DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2009

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: House Bill 392

Dear Governor O'Malley:

We have reviewed House Bill 392, entitled "Baltimore County – Roadside Solicitation of Money or Donations – Permit Program," for constitutionality and legal sufficiency. While we generally approve the bill, we write to discuss severable portions of the bill that we believe violate the First Amendment. We also suggest ways that Baltimore County should implement the bill to avoid violating the First Amendment.

House Bill 392 amends Transportation Article § 21-507 to authorize Baltimore County to enact "a permit program to allow a person to stand in a roadway, median divider, or intersection to solicit money or donations from the occupant of a vehicle." The bill specifies the contours of the permit program that Baltimore County may enact and states that at least 15 days in advance of soliciting, a permit applicant must give the County the following information:

1. The name, address, and age of each person who will solicit;
2. The name and address of the employing or sponsoring person, agency, or entity;
3. The exact location where each solicitor will be assigned;
4. The purpose of the solicitation;
5. The time frame and duration of the solicitation;

6. The means of travel to and from the place of solicitation; and

7. The name, address, and telephone number of a contact person who will be able to provide additional information to the county or municipality.

The bill goes on to direct the County to "examine each application and make any further investigation as deemed necessary in order to determine the truth of the statements made on the application." The bill further provides that the County "shall deny the permit if it determines that: (i) Any statement made on the application is untrue, or (ii) the location or method of the solicitation or its duration are such that it will be harmful to the health, safety, convenience, or welfare of the general public." Finally, the bill limits the duration of a permit to 24 hours and limits applicants to no more than 12 permits per year.

As explained below, it is our opinion that the provisions of the bill that require applicants to give the name and address of every person who will solicit as well as the purpose of the solicitation are unconstitutional. In addition, we believe that applicants may not constitutionally be limited to 12 permits per year.

The First Amendment to the U.S. Constitution states that "Congress shall make no law ... abridging the freedom of speech." The First Amendment applies to state and local governments through the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359 (1931); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Jakanna Woodworks, Inc. v. Montgomery Co.*, 344 Md. 584, 595 (1997)(citing *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 561 (1980)). Moreover, "the freedoms protected by Article 40 the Maryland Declaration of Rights have been interpreted by [the Court of Appeals] to be co-extensive with the freedoms protected by the First Amendment." *Id.* Charitable solicitations are protected under the First Amendment. *United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Specifically, regulation of roadside solicitation implicates First Amendment concerns. *Sun-Sentinel Co. v. Hollywood*, 274 F. Supp. 2d 1323 (S.D. Fla. 2003).

The First Amendment analysis begins by determining the nature of the forum at issue. *Eanes v. State*, 318 Md. 436, 447 (1990). The forum here is a public forum. "Public streets are the archetype of a traditional public forum... ." *Frisby v. Schultz*, 487 U.S. 474, 480-481 (1988). The Supreme Court in *Frisby* noted that its decisions

"identifying public streets as traditional public fora are not accidental invocations of a 'cliché,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.'" *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). In a public forum, the government may restrict speech if the restriction is content neutral, narrowly tailored to serve a significant government interest and "leave[s] open ample alternative channels for communication of the information." *Warren v. Fairfax Co.*, 196 F.3d 186, 190 (4th Cir. 1999)(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Moreover, because House Bill 392 requires government permission before a person may engage in free speech, it must also be examined under the doctrine of prior restraint. *The Pack Shack, Inc. v. Howard Co.*, 377 Md. 55 (2003). A regulation that imposes a prior restraint must provide for narrow, objective and definite standards to guide the licensing authority. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969). "A scheme that places 'unbridled discretion in the hands of a governmental official or agency constitutes a prior restraint and may result in censorship.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225-226 (1988)(citations omitted).

> Even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.

Thomas v. Chicago Park District, 534 U.S. 316, 323 (2002).

A total ban on roadside solicitations from persons in vehicles would be constitutional. Such a ban would be content neutral because it would not allow anyone to engage in roadside solicitation. Moreover, a ban on solicitation from persons in vehicles would be narrowly tailored to assure "free movement of vehicle traffic on city streets." *ACORN v. Phoenix*, 798 F.2d 1260, 1268-1269 (9th Cir. 1986).

> [S]uccessful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor....The direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control

> signals or warnings, and prepare to move through the intersection.

Id. at 1269. Hence, a roadside solicitation ban prohibiting all persons standing in the road from soliciting from occupants of vehicles would be constitutional because it is content-neutral and narrowly tailored to address the government's substantial interest.

On the other hand, creating a permitting process where the government chooses who may engage in roadside solicitations raises constitutional concerns. "With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 515 (1981). Further, it is well established that the State may not single out certain groups for special treatment. *Sun-Sentinel Co*, 274 F. Supp. 2d at 1528-1530; *Bischoff v. Florida*, 242 F. Supp. 2d 1226 (D. Fla. 2003). "[A] law permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship ...." *City of Lakewood v. Plain Dealer Publishing Co*. 486 U.S. 750, 764 (1988).

House Bill 392 does not establish a total ban on roadside solicitation but creates an application and permitting process. Most of the information that House Bill 392 requires applicants to disclose supports the governmental interest in ensuring public safety in the roadways. Accordingly, knowing where individuals intend to solicit and when they will be doing so enables the official to determine whether the intended location is safe for solicitation and whether there may be too many individuals planning to solicit at that location. Moreover, knowing whether the solicitors will be arriving in buses or cars would assist officials in determining whether there are adequate parking facilities at the intended location and whether officials need to provide traffic control. Additionally, it is reasonable to have an identifiable organization or individual for contact purposes. *See Sauk Co. v. Gumz*, 669 N.W.2d 509, 529 (Wis. Ct. App. 2003).

In contrast, requiring applicants to disclose the purpose of the solicitation and the name of every individual who intends to solicit does not appear to be narrowly tailored to meet the public safety purpose of the legislation. The regulation must serve the affected substantial government interest "in a direct and effective way." *Ward*, 491 U.S. at 800; *The Pack Shack*, 377 Md. at 183 (stating that there must be a "relevant correlation" between the required disclosure and the harm the government is trying to prevent). Moreover, "[i]ncluded within the panoply of protections that the First Amendment provides is the right of an individual to speak anonymously." *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 440 (2009). In the *Brodie* case, however, the Court recognized that "[t]he anonymity of speech, however, is not absolute...." *Id.* at 441. The

regulation will be upheld if there is a relationship between the governmental interest and the compelled disclosure of every person associated with the effort. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166 (2002)(declaring unconstitutional an ordinance that required the disclosure of the name of every person who was going to be soliciting for the group); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958)(declaring as unconstitutional in violation of the First Amendment a state law that required an organization to produce its membership list). We do not believe that the requirements of disclosure of identity of the solicitors and the purpose of the solicitation satisfy this requirement. Further, such mandated disclosure risks becoming a means by which a public official could suppress a particular point of view. *Forsyth Co. v. Nationalist Movement,* 505 U.S. 123, 130 (1992).

Additionally, the limitation on applicants in House Bill 392 to 12 permits a year, in our view, is not narrowly tailored. To be constitutional, the restriction must be tailored so that it does not "burden substantially more speech than necessary." *Ward*, 491 U.S. at 799. A regulation will meet this standard if it "targets and eliminates no more than the exact source of the 'evil' that it seeks to remedy." *Frisby*, 487 U. S. at 485. The 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." *Ward*, 491 U.S. at 800. Nevertheless, the regulation "need not be the least restrictive or least intrusive means" of furthering the government's interest. *Id.* at 798.

It is unclear how the public safety purpose is served by limiting persons to no more than 12 permits per year. There is no limitation on the number of persons any organization can have soliciting under its permit, thus there could be large numbers of solicitors on any day. *See Local 32B-32J v. Port Authority of New York*, 3 F. Supp. 2d 413 (S.D.N.Y. 1998)(declaring unconstitutional a regulation that limited the number of persons who could solicit in a bus terminal because the Port Authority did not show how the limit was narrowly tailored to address its congestion concerns); *Napa Valley Publishing Co. v. City of Calistoga*, 225 F. Supp. 2d 1176 (N.D. Cal. 2002)(finding that regulation limiting the number of newspaper racks on any given block to eight was not narrowly tailored to support the City's concerns about aesthetics, pedestrian circulation and safety). Further, the public safety purpose of House Bill 392 could be addressed by a more narrowly tailored regulation that limited the number of solicitors who could solicit each day and at each location, or by requiring a group to wait for a second permit at a particular location until all other applicants had an initial opportunity to solicit there. *Thomas*, 534 U.S. 316 (stating that a regulation that was narrowly tailored to increase the utility of limited space and maximize the benefit for the community was constitutional); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968)(finding that the Port

Authority "may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time," but officials drawing these regulations should be "mindful that the plaintiff has a constitutionally cognizable interest in reaching a broad audience"); *SEIU v. City of Houston*, 542 F. Supp. 2d 617 (S.D. Tex. 2008)(determining that a limit of four permits per day is constitutional because it addressed the City's concerns about traffic disruption); *Brown v. City of Pittsburgh*, 543 F. Supp. 2d 448 (W.D. Pa. 2008)(finding a regulation relating to a buffer zone outside a health clinic constitutional because, among other things, it did not place limits on the number of speakers).

Moreover, although the statute on its face does not distinguish between applicants, in our view, the impact of this provision may favor large organizations - who could have dozens of volunteers who solicit on a single day – over smaller groups or individuals who, to raise sufficient funds, need to engage in solicitation more frequently. The result is that more speech is burdened than is necessary to meet the government's public safety interests. *New Jersey Env'tl Federation v. Wayne Township*, 310 F. Supp. 2d 681 (D.N.J. 2004)(declaring solicitation ordinance unconstitutional because limitation of permit requirements to certain organizations did not support the purported justification for the limitation and there were numerous other ways the city's safety interest could be served); *Kokinda*, 497 U.S. at 736 (finding that regulation prohibiting solicitation in entrances to post office was content neutral because it did not discourage any group from engaging in free speech while favoring others); *New Jersey Freedom Organization v. City of New Brunswick*, 7 F. Supp. 2d 499, 510 (D.N.J. 1997)(stating that distinctions among groups contained in the city ordinance had no "logical relationship" with the city's asserted interests and thus the ordinance was unconstitutional). Therefore, because the yearly limitation on the number of permits a person may receive is not narrowly tailored to fit the County's public safety concerns, it our view, this provision is likely to be found unconstitutional.

Nevertheless, it is our view that while the requirements for applicants to provide identifying information and limiting applicants to 12 permits per year may be unconstitutional, they are severable from the remainder of the legislation. Article 1, § 23, Annotated Code of Maryland, provides that the "finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent." The remaining provisions of House Bill 392 can stand alone and be executed by Baltimore County without violating the constitution.

If you choose to sign House Bill 392 and the County Council of Baltimore County subsequently decides to enact a permit program, we suggest that the local law contain narrow, objective, and definite standards to guide and adequately limit the discretion of the officials who will be making decisions about the permits. *Shuttlesworth*, 394 U.S. at 151. To be constitutional, the standards must be limited to the public safety purposes of the legislation. For example, Baltimore County could identify locations that it determines to be too dangerous to allow any solicitation, or it could institute a "first come, first served" basis to limit the number of solicitors at any location on any given day. Such narrowly defined standards would advance the government's interest while ensuring that permit decisions are ministerial tasks, and thus, substantially reduce the likelihood that such decisions will made on the basis of reasons unrelated to public safety, or based on value judgments about the applicants. But, as explained above, the standards should not require an applicant to disclose the identity of the solicitors or the purpose of the solicitation. Similarly, applicants should not be limited to 12 permits a year, at least without a substantial showing that this limit is narrowly tailored to the public safety needs of the County.

In accordance with the foregoing, therefore, it is our view that there is no constitutional bar to signing this legislation.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/SBB/kk

cc: The Honorable James E. Malone, Jr.
The Honorable Steven J. DeBoy, Sr.
The Honorable John P. McDonough
Joseph Bryce
Karl Aro