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#### **Fourth Circuit Court of Appeals**

(Note: You may access the court's opinion by clicking on the case name)

#### **Plaintiff's First Amendment Challenge to County Ordinance That Prohibits Solicitation Within County's Roadways Is Remanded to District Court So County May Offer Evidence That It Has Attempted to Use Available Alternatives to Address Its Safety Concerns**

[Reynolds v. Middleton](#), \_\_\_ F.3d \_\_\_, 2015 WL 756884 (4th Cir. February 24, 2015). Henrico County, Virginia, amended its ordinance that prohibited soliciting in the county's roadways, so it essentially barred a person from sitting (the ordinance already covered standing) in any county roadway's median with a sign asking for donations or offering to work in exchange for food, but it permitted, for example, campaign workers with signs urging drivers to vote for their candidate to gather in the median. The plaintiff alleged that the amended ordinance inhibited his ability to collect donations by requiring him to move to locations where it would be more difficult for drivers to make contributions, and thus the amended ordinance violated the First Amendment. The district court granted summary judgment in favor of the county on the constitutionality of the amended ordinance.

The court reversed the district court's ruling. It first noted that the plaintiff satisfied his burden of proving that his speech was restricted by the amended ordinance. The burden then shifted to the county to prove that the amended ordinance was narrowly tailored to further a significant government interest and it left open ample alternative channels of communication. The court stated that the issue before it was deciding precisely what the county must present to carry its burden of proof. The court reviewed existing case law concerning intermediate scrutiny under the First Amendment (which applied to the issue in this case), and held that the county must present actual evidence supporting its assertion that a speech restriction did not burden substantially more speech than necessary—an argument unsupported by evidence would not suffice to carry the government's burden. The county's evidence established, at most, a problem with roadway solicitation at busy intersections in the west end of the county. Given the absence of evidence of a county-wide problem, the county-wide sweep of the amended ordinance burdened more speech than necessary. The county failed to present evidence that it ever tried to use available alternatives to address its safety concerns.

Even though the county's evidence was insufficient, a pertinent United States Supreme Court case on the evidentiary burden, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), had been decided after the district court's ruling in this case. As a result, the court decided to allow the county an opportunity to gather and present sufficient evidence to satisfy the *McCullen* standard. It remanded the case to the district court for this purpose.