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U.S. DISTRICT COURT

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Graden P. Jackson, #8607
William B. Ingram, #10803
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT,
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

AMERICAN CHARITIES FOR
REASONABLE FUNDRAISING
REGULATION, INC. and RAINBOW
DIRECT MARKETING, LLC,

Plaintiffs,

v.

KEVIN V. OLSEN, Director of the Utah
Division of Consumer Protection, Department
of Commerce for the State of Utah,

Defendant.

COMPLAINT

Case: 2:08cv00875
Assigned To : Kimball, Dale A.
Assign. Date : 11/12/2008
Description: American Charities for
Reasonable Fundraising Regulations
et al v. Olsen

COME NOW the above-named Plaintiffs who seek this Court's aid in protecting their rights by filing this Complaint and alleging as follows:

Nature of the Case

1. This is a civil action brought pursuant to 42 U.S.C. § 1983, wherein Plaintiffs pray for a declaratory judgment as well as permanent injunctions to restrain Defendant from

acting under the color of law to deprive Plaintiffs of the rights and privileges secured to them by the Constitution of the United States. Plaintiffs are also seeking reimbursement of costs and attorneys' fees pursuant to 42 U.S.C. § 1988(b).

Parties

2. Plaintiff, AMERICAN CHARITIES FOR REASONABLE FUNDRAISING REGULATION, INC. ("ACFRFR") is a Delaware corporation having its principal place of business in Virginia and is recognized as a tax-exempt organization under IRC § 501(c)(3). Its address is 9112 Tetterton Avenue, Vienna, VA 22182. ACFRFR is a membership organization that includes representation from fundraisers and nonprofit organizations. In this case, ACFRFR represents itself and its members and supporters who are national direct mail fundraising organizations who have been subject to Utah's state regulatory requirements.

3. Plaintiff RAINBOW DIRECT MARKETING, LLC ("RDM") is a New York limited liability company having its principal place of business in Ulster County, New York. Its address is PO Box 513, Highland, NY 12528.

4. Defendant KEVIN V. OLSEN is the Director of the Division of the Consumer Protection ("DCP") of the Utah Department of Commerce. The DCP has authority to enforce, *inter alia*, Utah's Charitable Solicitations Act, codified at Utah Code Ann. § 13-22-1 *et. seq.* As Director, KEVIN V. OLSEN is personally vested with authority under Utah Code Ann. § 13-22-3 to enforce the Charitable Solicitations Act. Although a State official, the Defendant does not enjoy immunity from this lawsuit under the Eleventh Amendment to the United States Constitution because this action seeks an injunction against his enforcement of a state law alleged to be unconstitutional. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 156 n. 6 (1978),

Ex Parte Young, 209 U.S. 123 (1908), and Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299, 304 (1952).

Jurisdiction

5. Plaintiffs bring this action to redress deprivations, caused by the Defendant acting under color of state law, of certain rights secured to the Plaintiffs and others by the United States Constitution Amendments 1 and 14, Article I, Section 8 of the United States Constitution, and 42 U.S.C. § 1983.

6. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 as a federal question arising under the United States Constitution Amendments 1 and 14, and Article I, Section 8 of the United States Constitution, and 42 U.S.C. § 1983

Venue

7. Venue properly lies with this Court pursuant to 28 U.S.C. § 1391(b) because Defendant resides in the District of Utah and because the events giving rise to Plaintiffs' claim for relief occurred in said district.

Facts

8. Plaintiff ACFRFR is a nonprofit organization whose members and supporters consist of numerous charities, nonprofit "umbrella" organizations (membership organizations which support ACFRFR on behalf of their members), professional fundraisers and fund raising counsel, nonprofits, and nonprofit associations of fundraisers.

9. Collectively, ACFRFR represents not only its own supporters but, including the umbrella organizations, it directly or indirectly represents more than 400 nonprofit organizations and fundraisers.

10. ACFRFR is supported by membership dues and additional gifts from interested persons and organizations. ACFRFR has itself never registered with the Utah Division of Consumer Protection.

11. ACFRFR's primary charitable purposes include acting on behalf of its supporters with regard to issues of charitable regulation: specifically including instituting legal actions as may from time to time be deemed appropriate or necessary by its Board of Directors.

12. ACFRFR appears in a representative capacity for its professional fundraising consultant supporters, who are affected by the Utah statute challenged herein, as well as on its own behalf.

13. A professional fund raising counsel or consultant ("PFC") is defined by the Utah Charitable Solicitations Act (the "Act") at Utah Code Ann. § 13-22-2(12) as:

a person who (i) for compensation plans, manages, advises, counsels, consults, or prepares materials for, or with respect to, the solicitation in this state of contributions for a charitable organization, whether or not at any time the person has custody of the contributions from a solicitation; (ii) does not solicit contributions; and (iii) does not employ, procure, or engage any compensated person to solicit or receive contributions.

14. Many of the PFCs who are supporters of ACFRFR are required to register with the Utah Division of Consumer Protection pursuant to § 13-22-5(4) of the Act because charities for which they perform services send educational and charitable solicitation materials into Utah.

15. These PFCs have no contact with Utah. If these PFCs have any contact at all with Utah it is indirect – the charities for which they perform services may send materials into Utah.

16. These PFCs do not have offices in Utah, do not perform services for any charity located in Utah and do not solicit business in Utah.

17. By definition, PFCs do not solicit charitable contributions. It is the PFCs' clients, the charitable organizations, that solicit charitable contributions.

18. These PFCs are not always made aware of all locations to which their charitable clients ultimately decide to mail educational and fundraising materials. These PFCs do not purposefully direct solicitation material toward Utah or toward any other state.

19. Since PFCs do not control the activities of their charitable clients, a PFC who does not register with Utah must take the extraordinary step of refusing to work with any charitable client who either insists on soliciting in Utah or who is unsure whether they will solicit in Utah. This prophylactic measure by the PFC would include any charitable organization which intends to employ broadcast or electronic media such as television, radio, the Internet, etc. to communicate their message and seek support for their programs. In many cases the PFC does not know whether its client is engaged in such activities outside of the communication channel concerning which it is providing services and many charities are unaware of the requirement to register in Utah regardless of the channel of communication.

20. Plaintiff RDM is a PFC as defined by Utah Code Ann. § 13-22-2(12) whose only office is located in the State of New York. RDM does not solicit funds anywhere nor does it employ, procure, or engage any compensated person to solicit or receive contributions. RDM does not possess or exercise any custody, control, or dominion over monies raised by its charitable clients.

21. RDM seeks to advise its clients on mailing campaigns designed to educate the public about the charitable clients' programs and to raise funds for those programs.

22. RDM has no offices in Utah, no contract with any entity located in Utah, does not market its services in Utah, and does not solicit funds in Utah. RDM has no other contact with Utah.

23. On April 2, 2008, Ms. Amy Tripi, President of RDM, spoke via telephone with Marcia Corak of the Utah Division of Consumer Protection (the "Division") regarding RDM's contract with its client Straight Women in Support of Homos, Inc. ("SWISH"). Ms. Tripi noted that SWISH had registered with the Division to solicit charitable contributions and asked if it was the Division's position that Tripi must register as a PFC.

24. Ms. Corak responded that the Division would require RDM to register as a PFC. Ms. Tripi indicated that RDM's attorney had advised it that RDM was not required to register in Utah because it has no clients in Utah, no office locations in Utah, does not solicit business in Utah, does not solicit charitable contributions in Utah, and has no other contacts with Utah whatsoever. Ms. Corak did not find this reasoning persuasive and reiterated that the Division would require RDM to register.

25. Ms. Tripi asked what would happen if RDM failed to register and Ms. Corak responded that the Division would take "administrative action" against RDM when SWISH renews its registration.

26. As a result of Ms. Tripi's conversation with the Division, RDM has been forced to refrain from providing fundraising consulting services to SWISH. See Exhibit A.

27. In the cases of other members and supporters of ACFRFR, they have registered with Utah, sometimes under protest, in order to serve their clients, despite the fact that they do not solicit charitable contributions in Utah, and have no other contacts with Utah whatsoever.

The Statutory Scheme

28. Utah's Charitable Solicitation Act (the "Act") is codified at Utah Code Ann. § 13-22-1 *et seq.*

29. The Act includes requirements that both charities and the PFCs that have contracted to advise them register with the DCP before solicitation activity can commence in Utah. Utah Code Ann. §§ 13-22-5(1), 13-22-9(1).

30. The Act vests Defendant KEVIN V. OLSEN, as Director of the DCP, with the general authority, powers, and jurisdiction to enforce the provisions of the Act. These include the powers to conduct investigations; issue orders to cease and desist; seek an injunction in state court; assess administrative penalties; issue orders to "deny, suspend, or revoke an application, registration, permit, or information card." Utah Code Ann. §§ 13-22-3, 13-22-12. Such powers are granted without specific guidelines, thereby creating in the Director an unbridled discretion in the exercise of those powers.

31. Section 4 of the Act provides that any violation of the Act's requirements is a class B misdemeanor, punishable by up to six months imprisonment. Utah Code Ann. § 13-22-4(1).

Causes of Action

Cause of Action I:

Violation of the Commerce Clause – Lack of Nexus

32. The Plaintiffs repeat and reallege each and every allegation set forth in the preceding paragraphs as if set forth more fully herein in each and every paragraph that follows.

33. Plaintiff ACFRFR's PFC supporters and RDM have no physical presence in the State of Utah, nor do any of the Plaintiffs solicit or conduct any business in Utah, nor do they

perform any services in Utah, nor do they sign any contracts in Utah, nor do they sign contracts with charities that are located in Utah. The Plaintiffs do not direct their clients' solicitations to any particular geographic area since their clients solicit on a national basis using national mailing lists that may include residents of Utah but are not directed to any particular geographic area. As a result, Plaintiffs have no nexus with Utah.

34. The Act requires that the Plaintiffs obtain a permit from the DCP as a condition of conducting interstate commerce that occurs wholly outside of Utah.

35. States may not impose regulations on interstate activity that does not have sufficient nexus with the regulating jurisdiction. See, e.g., Edgar v. Mite, 457 U.S. 624 (1982) and Healy v. The Beer Institute, 491 U.S. 324 (1989).

36. The mandate in Utah Code Ann § 13-22-9(1) requiring Plaintiffs to register with the DCP is an unconstitutional restriction on interstate commerce which is prohibited by the Commerce Clause contained in Article I, Section 8 of the Constitution of the United States.

***Cause of Action II:
Violation of the Commerce Clause – Undue Burden on Interstate Commerce***

37. The Plaintiffs repeat and reallege each and every allegation set forth in the preceding paragraphs as if set forth more fully herein in each and every paragraph that follows.

38. The Act requires that the Plaintiffs obtain a permit from the DCP prior to conducting interstate commerce that occurs wholly outside of Utah.

39. The Act requires that Plaintiffs register and pay annual filing fees to the DCP as a precondition for engaging in interstate commerce occurring wholly outside of Utah.

40. Regulation of interstate commercial activity in the form of multiple registration and licensing requirements by the several States unduly burdens commerce in violation of

Article I, Section 8 of the United States Constitution. See, e.g., National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U.S. 753, 759-60 (1967).

***Cause of Action III:
First Amendment Facial Challenge***

41. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if set forth fully herein in each and every paragraph which follows.

42. ACFRFR's PFC supporters currently advise charitable clients on matters that are an expression of those clients' ideas and positions which are fully protected speech under the First and Fourteenth Amendments to the Constitution of the United States. See Exhibit A.

43. RDM had sought to advise its client SWISH on matters that are an expression of SWISH's ideas and positions, which are fully protected speech under the First and Fourteenth Amendments to the Constitution of the United States. See Exhibit A.

44. Under the Act, RDM and ACFRFR's PFC supporters are required to register with the DCP and pay all applicable filing fees before providing advice and counsel to their charity-clients regarding their charitable solicitation programs.

45. The Act is intended to provide the Utah public with information regarding the various charities and fundraisers that solicit charitable contributions in Utah. It is further intended to provide the Utah public with information regarding the fundraising consultants that assist charities in their solicitation campaigns.

46. Under § 13-22-18 of the Act, localities are specifically permitted to layer on an additional level of compliance requirements for charitable solicitations. This adds to the burden on charities and fundraisers in that every town, city, and county can add additional regulatory

burdens, and some do by, for example, requiring registration with City Licensing Officers. See, e.g., West Valley City, Utah, Municipal Code § 17-22-1 et. seq.

47. States other than Utah also require registration of fundraising consultants and charities.

48. Such multiple registration and filing fee requirements imposed by states and localities stifles the free flow of speech that is fully protected by the First and Fourteenth Amendments of the United States Constitution.

49. Moreover, all of the material information required to be disclosed by charities and PFCs is already required to be disclosed by various provision of the Internal Revenue Code and Treasury Regulations. This multiple disclosure requirement is redundant, advances no legitimate government purpose, and unconstitutionally burdens the free speech rights of charities.

50. The Act seeks to regulate protected and unprotected speech.

51. For the reasons recounted in the preceding three paragraphs, the Act is overbroad in all of its applications and otherwise facially violates the First and Fourteenth Amendments to the Constitution of the United States.

52. Section 13-22-12 of the Act provides for judicial review of DCP decisions. However, this section violates the dictates of First Amendment jurisprudence because it places the burden of review upon the aggrieved party and not on the government body and it gives the DCP authority to withdraw a registrant's permit without first going to Court and allowing the registrant a fair hearing.

***Cause of Action IV:
First Amendment as Applied Challenge***

53. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if set forth fully herein in each and every paragraph which follows.

54. ACFRFR's supporters advise charitable clients on matters that are an expression of those clients' ideas and positions, which are fully protected speech under the First and Fourteenth Amendments to the United States Constitution. See Exhibit A.

55. RDM had sought to advise its client SWISH on matters that are an expression of SWISH's ideas and positions which are fully protected speech under the First and Fourteenth Amendments to the Constitution of the United States. See Exhibit A.

56. Under the Act, RDM and ACFRFR's PFC supporters are required to register with the DCP and pay all applicable filing fees before providing advice and counsel to their charity-clients regarding their charitable solicitation programs.

57. In fact, the DCP has informed RDM that it must register and that failure to register would result in prosecution under the Act.

58. The application of the Act to RDM and to ACFRFR's supporters is duplicative and overly burdensome. As such, it is not narrowly tailored to serve a compelling state interest as is required of all government regulations of charitable speech. See Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988).

59. The application of the Act to RDM and to ACFRFR's supporters is an unconstitutional prior restraint on Plaintiffs' First Amendment rights for which there is no compelling interest not already being served and for which there is no narrowly tailored

regulatory structure. Thus, the application of the Act to Plaintiffs violates the First and Fourteenth Amendments.

***Cause of Action V:
Undue Burden of First Amendment Rights***

60. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if set forth fully herein in each and every paragraph which follows.

61. ACFRFR's PFC supporters currently advise charitable clients on matters that are an expression of those clients' ideas and positions which are fully protected speech under the First and Fourteenth Amendments to the Constitution of the United States. See Exhibit A.

62. RDM had sought to advise its client SWISH on matters that are an expression of SWISH's ideas and positions which are fully protected speech under the First and Fourteenth Amendments to the Constitution of the United States. See Exhibit A.

63. Under the Act, RDM and ACFRFR's PFC supporters are required to register with the DCP and pay all applicable filing fees before providing advice and counsel to their charity-clients regarding their charitable solicitation programs.

64. ACFRFR's PFC supporters' charity-clients' speech is unduly burdened by the Act's registration requirements.

65. Consequently, ACFRFR's PFC supporters' charity-clients have been directly damaged as a result of the Act's restriction of their speech.

66. Because of the DCP's threats of enforcement actions against RDM, RDM has been unable to assist SWISH with SWISH's contemplated charitable solicitation campaign. This is also true of PFC members and supporters of ACFRFR where they have been forced to submit to registration in order to provide such assistance to their clients.

67. Consequently, both RDM and SWISH have been directly damaged as a result of the Act's restrictions on the speech of charities and upon the actions of PFCs. Similarly, PFC members of ACFRFR have been directly damaged as a result of being forced to register.

68. As a result, the Act violates Plaintiffs' First and Fourth Amendment rights to free speech and the corresponding rights of the charities which they represent (and whose rights Plaintiffs have *jus tertii* standing to protect through litigation, see Sec'y of Md. V. Joseph H. Munson Co., 467 U.S. 947, 956 (1984)) as well as the corresponding rights of the citizens of Utah to receive the charitable solicitations and information intertwined therein from the charities represented by these Plaintiffs.

69. Utah's mandate that PFCs register with and pay a fee to the DCP, even though the information gleaned from this process is already available to the public because of federal law and regulations, places an undue burden on Plaintiffs' and their charity-clients' First Amendment rights and, thus, violates the First and Fourteenth Amendments.

***Cause of Action VI:
Violation of Due Process***

70. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if set forth fully herein in each and every paragraph which follows.

71. None of the PFC supporters of Plaintiff ACFRFR solicit in Utah, nor do they receive funds solicited in Utah on behalf of their clients. None of the PFC members and supporters of Plaintiff ACFRFR direct their client's solicitations to any particular geographic area since their clients solicit on a national basis using national mailing lists that may include residents of Utah but are not directed to any particular geographic area.

72. The PFC supporters represented by Plaintiff ACFRFR are not doing business in Utah, nor do they have sufficient contacts with Utah for the DCP to exercise jurisdiction over them consistent with the notions of fair play and substantial justice.

73. Plaintiff RDM is a foreign corporation that does not solicit in Utah, nor does it receive funds solicited in Utah on behalf of any of its clients.

74. Plaintiff RDM is not doing business in Utah, nor does it have sufficient contacts with Utah for the DCP to exercise jurisdiction over it consistent with the notions of fair play and substantial justice.

75. The DCP's threat to take action against RDM for failure to register and otherwise comply with the Act violates RDM's Due Process rights under the Fourteenth Amendment to the United States Constitution, in that Plaintiffs do not have sufficient minimum contacts with Utah for the DCP to be able to fairly enforce its laws against them, and the Act give insufficient notice to those it seeks to regulate. Similarly the DCP's threats to take action against other members and supporters of ACFRFR forcing them to register despite their not having sufficient minimum contacts with Utah for the DCP to be able to fairly enforce its laws against them or to give sufficient notice to those it seeks to regulate also violate their Due Process rights under the Fourteenth Amendment to the United States Constitution.

Injunctive Relief Appropriate
Irreparable Injury

76. For the reasons set forth in the preceding paragraphs, the harm, loss, and injury resulting from the enforcement of the challenged Act is great and irreparable because Plaintiffs, and others similarly situated, will be deprived of rights protected by the First and Fourteenth Amendments to the United States Constitution, as well as the Commerce Clause appearing in

Article I, Section 8 of the United States Constitution. The challenged Act constitutes an overbroad, unreasonable restriction of free speech activity and of free trade and commerce. Similar statutes have been struck down by the United States Supreme Court (and by lower federal courts) on the basis of overbreadth, lack of compelling need, ambiguity, and restraints on commerce. See, Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); Secretary of State of Maryland v. Joseph H. Munson Company, 467 U.S. 947 (1984); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); National Federation of Non-Profits v. Lungren, 1995 WL 17199543 (N.D.Cal. 1995); Gospel Missions of America v. George Bennett, 951 F.Supp. 1429 (C.D.Cal. 1997); Quill Corp. v. North Dakota, 504 U.S. 298 (1992); Healy v. The Beer Institute, 491 U.S. 324 (1989); Brown-Forman Distilleries Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986); Edgar v. Mite, 457 U.S. 624 (1982).

Inadequate Remedy at Law

77. No remedy at law suffices to redress Plaintiff's grievances. A money judgment will not compensate Plaintiffs for the loss of the constitutionally protected rights of free speech and free trade and commerce.

Interest of Plaintiffs Balanced Against the Interest of Defendants

78. Upon information and belief, the Utah Charitable Solicitations Act was enacted to provide information regarding charitable solicitations to the Utah public and to protect against fraud in the solicitation of charitable contributions.

79. However, the aspects of the Act challenged in this Complaint are not rationally related to achieving said purposes. There is no evidence that these registration requirements have led to the detection, prevention, or prosecution of any fraudulent activity whatsoever.

There is no evidence that information gathered under the auspices of the Act is (a) not otherwise publicly available and (b) useful to the Utah public. On the other hand, if continued enforcement of the challenged provisions is permitted, the result will be to thwart the Plaintiffs' exercise of the right of free speech, thwart the exercise of the right of free speech by Plaintiffs' charity-clients, infringe Plaintiffs' due process rights, and violate the Dormant Commerce Clause for the reasons set forth above.

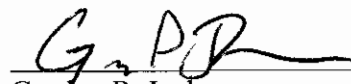
Prayer for Relief

80. Plaintiffs pray the Court issue the following:
- a. A declaration that sections 13-22-5, 13-22-6, 13-22-9, 13-22-12, 13-22-15, 13-22-16, 13-22-17, 13-22-18, and associated provisions of the Utah Administrative Code are unconstitutional and therefore unenforceable (Authority for declaratory relief sought herein by Plaintiffs is conferred upon this Court by 28 U.S.C. § 2201 and by Rule 57 of the Federal Rules of Civil Procedure.);
 - b. A permanent injunction enjoining the enforcement of the aforementioned provisions by the DCP
 - c. An order requiring the Defendants to pay all costs, interest, and attorneys' fees as may be incurred with this civil action, pursuant to 42 U.S.C. § 1988;
 - d. An order providing that this Court retain jurisdiction to enforce all injunctions granted against Defendants, their agents, and employees.

- e. An order providing such other and further relief as the Court may deem just and proper for the purpose of redressing Plaintiffs' grievances.

Dated this 12th day of November, 2008.

STRONG & HANNI, P.C.



Graden P. Jackson

William B. Ingram

Attorneys for Plaintiffs