

STATEMENT OF COMMISSIONER ORSON SWINDLE  
CONCURRING IN PART AND DISSENTING IN PART  
in *Federal Data Service, Inc.*, File No. X000064

In this case, the complaint alleges that the defendants made false claims as part of a postal employment scam. In crafting a remedy for these alleged violations, the Commission is not “limited to prohibiting . . . illegal practice[s] in the precise form in which [they are] found to have existed in the past.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). Instead, the Commission can impose “some fencing in,” *i.e.*, order restrictions designed to prevent the defendant from engaging in similar illegal practices in the future. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (*quoting* *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957)). Although fencing-in relief can prohibit more than a recurrence of the same illegal conduct, it must still bear a “reasonable relation to the unlawful practices found to exist.” *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946); *see Colgate-Palmolive*, 380 U.S. at 394-95; *Ruberoid*, 343 U.S. at 473.

Among other things, the order includes as fencing-in relief a provision (Part I.J.) that covers misrepresentations made while engaged in charitable solicitation. I do not think that this provision bears the requisite “reasonable relation” to the alleged false claims the defendants made during their postal employment scam. There are substantial differences between selling goods and services and seeking charitable donations. For example, because soliciting charitable donations often includes an expressive component lacking in selling goods and services, the Supreme Court has treated charitable solicitation as so fundamentally different from sales of goods and services that they are subject to different levels of protection under the First Amendment.<sup>1</sup> Similarly, charitable solicitation and sales of goods and services are often subject to separate statutory and regulatory schemes -- another indication that they are fundamentally different forms of activity. In my view, seeking charitable donations is not sufficiently related to the alleged false claims made while selling postal employment materials to justify fencing-in relief reaching conduct during charitable solicitation.<sup>2</sup>

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<sup>1</sup> *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (charitable solicitation differs significantly from commercial speech -- such as selling postal employment materials -- because charitable solicitation “is not primarily concerned with providing information about the characteristics and costs of goods and services;” “the reality [is] that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues”).

<sup>2</sup> The scope of the fencing-in relief here is broader than that which was upheld in seminal decisions addressing the proper scope of such relief. *See, e.g., Colgate-Palmolive*, 380 U.S. at 394-95 (order prohibiting the respondent from using deceptive demonstrations to make a claim for “any product” was not too broad where the respondent had used a deceptive demonstration in three different commercials in television advertisements for its shaving cream); *Ruberoid*, 343 U.S. at 473-75 (order prohibiting the respondent from charging different prices to any competing purchasers was not too broad where the respondent had violated the Robinson-Patman Act by

I support tough relief against those who engage in deception. But the relief that we impose must be both tough and proportionate. In my view, the provision in the order covering charitable solicitation is a disproportionate response to the alleged illegal conduct in this case.

I dissent from Part I.J. of the Order.

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charging competing retailers and applicators prices that differed by 5% or more); *see also Jacob Siegel*, 327 U.S. at 613-614 (order prohibiting the use of a deceptive trade name remanded for agency determination whether qualifying language would allow the name to be used without deceiving consumers).