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April 9, 2012

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

Re: House Bill 150

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 150, "Allegany County – Solicitation of Money or Donations from Occupants of Vehicles – Prohibitions and Permit Program." While we approve the bill, we write to suggest ways that Allegany County should implement the bill to avoid violating the First Amendment.

House Bill 150 adds Allegany County to TR § 21-507(f) to authorize the governing body of the County to "enact a permit program to allow individuals who are at least 18 years old and representatives of qualified organizations who are at least 18 years old to solicit money or donations from the occupant of a vehicle by standing in a roadway, median divider, or intersection" in the County. "Qualified organization" is defined as "a fire company or bona fide religious, fraternal, civic, war veterans', or charitable organization."

Although we conclude that House Bill 150 is constitutional and legally sufficient, we write to caution that a reviewing court well reach the contrary conclusion and to suggest ways that a County or municipality should implement House Bill 150 to avoid the constitutional issues that differentiating between individuals and organizations who may receive a permit raises. The distinction between charitable and non-charitable solicitation finds support within First Amendment jurisprudence, which "affords greater protection to noncommercial than to commercial expression." *Reed v. Town of Gilbert*, 587 F.3d 966, 981 (9th Cir. 2009). The Supreme Court has made clear that, unlike commercial speech, "conducting fundraising for charitable organizations" is "fully protected speech." *Board of Trustees of the State University of New York v. Fox*, 492

U.S. 469, 474 (1989); *see also Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781 (U.S. 1988); *FOP v. Stenehjem*, 431 F.3d 591, 596 (8th Cir. 2005) (citing to *Riley* for the proposition that "professional charitable solicitation is fully protected speech"); *see also Nefedro v. Montgomery Co.*, 414 Md. 585, 602 (2010) (observing that, "although the First Amendment 'protects commercial speech from unwarranted regulation,' there is a 'commonsense distinction' between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'") (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980)).

Regulations of commercial speech are governed by the four-part analysis of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566; *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001). The first two steps of the *Central Hudson* analysis would not appear to be at issue here. The Court has long "recognized that commercial speech does not fall outside the purview of the First Amendment," *Id.* at 553 (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976), and there is no suggestion that solicitations for non-charitable donations are misleading.

The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that "the speech restriction directly and materially advance the asserted governmental interest." *Lorillard*, 533 U.S. at 555. The Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citations and internal quotation marks omitted).

The last step of the *Central Hudson* analysis examines whether the speech restriction is not more extensive than necessary to serve the interests that support it. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188 (1999). In applying this step, the Court has made it clear that "the least restrictive means" is not the standard; instead, the case law requires a reasonable "'fit between the legislature's ends and the means chosen to accomplish those ends . . . a means narrowly tailored to achieve the desired objective.'" *Went For It, Inc.*, 515 U.S. at 632 (quoting *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. at 480). The "fit" the Court requires need not be "perfect" or "the least restrictive means," but "reasonable" and "one whose scope is in 'proportion to the interest served.'" *Fox*, 492 U.S. at 480. "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

We believe that a case can be made that House Bill 150 survives constitutional scrutiny. The State's asserted interest in traffic safety is plainly legitimate, and restricting roadside solicitations advances that interest. A general ban on solicitations for money in the "roadway"—or more broadly, in the "highway"—could be defended as constitutional. *See, e.g., United States Labor Party v. Oremus*, 619 F.2d 683 (7th Cir. 1980) (upholding broadly worded ban based on Uniform Vehicle Code); *Ater v. Armstrong,* 961 F.2d 1224 (6th Cir. 1992) (upholding Kentucky's qualified ban on solicitation of contributions that applied equally to all parties); *Opinion of the Hawaii Attorney General* No. 75-17 (1975) (concluding that broad ban on solicitation in the roadway modeled after Uniform Vehicle Code was constitutional); *but see Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949-51 (9th Cir. 2011) (municipal ordinance was over-inclusive and burdened more speech than necessary).

As we construe the Legislature's intent, however, House Bill 150 distinguishes between commercial speech and charitable speech; House Bill 150 allows individuals and qualified organizations to solicit donations, whereas non-charitable organizations may not receive a permit. Although it is a closer call, we believe that a strong argument could be made that restricting commercial solicitations without restricting charitable solicitations also presents a "reasonable fit" with the public safety objectives that lie behind the statutory provision. A solicitation for a contribution is a one-way transaction; occupants of vehicles simply respond by giving the individual a donation or not. A non-charitable solicitation, by contrast, is an interactive, two-way exchange. There is likely to be more negotiation involved and change given, both of which take more time and attention than

what is involved in donations and, thus, have the potential to cause more distraction for the driver involved as well as for other nearby drivers.[1]

We note, however, that the issue is far from clear. We suspect that the vast majority of roadside solicitations in Maryland are charitable, principally comprised of panhandlers in urban areas and fundraisers throughout the State. As a result, prohibiting commercial solicitors from entering the roadway while allowing charitable solicitors to do so may implicate *City of Cincinnati v. Discovery Network, Inc.*, in which the Supreme Court struck as unconstitutional an ordinance that would have required the removal of 62 commercial newsracks while leaving in place 1500 noncommercial newsracks. 507 U.S. 410 (1993). Under the facts of that case, the Court concluded that the ordinance lacked the requisite "reasonable fit" because it would have only a "paltry" or "minute" effect on safety and aesthetics—the governmental interest supporting the ordinance. *Id.* at 430.

Under other factual circumstances, however, legislation distinguishing between commercial and noncommercial speech has been upheld. For example, a municipal billboard law that allowed off-site noncommercial billboards but not commercial ones, was upheld as not in violation of the First Amendment. *RTM Media, LLC v. City of Houston*, 584 F.3d 220 (5th Cir. 2009). The Fifth Circuit upheld the distinction because the city showed that "[c]ommercial billboards make up the vast majority of signs targeted by the ordinance, so the benefit from the ordinance is not 'paltry' or 'minute'"). *Id.* at 226. The court further observed that the Supreme Court's holding in *Discovery Network* was narrow "because it did 'not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks.'" *Id.* (quoting *Discovery Network*, 507 U.S. at 428).

We believe that there is a public safety basis for treating charitable solicitations differently from non-charitable solicitations. Accordingly, on the basis of the facts as we suppose them to be, we believe that the distinction between commercial and noncommercial speech drawn in House Bill 150 is not clearly unconstitutional. We feel constrained, however, to point out that the constitutional ramifications House Bill 150 may compel a reviewing court to adopt the opposite construction. The Court of Appeals has long stated that, "[i]n light of the policy against deciding constitutional issues unnecessarily, we have consistently adhered to the principle that an interpretation which

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[1] The public safety purpose is also furthered by the requirement that a permit applicant submit proof that the individual or qualified organization has a plan for safely soliciting money or donations from the proposed location.

raises doubts as to a legislative enactment's constitutionality should be avoided if the language of the act permits." *VNA Hospice v. Dep't of Health & Mental Hygiene*, 406 Md. 584, 605-09 (2008) (internal quotation marks omitted).

Should the bill be enacted and the County enact a permit program, the County must take care how it determines who receives a permit. 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). Thus, to be constitutional, the objective standards must be limited to support of the government purposes of the legislation.

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 John P. McDonough
Joseph Bryce
Karl Aro