No. 01-1806

IN THE
Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, INC., AMERICAN CHARITIES FOR REASONABLE FUNDRAISING REGULATION, INC., AND 174 OTHER NONPROFIT ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the First Amendment bars a State from pursuing an action for fraud against a professional fundraiser soliciting contributions on behalf of a charitable organization when the allegation of fraud is based solely on the fact that the fundraiser described to prospective donors the charitable purposes for which funds were being solicited without divulging the percentage of gross contributions that the charity would pay the fundraiser for its services.

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INTERESTS OF AMICI CURIAE

This brief in support of respondents is submitted by Public Citizen, Inc., American Charities for Reasonable Fundraising Regulation, Inc., and 174 other nonprofit organizations. Amici, who are listed in the Appendix to this brief, are public charities or other nonprofit organizations exempt from federal taxation pursuant to various subsections of Section 501(c) of the Internal Revenue Code.[1]

The missions and viewpoints of amici vary greatly, but all rely primarily on the public for financial support. Amici do not take a position on the telemarketing contracts at issue here, but submit this brief to express their concern about the prospect that the Attorney General of Illinois (as well as state and local regulators across the country) may be given the power to pursue a fraud action, carrying the possibility of criminal penalties or severe civil sanctions, based on nothing more than the fact that a professional solicitor described the charitable purposes for which funds were solicited without also volunteering to prospective donors the organization's supposed "fundraising costs."

Although Illinois brought this case against an outside professional fundraiser, its theory, if successful, also would allow the State to make a claim of fraud against any charity that conducts solicitations using in-house staff rather than outside fundraisers. *See Secretary of State v. Joseph H. Munson Co.,* 467 U.S. 947, 967 n.16 (1984). Therefore, many of the amici, who may do much of their fundraising in-house (with or without the help of consultants generally paid on a fee-for-service rather than a percentage basis) could also potentially be defendants for not disclosing what the State now contends—without any advance notice—was so excessive a

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution to its preparation and submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court.

fundraising cost as to leave a "misleading impression" with donors regarding how their contributions would be spent.

The State's theory would cover not only telemarketing, the form of solicitation involved here, but all other forms of solicitation, from special events to direct mail, including solicitations prepared in-house, as is done by many amici. And if Illinois can require charities, to avoid a fraud charge, to make affirmative disclosures regarding the amount of money that they spend on fundraising, so can other states and localities. Given the considerable differences of opinion regarding how fundraising costs should be calculated, the imposition of diffuse and ill-defined state-by-state requirements for all manner of charitable solicitations could severely cripple charities' efforts to fulfill their missions.

Amici are filing this brief to alert the Court both to the dangers to all charities posed by the State's newly minted notion of fraud and to the existence of far less intrusive means, consistent with the First Amendment, of assisting donors in making informed choices about charitable giving and of protecting charitable assets from overreaching by professional fundraisers or wasting by charities.

STATEMENT OF THE CASE

1. In the aftermath of a trilogy of decisions by this Court in the 1980s extending full First Amendment protection to charitable solicitation, *Riley v. National Fed'n of the Blind of North Carolina,* 487 U.S. 781 (1988); *Secretary of State v. Joseph H. Munson Co.,* 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), general appeals to the public for charitable contributions have flourished, and the public has answered the call. In the 1990s, the level of public support for charities more than doubled, from $101.4 billion in contributions in 1990 to $203.5 billion in 2000. U.S. Census Bureau, Statistical Abstract of the United States 2001, No. 561, *available at* http://www.census.gov/prod/2002pubs/01statab/socinsur.pdf.

Demand for charitable services soared to new heights after

the events of September 11, 2001. Hundreds of charitable organizations stepped up to the task, helping thousands of people directly and indirectly affected by the attacks. *See* United States General Accounting Office, *September 11: Interim Report on the Response of Charities* 2, 4 (Sept. 2002). To meet this new, as well as historical, demand, charities require funding from the public; securing that funding requires communication with the public. To raise funds, a charity must educate donors that a particular problem exists, that the charity is addressing the problem, and that the donor can help by donating funds. Henry C. Suhrke, *The Future of Fundraising,* XXXII Philanthropy Monthly, Apr. 4, 1999, at 5 ("The key ingredient to giving—and to increased giving as well—is *asking*."). To thrive, charities require "breathing space," *NAACP v. Button,* 371 U.S. 415, 433 (1963), to experiment with innovative outreach methods, whose purpose can be as much to educate and engage the public as to raise funds. Such solicitations are often costly, combining a description of a group's charitable mission and a "call to action" urging the public to join in its cause, with a request for a donation. *See Buckley v. Valeo,* 424 U.S. 1, 19 (1976) ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."). To help in these efforts, charities frequently turn to outside professional fundraisers.

Both the states and the federal government have important oversight responsibilities to ensure that charities are operated for charitable purposes and that neither charities nor those soliciting the public on their behalf (whether in-house staff, volunteers, or outside fundraisers) abuse their right to solicit charitable donations from the general public. The question presented here is whether Illinois's fraud action in this case oversteps the proper bounds of state enforcement authority and infringes the First Amendment rights of professional fundraisers and charities.

2. In this case, respondents are professional fundraisers who called individuals to solicit donations to VietNow National Headquarters ("VietNow"), pursuant to their contracts

with the charity. In the course of those exchanges, they described VietNow's charitable purposes of providing food, shelter, and financial support for Vietnam War veterans, but did not disclose that VietNow had agreed to pay them 85 percent of the gross receipts collected, a fee Illinois claims is excessive. Am. Compl. ¶ 32 (J.A. 9). The 85-percent fee covered both fundraising and programmatic expenses, as the fundraisers agreed to produce, publish, edit, and pay associated expenses for a periodic publication "to increase community awareness" of VietNow. J.A. 21, 36. Although the United States attempts to portray the State's ensuing fraud action as predicated on intentional misrepresentations, U.S. Br. 15-22, its theory diverges sharply from that upon which Illinois has litigated this case. The State does not claim that the fundraisers made intentional affirmative misrepresentations to prospective donors, but predicates its fraud action on an implied misrepresentation theory: that given the fundraisers' allegedly excessive fees, their solicitations describing the charitable purposes for which funds were sought were misleading because donors supposedly expected "much more" of their donations to be used for charitable services. *See, e.g.,* State Br. 5, 9, 12, 44; Am. Compl. ¶¶ 37-38, 67F-I, 67K-O, 74 (J.A. 10, 85-88, 104). The Illinois Supreme Court also construed this action as premised on the fundraisers' allegedly misleading omissions. 763 N.E.2d 289, 291 (2001) ("[T]here is no allegation that defendants made affirmative misstatements to potential donors.").

The Illinois trial court dismissed the State's amended complaint against the fundraisers. Relying on the *Riley/Munson/Schaumburg* trilogy of decisions addressing the regulation of charitable solicitation, both the Illinois Appellate Court and Illinois Supreme Court affirmed.

SUMMARY OF ARGUMENT

The public's confidence in the integrity and honesty of the philanthropic sector is vital to the success of charitable organizations across the country. Amici therefore do not

oppose the efforts of federal and state regulators to root out genuine fraud—indeed, they agree with the states and the United States that appropriate government regulation of charitable solicitation serves legitimate governmental interests (as well as their own) in preventing, detecting, and prosecuting fraud. Moreover, amici do not object to government regulators punishing false statements regarding how charitable contributions will be allocated (*e.g.,* solicitors informing potential donors that a specific percentage of funds will be used for charitable purposes, knowing that statement to be false). Finally, amici do not ask this Court to hold that the State has no authority to bring a fraud action unless a charity or professional fundraiser has engaged in "outright lies" or "literal falsehoods." *See* State Br. 16, 31, 39. There is no dispute that the State has the power to punish implied misrepresentations regarding verifiable facts, *see id.* at 9, 17, 23, 32, 34, including solicitations made under false pretenses.

The problem with the fraud action Illinois has pursued in this instance, however, is that the percentage of charitable contributions to be used to defray fundraising costs, which the State maintains should have been disclosed by the professional fundraisers to avoid leaving a misleading impression, is not "factual," "verifiable," or even meaningful. *See id.* at 5, 9, 12, 44 (arguing that donors expected that "much more" of their contributions would be spent on charitable purposes, without specifying *how* much more). As this Court repeatedly has recognized, fundraising cost information is of marginal, if any, relevance to an assessment of a charity's legitimacy or efficacy. Indeed, there is no consensus as to what figure best represents a fundraising cost percentage or how such a figure should be derived. The State's fraud action is thus an attempted end-run around this Court's holding in *Riley* that states may not require professional solicitors to disclose to potential donors the percentage of charitable funds to be turned over to the charity—a holding that the State discusses in its brief only as an afterthought. *See id.* at 46-48.

This case involves an after-the-fact judgment by a state

attorney general regarding when the failure to disclose a fundraising cost percentage to prospective donors constitutes fraud. As such, it represents a far more heavy-handed approach, with a far more acute risk of chilling fully protected speech by charities, than the more clearly defined (but also unwarranted) prophylactic point-of-solicitation disclosure requirement struck down in *Riley*. As the State concedes, charities and fundraisers are entitled to "fair notice" regarding speech that is proscribed or prescribed. No "authoritative judicial construction" of fraud in Illinois or elsewhere, State Br. 28, however, provides such fair warning of the point at which "fundraising costs" become so high as to render a description of a charity's charitable services misleading (on the theory that a donor would have expected "much more" of her donation to be used for such services). The multitude of imprecise formulations offered by the State, *e.g.,* State Br. i ("vast majority"), 16 ("trifling amount"), 42 ("negligible amount actually used"), 44 ("insignificant degree") highlight the dangers of the broad authority the State seeks here and the jeopardy in which it places charities and fundraisers.

This Court need not bless a fraud action of this type either to ensure that the public possesses adequate information to make wise choices about charitable giving or to preserve state and federal regulators' ability to punish and prevent genuine fraud or shut down charities that do not operate for charitable purposes. The notion that donors have little chance to learn how their donations will be used is anachronistic given the prodigious amount of financial and other information regarding charities published (and publicized) by the states themselves and by charity watchdog groups, typically on the Internet at no charge. Finally, state and federal regulators already have an ample arsenal of enforcement tools to root out real fraud in charitable appeals, whether perpetrated through self-dealing, improper diversion of funds for personal gain, or through false representations (explicit or implicit) made in charitable solicitations, and to revoke the charters or tax exemptions of those charities that do not operate for charitable purposes.

ARGUMENT

I. THIS COURT'S DECISIONS IN *SCHAUMBURG, MUNSON,* AND *RILEY* DO NOT AUTHORIZE STATES TO PURSUE INDIVIDUAL FRAUD ACTIONS BASED ON A FAILURE TO DISCLOSE FUNDRAISING COSTS TO POTENTIAL DONORS.

The State argues that this Court's decisions in *Schaumburg, Munson,* and *Riley* invite a state to proceed in an ad hoc, retrospective fashion against particular fundraisers (and, presumably, against charities) for fraud based on their failure to disclose fundraising costs to dispel an allegedly misleading impression regarding how donations will be used. State Br. 22. Not only does the State misread these decisions, but its argument betrays a lack of appreciation of the profound chilling effect on charitable speech that would result if state regulators were permitted to make subjective, post hoc decisions regarding which charitable solicitations are fraudulent for failure to divulge a "fact" that, as discussed in Part I.A., *infra,* is too elusive to be readily defined and too peripherally related to the legitimacy of a charity to merit government-compelled disclosure. If successful, Illinois's attempt to find yet another way to dictate the content of the message solicitors must convey to potential donors would serve only to hinder charities in their ability to communicate their charitable appeals and successfully raise funds, while failing to provide donors with meaningful information regarding the legitimacy or actual merit of any given charity.

A. There Is No Nexus Between High Fundraising Costs and Fraud.

1. In 1980, this Court struck down a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). Although charitable appeals involve requests for funds and are

frequently conducted by for-profit professional fundraisers, the Court explained that because such appeals are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," they are treated as speech fully protected by the First Amendment, rather than as commercial speech. *Id.* at 632. In *Schaumburg,* the village defended its restriction as necessary to protect the public from fraudulent solicitations, but this Court held that the State's legitimate interest in preventing fraud was only "peripherally promoted" by a direct regulation of the amount of money a charity must devote to its programmatic purposes. *Id.* at 636. The Court recognized that fundraising or administrative costs will be high for those organizations that are primarily engaged in research, advocacy, or public education, and indeed, that the costs associated with fundraising campaigns "can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." *Id.* at 636-37 & n.10. Accordingly, the ordinance was not a "narrowly drawn regulation[] designed to serve" the State's interests "without unnecessarily interfering with First Amendment freedoms." *Id.* at 637.

In the wake of *Schaumburg,* states became increasingly creative in their efforts to restrict the percentage of funds charities would be permitted to pay their outside fundraisers. In *Secretary of State v. Joseph H. Munson Co.,* 467 U.S. 947 (1984), and *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988), this Court rebuffed those efforts because they were based "on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud," *Munson,* 467 U.S. at 966; *see also id.* at 961; *accord Riley,* 487 U.S. at 793, and because higher fundraising costs for a given charity may be attributable to a myriad of legitimate factors. *Riley,* 487 U.S. at 791-93; *Munson,* 467 U.S. at 961.

2. The Court's recognition in 1988 that fundraising costs bear only a tenuous relationship, at best, to the question

of fraud, *see Riley,* 487 U.S. at 793 n.7, is no less valid today. As the General Accounting Office (GAO) recently acknowledged, spending efficiency continues to vary depending upon the popularity of the cause, the age of the charity, the type of charitable activity, and sudden changes in events. Thus, expense data and related ratios provide little perspective on how well charities actually achieve their charitable purposes. United States General Accounting Office, *Tax-Exempt Organizations: Improvements Possible in Public, IRS, and State Oversight of Charities* 18-19 (Apr. 2002) ("April 2002 GAO Report").[2]

There is nothing fraudulent about this state of affairs, which is recognized by charities, professional fundraisers, and regulators alike. The Illinois Attorney General's own consumer pamphlet acknowledges that "[p]rofessional fund raisers often charge 80% to 90% of your contribution as a fee." Attorney General Jim Ryan, *Charity Fraud: Investigate Before You Donate, available at* http://www.ag.state.il.us/charitable/charity0301.pdf. Certain types of charities, such as groups that provide human services, have a particularly difficult time raising funds and accordingly have consistently high fundraising costs. A 2001 survey of the industry found that veterans groups, for instance, receive less than 17 percent of

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[2] An institution such as a university or hospital, for example, is likely to have an established donor base and a wide range of fundraising options and, accordingly, a relatively low fundraising cost ratio. By contrast, newer organizations undertaking costly campaigns to increase their donor base are likely to have relatively high fundraising cost percentages, such as 80 or 90 percent, or even in excess of 100 percent. Bruce R. Hopkins, *The Law of Fundraising* 90 (3d ed. 2002); *see also id.* at 103-04, 362-63. Donor-acquisition mailings cost more money than they earn in the short-term, as much as $1.25 to $1.50 to raise $1.00, though they hold out the potential for long-term gains if new donors give substantial additional funds in subsequent years. Telemarketing is an even more expensive, though often more successful, fundraising technique. James M. Greenfield, *The Nonprofit Handbook: Fund Raising* 259, 321 (2d ed. 1997); *see also* Hopkins, *supra,* at 24-25, 31, 100.

the funds collected by professional solicitors—less than any other type of charity. Harvy Lipman, *Calling Solicitors to Account,* XIII Chron. of Philanthropy, Apr. 5, 2001, at 1, 24. As the survey notes, a fundraiser that returns a low percentage of collections to charity has not necessarily acted improperly, as the percentage may simply reflect the size and type of its charity clients. *Id.* at 24.

Not only are fundraising cost percentages poor indicators either of fraud or a charity's intrinsic merit, but there is no readily ascertainable fundraising percentage or expense figure available that would constitute a material or verifiable "fact" that must be disclosed to potential donors. *See* Hopkins, *supra,* at 89-91 (explaining reasons for absence of agreed-upon base or universal standard for computing fundraising costs or percentages). As the GAO recently acknowledged, charities have considerable discretion in determining how to allocate expenses among the program services, management, and fundraising categories, differences that can affect comparisons across charities. Neither the IRS nor professional accounting accrediting bodies require or prohibit particular allocation methods, so long as they are reasonable and consistently applied. April 2002 GAO Report at 2, 8, 13, 16-19; *see also* Hopkins, *supra,* at 105 & n.29. Two organizations may have identical fundraising expenses and yet derive different fundraising cost ratios. This fact does not illustrate fraud, but the lack of uniformity in, and intrinsic malleability of, fundraising cost allocation methods.[3]

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[3] Moreover, had the same activities, with the same fundraising expenses, been conducted by VietNow entirely in-house, there would have been no "percentage" in a fundraising contract for Illinois to point to as "excessive" or to contend the charity must disclose to potential donors to dispel any misleading impression. Yet there would be no economic difference in terms of the group's solicitation costs or amounts expended for charitable services. *See Riley,* 487 U.S. at 799 (criticizing disclosure requirement's discrimination between those charities who must rely on professional fundraisers and those that conduct their campaigns in-house). The susceptibility of a fundraiser or charity to prosecution for fraud cannot be

The State's effort, in other words, to force charities or fundraisers to attempt to describe fundraising costs to potential donors as a single percentage not only is not "a meaningful indicator of anything," but, even worse, "may be so misleading as to be counterproductive to the disclosure motive and unfair to certain categories of charitable groups." Hopkins, *supra,* at 90; *see also* April 2002 GAO Report at 16. An in-house or outside solicitor's silence on the issue of fundraising expenses simply is not an implied misrepresentation of fact. Even apart from the legitimate variation of fundraising costs among charities, the states' insistence on making charitable spending efficiency the lodestar of their regulatory approach is fundamentally misguided. Cost of fundraising measures, however calculated, are of marginal, if any, utility to the potential donor attempting to ascertain the actual efficacy or accomplishments of a charity soliciting donations. *Id.* at 19.

In short, any effort by the government to punish charitable appeals or to compel crippling, but meaningless, disclosures to potential donors on the ground that the charity's fundraising costs or the professional fundraiser's fees are "higher than expected," both ignores the First Amendment value of these appeals and discriminates against new, small, or unpopular charities and those that combine education and solicitation.

B. *Riley's* Rationale in Barring States from Compelling Before-the-Fact Disclosures of Fundraising Cost Percentages Applies as Surely to an After-the-Fact Disclosure Requirement.

Illinois insists that regardless of whether the professional fundraisers' fee here can be labeled fraudulent in and of itself, the fundraisers' failure to disclose that fee to prospective donors on the spot renders the solicitations fraudulently misleading because the fundraisers described to donors the charitable purposes for which funds were being solicited without also revealing their (allegedly high) fee. To avoid

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permitted to turn on such an artificial distinction.

leaving a false or misleading impression that "much more" than a "trifling," "negligible," or "insignificant" amount of donated funds would be used to further VietNow's charitable purposes, State Br. 5, 9, 12, 16, 42, 44, the State contends that the fundraisers were required either to refrain from describing the charitable purposes for which funds were solicited or to disclose their fee. State's Br. 46, 48.

The first alternative, that fundraisers refrain from disclosing the charitable purposes for which donations are sought, is not an option. Indeed, Illinois law explicitly provides that a person soliciting contributions must disclose the primary program service for which funds will be spent. 225 Ill. Comp. Stat. 460/18(b). The only other alternative to avoid the risk of a fraud action, then, is for charities and fundraisers to make an affirmative disclosure of fundraising costs in any case in which the fee is higher than *some* donor might expect. But the State cannot compel such speech. *Riley,* 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 573 (1995) (the right of the speaker to choose "what not to say" applies "equally to statements of fact the speaker would rather avoid"); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 348-49 (1995). Although *Riley* addressed a prophylactic disclosure requirement, its rationale applies as surely to one based on a post hoc judgment by a State that the magnitude of fundraising costs rendered a description of the charitable purposes for which funds were sought a deceptive "half truth."

1. Just as Illinois argues here, North Carolina maintained in *Riley* that a blanket disclosure to all potential donors of the percentage of receipts turned over to charity was necessary "to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity." 487 U.S. at 798. The Court rejected the proposed disclosure requirement as a content-based regulation of speech, *id.* at 795, for several reasons all fully applicable in this case.

First, the Court reasoned, North Carolina's disclosure requirement incorrectly presumed that the charity derived no benefit from funds collected but not turned over to it. As the Court had made clear in *Schaumburg* and *Munson,* "where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself." *Riley,* 487 U.S. at 798. For some charities, a substantial aspect of their programmatic purpose *is* to broadly communicate a particular message. Amicus MADD's mission, for instance, is to communicate the message "Don't Drink and Drive." For such groups, "a significant portion of the fundraiser's 'fee' may well go toward achieving the charity's objectives even though it is not remitted to the charity in cash." *Id.* at 798-99 (citations omitted); *e.g.,* Gary Ellis, *Making a Connection: DialAmerica Helps Raise Awareness and Funds for MADD's Mission,* DRIVEN Magazine, at 23 (Fall 2002) (DialAmerica telemarketers "reach millions of people a year, and each call educates the public about the tragedy of drunk driving, provides statistics and asks the customer to always designate a sober driver"), *available at* http://www.madd.org/news/0,1056,5616,00.html.

Here Illinois has ignored the First Amendment value inherent in the solicitations the professional fundraisers conducted on VietNow's behalf, attaching significance only to the 85 percent figure in the contract without regard to how that fee was spent and whether a portion of the fee was used for programmatic purposes. As Judge Posner explained in rejecting the IRS's revocation of the tax exemption of a charity that paid its professional fundraiser $26-plus million of the $28-plus million in charitable funds it had raised: "These figures are deceptive, because UCC got a charitable 'bang' from the mailings themselves, which contained educational materials . . . in direct support of the charity's central charitable goal. A charity whose entire goal was to publish educational materials would spend all or most of its revenues on publishing, but this would be in support rather than in derogation of its charitable purposes." *United Cancer Council*

v. Commissioner, 165 F.3d 1173, 1178 (7th Cir. 1999). Moreover, it is wrong for Illinois to suggest, absent an actual diversion of charitable funds or violation of the terms of the fundraising contracts, that the professional fundraisers in this or similar instances "kept" for themselves a certain percentage of charitable collections—as if to imply that the fee represents pure profit. Henry C. Suhrke, *What Can Be Done About Fund Raising "Fraud"?,* XXVI Philanthropy Monthly, July/Aug. 1993, at 11; *see, e.g.,* State Br. 2, 3, 9, 45. Fundraising, especially telemarketing, is expensive, often requiring the outlay of hundreds of thousands of dollars to buy telephone equipment, hire solicitors to make calls, pay phone bills, send out follow-up mail to donors, and handle donation checks. Lipman, XIII Chron. of Philanthropy, *supra,* at 24, 27.

Second, the *Riley* Court noted that an unchallenged portion of North Carolina's disclosure law required professional fundraisers to disclose their professional status to potential donors, "thereby giving notice that at least a portion of the money contributed will be retained." *Riley,* 487 U.S. at 799 & n.11. The Court also recognized that donors are "undoubtedly aware that solicitations incur costs, to which part of their donation might apply." *Id.* at 799. Illinois likewise requires that professional fundraisers inform prospective donors that the solicitation is being made "by a paid professional fund raiser" and "that contracts and reports regarding the charity are on file with the Illinois Attorney General." *See* 225 Ill. Comp. Stat. 460/17(a). There is no reason that these disclosure requirements are insufficient to put potential donors on notice that part of their donation will be used to defray the solicitor's expenses.[4] Although both Illinois and the United States assert

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[4] Amici do not object to Illinois's requirement that fundraisers disclose their paid professional status. Such a "brief, bland, and non-pejorative disclosure" is unobjectionable because, unlike a fundraising percentage disclosure requirement, it is "unlikely to discourage donations." *Telco Communications, Inc. v. Carbaugh,* 885 F.2d 1225, 1232 (4th Cir. 1989); *see also Indiana Voluntary Firemen's Ass'n v. Pearson,* 700 F. Supp. 421,

that the amended complaint alleges that the fundraisers failed to disclose their paid professional status here, *see* State Br. 4; U.S. Br. 16, the complaint in fact makes no such claim, *see* ¶ 37 (J.A. 10); nor, unsurprisingly, did the Illinois courts understand the Attorney General to assert such a claim.

Under the State's theory, then, a general solicitation that describes the charitable purposes to which funds will be used is "misleading" not because the solicitor has falsely implied a verifiable *fact,* but rather because the Attorney General has made a subjective judgment that the fundraiser's fee is "higher" than a donor might have expected. As the *Riley* Court pointed out, however, a donor is always "free to inquire how much of the contribution will be turned over to the charity." In fact, the Court emphasized, North Carolina law (like the Illinois statute, 225 Ill. Comp. Stat. 460/17(b)) required the disclosure of such information *upon request* by the donor. 487 U.S. at 799; *see, e.g., Famine Relief Fund v. West Virginia,* 905 F.2d 747, 751-52 (4th Cir. 1990) (sustaining disclosure-upon-request requirement). Even without such a requirement, the potential donor who is refused an answer is not likely to donate. *Riley,* 487 U.S. at 799. Such disclosure-on-demand statutes are far less objectionable because specific requests for information from potential contributors provide a context for the solicitor (or in-house staff or volunteer) to make fundraising expense information understandable to a listener who presumably (because she asked the question) is willing to attend to the answer. *Cf. Ibanez v. Florida Dep't of Bus. & Prof'l Reg'n,* 512 U.S. 136, 145 n.9 (1994) (attorney advertisement of credentials not misleading in part because consumers could call the board to verify the credentials and state bar rules required the provision of written information describing the attorney's expertise "to anyone who so inquires"). The State has not alleged that the professional fundraisers refused to answer candidly such informational requests here.

Finally, the Court in *Riley* rejected the fundraising

441-42 (S.D. Ind. 1988).

percentage disclosure requirement for the simple reason that it "will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent." 487 U.S. at 799. Not only would such a requirement discriminate against new, expanding, or unpopular charities that rely on professional fundraisers and conduct costly campaigns, but "in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id.* at 799-800. In short, the Court concluded: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-91.

A charitable solicitation, particularly by telephone, is made in a brief exchange with a prospective donor. A premium is placed on the solicitor's ability to convey effectively and persuasively the importance of the charity's mission and the need for that potential donor's involvement and financial support, and to put to rest any reservations regarding the track record of the organization or the popularity of its cause. In short, it is a delicate and fleeting exchange. Similar concerns arise for direct mail, as that mail competes with every other piece of mail for the recipient's limited attention. Any government-compelled disclosure, other than the most basic facts regarding the identity of the charity, the nature of its mission, and, in the case of telemarketing, the status of the caller, threatens the success of that exchange, hampering charities' protected speech and chilling the free flow of information in the future. *See Texas State Troopers Ass'n v. Morales,* 10 F. Supp. 2d 628, 634-35 (N.D. Tex. 1998). ("[T]elephone solicitors have a limited and time sensitive window of opportunity during which to communicate their message. Mandating that the solicitors disclose [percentage] information at the beginning of the phone call would certainly inhibit the solicitors' ability to effectively seek contributions and, consequently, would impede the solicitation.").

2. Although the *Riley* Court reaffirmed that a State "may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements," 487 U.S. at 800; *see also Munson,* 467 U.S. at 961 n.9; *Schaumburg,* 444 U.S. at 636-37, the Court plainly did not mean to imply that regulators could bring fraud actions against fundraisers or charities for failing to make a disclosure that the Court had just explained was not required to render a solicitation non-misleading. *See Riley,* 487 U.S. at 798-801. Indeed, the Court clarified that it would "not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's travel budget." Although "the foregoing factual information might be relevant to the listener, and in the latter case, *could encourage or discourage the listener from making a political donation,*" a law compelling its disclosure would "clearly and substantially burden the protected speech." *Id.* at 798 (emphasis added).

A fundraiser's failure to disclose a fundraising cost percentage in a particular case where a state attorney general has deemed the cost especially high is no different from these other types of potentially discouraging disclosures that the *Riley* Court denied the states the power to compel. Such compulsion would impose an even more significant burden on protected speech here because, as explained above, fundraising cost percentages have no independent informational significance, and there is no readily ascertainable or verifiable "fact" to disclose. Charities and fundraisers alike would be left wondering which disclosures they must make up front to prospective donors to avoid the risk of a fraud action by state regulators afterward. The specter of such enforcement action whenever a charity or fundraiser has failed to disclose fundraising costs that a state deems to be "excessive," "blankets with uncertainty whatever may be said," compelling "the speaker to hedge and trim" its speech. *Thomas v. Collins,*

323 U.S. 516, 535 (1945). The only other choice is for a charity or fundraiser to make elaborate, distracting, and potentially unappealing fundraising cost revelations in *all* communications with potential donors to avoid the possibility of losing the right to speak at all. Either course of action is sure to inhibit charities' efforts to build public support for their missions.[5]

C. Imposing Such a Requirement After the Fact on a Case-by-Case Basis Presents an Even Greater Risk to Charities' Protected Speech Than a Prophylactic Disclosure Requirement.

The State contends, however, that the *Schaumburg/Munson/Riley* trilogy is irrelevant to its ability to bring an individual fraud action in this case because Illinois has attempted neither to regulate the size of the professional fundraisers' fee nor to mandate any particular point-of-solicitation disclosure that must be made in all cases. Instead, it argues, a case-by-case approach is less intrusive because it permits the State to evaluate in retrospect whether a fraud on potential donors has occurred and to tailor its regulatory approach to the particular facts. State Br. 12, 23-24, 48. The Illinois Supreme Court was right to reject this disingenuous effort to distinguish *Riley* and its predecessors. 763 N.E.2d at 297. To be sure, a failure to disclose can constitute fraud in some situations, but what is particularly striking about the State's lengthy discussion of fraud principles here is that it fails to cite even a single fraud case in which the facts remotely resemble these, let alone one where fully protected speech was

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[5] This does not mean, however, that fundraising cost information should be "categorically" barred as *evidence* in a fraud case brought against a charity or a fundraiser or that fundraising costs are "irrelevant" to a fraud action based on other indicia of fraud, as the State claims the Illinois Supreme Court ruled. *See* State Br. i, 11, 43, 44. The court below simply held that a fraud action may not be predicated *on nothing more than* a solicitor's failure to divulge fundraising costs at the point of solicitation.

at issue. The blunt hammer of a fraud action for failure to disclose fundraising fees when they are higher than some real or hypothesized individual might expect is no more "narrowly tailored" or able to survive "exacting First Amendment scrutiny," *Riley,* 487 U.S. at 789, than a disclosure requirement that applies to all solicitations.

1. As an initial matter, it is important to dispel the myth that *Riley* is inapposite because the State does not propose to compel any particular disclosures up front, but merely wishes the option of prosecuting false or misleading statements after they are made. State Br. 46; U.S. Br. 9, 24. There is nothing about the alleged exchanges between the fundraisers here and potential donors that takes them outside of the prototypical exchange contemplated by this Court in *Riley,* in which a professional fundraiser identifies the charitable purposes for which funds are solicited, but does not volunteer the proportion that will go toward paying the fundraiser's fee (of which a substantial portion is expended to fulfill the fundraiser's obligations to the charity). While amici do not dispute the authority of state and federal regulators aggressively to pursue actual fraud committed by fundraisers or charities, the use of suggestive or inflammatory terms such as "deception," "half truths," "deceit for pecuniary gain," and "ingenious swindlers," State Br. 9, 11, 29, 39, cannot convert this case into something other than what it is: a fraud action premised on the fundraisers' failure to disclose voluntarily to potential donors the terms of their contract with VietNow.

Far from a saving grace, the State's claimed discretion to decide, without notice or fair warning, when to bring a fraud action for failure to make a disclosure that this Court previously held the states could not compel, renders this type of enforcement activity far worse, from the standpoint of safeguarding First Amendment freedoms, than the categorical disclosure requirement struck down in *Riley*. The discretion Illinois seeks to exercise here is no different, in effect, from the "waiver" provision this Court rejected in *Munson*. The Maryland law invalidated in that case prohibited charities from

paying or agreeing to pay more than 25 percent of the amount raised, but provided for an administrative waiver for a charity that could demonstrate financial necessity. The Court ruled that this added flexibility did not save the statute because Maryland's waiver authority was tantamount to a "license" for the dissemination of ideas and hence "inherently suspect." 467 U.S. at 964 n.12; *cf. Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969) ("[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."). As the Court aptly concluded, charities whose First Amendment rights are abridged by the fundraising limitation "simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State." 967 U.S. at 964 n.12; *see also Riley,* 487 U.S. at 793-94; *Schaumburg,* 444 U.S. at 643 n.1 (Rehnquist, J., dissenting).

As the court below recognized, Illinois's fraud action is no "less intrusive" because it is an instance of individual litigation. 763 N.E.2d at 297. The post-solicitation approach invites significantly more self-censorship because all fundraisers in the State "would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fund-raiser's fee was too high." *Id.* at 299. As a result, fundraisers (and charities, as well) "would be at constant risk of incurring litigation costs, as well as civil and criminal penalties, which could produce a substantial chilling effect on protected speech, based on nothing more than a 'loose inference that the fee might be too high.'" *Id.* (quoting *Riley,* 487 U.S. at 793). And although Illinois disclaims any intent to regulate the size of the fees charged by fundraisers, *see* State Br. 11, 24 n.21, 41, a fundraiser's obligation to divulge its fee would be triggered only when that fee was higher than a donor might expect, a determination to be made at the discretion of state officials who

might be serving their own political interests in making such a determination. The State's fraud action, then, would have the effect either of capping fundraising costs at whatever level regulators decided was excessive, or driving fundraisers out of a jurisdiction altogether to avoid making undesirable and even misleading disclosures to potential contributors.

2. Further compounding the burden placed on charities and fundraisers from fraud actions pursued on an "ad hoc and subjective basis" by state regulators, *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972), is the intractable difficulty that charities would face in being denied "fair warning as to what is prohibited." *Id.* at 114. "All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). Still "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Smith v. California,* 361 U.S. 147, 151 (1959); *accord Baggett v. Bullitt,* 377 U.S. 360, 372 & n.10 (1964). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button,* 371 U.S. at 433. Such specificity is completely lacking here: If this fraud action is permitted to proceed, charities and fundraisers will be left to guess which representations they may make without risk and which disclosures they *must* make to avoid criminal penalties, loss of charitable solicitation licenses, and other sanctions.

Conceding that charities and fundraisers must be provided "fair notice" of what is proscribed before the State may bring an action for fraud against them, State Br. 28, the State finds that requirement satisfied here because there is a well-developed law of misrepresentation, State Br. 28-30—in other words, solicitors are on notice of their obligation not to commit fraud. Yet there is no "authoritative judicial construction," State Br. 28, of the principles of implied misrepresentation that would suggest that this kind of case is susceptible to a fraud

claim.[6] The real-life scenarios in which charities and fundraisers would be left to speculate, at their peril, about their legal obligations are legion:

- Suppose a charity agreed to pay a professional fundraiser 85% of funds received for a risky and expensive telemarketing campaign aimed at increasing the charity's donor base, but, over a several-year period, the charity devoted more than 50% of its overall contributions to its charitable services. Would it be misleading in that instance for the charity or fundraiser to fail to disclose the 85% contract to potential donors?
- Suppose a charity spent 85% of funds received from a particular campaign on fundraising costs, but all fundraising was conducted entirely in-house. If the charity's staff described its charitable purposes in its solicitations, but did not disclose its fundraising expenses to potential donors, would the charity be guilty of fraud?
- Imagine the converse situation, in which a fundraising contract provided that the charity would receive *more* than half of the gross proceeds in a particular fundraising drive, but *overall* the charity spent only 15% of funds received on its charitable purposes. Would the charity or fundraiser have to disclose the charity's overall fundraising costs to donors solicited in that fundraising drive?
- What is the relevant time-frame for determining whether a solicitation left a false impression regarding how funds

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[6] The lower courts' treatment of state statutes that expressly *stated* the principle upon which Illinois relies here—that at a specified fundraising percentage level, it is a misrepresentation of fact for a solicitor to represent to potential donors that funds will go to charitable purposes without divulging the fundraising cost percentage—is instructive. In each case, the courts struck the statutes down. *See, e.g., Texas State Troopers,* 10 F. Supp. 2d 628; *Kentucky State Police Professional Ass'n v. Gorman,* 870 F. Supp. 166 (E.D. Ky. 1994); *People v. French,* 762 P.2d 1369 (Colo. 1988) (en banc); *State v. Events Int'l, Inc.,* 528 A.2d 458 (Me. 1987).

would be used? Should regulators focus on the alleged misrepresentations or omissions made regarding the fundraising costs involved in a particular campaign or under a specific contract, or, instead, should they focus on the charity's *overall* allocation of funds between fundraising and charitable expenses?

- Many of the amici enter into fundraising contracts, such as fee-for-service agreements, that do *not* specify a percentage payment to the fundraiser or return to the charity. Will a charity or its fundraiser be held accountable after the fact by state or local regulators, who can review the charities' IRS Form 990s, if it turns out that a particular campaign—or, indeed, their fundraising effort for the entire year—has been a financial failure, yielding little to no return to the charity?

All charities incur high fundraising costs at some point. The State offers no objective standard to govern when a charity must qualify its description of its program services or reveal fundraising costs to potential donors to avert a potential fraud action. Under the State's approach, virtually any statement a solicitor might make in a solicitation could be viewed as potentially misleading if not accompanied by a disclosure of fundraising costs.

Without "explicit standards" governing when a fraud action may be brought based on an omission of fundraising cost information in a solicitation, it is left to the whim of the state or local regulator to determine whether to target particular charities or fundraisers for political or public relations gains or to discriminate against those groups that have taken positions in opposition to regulators in a particular state. The very threat of such selective enforcement raises serious First Amendment concerns. *See, e.g., Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1051 (1991) (invalidating attorney disciplinary rule that was "so imprecise that discriminatory enforcement [was] a real possibility"); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972) (standardless local vagrancy ordinance

furnished "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'") (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940)); *see also City of Houston v. Hill,* 482 U.S. 451, 465 & n.15 (1987); *Kolender v. Lawson,* 461 U.S. 352, 357-61 (1983); *Hynes v. Mayor of Oradell,* 425 U.S. 610, 622 (1976).

The conclusion is inescapable that the "substantial imprecisions" of applying a common-law theory of fraud to the failure to reveal fundraising cost information to potential donors "will chill speech." *Hill v. Colorado,* 530 U.S. 703, 772 (2000) (Kennedy, J., dissenting); *Button,* 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). The end result, if Illinois prevails, will be to inhibit charitable solicitations and reduce the total quantity of protected speech. *See Schaumburg,* 444 U.S. at 632 (without solicitation, "the flow of . . . information and advocacy would likely cease"); *Meyer v. Grant,* 486 U.S. 414, 423 (1988) (prohibition against use of paid petition circulators had "the inevitable effect of reducing the total quantum of speech on a public issue").

II. FACILITATING PUBLIC ACCESS TO INFORMATION REGARDING CHARITIES, COUPLED WITH EXISTING ENFORCEMENT REMEDIES, PROVIDES MORE EFFECTIVE AND CONSTITUTIONAL MEANS OF ADDRESSING ABUSIVE CHARITABLE SOLICITATIONS.

A. The State argues that donors have little opportunity to learn how their contributions will be used, *see* State Br. 10-11, 36, and that, therefore, states must protect consumers from rapacious fundraisers by compelling, in certain instances, affirmative disclosures to donors regarding fundraising costs. If that were ever true, the notion is antiquated today, given the extensive financial information regarding charities and professional fundraisers that is reported to, made accessible to the public by, and frequently published by the states.

Extensive information regarding charities is widely disseminated, usually at no charge on the Internet, by the states, charity watchdog groups, charities themselves, and others.

This Court has invited the states to require charities and fundraisers to submit financial information as part of their state filings and to publish that information to educate the public. S*ee, e.g., Riley,* 487 U.S. at 795, 800; *Schaumburg,* 444 U.S. at 637-38. Many lower courts have followed that lead, rejecting regulations of charitable solicitations—many of them compelled point-of-solicitation disclosures—because state publication of the same information would be at least as effective without offending the First Amendment. *See, e.g., Texas State Troopers,* 10 F. Supp. 2d at 634; *National Fed'n of the Blind of Colorado v. Norton,* 981 F. Supp. 1371, 1374 (D. Colo. 1997); *Gorman,* 870 F. Supp. at 169; *Pearson,* 700 F. Supp. at 443-44.

The states have accepted the courts' invitation. Forty of them, including Illinois, and the District of Columbia (in addition to many local governments) have adopted charitable solicitation acts that require charities and fundraisers soliciting contributions in their jurisdictions to register and submit financial information. *See, e.g.,* 225 Ill. Comp. Stat. 460/2, 460/4 (registration and annual reporting requirements for charities); *id.* 460/6, 460/6.5, 460/8 (registration, annual reporting requirements, and contract requirements for professional fundraisers). Charities and professional fundraisers alike are required to file copies of their fundraising contracts with the Illinois Attorney General. *Id.* 460/2(a)(10); *id.* 460/7(a). All of this extensive information is open to public inspection, *id.* 460/2(f), and the Attorney General is authorized to publish an annual report on charities, including the amount of money and percentage of collections spent on program services. *Id.* 460/9(i); *see* http://www.ag.state.il.us/charitable/

charitydb.html (future Illinois charity database).[7] States, including Illinois, often publish guides for the general public on charitable giving. *E.g., Tips for Informed Charitable Giving, available at* http://www.ag.state.il.us/charitable/charitygive.htm. In addition, the Internal Revenue Code requires nonprofits to provide copies of their annual tax filings, the IRS Form 990s, to the public upon request. 26 U.S.C. § 6104(d). Charities often post these forms on their websites, *see, e.g.,* http://www.citizen.org/about/articles.cfm?ID=5165 (amicus Public Citizen's Form 990s), along with other information about their missions and accomplishments.

In addition to information made publicly available by the states and charities themselves, considerable information regarding charities is disseminated by third parties. GuideStar, a national database of nonprofit organizations, provides information on 850,000 nonprofits nationwide, including their IRS Form 990s. *See* www.guidestar.org. Numerous charity watchdog groups provide fundraising percentage information or prepare reports evaluating or rating charities according to varied criteria.[8] The trade press provides similar information. *See, e.g.,* Lipman, XIII Chron. of Philanthropy, *supra* (analysis of nonprofit groups and professional fundraising fees). Offering such information to the donating public through

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[7] Numerous states publish such information. *See, e.g.,* http://justice.hdcdojnet.state.ca.us/charitysr/default.asp (California charities database search); Florida Gift Givers' Guide: A Guide to Charitable Giving in Florida (2002-2003), *available at* http://www.800helpfla.com/~cs/gift_givers/search.html; New York State Department of Law, Charities Bureau, *Pennies for Charity: Where Your Money Goes* (Dec. 2002), *available at* http://www.oag.state.ny.us/charities/pennies02/penintro.html; http://www.secstate.wa.gov/ charities/search.aspx (Washington database for charities and commercial fundraisers).

[8] *See, e.g.,* Better Business Bureau Wise Giving Alliance (www.give.org/reports/index.asp); Charity Navigator (www.charitynavigator.org); American Institute of Philanthropy (www.charitywatch.org); Charitable Choices (www.charitychoices.com); Minnesota Charity Review Council (www.crcmn.org); National Crime Prevention Council (www.ncpc.org).

multiple channels not only respects First Amendment values, but is likely to be a more effective means of ensuring that potential donors have at their fingertips the information that *they* believe to be most important in deciding whether to make a charitable contribution. *See Riley,* 487 U.S. at 804 (Scalia, J., concurring) ("[W]here the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.").

B. This emphasis on publication of information regarding charities is not meant to suggest that amici believe that there is no place for fraud actions or other enforcement activities by federal or state regulators seeking to shut down charities or fundraisers engaged in abusive solicitation practices or to force them to comply with legal obligations. The enforcement tools available to federal and state regulators that do not compel speech of the government's choosing, however, are already adequate for the task.

As noted above, the great majority of states regulate charities and fundraisers soliciting in their jurisdictions. The states have successfully enjoined solicitations by, and have even dissolved, or revoked the charitable charters of, those charities that have refused to register or satisfy annual reporting requirements.[9] State regulators likewise have been unhindered in their efforts to root out real fraud in charitable appeals, whether that fraud is perpetrated through the improper diversion of funds for personal benefit or through false representations (explicit or implicit) made in solicitations themselves. *See, e.g., People v. Knippenberg,* 757 N.E.2d 667 (Ill. App. Ct. 2001) (affirming fundraiser's criminal convictions for theft and for using charitable contributions for his own personal benefit); *People v. Caldwell,* 290 N.E.2d 279

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[9] *See, e.g., Brattman v. Secretary of the Commonwealth,* 658 N.E.2d 159 (1995) (Mass. 1995); *People ex rel. Abrams v. Westchester County,* 604 N.Y.S.2d 579 (N.Y. App. Div. 1993); *Abrams v. New York Found'n for the Homeless, Inc.,* 148 Misc. 2d 791 (N.Y. Sup. Ct. 1990).

(Ill. App. Ct. 1972) (affirming conviction of organizer of charity art auction for unauthorized use of a person's name to promote the auction).[10] The array of existing criminal and civil sanctions gives the states considerable leverage over charities and professional fundraisers to negotiate settlements barring offending persons from further solicitation activities within their jurisdictions.[11] And states long have possessed the authority at common law (as well as by statute) to supervise the administration of assets given for charitable purposes. *See* State Br. 39 n.30; *e.g., Summers v. Cherokee Children & Family Servs., Inc.,* 2002 WL 31126636 (Tenn. Ct. App. 2002) (upholding dissolution of two nonprofits that had abandoned their charitable purposes and been used for private gain). This responsibility includes the legitimate authority to ensure that charitable assets are not grossly mismanaged or wasted—so long as the State provides advance notice through statutes, regulations, or authoritative judicial constructions regarding the circumstances in which it will intervene to preserve those assets, revoke a charitable charter, or dissolve the corporation.

Furthermore, the states do not act alone in this endeavor. The federal government has several enforcement options at its disposal as well. Federal fraud law applies to charitable solicitations made through the mail or by telephone. *See* 18 U.S.C. §§ 1341, 1343; *e.g., United States v. Ciccone,* 219 F.3d

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[10] *See also People v. Orange County Charitable Servs.,* 73 Cal. App. 4th 1054 (Cal. Ct. App. 1999); *Marcus v. Jewish National Fund,* 557 N.Y.S.2d 886 (N.Y. App. Div. 1990); *Commonwealth ex rel. Preate v. Pennsylvania Chiefs of Police Ass'n,* 572 A.2d 256 (Pa. Commw. Ct. 1990); *Strope v. Commonwealth,* 2000 WL 389452 (Va. Ct. App. 2000).

[11] *See, e.g.,* Press Release, *Settlement with United Children's Fund Permanently Bars Charity From Operating in New York* (Apr. 2, 2001), *available at* http://www.oag.state.ny.us/press/2001/apr/apr02a_01.html (misrepresentation of percentage of fundraising actually supporting charitable purpose); Press Release, *Charity Scam Highlights Need for Scrutiny in Making Donations* (Dec. 12, 2000), *available at* http://www.oag.state.ny.us/press/2000/dec/dec12a_00.html (failure to forward charitable contributions to the charity).

1078 (9th Cir. 2000); *United States v. Hawkey,* 148 F.3d 920 (8th Cir. 1998). The FTC has successfully obtained injunctive and monetary relief against telemarketers that have engaged in deceptive fundraising practices, *see, e.g., FTC v. NCH, Inc.,* 1995 WL 623260 (D. Nev. 1995), *aff'd,* 106 F.3d 407 (9th Cir. 1997), authority that Congress has recently expanded. *See* USA Patriot Act of 2001, Pub. L. No. 107-56, § 1011 (Oct. 26, 2001); *see also* 16 C.F.R. 310.3(d) & 310.4(e) (Dec. 2002); U.S. Br. 1-2. Research has uncovered no case, however, in which either a state or the federal government has successfully brought a fraud action against a charity or fundraiser for the failure to disclose fundraising costs to potential donors because fundraising costs were higher, or the percentage of funds used for charitable purposes was lower, than a donor might have expected, absent a false statement.

Finally, the IRS has considerable oversight authority over tax-exempt organizations, with both its long-established power to revoke a charity's tax exemption and its newer authority, conferred by Congress in 1996, to impose intermediate sanctions, in the form of substantial excise taxes, on "excess benefit transactions." *See* 26 U.S.C. § 4958; 26 C.F.R. Parts 53, 301 & 602 (2002) (implementing regulations). To maintain their tax-exempt status, charities must, among various requirements, be operated (1) so they do not cause any inurement of their net earnings to the benefit of private individuals, primarily insiders, who maintain a special relationship to the charity, 26 U.S.C. § 501(c)(3) & (c)(4)(B); 26 C.F.R. § 1.501(c)(3)-1(c)(2) (2002); and (2) so they do not confer any other impermissible private benefit, such as when the charity is not organized and operated primarily for the advancement of charitable purposes. 26 C.F.R. § 1.501(c)(3)-1(a)(1) (2002). *See generally* Hopkins, *supra,* at 272-79; Bruce R. Hopkins & D. Benson Tesdahl, *Intermediate Sanctions: Curbing Nonprofit Abuse* 52-59 (1997).

Thus, charities that pay excessive or otherwise unreasonable compensation for services, or engage in self-dealing or related-party transactions that primarily benefit

individuals with control over the organization, are at risk of losing their tax exemptions under either the private inurement doctrine (if insiders are involved) or the more encompassing private benefit doctrine. *See, e.g., United Cancer Council,* 165 F.3d at 1179-80 (remanding for determination whether the charity was operated exclusively for charitable purposes rather than for the private benefit of its professional fundraisers).[12] Indeed, compensation for performance of services to disqualified persons that exceeds the value of the consideration is the principal focus of IRS's new authority to tax excess benefit transactions, which are, in essence, private inurement transactions. *See* Hopkins, *supra,* at 206-14; Hopkins & Tesdahl, *supra,* Chapter 4; *cf. Caracci v. Commissioner,* 118 T.C. 379 (2002) (upholding imposition of sanctions on excess benefit transactions where nonprofit home health care organizations transferred their assets to for-profit entities for less than market value).

In sum, if charities fail to comply with state registration and reporting requirements, engage in charitable solicitations that actually are fraudulent, enter into fundraising or other contracts that are not at arms length, engage in self-dealing or related-party transactions with controlling individuals or entities without adequate consideration, are grossly mismanaged, or, for whatever reason, are not operated exclusively for charitable purposes, both the states and the federal government have ample authority to respond without running afoul of the First Amendment.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the judgment of the Illinois Supreme Court.

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[12] *See also Church of Scientology of California v. Commissioner,* 823 F.2d 1310 (9th Cir. 1987); *Church By Mail, Inc. v. Commissioner,* 765 F.2d 1387 (9th Cir. 1985); *Airlie Found'n, Inc. v. United States,* 826 F. Supp. 537 (D.D.C. 1993), *aff'd,* 55 F.3d 684 (D.C. Cir. 1995) (per curiam); *American Campaign Academy v. Commissioner,* 92 T.C. 1053 (1989).

Respectfully submitted,

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JANUARY 2003

APPENDIX

The foregoing brief is submitted on behalf of the following 176 nonprofit organizations:

American Academy of Family, Leawood, Kansas
American Association of State Troopers, Tallahassee, Florida
American Breast Cancer Foundation, Inc., Baltimore, Maryland
American Cell Therapy Research Foundation, Clarksburg, Maryland
American Charities for Reasonable Fundraising Regulation, Inc., Arlington, Virginia
American Council of the Blind, Washington, D.C.
American Council of the Blind Enterprises and Services, Inc., Minneapolis, Minnesota
American Diabetes Association, Alexandria, Virginia
American Health Assistance Foundation, Clarksburg, Maryland
American Humane Association, Englewood, Colorado
American Institute for Cancer Research, Washington, D.C.
Americas Second Harvest, Chicago, Illinois
Amnesty International of the USA, New York, New York
ARRISE Centers, Inc., Glen Ellyn, Illinois
Associated Fire Fighters of Illinois, Springfield, Illinois
Association of Marian Helpers, Stockbridge, Virginia
Association of the Miraculous Medal, Perrville, Missouri
Blinded Veterans Association, Washington, D.C.
Bread for the World, Washington, D.C.
Cal Farley's Boys Ranch and Affiliates, Amarillo, Texas
Cancer Care, New York, New York
Cancer Recovery Foundation of America, Harrisburg, Pennsylvania
Central Pennsylvania Food Bank, Harrisburg, Pennsylvania
Childhelp, Inc., Scottsdale, Arizona
Childhood Leukemia Foundation, Inc., Brick, New Jersey
Children Awaiting Parents, Inc., Rochester, New York
Children International, Kansas City, Missouri
Children's Hunger Relief Fund, Santa Rosa, California

Children's Organ Transplant Association,
Bloomington, Indiana
Children's Wish Foundation International, Atlanta, Georgia
Christian Appalachian Project, Lancaster, Kentucky
Concerned Women for America, Washington, D.C.
Concerns of Police Survivors, Camdenton, Missouri
Council for Government Reform, Arlington, Virginia
Covenant House, New York, New York
Dakota Boys Ranch Association, Minot, North Dakota
Defeat Diabetes Foundation, Inc., Madeira Beach, Florida
Disabled American Veterans, Cincinnati, Ohio
Doris Day Animal League, Washington, D.C.
Ducks Unlimited, Memphis, Tennessee
Eastern Paralyzed Veterans Association,
Jackson Heights, New York
Elderhostel, Inc., Boston, Massachusetts
Endometriosis Association, Milwaukee, Wisconsin
Food For The Poor, Inc., Deerfield Beach, Florida
Food Bank of the Rockies, Denver, Colorado
Food Bank of the Southern Tier, Elmira, New York
Franciscan Friars of the Atonement-Graymoor,
Garrison, New York
Freedom from Hunger, Davis, California
Girls Incorporated, New York, New York
Good Shepherd Food Bank, Auburn, Maine
Guide Dog Foundation for the Blind, Inc.,
Smithtown, New York
Guiding Eyes for the Blind ,Yorktown Heights, New York
Haggai Institute for Advance Leadership Training, Inc.,
Norcross, Georgia
HALT, Inc.—An Organization of Americans for Legal Reform,
Washington, D.C.
Have A Heart Children's Cancer Society, Inc.,
Levittown, New York
Help Hospitalized Veterans, Winchester, California
Hemophilia Association of New York, Inc.,
New York, New York

Hospitaller Brothers of St. John of God, Westville, New Jersey
Infact, Boston, Massachusetts
Inner-City Scholarship Fund, Inc., New York, New York
International Association of Fire Fighters, Washington, D.C.
International Fund for Animal Welfare,
Yarmouthport, Massachusetts
Iowa Professional Firefighters, West Des Moines, Iowa
Israel Children's Cancer Foundation, Inc.,
New York, New York
Kentucky Special Olympics, Inc., Frankfort, Kentucky
Kids Wish Network, Inc., Oldsmar, Florida
Lifesavers, Inc., Lancaster, California
Little Shelter Animal Adoption Center, Inc.,
Huntington, New York
March of Dimes Birth Defects Foundation,
White Plains, New York
Marine Corps Heritage Foundation, Quantico, Virginia
Mays Mission for the Handicapped, Heber Springs, Arkansas
Messengers of Christ—Lutheran Bible Translators, Inc.,
Aurora, Illinois
Michigan Professional Fire Fighters Union, Trenton, Michigan
Missionary Servants of the Most Holy Trinity dba
Trinity Missions, Silver Spring, Maryland
Missouri State Council of Fire Fighters, Kansas City, Missouri
Moose Charities, Inc., Mooseheart, Illinois
Mothers Against Drunk Driving, Irving, Texas
Multiple Sclerosis Association of America,
Cherry Hill, New Jersey
Multiple Sclerosis Foundation, Fort Lauderdale, Florida
Muscular Dystrophy Family Foundation, Indianapolis, Indiana
National Association for the Terminally Ill,
Shelbyville, Kentucky
National Children's Cancer Society, St. Louis, Missouri
National Coalition of Prayer, Inc., Springville, Tennessee
National Committee to Preserve Social Security and Medicare,
Washington, D.C.
National Federation of the Blind, Baltimore, Maryland

National Humane Education Society,
Charles Town, West Virginia
National Law Enforcement Officers Memorial Fund,
Washington, D.C.
National Multiple Sclerosis Society, New York, New York
National Museum of Women in the Arts, Washington, D.C.
National Troopers Coalition, Howell, Michigan
National Trust for Historic Preservation, Washington, D.C.
North Shore Animal League of America,
Port Washington, New York
Notre Dame India Mission, Chardon, Ohio
Ohio Right to Life Society, Inc., Columbus, Ohio
Omega Institute for Holistic Studies, Rhinebeck, New York
Osmond Foundation for the Children of the World
Salt Lake City, Utah
Paralyzed Veterans of America, Washington, D.C.
Pennsylvania Professional Firefighters Association,
Harrisburg, Pennsylvania
People for the American Way, Washington, D.C.
Plan International - USA, Warwick, Rhode Island
Priests of the Sacred Heart, Hales Corners, Wisconsin
Professional Firefighters of Utah, Farmington, Utah
Professional Firefighters of Wisconsin, Inc.,
Waukesha, Wisconsin
Project on Government Oversight, Washington, D.C.
ProLiteracy Worldwide, Syracuse, New York
Public Citizen, Inc., Washington, D.C.
Public Citizen Foundation, Inc., Washington, D.C.
Reach Our Children, St. Louis, Missouri
Sacred Heart League, Walls, Mississippi
Salesian Missions, New Rochelle, New York
Save A Child Foundation, Flint, Montana
Second Harvest Foodbank of Eastern Tennessee,
Knoxville, Tennessee
Shiloh International Ministries, Inc., La Verne, California
Southern Poverty Law Center, Montgomery, Alabama
Special Olympics, Inc., Washington, D.C.

Special Olympics Alabama, Inc., Montgomery, Alabama
Special Olympics Arizona, Inc., Phoenix, Arizona
Special Olympics Arkansas, Inc., North Little Rock, Arkansas
Special Olympics Colorado, Inc., Denver, Colorado
Special Olympics Connecticut, Inc., Hamden, Connecticut
Special Olympics Delaware, Inc., Newark, Delaware
Special Olympics District of Columbia, Inc., Washington, D.C.
Special Olympics Florida, Inc., Clermont, Florida
Special Olympics Georgia, Inc., Atlanta, Georgia
Special Olympics Hawaii, Inc., Honolulu, Hawaii
Special Olympics Illinois, Inc., Normal, Illinois
Special Olympics Indiana, Inc., Indianapolis, Indiana
Special Olympics Iowa, Inc., West Des Moines, Iowa
Special Olympics Kansas, Inc., Mission, Kansas
Special Olympics Louisiana, Inc., Hammond, Louisiana
Special Olympics Maine, Inc., South Portland, Maine
Special Olympics Maryland, Inc., Columbia, Maryland
Special Olympics Massachusetts, Inc.,
Hathorne, Massachusetts
Special Olympics Michigan, Inc., Mount Pleasant, Michigan
Special Olympics Minnesota, Inc., Minneapolis, Minnesota
Special Olympics Missouri, Inc., Jefferson City, Missouri
Special Olympics Montana, Inc., Great Falls, Montana
Special Olympics Nebraska, Inc., Omaha, Nebraska
Special Olympics Nevada, Inc., Las Vegas, Nevada
Special Olympics New Hampshire, Inc.,
Manchester, New Hampshire
Special Olympics New Mexico, Inc.,
Albuquerque, New Mexico
Special Olympics North Dakota, Inc.,
Grand Forks, North Dakota
Special Olympics Northern California, Inc.,
Pleasant Hills, California
Special Olympics Ohio, Inc., Columbus, Ohio
Special Olympics Oklahoma, Tulsa, Oklahoma
Special Olympics Pennsylvania, Inc.,
Norristown, Pennsylvania

Special Olympics Rhode Island, Inc., Warwick, Rhode Island
Special Olympics South Carolina, Inc.,
Columbia, South Carolina
Special Olympics South Dakota, Inc.,
Sioux Falls, South Dakota
Special Olympics Southern California, Inc.,
Culver City, California
Special Olympics Tennessee, Inc., Nashville, Tennessee
Special Olympics Texas, Inc., Austin, Texas
Special Olympics Virginia, Inc., Richmond, Virginia
Special Olympics Washington, Inc., Seattle, Washington
Special Olympics West Virginia, Inc.,
Charleston, West Virginia
Special Olympics Wisconsin, Inc., Madison, Wisconsin
St. Anthony's Guild, New York, New York
St. Elizabeth Mission Society, Inc., Allegany, New York
St. Francis Missions, St. Francis, South Dakota
St. Joseph's Indian School, Chamberlain, South Dakota
Support Our Aging Religious!, Silver Spring, Maryland
The Arc of the United States, Silver Spring, Maryland
The Center for Food Safety, Washington, D.C.
The Committee for Missing Children, Lawrenceville, Georgia
The Magic Foundation, Oak Park, Illinois
The National Center for Public Policy Research,
Washington, D.C.
The Patagonia Land Trust, Mill Valley, California
The V Foundation, Cary, North Carolina
United States Sportsmen's Alliance Foundation,
Columbus, Ohio
Utah Special Olympics, Inc., Salt Lake City, Utah
Vermont Public Television, Colchester, Vermont
Vermont Special Olympics, Inc., Williston, Vermont
Veterans Charitable Foundation, Inc., Boynton Beach, Florida
Vietnam Veterans Memorial Fund, Washington, D.C.
Wheat Ridge Ministries, Itasca, Illinois
World Emergency Relief, Carlsbad, California