charities that have been soliciting and to guarantee that new applicants may begin soliciting without undue delay. See Redner, 29 F.3d at 1500-01.[18]

Finally, the Ordinance fails the second Freedman requirement because, although the Ordinance provides for judicial review, PC Code § 42-278, it does not require that a judicial decision be made promptly or that any adverse action taken against a charity be stayed pending judicial review. Exactly what Freedman and its progeny require with respect to judicial review is the subject of a federal circuit-court split—in particular, over whether the scheme must provide for a prompt judicial *disposition* or merely prompt *access* to the courts. See City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 281 (2001).[19] But whatever the precise contours of the judicial review

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[18] Accord Artistic Entertainment, Inc. v. City of Warner Robins, 223 F.3d 1306, 1311 (11th Cir. 2000) (per curiam); Cafe Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc. v. St. Johns County, 143 F. Supp. 2d 1331, 1335 (M.D. Fla. 2001); Florida Cannabis Action Network, Inc. v. City of Jacksonville, 130 F. Supp. 2d 1358, 1367-68 (M.D. Fla. 2001). Indeed, the Ordinance fails utterly to maintain the status quo because the charity is prohibited from engaging in any charitable solicitation in the County during the licensing process, see PC Code §§ 42-291(a), 42-321(a)(1), regardless of whether the charity was already soliciting at the time, or after expiration of its permit, even if the permit is in the process of being renewed. See id. § 42-321(a)(3). This is a direct violation of the commands of Freedman and FW/PBS.

[19] The question is unresolved in the Eleventh Circuit with respect to licensing schemes that, as here, involve non-commercial enterprises. See Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1256-57 (11th Cir. 1999) (holding that access to prompt judicial review is sufficient for business licensing schemes); see also Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 774 (11th Cir. 2000) (recognizing that Boss Capital did not resolve the issue of prompt judicial review in cases not involving business licensing schemes), vacated on other grounds, 122 S. Ct. 914 (2002).

required by Freedman, the Ordinance not only fails to provide for swift judicial action, but it also fails to provide for a stay of the County's suppression of a charity's speech pending judicial review. This surely is not acceptable under Freedman and FW/PBS. See Lakewood, 486 U.S. at 758 ("Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost.").

III. THE ORDINANCE AND ACCOMPANYING FORMS IMPOSE EXCESSIVE BURDENS ON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE.

Because the Pinellas County regulatory scheme burdens interstate commerce, it is also invalid under the Commerce Clause. It is beyond dispute that the scheme affects and burdens interstate commerce. As the Supreme Court held in Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 586 & n.18. (1997), the nonprofit sector is engaged in extensive interstate commerce that is embraced within the Commerce Clause. And, indeed, plaintiffs are engaged in interstate commerce when they communicate with, solicit contributions from, and provide goods and services to the residents of Pinellas County. See, e.g., Second Zillo Decl. ¶¶ 55-57; Brooks Decl. ¶¶ 3, 6-7; Second McPeake Decl. ¶¶ 27-28. Public Citizen's and Greenpeace's commerce with Pinellas County residents has dropped off substantially because of their cessation of efforts to communicate with potential contributors. Second Zillo Decl. ¶¶ 55-57; Brooks Decl. ¶ 8; Second McPeake Decl. ¶¶ 27-28. Indeed, all charities that have had a permit denied or revoked by the County, or that have curtailed or suppressed their activity in the County, have lost opportunities to engage in interstate commerce as a direct result of the Ordinance. See, e.g., Second Cassidy Decl. ¶ 4; Second Hardin Decl. ¶ 4; Browning Affid. ¶ 6; Bailey Decl. ¶ 11; Copilevitz Decl. ¶ 67.

The Commerce Clause is more than an affirmative grant of power to Congress; "it has a negative sweep as well." Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992). The "negative"

or "dormant" Commerce Clause prohibits state regulation "that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" General Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) (citation omitted). The prohibition is equally applicable to local governmental regulation. See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

When, as here, a state regulation does not discriminate against interstate commerce, but imposes "only indirect effects on interstate commerce and regulates evenhandedly," the Court examines whether the State's interest "is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). "[T]he critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman, 476 U.S. at 579. Under Pike, the Ordinance will be upheld only if "the burden imposed on such commerce is [not] clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Where a legitimate local purpose is found, "then the question becomes one of degree." The "extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities." Id.

For the reasons outlined in Part I, supra, the Ordinance cannot survive such analysis. The excessive amount of information demanded, the requirement that charities provide copies of their solicitation materials and scripts, the multitude of redundant documents required, the fact that out-of-state charities are forced to pay the maximum $120 filing fee because they cannot readily compute the contributions they receive from County residents, the six-month reporting obligation, and the mandatory 15-day update rule—all impose enormous operational costs on those charities that choose to register and result in significant losses for those that either suppress their activities rather than

register or that have their permits denied or revoked by the County. Moreover, the nature of the information required (such as financial projections and highly detailed expense disclosures) forces charities to alter their business practices to accommodate the specific demands of this one County, thereby "interfer[ing] with the natural functioning of the interstate market . . . through burdensome regulation." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976).

Although the County's interest in preventing fraud is a legitimate one, "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981). Thus, the Court in Kassel struck down an Iowa law barring use of trucks longer than 60 feet on its highways because the State's safety interest was "illusory" and the law "engender[ed] inefficiency and added expense." Id. at 671, 674; see also Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978).

As explained in Part I, the County's regulatory regime is not narrowly tailored to serve its purported goals and exacts a toll that is excessive in relation to those goals. This is fatal under Pike.[20] Moreover, the administrative burden and cost of complying with the Ordinance cannot be viewed in isolation. See Carbone, 511 U.S. at 406 (O'Connor, J., concurring); National Bellas Hess v. Department of Revenue, 386 U.S. 753, 759-60 (1967) (many variations in administrative and recordkeeping requirements "could entangle [company's] interstate business in a virtual welter of

[20] As the Eleventh Circuit held in voiding a ban on importation of out-of-county waste, the fact that the county "could have achieved its objectives 'as well with a lesser impact on interstate activities,'" was "crucial" in finding a Commerce Clause violation. Diamond Waste, Inc. v. Monroe County, 939 F.2d 941, 945 (11th Cir. 1991) (quoting Pike, 397 U.S. at 142). The existence of "less restrictive alternatives" here, as discussed in Part I, Section C above, makes the burden imposed "clearly excessive in relation to the local benefits created." Id. at 946; see also Santa Fe Natural Tobacco Co. v. Spitzer, 2001 WL 636441, at *29 (S.D.N.Y. June 8, 2001) (striking down state statute prohibiting direct sales of cigarettes to New York consumers because it burdened interstate commerce to a greater extent than it promoted the state's interests).

complicated obligations to local jurisdictions"), overruled in part on other grounds by Quill Corp. v. North Dakota, 504 U.S. 298 (1992). Forty States regulate charitable organizations, Copilevitz Decl. ¶ 65; Tigner Decl. ¶ 8; Second Zillo Decl. ¶ 54, each with its own registration requirements and registration fee. A substantial number of local jurisdictions also impose registration and reporting requirements on charities—although few enforce them with the aggressiveness of Pinellas County. Copilevitz Decl. ¶ 10. There are more than 3,000 counties, 19,000 municipalities, and 16,000 townships and towns in this country. Id. ¶ 65 (citing the Statistical Abstract of the United States). If the smallest fraction of these 38,000 jurisdictions imposed registration requirements and filing fees half as demanding and expensive as those of Pinellas County, then even the largest and most established of charities would soon find themselves closing up shop. Id.; Second Cassidy Decl. ¶ 12. The Pinellas County Ordinance therefore violates the dormant Commerce Clause as well as the First Amendment.

CONCLUSION

For the foregoing reasons, the Court should enter a permanent injunction enjoining the County from enforcing the Ordinance in its entirety against charitable organizations and a declaratory judgment that the Ordinance as a whole violates the First Amendment and the Commerce Clause.

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Respectfully submitted,

Robert R. Hearn, Local Counsel
Florida Bar No. 0067687
Zuckerman Spaeder, L.L.P.
101 East Kennedy Boulevard, Suite 1200
Tampa, FL 33602 • (813) 221-1010

Bonnie I. Robin-Vergeer (Pro Hac Vice)
Alan B. Morrison
Public Citizen Litigation Group
1600-20th Street, N.W.
Washington, D.C. 20009 • (202) 588-1000

Counsel for Plaintiffs

Geoffrey W. Peters (Pro Hac Vice)
Geoffrey W. Peters, P.C.
9024 Trailridge Court
Vienna, VA 22182 • (703) 356-8703