DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE
in *Eight Point Communications, Inc.*, File No. X990004

In this case, the defendants made telephone calls in which they solicited donations on behalf of charitable law enforcement and firefighter organizations. During these telephone calls, the defendants' telemarketers allegedly misrepresented that they were law enforcement officers and firefighters and that contributions would benefit the organizations in the donors' local communities. The Commission alleged that these misrepresentations violated Section 5 of the FTC Act, and the Commission now has authorized the filing of a settlement agreement against the defendants. Although I generally support the relief contained in the settlement agreement, I do not support the ban on charitable solicitation that is included in Parts I and II of the Order.

I have dissented from a number of recent settlement agreements that have imposed bans or bonds covering charitable solicitation. I want to emphasize that the justification for relief extending to charitable solicitation in this case is stronger than it has been in these other recent FTC cases because here the alleged underlying misconduct clearly involves false claims made while actually soliciting charitable donations.

Nevertheless, I do not believe that the ban on charitable solicitation in this case is justified. Charitable solicitation, even when undertaken by paid solicitors, is fully-protected speech under the First Amendment, not mere commercial speech. *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 801 (1988). A ban on fully-protected speech that is incorporated into a court order (like the stipulated permanent injunction here) is a prior restraint on the exercise of First Amendment rights.[1] Courts have recognized that prior restraints on fully-protected speech pass constitutional muster only in "exceptional cases." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (Blackmun, Circuit Justice 1994) (*citing Near v. Minnesota (ex rel. Olson)*, 283 U.S. 697, 716 (1931)). Specifically, prior restraints on fully-protected speech are unconstitutional unless "the evil that would result from the [speech] is both great and certain and cannot be mitigated by less intrusive measures." *CBS Inc.*, 510 U.S. at 1317 (*citing Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562 (1976)).

In this case, the ban is intended to prevent the harm to donors that is caused when charitable solicitors engage in deception. But not all future charitable solicitation by the defendants will necessarily cause such harm; indeed, harm will occur only if the defendants make false or misleading claims in soliciting donations. The obvious less intrusive means of addressing the prospect of harm is to prohibit only false or misleading claims while soliciting donations, not to ban all charitable solicitation. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980) (penal laws prohibiting fraudulent misrepresentations in door-to-door and on-street solicitations are "measures less intrusive than a direct prohibition on [these types of] solicitation" to prevent fraud). A ban that prohibits

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[1] *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (*citing* M. Nimmer, Nimmer on Freedom of Speech §4.03 at 4-14, 4-16 (1984) (prior restraints are "judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur"; "permanent injunctions - - *i.e.*, court orders that actually forbid speech activities - - are classic examples of prior restraints")) (italics added by Court).

fully-protected speech that cannot cause any harm is, in the absence of a waiver, a prior restraint violative under the First Amendment.

As with prior bans on charitable solicitation, the majority of the Commission justifies the instant ban on charitable solicitation because "the egregious conduct engaged in by defendants" demonstrates that, in the absence of a ban, they are likely to continue to engage in deception that will harm donors.[2] I think that this justification for a broad prior restraint is undermined by the holding in *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979). In that case, Atlanta, Georgia, had enacted an ordinance imposing a variety of restrictions on charitable solicitations at city airports, including requiring that solicitors obtain a permit before seeking donations. Solicitors also were specifically prohibited from misrepresenting "that [they are] a representative of the City of Atlanta, or the Atlanta airport authorities," such as law enforcement officers, and from "[m]isrepresent[ing their] identity." If an individual solicitor was convicted of violating any of the ordinance's provisions, his or her permit to engage in charitable solicitation at the airport would be revoked for one year. The International Society for Krishna Consciousness of Atlanta sought a preliminary injunction against this permit revocation provision on the ground that it violated the First Amendment, but the district court refused to grant the injunction.

On appeal, the Fifth Circuit reversed the district court's refusal to enjoin the permit revocation provision.[3] In support of the provision, Atlanta argued that even though it was a prior restraint, it was constitutional under the rationale "once a sinner always a sinner; [that is,] anyone who has violated the ordinance once is likely to violate it again." *Id.* at 833.[4] The Fifth Circuit, however, rejected Atlanta's argument and held that the provision was unconstitutional because "no prior restraint nay be based on this broad generalization." *Id.* Indeed, the court stated that the provision "presents no difficult issues; it is simply a recipe for an unlawful prior restraint." Id. at 832.[5]

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2 In this regard, although the defendants have been the subject of law enforcement scrutiny, I am not aware that any court has ever found that the defendants have violated any statute, regulation, or order while engaged in charitable solicitation.

3 The ordinance barring a solicitor from misrepresenting his or her identity and from misrepresenting that he or she was a local government official were added to the ordinance following the issuance of the district court's decision, but they were part of the ordinance that the Fifth Circuit considered on appeal.

4 Historical figures for whom this broad generalization would not be true include Mary Magdalene, John Newton, St. Augustine, St. Paul, and many others.

5 Atlanta's argument was stronger than the argument for the prior restraint in the instant case because Atlanta imposed a one-year prior restraint based on a proven criminal conviction, whereas in this case a perpetual prior restraint is based on a mere alleged civil violation.

I agree with my colleagues that the Commission should protect consumers by seeking and obtaining tough relief in response to alleged misrepresentations by those engaged in charitable solicitation. But it is not in the public interest to seek and obtain relief that, in the absence of waiver, would flatly and permanently infringe the constitutional rights of the defendants to engage in fully-protected speech.[6] Accordingly, I dissent from the ban on charitable solicitation included in Parts I and II of the Order.

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[6] Because the defendants have entered into a settlement agreement that contains a ban on charitable solicitation, they likely have waived their right to raise constitutional objections to the ban. However, waiver does not answer the fundamental question of whether it is the public interest for the Commission to seek and obtain such a ban.