AMERICAN CHARITIES FOR REASONABLE FUNDRAISING REGULATION
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MEMORANDUM

TO: WHOM IT MAY CONCERN

FROM: GEOFF PETERS

SUBJECT: **WHY SHOULD YOU CARE ABOUT RYAN V. TELEMARKETING ASSOCIATES**

DATE: 12/4/02

Background

The Supreme Court of the United States has agreed to hear the case of "People of the State of Illinois v. Telemarketing Associates." This is a case where the Attorney General of Illinois attempted to prosecute Telemarketing Associates for fraud based solely on their a contract with Vietnow (a nonprofit) whereby the nonprofit would receive 15% of the funds raised by Telemarketing Associates after the firm performed a number of services for the nonprofit.

The Illinois Supreme Court made clear what was involved in the case.

> Vietnow does not complain that it did not receive the amounts for which it contracted, and there is no suggestion that defendants have not fully complied with the terms of their contracts. Further Vietnow has never expressed dissatisfaction with the fundraisers and there is no allegation that defendants made affirmative misstatements to potential donors.

Each of the Illinois courts that heard this case threw out the Attorney General's complaint on the grounds that such a contract was not per se fraudulent. Each of the Illinois courts cited and followed the Supreme Court of the United States rulings in the Riley, Munson, and Schaumberg cases. The Supreme Court of Illinois in rejecting the position of the Attorney General stated that if the complaint were upheld:

> all fund-raisers in this 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 fundraiser's fee was too high.

The Attorney General of Illinois petitioned the Supreme Court of the United States to hear the case (the Supreme Court decides which cases it will hear) and rule that it could prosecute the telemarketer. Eighteen state Attorneys General, led by Florida, signed an amicus curiae brief ("friend of the court") urging the Supreme Court of the U.S. to take the case. They argued that the fundraiser engaged in fraud because it should have, voluntarily and unasked, informed the public of the percentage of funds that would become net income to the charity.

At least four of the nine justices had to approve the petition. There is much speculation as to why they might have done so. An attorney for the telemarketing firm in the case believes it was taken because of the 18 state AGs who urged the Court to take the case. There is no way to know for sure why the case is being heard.

What It Means To Us

What is clear is that this case will be very, very important to the nonprofit and fundraising community. **This case is not about telemarketing. It is about all forms of fundraising and whether you and your Board of Directors decide how to communicate to your supporters or the Attorney General does. It is about your right to speak to those interested in your message without fear of being second-guessed, after the fact, without known or clear standards.** It appears that the same 18 state Attorneys General and others will be filing an amicus brief in the case itself on behalf and along with the State of Illinois.

The implications to the fundraising community of a reversal of the Riley, Munson and Schaumberg decisions are enormous. As usual, the AGs have chosen a case with facts that are favorable to their position. They always do. While many don't necessarily approve of the contract between Telemarketing Associates and Viet Now and while many may not approve of the nonprofit's Board's decision as to how best to raise funds or what cost of fundraising ratio is acceptable, the principles that will be established by the Court are too important to let this issue pass without the views of the nonprofit community being heard.

If the three precedent setting Supreme Court decisions of Riley, Munson, and Schaumburg are overturned, we may well find ourselves back in a situation where each state's Attorney General could announce what he or she considers to be maximum fundraising costs (e.g. 15%, 25%, 35%, even 50%) and then prosecute an organization for fraud if they exceed this figure without regard for any public education or other joint cost allocation. In fact, they wouldn't even have to announce the standard in advance. They could simply apply what they think afterward.

It isn't even clear whether the Attorney General would base his or her decision on a full year of fundraising by all methods. **It is entirely possible they could say that any campaign that did not exceed, say 35% would be subject to a fraud action. This might be a single special event or an unsuccessful alumni or capital campaign, or just donor acquisition.** In other words, the Attorney General could choose any time period, any specific methods or purpose or technique, any type of solicitation, or any media and declare that those particular campaigns were fraudulent even if the overall result for the charity was acceptable.

What about charities like MADD or some of the preventative health charities that strongly believe that communicating their message is at least as relevant as or more important than fundraising? Are they to be restricted to a percentage set by the Attorney General that not only is irrelevant to their mission but also is based on bad economic thinking, bad accounting, and a mistaken understanding of the value of "cost of fundraising ratios"?

What would happen if a charity decided to try a new technique or method of fundraising and it didn't initially work? Could the Attorney General conclude that while a noble experiment, because the public wasn't informed in advance of the percentage cost of the fundraising (which

in most cases wasn't known in advance), therefore the donations would have to be refunded and there would be penalties for the officers of the charity that permitted the cost of fundraising to exceed the percentage thought by the AG to be excessive?

Prior to Schaumburg, in the 1970's and early 1980's, there were as many as 30 states with statutes mandating that fundraising costs should not exceed a low of 15% (Indiana) to a high of 50%. Most states were in the 35% range. It is unfortunate that one has to defend a possibly unsavory organization but the implications of this case go well beyond the immediate parties. It may not be coincidental that the State of Illinois is trying to overturn the Schaumburg decision which came from Illinois. It is expected that more than half of the state Attorneys General will support this action and would like to discretion to regulate nonprofits' fundraising costs even if they don't understand how they are calculated or arrived at or how different methods produce differing results. Clearly, this is an issue we cannot afford to lose.

What are we trying to accomplish

We want as many charities as possible, by name, to participate. Take a look at footnote 6 from the Riley decision:

> "North Carolina was apparently surprised to learn of the charities' opposition to its law, and at oral argument could only surmise that the charities had been misinformed regarding the procharity nature of the statute. Tr. of Oral Arg. 2021. Nonetheless, every charity that has stated a position before us in this case (and there are almost 60 of them other than appellees) supports the judgment below."

It is common for the states to argue (as did Pinellas County) that they are merely friends of charities and protecting them from rapacious fundraisers. It is obvious from the above footnote that the Supreme Court was impressed with the fact that the Amicus Brief in Riley was joined in by nearly 60 charities by name which unanimously opposed to the statute.

The nonprofit community was successful in pulling together when the Riley case was litigated in the Supreme Court and it is time to do so once again. The consequences of failing to do so are enormous.

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Enclosed: Signup form for those organizations that are willing to have their name added to the amicus briefs. Nonprofits will be added to Amicus Brief #1 – filed solely on behalf of a large number of named nonprofit organizations. Umbrella organizations will be added to Amicus Brief #2 – filed on behalf of these umbrella organizations and representing their members. Commercial fundraisers will be added to Amicus Brief #3 – filed solely on behalf of a large number of for profit fundraising organizations.