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 Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Printed by Authority of the State of Illinois (P.O. 30038—63—10-10-02)

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. This Case Presents the Significant, Unresolved Question Whether the First Amendment Displaces Generally-Applicable Fraud Principles in Individual Fraud Actions Focusing on Specific Charitable Solicitations.

Respondents' brief in opposition to Illinois' *certiorari* petition simply reinforces the conclusion that this case squarely presents a significant First Amendment issue never decided by the Court. That issue is whether, in the context of an individual action involving particular charitable solicitations, the free speech clause displaces generally-applicable fraud principles so that a fraud claim cannot be asserted against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps virtually all the funds donated. The Court should resolve this issue to provide much-needed guidance in this area of substantial national importance.

Despite the multitude of arguments made in Respondents' brief, their position essentially boils down to the proposition that the First Amendment shields a professional fundraiser from any liability under the common law of fraud or its statutory counterparts as long as its charitable solicitations stop short of naked lies, and instead rely only on deceptive implications and half-truths. (Brf. in Opp. at 7, 8, 23, 28.) Both sides agree that the Illinois Supreme Court's opinion in this case effectively embraces such an interpretation of the First Amendment. (Pet. at 10 n.4; Brf. in Opp. at 7-8, 26.) Contrary to what Respondents maintain, however, that result is not controlled by this Court's decisions in *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson*

Co., 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). There are compelling reasons, though, for the Court to decide whether the First Amendment does, as the Illinois Supreme Court held, protect the type of conduct alleged here: particular and intentionally deceptive charitable solicitations that do little more than generate income for professional telemarketing companies.

A. The Illinois Supreme Court Based Its Decision Solely on the First Amendment.

The Illinois Supreme Court did not, as Respondents suggest, base its decision on state law. (Brf. in Opp. at 25-26.) To the contrary, that court explicitly grounded its ruling solely on its understanding of the First Amendment as interpreted in *Riley*, *Munson* and *Schaumburg*. (App. 6-17.) Its analysis "begin[s] by examining the scope of first amendment guarantees afforded charitable solicitations" (*id.* at 6) and, after a lengthy discussion of *Riley*, *Munson* and *Schaumburg*, "conclude[s] . . . that the Attorney General's complaint is prohibited under first amendment principles" and is "constitutionally deficient under *Schaumburg*, *Munson* and *Riley*." (*Id.* at 17.)

Although the Illinois Supreme Court's opinion notes that Illinois' Complaint alleges claims for "common law fraud," "false pretenses" and violations of several antifraud statutes (App. 3-4), the opinion neither discusses the elements of such claims nor addresses whether the Complaint satisfactorily alleges any of those elements. (App. 5-17.) And it certainly does not hold, as Respondents wrongly suggest (Brf. in Opp. at 23-26), that Illinois law regarding those claims prohibits only explicit misstatements of fact. (*See* Pet. at 7-8.) The decision

below therefore squarely raises the constitutional issue that Illinois asks the Court to resolve.

B. This Case is Not Controlled by the Court's Decisions in *Riley*, *Munson* and *Schaumburg*.

There is likewise no basis for Respondents' contention that this Court's rulings in *Riley*, *Munson* and *Schaumburg* control the outcome in this case. Neither the facts in those cases nor their reasoning dictates the result reached by the Illinois Supreme Court.

Whereas this case involves an individual fraud action focusing on what Respondents actually communicated to donors, *Riley*, *Munson* and *Schaumburg* involved statutes that prohibited charitable solicitations based solely on how donations were spent. Those statutes branded an entire category of charitable solicitations illegal (either conclusively or presumptively) even absent *any* representation by the charitable organization or fundraiser. Here, by contrast, Illinois' Complaint focuses on *actual representations* made by Respondents regarding how donations for a particular charity would be used, and on the deceptive nature of those representations in light of other information Respondents withheld. In light of that critical difference, *Riley*, *Munson* and *Schaumburg* cannot be controlling precedent on the issue raised here. *See Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

The logic of *Riley*, *Munson* and *Schaumburg* also does not automatically extend to the different situation presented in this case. Illinois' fraud action against Respondents does not attempt to regulate the "reasonableness" of their fee, *see Riley*, 487 U.S. at 790-91 (condemning the

"paternalistic premise" that government, not charities, should decide how charitable funds should be spent), or to "equate" that fee *alone* with fraud. (Brf. in Opp. at 13.) Instead, Illinois complains that Respondents induced donors to contribute money by representing that donations would be used to provide food, clothing and shelter to needy veterans, when in fact Respondents actually kept 85 percent of those donations (and only *three percent* was actually devoted to such programs). (Pet. at 2.) Because Illinois' claims in this case are not based on Respondents' fundraising fee *alone*, *Riley*, *Munson* and *Schaumburg*, which declare such a basis insufficient to restrict charitable solicitations, are not controlling here.

Riley also does not compel the conclusion that using Respondents' fee as evidence to prove Illinois' fraud claim constitutes unconstitutionally "forced speech." Again, it is Respondents' *own* representations regarding how donations would be used—a factor not present in *Riley*—that makes the extraordinarily high percentage of donations they kept relevant to demonstrate the deceptive nature of those representations. By invoking a "constitutional right to remain silent" (Brf. in Opp. at 27), Respondents are improperly trying to have it both ways. Neither the law of torts nor the constitution permits a person to abuse the general right to remain silent when doing so would, in light of other statements voluntarily made, perpetrate a fraud. *See* Page Keeton, *et al.*, *Prosser and Keeton on The Law of Torts*, § 106 (5th ed. 1984) ("if the defendant does speak, he must disclose enough to prevent his words from being misleading"); Fleming James, Jr. and Oscar S. Gray, *Misrepresentation – Part II*, 37 Md. L. Rev. 488, 523-26 (1978); *cf. United States v. Nobles*, 422 U.S. 225, 241 (1975) ("one cannot invoke the Sixth Amendment as a justification for presenting what

might have been a half-truth"); *Johnson v. United States*, 318 U.S. 189, 195 (1943) ("The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying are of course vastly different.") (citations omitted).

Respondents admit they are lawfully required to disclose the portion of donations they keep when asked that question. (Brf. in Opp. at 22.) And they apparently agree that their fundraising fee would be admissible in a fraud action against them if they affirmatively misstated that fee. (*Id.* at 28.) Thus, Respondents' arguments ultimately come down to the position that the First Amendment forecloses any fraud claim against a professional fundraiser or charitable solicitor except in the case of explicit falsehoods, as opposed to frauds perpetrated through deceptive implications and half truths. (*Id.* at 7, 8, 23, 28.) Even if that principle—which is not supported by the law of fraud in Illinois (Pet. at 7-8)—were constitutionally defensible, it is not one mandated by any of this Court's precedents.

Indeed, the Court's statements indicate just the opposite. In *Riley* the Court affirmed that States could "vigorously enforce [their] antifraud laws to prohibit professional fundraisers from obtaining money on *false pretenses* or by making false statements." 487 U.S. at 795 (emphasis added). In *Schaumburg* the Court similarly approved a law making it "unlawful for a . . . solicitor to cheat, deceive or fraudulently misrepresent." 444 U.S. at 637 n.11. In making these statements, moreover, the Court did not suggest that it intended to depart from the common meaning of the terms "misrepresentation" and "false pretenses" by limiting them to explicit misstatements, as distinguished from intentionally deceptive half-truths and implied falsehoods. (*See* Pet. at 7-8;

Amici Brf. at 3.) *See also Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. ___, ___, 122 S. Ct. 2080, 2087-88 (2002) (acknowledging the government's ability "to protect its citizens from fraudulent solicitation") (citing *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)). This case presents precisely what *Riley* contemplated and *Schaumburg* approved.

II. The Court Should Grant the Petition to Resolve this Significant Constitutional Issue Concerning a Matter of National Importance.

In urging the Court not to take this case, Respondents insist that no adverse consequences will result because the First Amendment still allows States to enforce their laws against fraud whenever a telemarketer or other professional fundraiser makes an "actual misstatement." (Brf. in Opp. at 23, 28.) That reassurance is hardly comforting. As one court aptly observed, limiting fraud liability to "literal falsehoods" simply shields from scrutiny the "clever use of innuendo, indirect intimations, and ambiguous suggestions . . . when protection against such sophisticated deception is most needed." *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978). The same is true for intentionally deceptive half-truths.[1] Indeed, the disturbing implications of

[1] This Court has repeatedly made this point. *See, e.g., Bronston v. United States*, 409 U.S. 352, 358 n.4 (1973) (noting that the law regarding criminally fraudulent statements includes the "intentional creation of false impressions by a selection of literally true representations"); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948) (observing that communications "as a whole may be completely misleading (continued...)

such a limitation are illustrated by Respondents' assertion to the Illinois Supreme Court that their representations to donors about how contributions are used could not constitutionally support a fraud claim even if they kept *99 percent* of all money donated. (Pet. at 16 n.13.) Under that view the First Amendment would simply become an engine for fraud clothed in the garb of free speech.

Given the hundreds of billions of dollars generated by charitable solicitations each year, including an ever-increasing amount raised by professional telemarketers, the potential mischief invited by the Illinois Supreme Court's decision is obvious. The *Amici* States accurately observe that the opportunistic exploitation of people's charitable impulses shows no sign of diminishing, and that the uncertainty created by the Illinois Supreme Court's decision will simultaneously embolden unscrupulous fundraisers and deter States from using their limited resources to target charitable solicitation fraud that does not clearly involve explicit lies. (*Amici* Brief at 5-7.) Respondents tellingly make virtually no attempt to address these serious concerns by 18 States and the Commonwealth of Puerto Rico. (Brf. in Opp. at 26-28.)

[1] (...continued)
although every sentence separately considered is literally true"); *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 426 (1941) ("a statement of a half-truth is as much a misrepresentation as if the facts stated were untrue") (applying Iowa law); *Wiser v. Lawler*, 189 U.S. 260, 264 (1903) (characterizing as a "gross fraud" prospectuses which, while not containing a "distinct assertion" of untrue fact, necessarily "produced upon the ordinary mind" a misleading inference and were "more damaging in their omissions than in their statements").

This Court has never decided whether the free speech clause of the First Amendment mandates the displacement of generally-applicable fraud principles in individual fraud actions by limiting the liability of professional fundraisers and other charitable solicitors to instances of explicit factual misstatements. This case squarely raises that issue, and the Court should grant review to correct the uncertainties created by the Illinois Supreme Court's decision in this area of substantial national importance.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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