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 FOR RESPONDENTS

ERROL COPILEVITZ
WILLIAM E. RANEY
MACKENZIE CANTER, III
MARK DISKIN
COPILEVITZ & CANTER, LLC
423 W. 8th Street , Suite 400
Kansas City, Missouri 64105
(816)472-9000

Attorneys for Respondents

QUESTION PRESENTED

May a State prosecute a claim of common law fraud based solely on the failure to disclose the cost of fundraising during a solicitation for a charity when government believes the cost is too high?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Constitutional Provisions

Cases

45

Statutes

Miscellaneous

OPINIONS BELOW

The Honorable Thomas A. Hett of the Circuit Court of Cook County, Illinois, entered an Agreed Judgment Order on December 1, 1998. Pet. App. 30. The opinion of the Appellate Court of Illinois, First District, Sixth Division, is reported at 313 Ill. App. 3d 559, 729 N.E.2d 965 (2000). Pet. App. 19. The opinion of the Supreme Court of Illinois may be found at 198 Ill. 2d 345, 763 N.E.2d 289 (2001) ("*Ryan*"). Pet. App 1.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a) (1988). The Court granted *certiorari* on November 4, 2002.

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution provide: "Congress shall make no law . . . abridging the freedom of speech . . ." U. S. Const. amend. I. " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In 1991, Petitioner, the People of Illinois *ex rel.* Attorney General James Ryan, filed suit against Respondents, Telemarketing Associates, Inc., Richard Troia, and Armet, Inc. The Complaint alleged that Respondent Armet was not registered as a professional fundraiser as required by the Illinois law governing charitable solicitations. J.A. 7. Petitioner alleged that Respondents' fees were "excessive in amount" and, therefore, fraudulent. J.A. 9. Petitioner alleged that Respondents, while raising money for VietNow:

> . . .did not advise the donors that the campaign was being conducted pursuant to private for-profit contracts whereunder a negligible amount, or only 15%, of all funds raised would be given to VietNow and used for its charitable purpose.

J. A. 10.

Petitioner did not allege Respondents affirmatively misrepresented any material fact; nor that the other Respondents were not properly registered; nor that the Respondents failed to disclose at the point of solicitation their paid status and that their contract and financial reports were on file with the Petitioner as required by 225 Ill. Comp. Stat. 460/17 (2000); nor that they failed to make any other statutory filing or disclosure requirement.

On June 25, 1996, Petitioner amended the Complaint. Petitioner alleged:

> In soliciting for VietNow, TROIA and TELEMARKETING and their agent solicitors rarely, if ever, disclosed to donors that less than 17 percent of the contributions would be paid over to VietNow, and that more than 83 percent of the contributions would be used for fundraising and other expenses.

J. A. 85.

Respondents moved to dismiss the Complaint on September 6, 1996. On November 4, 1996, Judge Hett dismissed the fraud claim, but denied the Respondents' Motion insofar as it pertained

to the failure to register. Judge Hett gave Petitioner leave to amend. Pet. App. 36.

On December 4, 1996, Petitioner amended the Complaint a second time, adding new allegations and noting that the contract between VietNow and Respondents had been renewed. Again, Petitioner did not allege affirmative misrepresentation by Respondents, but, rather, alleged the cost of fundraising was "excessive." *See*, *e.g.*, J.A.103. Judge Hett again dismissed Petitioner's fraud allegations. Pet. App. 33.

Petitioner dismissed its remaining claim that the Respondent Armet had failed to register as required by law pursuant to an Agreed Judgment Order on December 1, 1998, thus ending the first stage of this litigation. Pet. App. 30. Petitioner filed its Notice of Appeal on December 24, 1998.

On May 19, 2000, the Appellate Court of Illinois, First District, Sixth Division, entered its decision finding that the decisions of this Court in *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988)("*Riley*"); *Sec'y of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947 (1984)("*Munson*"); and *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) ("*Schaumburg*"), mandated dismissal of the Complaint. Pet. App. 19.

Petitioner appealed to the Illinois Supreme Court which affirmed the Appellate Court's ruling. In its November 21, 2001, opinion, delivered by Justice Mary Ann McMorrow, the Illinois Supreme Court, in reliance on this Court's decision in *Riley* and its predecessors, ruled that the First Amendment protects VietNow's telephone solicitations as fully protected speech because "solicitation is characteristically intertwined with informative and perhaps persuasive speech." *Ryan*, 763 N.E.2d at 294.

The Court noted that the 85% of donations received retained by Respondents was not solely the "fee" for making the solicitations. Rather, this percentage paid for expenses to create and

maintain a statewide appeal, produce more than 2,000 copies of a magazine aimed at raising awareness about VietNow and its cause, and maintain a toll-free number providing information about the charity. *Id.* at 297.

Justice McMorrow observed that beyond these tangible services, "charities often reap non-monetary benefits by having their message disbursed by the solicitation process. In fact . . . the solicitation may be so intertwined with informative and persuasive speech that the solicitation itself is part of the charitable purpose." *Id.* at 298.

Compelled disclosure of Respondents' compensation is tantamount to silencing VietNow's appeal. Respondents would be hard-pressed to keep prospective donors on the phone after disclosing how the funds were distributed. The Court wrote, " ' . . . the disclosure will be the last words spoken as the donor hangs up the phone.' " *Id.* at 299.

The Court concluded that ruling in favor of Petitioner would chill the activities of all fundraisers: "[They] would be at a constant risk of incurring litigation costs, as well as civil and criminal penalties, which could produce a substantial chilling effect on protected speech." *Id.* The Court also noted that "there is no allegation that [Respondents] made affirmative misstatements to potential donors." *Id.* at 291.

Petitioner applied for a writ of *certiorari* from this Court which was granted on November 4, 2002.

SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution protects the right of a charity to raise funds to support its causes unfettered by improper government regulation. Petitioner's suit and the remedies it seeks violate this right.

Professional fundraisers which solicit support from the public on behalf of charities are heavily regulated by the State of Illinois. The Solicitation for Charity Act, 225 Ill. Comp. Stat. 460 *et seq.* (2000), (the "Act") imposes a litany of requirements on professional fundraisers. The Illinois General Assembly designed the Act to prevent fraud without infringing on protected speech.

Professional fundraisers must register. Registrants pay a fee and post a $10,000 bond. Professional fundraisers must file financial reports. The Act bars convicted felons from registration as professional fundraisers. The Act bars any person convicted of a misdemeanor involving fiscal wrongdoing, breach of fiduciary duty, or violation of the Act, from registration as a professional fundraiser for a period of five years from the date of conviction. 225 Ill. Comp. Stat. 460/6 (2000).

The Act also regulates contracts between professional fundraisers and charities. The contract must contain an estimated, reasonable budget disclosing both the targeted amount of funds to be raised, as well as the projected expenses, and must delineate all projected costs. The contract must grant the charity the right to approve in advance the content and form of all solicitation materials. A professional fundraiser who materially fails to comply with these provisions may not collect or retain any compensation or fee. 225 Ill. Comp. Stat. 460/7 (2000).

Individual solicitors working for professional fundraising businesses also must register.

No individual convicted of a felony may register as a professional solicitor. No individual convicted of a misdemeanor involving fiscal wrongdoing, breach of duty or violation of the Act may act as a solicitor. 225 Ill. Comp. Stat. 460/8 (2000).

The Act also requires fundraisers to make disclosures during verbal or written solicitations. Professional fundraisers must promptly inform consumers by a statement in an oral communication and by a clear and unambiguous disclosure in a written appeal that ". . .the solicitation is being made by a paid professional fundraiser. The fundraiser, solicitor, and materials used shall also provide the professional fundraiser's name and a statement that contracts and reports regarding the charity are on file with the Illinois Attorney General. . ." Upon request by a prospective donor, a professional fundraiser must disclose its fee and the net amount or the percentage of each contribution to be received by the charitable organization. 225 Ill. Comp. Stat. 460/17 (2000).

The Act prohibits misrepresentations in solicitations. It specifically defines what constitutes a "misrepresentation." Prohibited misrepresentations include failure to disclose professional status and making materially false statements regarding the purpose for which the contribution will be used. Failure to provide a truthful answer to a request as to the estimated percentage or actual percentage, if known, of the amount the charity will receive and the amount the professional fund will receive is also a misrepresentation. The Act provides it is a misrepresentation for the fundraiser to represent itself to be a member of the charity or a volunteer. Additionally, any person soliciting for a charity who makes an intentional misrepresentation is subject to punitive damages. 225 Ill. Comp. Stat. 460/18 (2000).

The Act requires Petitioner to use the fees and penalties collected through the Act to

provide the public with information and for enforcement. 225 Ill. Comp. Stat. 460/22 (2000).

Petitioner alleges only one substantive violation of the Act, i.e. that the Respondent Armet failed to register pursuant to 225 Ill. Comp. Stat. 460/6, J.A. 8. Petitioner withdrew this claim. Petitioner made no other allegations of violation of the Act. The remaining allegations in the Complaint are that Respondents' compensation is excessive and Respondents' failure to "advise" potential donors of the nature and extent of such compensation constitutes fraud.

The solicitation of support by or on behalf of a charity is a form of fully protected speech. *Riley*, 487 U.S. at 789; *Munson,* 447 U.S. at 967; *Schaumburg***,** 444 U.S. at 632. Petitioner alleges Respondents committed fraud by failing to "advise" each donor during each appeal as to the percentage of each dollar received which would be spent on fundraising costs. J.A. 10. Thus, Petitioner attempts to do indirectly that which this Court has ruled may not be done directly. *Riley, supra.* The Constitution is not so easily evaded.

Petitioner's averment of fraud is based on the premise that the percentage of donations spent on fundraising is material to whether a solicitation is fraudulent. This Court has rejected this premise. ". . .[T]here is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent . . ." *Riley*, 487 U.S. at 792, citing *Munson*, 467 U.S. at 950; *Schaumburg*, 444 U.S. at 637. Respondents readily acknowledge that fraudulent words are not protected by the First Amendment. This Court has made clear, however, that Petitioner may not define "fraud" solely based on the cost of fundraising.

Petitioner's approach creates even graver concerns than the government actions reviewed by this Court in *Riley*, *Munson*, and *Schaumburg*. No standard limits Petitioner's discretion (and other prosecutors). Charities have no way of knowing when costs are "excessive" thus triggering

the duty to disclose such costs to potential donors on pain of being sued for fraud. Respondents, further, had no fair warning that Petitioner would compel this speech. Unless a charity is willing to risk prosecution, and few would, a charity would be required to make the disclosure of fundraising cost. Whether the Petitioner would require the percentage for each campaign, or a charity's overall record, is unclear. Neither figure accurately measures the worth of the solicitation to the charity.

Petitioner contends that the payment of 15% of funds raised to VietNow is a "trifling amount," but provides no opinion as to what percentage is "reasonable".[1] This decision is left to the unguided discretion of any prosecutor. It is entirely feasible that the prosecutor in Springfield may disagree with the prosecutor in Peoria regarding the demarcation between "reasonable" and "excessive." A charity's only recourse from this "patchwork quilt" of prosecutions would be to abstain from soliciting support. Charities need uniform, consistent, and specific advance notice of what is prohibited, or they may remain silent to avoid prosecution.[2]

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[1]Apparently, however, 17% is not a "trifling amount." Petitioner declined to bring a fraud action when asked about a charity ball held by the Governor of Illinois in 2001 even though 17% of the money raised went to charities. *Governor's Charity Ball Gave Just 17 Pct. of Funds to Needy,* St. Louis Post-Dispatch, Sept. 11, 2001, at B3. Petitioner saw no reason to investigate, though it seems highly unlikely that attendees were informed that only 17% of the proceeds would go to charitable uses. ("The amount of money we're talking about that was spent on overhead expenses and vendors . . . given the nature of the event, doesn't suggest they've run afoul of the law, which would prompt this office to do something."). *Id.* On the other hand, Floyd Perkins, counsel on behalf of the Petitioner admitted to the Circuit Court that "In a situation, 100 percent [fundraising cost] might be appropriate." Portions of the transcript from oral hearings are attached hereto as the Respondent's Appendix for the Court's convenience. These materials are a part of the trial record. ("App."). App. 10.

[2]How could a charity reconcile the potentially inconsistent opinions of fifty states' attorneys general and innumerable other regulators, including, under common law, private individuals? In *Munson*, the Secretary of State of Maryland had found that the fundraising costs of thirteen charities (out of sixteen applicants) were reasonable even though they exceeded the statutory limit of 25 percent, including five charities with fundraising costs of 80 to 85 percent.

It is no answer to the lack of a standard that charities may contest fraud prosecutions and have their day in court to rebut allegations of "fraud." *See*, *e.g.*, *Riley*, 487 U.S. at 793-794. The right to contest a charge is neither a substitute for the fair warning required by the First and Fourteenth Amendments nor does it alleviate the "chill" caused by fear of prosecution and the expense of litigation.

Petitioner ignores the fact that charities may reap important non-monetary benefits from solicitations even if they have high costs. *Riley*, 487 U.S. at 798. Many factors can affect a charity's success in fundraising including but not limited to: the popularity of its cause, its message, its name recognition, whether the campaign is to past donors or to prospects, labor costs, postage etc. All of these factors affect the cost of that solicitation to the organization, but are unrelated to whether the solicitation is fraudulent.[3] Petitioner disregards all the myriad benefits which a charity derives from its appeals besides monetary return, *e.g.* heightened name recognition, public education, and/or advocacy for a cause. *Riley*, 487 U.S. at 798; *Munson*, 467 U.S. at 963; *Schaumburg*, 444 U.S. at 635.

Munson, 467 U.S. at 967 n.15. A charity's only solution to this dilemma is silence. There is also disagreement in the industry as to what costs actually determine this percentage. One expert noted "There is no uniform method for measuring fund-raising expenses. Indeed there is disagreement within the nonprofit field over the definition of fundraising, including when to allocate costs between program and fund-raising activities." Bruce R. Hopkins "A Struggle for Balance," *Advancing Philanthropy*, Fall 1995, 26-31.

[3]For example, a series of calls to a potential donor who does not know about the organization is likely to be much more expensive to the organization, based on percentages, than calls to renew prior donors' support but is no more likely to be fraudulent. Bruce R. Hopkins, *The Law of Fundraising* 90 (3d ed. 2002) ("Hopkins"). Donor acquisition campaigns generally cost a charity more money than they earn. James M. Greenfield, *The Nonprofit Handbook: Fund Raising* 259 (2d ed. 1997). Charities may choose to absorb losses because of the nonmonetary benefits of these campaigns.

Compelling Respondents to include this information in their solicitations necessarily changes the content of VietNow's message and is therefore content-based. *Riley*, 487 U.S. at 795. As a content-based restriction on fully protected speech, the disclosure is subject to the highest level of scrutiny by this Court. It must be narrowly tailored to further a compelling government purpose by the least restrictive means available. Donor education, disclosure of fees upon request, and prosecution of fraud are less restrictive means with fewer opportunities for standardless regulation which chills free speech. These are already required by Illinois law.

Nor can Petitioner circumvent the will of the Illinois General Assembly by creating a common law requirement not found in, and indeed at odds with, the legislation regulating this aspect of charitable fundraising. Petitioner's attempt to compel speech cannot satisfy strict scrutiny for it is not a "fine tool" with delicate impact on protected speech, but, a prophylactic and inaccurate measure of fraud with blunt impact which will silence legitimate speech and deter potential speakers.

For these reasons, this Court should affirm the judgment of the Illinois Supreme Court.

ARGUMENT

Petitioner neither alleges that Respondents made any affirmative misrepresentation in their solicitation calls nor that Respondents failed to disclose any fact required by the Act. Petitioner alleges Respondents defrauded the public by failing to "advise" donors during each telephone call that their fees were, in Petitioner's opinion, "excessive in amount" expressed as a percentage of total funds raised for the charity. J.A. 9-10.[4] By prosecuting as "fraud" the failure to affirmatively disclose "excessive fees" during an appeal to a potential donor, Petitioner forces all future speakers to disclose their fundraising costs, regardless of the level of those costs, or risk similar prosecution. In the absence of any standard as to "excessiveness", the only sure way to avoid prosecution for "fraud" is to make this disclosure. Petitioner's approach would create in practice precisely the compelled speech requirement rejected by this Court in *Riley*.

I. Petitioner's Complaint for Common Law Fraud Creates an Affirmative Disclosure Requirement.

Petitioner's suit is based on "excessive" fundraising costs. Petitioner does not argue that fundraising costs which are "reasonable" are required to be disclosed. All allegations are predicated on the erroneous assumption that high fundraising costs indicate fraud.

A. The Complaint and Amendments are Based on Allegedly Excessive Fees.

Petitioner first filed suit against Respondents alleging violation the Act, common law fraud, and breach of fiduciary duty. J.A. 1. The Complaint alleges that one of Respondents failed to register under the Act (J.A. 7) but does not allege that Respondents failed to provide

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[4]Petitioner's Pleadings and statements of counsel before the Circuit Court clearly show that the "percentage" is the sole measure it used to determine to file this suit, e.g., "Material misrepresentation conjures up substantial. And when you talk about numbers, I guess you've got to do percentage. I don't know any other way that I could use substantial." App.6.

any of the information required to be disclosed by the Act, *e.g.*, to truthfully provide information about their fees if asked by a donor. Petitioner twice amended the Complaint to add claims of fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 501/1 et seq. (1996), and § 2 of the Illinois Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/2 (1996). J.A. 83, 101.

It is clear that the gravamen of the Complaint can be reduced to the allegation that VietNow paid "too much" for Respondents' services. Petitioner cannot disavow this allegation now, and "unring a bell", concerning this paternalistic judgment that VietNow must be regulated for its own benefit with regard to fundraising costs.

1. Petitioner's Complaint Alleges the Respondents' Fees Were "Excessive in Amount."

The first of Petitioner's theories of this case is set forth in the Complaint. J.A. 1. The Complaint alleges the fees charged by Respondents were "excessive in amount" such that Respondents committed fraud. *See, e.g.,* Complaint ¶¶32, 33, 35 and 38, J.A. 9-10. Petitioner also alleged that failure to disclose that "a negligible amount, or only 15%, of all funds raised would be given to Vietnow and used for its charitable purpose" constituted fraud. Complaint ¶34, J.A. 10.

Petitioner now states it makes no judgment as to the fee charged by Respondent. *See* Pet. Brief 41 *et seq*.[5] A leopard cannot so easily change its spots.

Petitioner sought the following relief: (a) surcharge Respondents for assets allegedly

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[5]Petitioner's arguments for fraud by omission cannot be considered by the Court without reference to Petitioner's ongoing and improper opinion as to VietNow and its contract, e.g. describing the benefit of the contract to VietNow as "exceedingly small" and "a trifling amount". Pet. Brief, 10 and 16.

misspent or misused and for all proceeds, fees, and salaries paid, J.A. 12.; (b) preliminary and permanent injunction against Respondents preventing them "from soliciting or holding funds for charitable purposes within the State of Illinois," J.A. 13; (c) enjoin Respondents from "continuing to act on behalf of charity for a period of years and an order requiring Respondents the forfeiture of "any compensation they have earned while in violation of § 15 of the Solicitation for Charity Act," J.A. 88; and (d) "punitive damages in an amount equal to the compensatory damages herein and at least $100,000 as to each and every Defendant," J.A. 106.

The Complaint, as variously amended, does not allege Respondents affirmatively misrepresented any fact or the percentage spent on fundraising or that Respondent failed to honestly answer consumers' questions as to fundraising costs. *Ryan*, 763 N.E.2d at 291. The Complaint does not acknowledge any non-monetary benefit VietNow received from these solicitations. Petitioner solely focuses on the percentage of total donations ultimately paid to VietNow.[6] However, Petitioner knew the other benefits VietNow was to receive. The contracts describing these non-monetary benefits are attached to the Complaint. J.A. 21 *et seq*. There is no allegation that VietNow did not receive all of the services to which it was entitled.

Although the Complaint alleges fraud, it does not allege specific dates, times of day, conversations, donors, or scripts used which were allegedly fraudulent. J.A. 1 *et seq.* It relies solely on the allegation, expressed in various ways, that fundraising costs were "excessive" as

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[6]This Court is well-aware that a charity can reap many other benefits from a solicitation besides donations. *See, e.g., Riley*, 487 U.S. at 791-792 and *infra.* at II.A. The American Institute of Certified Public Accountants also recognizes such benefits and accounts for fundraising costs by classifying some portion of this expense as program service for the organization depending on the message delivered. *Accounting for Costs of Activities of Not-For-Profit Organizations and State and Local Governmental Entities That Include Fund Raising*, AICPA Statement of Position 98-2, March 11, 1998. *See also* the predecessor document AICPA Statement of Position 87-2.

"evidence" that the level of the expenses themselves, as well as calls and other contacts with consumers, were fraudulent.

2. Petitioner's First Amendment to the Complaint Alleges Common Law Fraud.

Petitioner amended the Complaint on June 25, 1996. J.A. 83. This amendment continued to focus on the percentage of donations paid by VietNow to Respondents. Complaint ¶47A, J.A. 83 *et seq*. This amendment supplements Petitioner's argument that common law fraud requires disclosure of this percentage. J.A. 85 *et seq*.

3. Petitioner's Second Amendment to the Complaint Also Alleges "Excessive" Fees.

Petitioner amended its Complaint again on December 4, 1996. J.A. 101. The amendment renumbered paragraphs added by the earlier amendment and added additional allegations and again shows clear hostility to the fees charged by Respondents. *See, e.g.,* Complaint ¶¶70(*e.g.* "Such a charge is excessive for fundraising from a prior donor."), 71, 72, and 80. J.A. 103 *et seq.*

Petitioner attached "affidavits" to this pleading signed by donors "disclosing that they would not have given had they known the truth . . ." J.A. 104. These affidavits are the result of biased questions and were not subject to cross examination. At no time did Petitioner disclose any nonmonetary benefit VietNow could receive from a solicitation to the survey participants, despite knowing of these benefits. These affidavits prove only that the wording of a question often determines its answer.[7]

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[7]The Amicus Brief filed by the United States and the Federal Trade Commission refers to these affidavits regarding affirmative misrepresentations as to fundraising percentage and other aspects of these solicitations. e.g. "all members are volunteers" and ". . .90% or more goes to the vets." United States and FTC Br. at 4-5. Even if true, Petitioner still did not allege violations of the provisions of the Act, which might prohibit these statements as misrepresentations and require truthful answers to fundraising inquiries. The affidavits are not incorporated into the

B. The Claim of Fraud is Based on the Failure to Disclose Fundraising Costs Which Petitioner Arbitrarily Has Classified as "Excessive."

When a paid professional makes an appeal on behalf of a charity to a resident of Illinois, the law requires important disclosures be made, to-wit: that the solicitor is being paid and contracts and reports are on file with and available from the Attorney General. Professional fundraisers are required to truthfully answer any inquiry as to these costs. 225 Ill. Comp. Stat. 460/17 (2000)[8].

Illinois residents thus know that there are costs associated with fundraising and may inquire further if this fact is important to them. 225 Ill. Comp. Stat. 460/18 (2000). Thus, the General Assembly left it to donors to decide when these costs were relevant to their decision to donate.[9] Petitioner seeks to override the decision of the General Assembly and that of the donor with its own discretionary judgment as to when these costs are "excessive." This discretion creates a content-based restriction on speech.

Petitioner seeks to impose a standardless scheme with quasi-criminal enforcement leaving charities to wonder, at their peril, whether their fundraising costs are "excessive in

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Complaint or admitted as evidence and are not allegations against Respondents accepted as true for purposes of a motion to dismiss. J.A. 104.

[8]Conversely, when a charity uses its own employees these disclosures are not required. This disparate treatment may cause donors to believe that such solicitations do not have fundraising costs or that costs are lower.

[9]Even experts disagree as to the relationship between the effectiveness of a charity and its fundraising costs. *See e.g.*, "The perception on the part of the public, that [the cost of fundraising benchmark] communicates meaningful information about the management and effectiveness of the organization is seriously misleading for a number of reasons." 1 Phyllis Freedman, "Fundraising Percentages: Do they Really Matter?" *Federation Folio of the National Federation of Nonprofits*, No. 3, at 1-5 (Oct. 1997).

amount."[10] Petitioner argues that common law fraud requires Respondents (and any charity raising funds in any way) to affirmatively volunteer their costs of raising funds if such costs are "excessive." Because a charity espousing an unpopular or unusual cause will incur significantly higher fundraising costs that a "mainstream" charity, this burden will fall disproportionately on unpopular groups. Further, as noted, what is "excessive" to one prosecutor may be "reasonable" to another. Moreover, the comparative costs of fundraising vary greatly depending on a host of factors unrelated to fraud. Petitioner may not accomplish indirectly *via* threat of prosecution that which the Constitution bars Petitioner from accomplishing by statute.[11]

As in any well-constructed syllogism, Petitioner's argument flows from its premise. If

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[10]Counsel for Petitioner argued before the Circuit Court it would be able to distinguish between expenses associated with a golf outing or a dinner dance, and telemarketing expenses. App.1-5. Counsel distinguishes VietNow's fundraising expenses because "there is no economy of scale here. . . . You are really a sucker if you have given one and year – and only fifteen (15) percent of your money in fees to the charity who would give to that." App. 8. Respondents urge this Court to reject this "know-it-when-I-see-it" approach which empowers Petitioner to judge the worth of free speech. The approach advocated by Petitioner makes it impossible for Respondents and charities to predict what Petitioner will sue as fraudulent *versus* when expenses are "acceptable" because of an "economy of scale" (or otherwise).

[11]One observer of this industry hypothesized that this disclosure would be required to satisfy Petitioner:

> We invite you to send a contribution of $__ to help us start up a new organization, Charity X. If our plans go according to schedule, we will begin to help (the poor, children, etc.) on a small scale within 2 years; and at projected increases for the following three years. Your contribution and most of the money contributed during the early years will perforce be required to build a donor base sufficient to set up the staffing, construction, and programs which we will need. Up to 40% of the funds contributed in the first few years will be paid to the U.S. Government to meet the postal costs of our solicitation.

Suhrke, *What Can be Done About Fundraising "Fraud"?*, XXVI Philanthropy Monthly 11 (July 1993). As Suhrke observes: "Who would contribute to such an appeal? Clearly, very few. A donor would be an exception." *Id.* at 11.

one accepts the premise, the conclusion is inevitable. Petitioner's argument is that fraud is unprotected by the First Amendment, failure to disclose a material fact is fraud, and high fundraising costs are material to fraud. Therefore, Petitioner is justified in prosecuting Respondents for failing to affirmatively disclose the percentage of fees spent on fundraising. Petitioner's premise is mistaken. The cost of fundraising is unrelated to fraud. The First Amendment does not immunize charitable solicitations from fraud prosecutions. However, it prohibits Petitioner from predicating fraud on the failure to "volunteer" fundraising costs.

Petitioner's approach is more invidious to the First Amendment than the statute rejected by *Riley*. Here, there is no legislative restraint on the prosecutor who would have *carte blanche* to determine when the amount of money received by the charity is "trifling" and the other benefits a charity may receive from a solicitation unworthy of consideration. Only the prosecutor knows when disclosure of fundraising costs are required to avoid prosecution.

Petitioner's argument is in conflict with what the General Assembly did say in this area: fundraisers are required to truthfully answer donors' requests regarding fundraising costs and file financial reports accounting for funds received with the Attorney General. 225 Ill. Comp. Stat. 460/18(c) and 460/6 (2000). Petitioner does not allege Respondents violated these laws.

This Court in *Riley* examined compelled speech and specifically rejected it as a legitimate way to educate donors:

> The State asserts as its interest the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity. To achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored.

Riley, 487 U.S. at 798.

Petitioner argues that its case-by-case disclosure requirement will give charities adequate notice of which solicitations will be prosecuted as fraudulent. Pet. Brief 28. However, Respondents had no such notice, nor can other charities, as the common law has never compelled disclosure of the level of compensation paid to the fundraiser nor defined when costs are "excessive." Nor can there be any guarantee that Petitioner's determination of "excessive" will be consistent with that of other states' attorneys general[12], local prosecutors, private parties within Illinois, or future holders of the office of Illinois Attorney General.

Petitioner argues that future courts will adequately define when costs are so "excessive" as to require forced speech in solicitations and cure this lack of precedent. Pet. Brief, p.28.[13] This Court has rejected this "standard." In *Riley*, this Court specifically considered a standard of "reasonableness" for fundraisers' fees:

> . . .[T]he burden is placed on the fundraiser in such cases to rebut the presumption of unreasonableness.
>
> According to the State, we need not worry over this burden as standards for determining "[r]easonable fundraising fees will be judicially defined over the years." . . . Speakers, however, cannot be made to wait for "years" before being able to speak with a measure of security.

Riley, 487 U.S. at 793-94.

The arbitrary judgment of the prosecutor is no standard at all. Few cases will be

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[12] *See* n.2. The Secretary of State of Maryland found that the fundraising costs of thirteen charities (out of sixteen applicants) were reasonable even though they exceeded the statutory limit of 25%, including five charities with fundraising costs of 80 to 85%. *Munson*, 467 U.S. at 967 n.15.

[13] *E.g.,* Petitioner argues that " . . .vagueness concerns in the First Amendment context are alleviated where a law has received an authoritative judicial construction. [citation omitted]." Pet. Brief 28.

presented to a judge or jury because the vast majority of Petitioner's complaints will be settled either before litigation or without a trial. Charities would steer a wide berth around Illinois to avoid prosecution. The burden would fall most heavily on small or new organizations, or those with an unusual or unpopular message. This is exactly the type of compelled speech prohibited by the First Amendment. Indeed, this Court held the compelled disclosure of fundraising expenses

> necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful.

Riley, 487 U.S. at 799.

The disclosure would also disrupt each communication made by charity: "[T]he disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Riley*, 487 U.S. at 800; *Ryan*, 763 N.E.2d at 298-99. This Court has rejected both this motive and indirect infringement on protected rights.

II. The First Amendment Prohibits the Application of Common Law Fraud to Force Affirmative Disclosure of Compensation Paid to the Fundraiser.

This Court has rejected all portions of Petitioner's argument: first, the percentage of a donation spent on fundraising is immaterial to whether a solicitation is fraudulent; second, government may not circumvent the First Amendment through indirect means; third, the government's legitimate interest in forcing this disclosure is not directly advanced by this requirement; and fourth, any legitimate interest in this information can be furthered by means less destructive to rights protected by the First Amendment. These include Petitioner's own initiatives to inform prospective donors about fundraising costs and the donors' right to question

the fundraiser about costs.

The speech of a charity engaged in advocacy and dissemination of information is entitled to the highest protection of the First Amendment, even when it takes the form of a solicitation to contribute money to that organization. *Riley*, 487 U.S. at 791; *Munson*, 467 U.S. at 967; *Schaumburg*, 444 U.S. at 632. In *Schaumburg* the Supreme Court held that:

> . . . charitable appeals for funds . . . involve a variety of speech interests-- communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes- that are within the protection of the First Amendment.

444 U.S. at 632.

Further, a charity does not lose the protection of the First Amendment if it chooses to use the services of a compensated agent to deliver its speech. As set forth in *Riley*, it is insignificant from a constitutional standpoint that charities choose to use professional representatives to deliver their messages to potential supporters. Any commercial aspect of such solicitations is "inextricably intertwined" with fully-protected speech and, therefore, courts should "apply [the] test for fully-protected expression" to regulations of the speech of charities' professional agents. *Riley*, 487 U.S. at 796.

Thus, while the Petitioner can and does regulate the fundraising activities of VietNow and other charities, it may do so only through regulations which can withstand strict scrutiny from this Court. To withstand strict scrutiny, a statute must be narrowly tailored to further a compelling governmental interest. *Munson*, 467 U.S. at 959-60; *Schaumburg*, 444 U.S. at 636. Meeting this standard is a burden borne by the Petitioner. *See, e.g., Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 960-61. This Court has also held that the government has the ability to regulate the content of protected speech to further a compelling interest only if "it chooses the

least restrictive means to further the articulated interest." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Petitioner has failed to meet these standards.

A. The First Amendment Protects Speakers' Right to Choose Their Words or to Remain Silent.

The First Amendment protects not only speakers' rights to speak, but also their right to choose their words and their right to remain silent. This Court has ruled that just as important as the right to speak is the right not to speak, or to choose the content of one's speech. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995). In the context of charitable solicitations:

> [t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.

Riley, 487 U.S. 796-97. A law requiring disclosure of "the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity . . ." is unconstitutional. *Id.* at 795. Such disclosures were held to be content-based restrictions of speech subject to strict scrutiny. *Id.* It is irrelevant that Petitioner's action compels disclosures instead of directly silencing VietNow's speech. There is no distinction between the two in First Amendment analysis. *Id.* at 797.

Similarly, the First Amendment protects a speaker's choice of how to speak-- in this situation how a charity chooses to raise the funds needed to support its purposes. *Riley*, *Munson* and *Schaumburg*, all rejected the constitutionality of ordinances or statutes which impinged on speech based on the "excessiveness" of a fundraiser's fee. *Riley* , 487 U.S. at 789; *Munson*, 467 U.S. at 966-67; *Schaumburg*, 444 U.S. at 635-37. In *Riley*, this Court summarized the prior cases

and concluded ". . . we are unpersuaded by the State's argument that its three-tiered, percentage-based definition of 'unreasonable' passes constitutional muster." *Riley*, 487 U.S. at 789.

The Constitution presumes that the decision as to how a charity can best raise funds to further its goals is best made by the charity, not the government. *Id.* at 791. This Court held

> . . . [T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listener; free and robust debate cannot thrive if directed by the government.
> . . .
> [T[here are several legitimate reasons why a charity might reject the State's overarching measure of a fundraising drive's legitimacy–the percentage of gross receipts remitted to the charity. For example, a charity might choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars rather than the percentage of dollars remitted. Or, a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits. To illustrate, a charity may choose to engage in the advocacy or dissemination of information during a solicitation, or may seek the introduction of the charity's officers to the philanthropic community during a special event (e. g., an awards dinner). Consequently, even if the State had a valid interest in protecting charities from their own naivete or economic weakness, the Act would not be narrowly tailored to achieve it.

Id.

Nor is Respondents' speech protected at a lesser level than fully-protected speech and subject to a different standard of review with regard to forced speech. *E.g.*, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). Any commercial aspect of Respondents' speech is "inextricably intertwined" with fully-protected speech such that the Constitution provides plenary protection. *Riley*, 487 U.S. at 796.

Petitioner may not judge the "worth" of VietNow's solicitations based on fundraising costs alone nor use this measure as a substitute for proving fraud.[14]

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[14]*E.g.*, Counsel for the Petitioner before the Circuit Court argued "People know that there are cost [sic]. But eighty-five percent (85%) is ridiculous . . . ." App. 8. *Riley*, of course, rejected the notion that charities need the government to advise them regarding contracting issues: ". . .

B. Petitioner Would Impose a Content-based Restriction on Speech.

Forcing a speaker to say what the speaker would not otherwise say necessarily changes the content of that speech and is subject to exacting First Amendment scrutiny. In *Riley*, the Court held "[m]andating speech that a speaker would not otherwise make necessarily alters the content of that speech. We therefore consider the Act as a content-based regulation of speech." 487 U.S. at 794. Content-based restrictions on speech are presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

This Court has already considered a requirement that fundraisers disclose the percentage of charitable contributions collected which were actually paid to charity. *Riley*, 487 U.S. at 798. This Court rejected the disclosure as a content-based regulation of speech. 487 U.S. at 795; *see also McIntyre v. Ohio Elections Comm'ns*, 514 U.S. 334, 348-49 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Tornillo*, 418 U.S. at 257-58; *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

This Court held that no legitimate state interest justified a statute which compelled disclosure of fundraising percentage. *Riley*, 487 U.S. at 798. Alternative means exist such as public education and prosecution of actual fraud which would have less impact on protected speech. *Id.* at 800.

The Constitution protects speech from infringements arising from the common law just as it does if such infringements are based on written statutes. *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964) ("*N.Y. Times*"). It makes no difference in application of First Amendment

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[t]he state's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test." 487 U.S. at 792. Hopkins, *supra.* at n.2, shows that the nonprofit community disagrees as to what factors should be included in fundraising costs.

analysis whether speech is restricted by a pre-donation regulation or a post-donation prosecution. *Munson*, 467 U.S. at 969.

C. Application of Strict Scrutiny Shows Petitioner is Acting Unconstitutionally.

To withstand strict scrutiny, a statute must be narrowly tailored to further a strong interest which the state is entitled to protect. *Munson*, 467 U.S. at 959-60; *Schaumburg*, 444 U.S. at 636. Meeting this standard is a burden borne by the state. *See, e.g.*, *Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 960-61. Government has the ability to regulate the content of protected speech to further a compelling interest only if "it chooses the least restrictive means to further the articulated interest." *Sable Communications,* 492 U.S. at 126.

Petitioner's application of common law fraud to compel the disclosure of costs cannot withstand strict scrutiny. First, there is no legitimate government purpose advanced by the disclosure. Neither prevention of fraud nor consumer education satisfies this test. This Court has ruled that the percentage is unrelated and immaterial to common law or statutory fraud. Further, although consumer education is important, it is not a "compelling" reason which justifies infringement upon First Amendment protected speech. *Riley*, 487 U.S. at 799.

In *Riley*, the State of North Carolina asserted that the purpose of fully informing donors was advanced when attempting to justify disclosures applicable to solicitations made by professional solicitors, (i.e., the disclosures did not apply to solicitations made by volunteers or employees of a charity). The Supreme Court observed that:

> [t]he State asserts as its interest the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional solicitors goes in greater-than-actual proportion to benefit charity. To achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the

means chosen to accomplish it are unduly burdensome and not narrowly tailored. *Riley*, 487 U.S. at 798.

It is uncertain how Petitioner's disclosure could advance the prevention of fraud, especially when much more specific, non-prophylactic state and federal laws prohibit fraud and require disclosure of fundraising expenses to Petitioner and others. The Act itself already contains many disclosure requirements which educate the public without creating a contrary-to-fact impression that high fundraising costs are an indicator of fraud. *Infra.* at III.A. Nor would forced speech prevent fraud, as it is unlikely that those who would commit fraud would include a truthful disclosure in their solicitations.

The Petitioner's Complaint and amendments show Petitioner's true intention is to burden Respondents with an unfavorable disclosure such that their appeals are silenced. Other charities will be chilled by the unfettered and amorphous nature of this disclosure requirement. Because the disclosure cannot withstand scrutiny as a content-based restriction of protected speech, this Court should reject this attempt to circumvent the protections of the First Amendment.

5. There is No Nexus Between Fundraising Expenses and Common Law Fraud.

Petitioner's premise that the percentage of fees paid by a charity to its fundraiser is material to whether the solicitation is fraudulent has been repeatedly rejected by this Court: "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent. . . ." *Riley*, 487 U.S. at 793, citing *Munson*, 467 U.S. at 950. A charity has many good reasons to place more importance on other aspects of fundraising than the percentage returned to it. *Riley*, 487 U.S. at 798.

It makes no difference that a donor would be unlikely to donate if this information were

disclosed or that the information is "fact" as opposed to opinion:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we 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 recent 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.

Riley, 487 U.S. at 798. The fact that a donor would be unlikely to give when this disclosure is compelled may be Petitioner's true motive. The disclosure would effectively silence Respondents even though such a result would be unconstitutional if attempted directly. While disclosure of this fact may or may not be relevant to whether a person chooses to donate to a charity, it nonetheless is immaterial to fraud.

It is settled law that the "worth" of a charitable solicitation is not affected by the cost of making the solicitation. Such an evaluation is simplistic, improper and erroneous. This measure ignores the many benefits a charity can reap besides the percentage of funds received.[15] This

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[15]VietNow's contract with Respondents did not require it to invest any resources or personnel in its fundraising effort. J.A. 90 *et seq*. Because VietNow was organized, in part, to ". . .help increase community awareness of the problems and readjustments encountered by Vietnam veterans and his family", J.A. 16, every telephone and mail contact Respondents made potentially furthered this goal even if it did not result in a monetary donation. VietNow was held harmless of any risk that the fundraising campaign would lose money and received a $20,000 advance at the time the contract was signed plus 15% of the gross donations received. Respondents assumed all labor costs, facility rent, utility bills and creative expense. Respondents also produced an information magazine, paid for registration fees; and provided and staffed a nationwide 800 number. Petitioner made no allowance for any of these benefits in determining the percentage figure used in the Complaint. Further, Respondents bore the risk of failure and had to satisfy all these expenses prior to generating any profit. There is also no accounting for donations of nonmonetary items such as cars, clothing or furniture that may have been made based on Respondents' calls. Similarly, some donors may have chosen to include VietNow in

Court has consistently rejected the premise that the measure of percentages is related to whether a solicitation is fraudulent. This premise is simplistic and is unsound.

2. Petitioner's Argument is Not Narrowly Tailored to Prevent Fraud.

Compelled disclosure of fundraising expenses has been rejected by the Court as an overbroad, prophylactic measure to accomplish goals which may be achieved by less intrusive means. Forcing a charity to include a disclosure of the percentage of the donation spent on fundraising is not the type of "fine" tool required when government regulates speech. *See e.g. Speiser v. Randall*, 357 U.S. 513, 525 (1958).

When considering the forced disclosure of fundraising percentage in North Carolina, this Court noted that "to achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as Petitioner asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored." *Riley*, 487 U.S. at 798.

The Court noted several "more benign and narrowly tailored" ways that the North Carolina's interest could be advanced in manners less burdensome to First Amendment freedoms including publication of the forms state law requires fundraisers to file which disclose their fees,[16] and enforcement of anti-fraud laws. *Riley*, 487 U.S. at 800.

Similarly, if Petitioner or *amici* is concerned about inurement of donations to private

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their planned giving as a result of these calls or chosen to volunteer for this or other veterans organizations, e.g "Another nonmonetary goal [of fundraising] is to attract volunteers, and fundraising campaigns often accomplish this goal as a side effect of raising money." Richard Steinberg, The Economics of Fundraising, in *Taking Fundraising Seriously*, at 239-256, (Dwight F. Burlinggame and Lamont J. Hulse, eds.,1991).

[16]E.g. 225 Ill. Comp. Stat. 460/6 (2000).

parties, they should allege and prove facts supporting such allegations and not attempt to rely solely on fundraising costs as a substitute measure. High fundraising costs, alone, however, are not related to inurement, self-dealing or fraud and should not be used as a substitute measure for either tort. *United Cancer Council, Inc. v. Comm'r of Internal Revenue*, 165 F.3d 1173 (7th Cir. 1999) ("*UCC*").

Illinois donors are also free to inquire as to fundraising expenses. Petitioner could and should encourage its citizens to do so. Respondents' answers are required to be truthful. 225 Ill. Comp. Stat. 460/18 (2000). Even if it did not answer donors' requests in this area, "if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate." *Riley*, 487 U.S. at 800.

Petitioner would have the Court believe that infringement on speech is acceptable if it sues one defendant at a time. This argument is fundamentally mistaken with regard to the meaning of "narrowly tailored," which does not mean "selectively prosecuted" but, rather, "narrowly tailored" so as to have the least adverse effect on free speech rights, even the speech rights of one speaker. *Riley*, 487 U.S. at 800; *Ryan*, 763 N.E.2d at 297. Suing charities *seriatim* for violating prosecutor's varying interpretations of "excessive" casts a pall over the exercise of free speech. This is far from "narrowly tailored."

3. Petitioner's Disclosure Requirement Disproportionately Affects Small or Unpopular Charities.

The effect of Petitioner's argument would be devastating to innumerable charities, particularly charities most in need of First Amendment protection: small, weak or new charities which are more likely to have high fundraising expenses than more established groups. Fundraising costs, whether incurred by a charity internally or paid to a professional fundraiser,

vary widely depending on many factors, including many outside of a charity's control. *Riley*, 487 U.S. at 791-92; *Munson*, 467 U.S. at 961-62, 967; *Schaumburg*, 444 U.S. at 636-37 n.10.

Petitioner's theory applies to every form of fundraising. Direct mail would be particularly vulnerable to this disclosure as would a failed capital campaign or special event[17]. Forced speech with regard to an issue immaterial to fraud, further, punishes small or weak charities which are least likely to be able to survive such actions-- the very parties whose speech rights are most at risk and must be protected in a free society.

Riley held that a law requiring disclosure by professional solicitors of the percentage of funds collected in the previous twelve months that were ultimately received by the charity:

> . . . necessarily discriminates against small or unpopular charities, which must usually rely on professional solicitors. Campaigns with high cost and expenses carried out by professional solicitors must make unfavorable disclosures, with the predictable result that such solicitation will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success.

Riley, 487 U.S. at 799.

Nor does Petitioner's case-by-case singling out of particular charities or fundraisers to prosecute vitiate the effect of this disclosure on the groups most in need of First Amendment protections. "Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group*, 529 U.S. 803, 879 (2000).

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[17]"Experienced fundraisers seem to agree that direct-mail prospecting is considered successful if it breaks even." Janet S. Greenlee and Theresa P. Gordon, "The Impact of Professional Solicitors on Fundraising in Charitable Organizations", 27 *Nonprofit and Voluntary Sector Quarterly* at 284 (1998) ("Greenlee and Gordon"). What effect would this disclosure have on direct mail fundraising: "The costs of printing and mailing this letter will probably consumer your entire donation."? Charities' speech will be stifled.

In the *Playboy* decision, this Court considered a law which restricted broadcast of adult television programs. In the legislative history to the law, a sponsor specifically named Playboy as the target of the law. *Id.* at 812. The law was therefore content- based.

Petitioner's common law scheme of case-by-case prosecutions based on failure to disclose fundraising costs is identical in effect to a law intended to regulate the speech of one speaker. Petitioner continues to express hostility to Respondents based on their fundraising fees alone.[18] The attempt to create a new requirement of common law applied to Respondents alone, and heretofore unrecognized by the State or courts, is content-based for this reason.

Petitioner's argument disproportionately affects Respondents, as well as small, new or unpopular charities. This result violates the First Amendment.

4. Petitioner's Interest in Education Is Better Furthered By Narrower Means.

Numerous state and federal agencies require charities to disclose information including fundraising expenses. *Infra* at § III. A. These agencies are free to share and distribute this information as they see fit and use it to educate the public.[19] Petitioner's interest in education

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[18]The Complaint does not, however, allege the contract between VietNow and Respondents was other at "arms-length.". As noted at the Petitioner's website, it is common for professional fundraisers to be paid 80-90% of the funds received from their solicitations. http://www.ag.state.il.us/charitable/donor.html. One study noted: "One half of all professional solicitor contracts yielded less than $0.19 on the dollar," Greenlee and Gordon at 291. Is a near majority of these professionals guilty of fraud, or is it a competitive marketplace?

[19] The Petitioner educates donors regarding this topic at its website which states: "Professional fund-raisers often charge 80% to 90% of your contribution as a fee. Consider funding volunteer organizations." "Be an Informed Donor," *available at* http://www.ag.state.il.us/charitable/donor.html. It is important to note that the website does not add "these solicitations are fraudulent" or "common law requires professional fundraisers to disclose their expenses." *See also* Illinois Solicitation for Charity Act, 225 Ill. Comp. Stat. 460/22.

gives consumers too little credit and is not as weighty as represented. Donor education does not justify forced speech because "[d]onors are also undoubtedly aware that solicitations incur costs, to which a part of their donations may apply." *Riley*, 487 U.S. at 800.

These agencies are not free, however, to force speakers to educate donors at their expense simply because the agencies feel this disclosure would be more educational or effective if included in the solicitation itself. The First Amendment does not permit Petitioner to sacrifice speech for efficiency. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 430 (Thomas, J., dissenting.), *citing Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.").

This Court rejected efficiency as a justification for infringing on charitable solicitations in *Schaumburg*:

> 'Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than . . . [deciding in advance] what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.' *Schneider v. State*, *supra*, at 164.

444 U.S. at 639.

The goal of educating the public is laudable but does not justify compelled speech. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 349.

Because there are narrower means available to further the educational goals of Petitioner, including laws already enacted by the General Assembly, e.g. 225 Ill. Comp. Stat. 460/22(2000),

common law cannot be construed to require compelled disclosure of a fundraising percentage during the solicitation.

D. Petitioner Cannot Indirectly Impose a Forced Speech Requirement.

By creating a legal disclosure requirement using common law fraud, Petitioner argues for a standardless scheme of compelled speech, accomplishing what this Court has forbidden Petitioner from accomplishing directly:

> As we have often noted, "'[c]onstitutional rights would be of little value if they could be . . . indirectly denied.'" *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on Constitutional protections. *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *Harman v. Forssenius*, 380 U.S. at 540-541.

U.S. Term Limits v. Thornton, 514 U.S. 779, 829 (1995).

Petitioner's forced disclosure is exactly the type of indirect infringement this Court has forbidden in the First Amendment context in the context of charitable solicitations. This Court should reject this attempt to dress a forced speech requirement in the clothing of fraud.

1. Indirect Restrictions Impinging Upon First Amendment Protections are Unconstitutional.

The First Amendment guarantees speakers not only the freedom to choose what to say and how to say it, but also requires that laws give free speech sufficient "breathing room" such that speakers are not silenced by the threat of lawsuit or uncertainty of prosecution. *N.Y. Times,* 376 U.S. 254 at 272. Such protections and breathing room would be of little effect if they could be circumvented by shifting legal theory or changes in phrasing.

This Court examined this question in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In that case, Falwell, a public figure, sued the Hustler Magazine for libel and intentional

infliction of emotional distress based on the Petitioner's publication of a satirical cartoon featuring the Respondent. *Id.* at 48-49. Although lower courts applied the "actual malice" standard set forth in *N.Y. Times* to Falwell's libel claim, they did not apply the "actual malice" standard to Falwell's emotional distress claim. *Id.*

This Court rejected this holding. The same protections afforded speakers with regard to libel claims from public figures must apply to other types of tort liability to adequately protect free speech: "were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject." *Id.* at 54.

Application of the "actual malice" standard to the tort of intentional infliction of emotional distress is necessary with regard to public figures to give "adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56.

This breathing space is necessary to protect the First Amendment rights of Respondents and innumerable charities facing imposition of Petitioner's standardless disclosure requirement. *Riley*, and its predecessors, make clear the relative percentage spent on fundraising costs is unrelated to fraud. Accordingly, Illinois cannot sue for fraud if the fundraiser charity fails to "volunteer" the percentage when Petitioner finds it "excessive." The importance of "breathing room" increases as fundraising costs increase as smaller or unpopular charities are more likely to have high costs. *Riley*, 487 U.S. at 799. *Munson* noted the relationship between this percentage and fraud was "little more than fortuitous." 467 U.S. at 966. Because the First Amendment can not be avoided by shifting terminology, the Court should reject Petitioner's attempt.

2. Indirect Restrictions on Constitutional Rights are Forbidden in the Context of Charitable Solicitations.

Indirect restrictions on charitable solicitations are also subject to strict scrutiny under the First Amendment.

Other courts have recognized that government may not use a substitute measure to express an improper judgment regarding a charity's fundraising choices. In *UCC*, 165 F.3d at 1173, Chief Judge Richard Posner considered the argument of the Internal Revenue Service ("IRS") that a charity with high fundraising costs over a period of time should have its tax-exempt status revoked because donations inured to the benefit of the fundraiser. *Id.* at 1175. Posner noted that:

> The Service's point that has the most intuitive appeal is the high ratio of fundraising expenses, all of which went to [the fundraiser] because it was [the charity's] only fundraiser during the term of the contract, to net charitable proceeds. Of the $28- odd million that came in, $26-plus million went right back out, to [the fundraiser].

Id. at 1178.

Chief Judge Posner held, however, that "the ratio of expenses to net charitable receipts is unrelated to the issue of inurement." The IRS' argument, he continues "threatens to unsettle the charitable sector by empowering the IRS to yank a charity's tax exemption simply because the Service think its contract with it major fundraiser too one-sided in favor of the fundraiser..." *Id.* at 1179.

He concluded:

> It is hard enough for new, small, weak, or marginal charities to survive, because they are likely to have a high expense ratio, and many potential donors will be put off by that. The Tax Court's decision if sustained would make the survival of such charities even more dubious, by enveloping them in doubt about their tax exemption.
>
> We were not reassured when the government's lawyer, in response to a question from the bench as to what standard he was advocating to guide decision in this

> area, said that is was the "facts and circumstances" of each case. That is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS.

Id.

This Court has also rejected the argument that a speech requirement to be judicially defined in future years provides meaningful notice to speakers as to what conduct will be prosecuted. *Riley*, 487 U.S. at 793-94. Such a situation imposed the costs of litigation on speakers and are "in direct contravention of the First Amendment's dictates." *Id.* at 794.

Chief Judge Posner's logic applies to Petitioner's claim that the "facts and circumstances" of each case will determine when fundraising costs are so high as to be "excessive" and therefore require the onerous disclosure. Pet. 28. Currently, Petitioner argues that 15% is "trifling" because 85% is "excessive in amount," therefore a disclosure is required. J.A. 9. Charities spending 84% and less are left to wonder where "trifling" ends, leaving them unable to choose their own words without fear of prosecution.

If an Illinois charity paid a movie star a substantial amount to raise support but was unsuccessful would it commit fraud? Would charities contacting prospective donors commit fraud because those contacts were more expensive than contacting existing donors? Petitioner is the only entity with the answers to these questions. Similarly, Petitioner would favor a charity with lower fundraising costs over other groups even if that organization had high salaries, travel expenses or entertainment budget.

Because there is no real standard governing Petitioner's discretion, no charity could raise funds without some risk of prosecution and resulting chill on free speech.

III. Less Intrusive Means Will Accomplish Petitioner's Legitimate Goals.

Although fundraising expenses are unrelated to fraud, Petitioner has many tools to advance legitimate goals. First, Petitioner may educate the public regarding issues it considers to be important with regard to charitable fundraising. Second, Petitioner may continue to enforce the many filing and disclosure requirements found in the Act. Finally, Petitioner can sue those who make affirmative misrepresentations in violation of the Act.

A. Disclosure to the Government and Education of the Public Are Both Less Intrusive Available Means.

Educating potential donors is a worthy goal which can be advanced by Petitioner. *Riley*, 487 U.S. at 800. The General Assembly and other government agencies have answered this call and provide Petitioner means with less impact on free speech than compelled disclosure.[20]

Government requires extensive disclosures of charities. The IRS requires charities to file annually a six-page Form 990 (Return of Organization Exempt from Income Tax), a six-page Schedule "A" to Form 990 specifically designed for charities, and a list of major donors. As part of the Form 990, charities are required to provide information about their fundraising costs.[21]

Almost all of states and many localities require charities and professional fundraisers to register and file regular reports on activities and finances, particularly fundraising costs. These jurisdictions generally require charities to report information above and beyond the information required on Form 990, as well as requiring fundraisers to provide extensive information. The Act is representative of charitable solicitation laws passed by nearly every state.

The Illinois General Assembly has specifically directed Petitioner educate the public

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[20]Counsel on behalf of Petitioner admitted to the Circuit Court that "There's no doubt that public information is really one of the keys to this process." App.10.

[21]*See* IRS Form 990, Part II (requiring a breakdown of fundraising costs and information about "joint costs" for combined educational and fundraising campaigns).

concerning solicitation issues appropriating funds for this purpose.[22]

Each charity that solicits contributions from persons in Illinois is required to file annually with the Attorney General a copy of its IRS Form 990, an Illinois Charitable Organization Annual Report (Form AG990-IL), an Individual Fundraising Campaign report (Form IFC) for each campaign in which the charity used a paid professional fundraiser, and audited financial statements if either the charity's gross contributions for the year exceeded $150,000 or it used a paid professional fundraiser that raised in excess of $25,000. 225 Ill. Comp. Stat. 460/4 (2000); filing requirements are listed at www.ag.state.il.us/charitable/require.htm.

Professional fundraisers are required to periodically file a financial report (Form PFR-02), a compensation report (Form PFR-04), an explanation of fundraising fees (Form PFR-05), and a Form IFC for each fundraising campaign conducted. 225 Ill. Comp. Stat. 460/6 (2000). They are also required to annually file a registration statement (Form PFR-01), a list of charities and contracts (Form PFR-06), a copy of each fundraising contract, and a bond. 225 Ill. Comp. Stat. 460/7 (2000).

Petitioner, in fact, appears to have based its Complaint primarily on information from filings that Respondents made. *See* J.A. 21-35 (1984 and 1988 contracts between respondent Telemarketing Associates, Inc. and VietNow), 41-82 (financial reports filed by respondent Telemarketing Associates, Inc.), 90-100 (1992 contract between respondent Telemarketing

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[22] "All fees and penalties collected by the Attorney General pursuant to this Act shall be paid and deposited into the Illinois Charity Bureau Fund in the State Treasury. Moneys in the Fund shall be appropriated to the Attorney General for charitable trust enforcement purposes as an addition to other appropriated funds and be used by the Attorney General to provide the public with information concerning charitable trusts and organizations and for charitable trust enforcement activities." 225 Ill. Comp. Stat. 460/22 (2000).

Associates, Inc. and VietNow).

Failure to provide the required reports can lead to severe penalties. The IRS late filing penalties accumulate at a rate of $20 per day, increased to $100 per day for charities with over $1 million in annual gross receipts. 26 U.S.C. § 6652(c)(1)(A) (2002). The states can impose fines, require professional fundraisers to forfeit any compensation they have received, seek injunctive relief to prevent a charity or fundraiser that has not filed the required reports or registered from soliciting in their state, and even file criminal charges. *See, e.g.*, 225 Ill. Comp. Stat. 460/2(I) (civil penalties; injunctive relief), 460/6(g) & (h) (criminal penalties; forfeiture of compensation), 460/7 (g) & (h) (late penalties; injunctive relief; forfeiture of compensation), 460/9(g) (punitive damages; injunctive relief), 460/9(h) (forfeiture of compensation) (2002).

Both government and private parties make the information collected available to the public. All of the information reported to the IRS, except for the names, addresses and other identifying information for the major donors, is available to the public from the IRS on request. 26 U.S.C. § 6104(a)(1), (b) (2002); 26 C.F.R. § 301.6104(b)-1 (2002). All charities are also required by law to provide copies of Form 990 and schedules, except for information about major donors, to any person who requests a copy. 26 U.S.C. § 6104(d) (2002).

Information filed with a state is generally available on request from the appropriate agency, usually either the Attorney General or the Secretary of State. In Illinois, any reports and documents filed with the Attorney General are open to public inspection. 225 Ill. Comp. Stat. 460/2(f) (2000). Petitioner's office also provides copies of reports it receives for a nominal fee. *See* www.ag.state.il.us/charitable/aboutcharitydb.htm (stating that copies of reports are available for a 15 cent per page fee).

Many states have placed or are in the process of placing the reports they receive from

charities and professional fundraisers on the Internet. As noted by Petitioner, a copy of VietNow's 2000 IRS Form 990 is available on the California Attorney General's web site, along with VietNow's audited financial statement for the same year. Pet. for Writ of Cert. 2, n.1. Both VietNow's Form 990 and its audited financial statement show the amount of contributions received by VietNow which are spent on fundraising costs. 2000 VietNow Form 990, Part I, line 15 & Part II, column (D); VietNow June 30, 2001 Financial Statement 3, 7. The Illinois Attorney General is also currently in the process of establishing an Internet accessible database to provide the public with access to the reports it receives.[23]

Finally, many private organizations operate to encourage transparency with regard to the finances of charities. Media also scrutinize charitable fundraising rating organizations and educating the public, in part, on fundraising expenses.[24]

All of these requirements and groups further donor education and are less intrusive than compelled speech. None of the above interfere with a speaker's right to choose his or her own words or remain silent. None of the above sacrifice speech for more efficient public education. Because these less intrusive means exist to educate the public concerning charitable fundraising issues, the forced disclosure is improper.

B. Government Can and Does Enforce Fraud Laws to Protect Consumers.

Petitioner would require disclosure of a fact that this Court has ruled is immaterial to the issue of fraud, *Riley*, 487 U.S. at 793, and of which donors are "undoubtedly aware." *Id.* at 799,

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[23]*See* www.ag.state.il.us/charitable/charity.html.

[24]*See, e.g.,* "Charity Navigator", *available at* http://www.charitynavigator.org/index.cfm/bay/content.press.htm, containing links to more than twenty recent examples of coverage in television, print and electronic media.

804. Petitioner has therefore not advanced a valid or cognizable claim for fraud, but rather dressed compelled speech, i.e. words that Petitioner thinks Respondents should say, in the guise of common law fraud prosecution for what Respondents did not say.

This Court has been clear that Petitioner may enforce its fraud statutes to regulate charitable fundraising, but this holding assumes that regulators will use this power legitimately and not as a bypass to negate the First Amendment. When this Court ruled that a State may "vigorously enforce its antifraud laws . . .", *Riley*, 487 U.S. at 800, it did not add "to require this disclosure." *Id.* Such an addition would negate the opinion of the Court in that very case. This Court ruled that fundraising costs are immaterial to fraud and their disclosure could not be compelled. *Riley*, 487 U.S. at 793. Nor can Petitioner use fundraising expense as a substitute for pleading and proving fraud. *Schaumburg*, 444 U.S. at 639. "Vigorous enforcement" of fraud laws, common or otherwise, cannot mean that Petitioner can use failure to disclose immaterial facts to make a fraud case.[25]

1. Fraud Requires Misrepresentation of Material Facts.

Because Illinois law requires that fundraisers tell each donor a call is being made by a paid fundraiser, the donor realizes that there is a cost to charity associated with the call. Whether that fact is relevant is the donor's decision. If it is, the donor may ask the fundraiser about

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[25]There is no lack of cases showing government has been able to prove actual fraud in the course of charitable solicitations. *See, e.g., People v. Knippenberg,* 757 N.E. 2nd 667 (Mo. App. 2001); *United States v. Ciccone,* 219 F.3d 1078 (9th Cir. 2000); *United States v. Kinney,* 211 F.3d 13 (2d Cir. 2000); *People v. Orange County Charitable Services,* 73 Cal. App. 4th 1054 (Cal. App. Ct. 1999); *FTC v. Saja,* 1997 U.S. Dist. Lexis 17225 (D. Ariz. 1997); *People ex rel. Scott v. Gorman,* 421 N.E. 2d 228 (Ill. App. Ct. 1981); *People v. Caldwell,* 290 N.E.2d 279 (Ill. App. Ct. 1972); *People v. French*, 762 P.2d 1369 (Colo. 1988); *Telemarketing Fraud Bulletin*, National Association of Attorneys General, October 2002, "California Announces Charities Indictments", "New York Sues All-Pro Telemarketing Associates Corporation," at 1, 7.

compensation. As noted, Illinois law requires the fundraiser to answer truthfully. 225 Ill. Comp. Stat. 460/18 (2000). Nor may Petitioner substitute its judgment as to the importance of fundraising costs for that of the charity and the donor. *Riley*, 487 U.S. at 791. Fundraising costs may or may not be relevant to some donors, but they are not material to fraud, nor can or should Petitioner decide for a charity how best to speak. Fundraising efficiency alone does not measure the worth of an organization. A connection to the cause and a desire to advance it may be far more important to a prospective supporter.

Essential to the cause of action for deceit is an intent to deceive, to mislead, to convey a false impression under circumstances creating a duty to speak. *Perlman v. Time, Inc.*, 380 N.E.2d 1040, 1044 (Ill. App. Ct. 1978); *Soules v. Gen. Motors Corp.,* 402 N.E.2d 599, 601 (Ill. 1980); W. Prosser, *Torts,* § 107, at 700 (4th ed. 1971). The Illinois Supreme Court has held that the concept of fraud implies a wrongful intent, an act calculated to deceive. *Exline v. Weldon*, 311 N.E.2d 102, 105 (Ill. 1974); *Zeve v. Levy*, 226 N.E.2d 620, 623 (Ill. 1967); *Dahlke v. Hawthorne, Lane & Co.*, 222 N.E.2d 465, 467 (Ill. 1966). *See also First Nat'l Bank v. Insurance Co. of N. Am.*, 424 F.2d 312, 318 (7th Cir. 1970); *Paskas v. Illini Fed. Sav. & Loan Assoc.*, 440 N.E.2d 194, 199 (Ill. 1982); *Cokinis v. Maywood-Proviso State Bank*, 401 N.E.2d 1063, 1077 (Ill. 1980).

A fact may or may not be relevant to whether a consumer makes a donation or not, but relevancy does not necessarily make that fact material to the donation. *Riley*, 487 U.S. at 798. *Riley* specifically considered that:

> We 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 recent 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. Other facts might also be relevant such as the compensation of the highest paid employees of the organization, its travel budget or the amount ultimately spent on program service. Petitioner can no more compel disclosure of these facts than fundraising percentage as they are immaterial to fraud. Clearly, this compelled speech lacks any standard as to when the obligation to "volunteer" facts which Petitioner might consider relevant to the donor's decision ends, and the charity's right to choose its own words resumes.

Just because something may be relevant to whether the donor donates, does not mean it is material, *Riley*, 487 U.S. at 798; *McIntyre*, 514 U.S. at 352, nor that there is a duty to disclose it. For example, in *In re Witt*, 583 N.E. 2d 526 (Ill. 1991), the Illinois Supreme Court ruled that a judge had no duty to disclose a legitimate loan, and, therefore, failure to make that disclosure was not fraud. *Id.* at 533.

Nor is there a duty to disclose any fact immaterial to fraud during a fundraising telephone call. This duty is not found in the Act, nor can it be supported by common law. The Act, further, contains restrictions on this very topic and does not explicitly or implicitly set forth this duty. If the duty exists at common law, further, the statutory requirement to provide this information upon request would be meaningless. 225 Ill. Comp. Stat. 460/17(b). Fundraising expense alone has no "nexus" with fraud and is not a material measure of fraud as a matter of law. *Riley* at 793.

2. Failing to Disclose a Fact the Consumer "Undoubtedly Knows" is Not Fraud.

The common law requires that a person be harmed or prejudiced for fraud to incur. *E.g.*, *People v. Brown,* 72 N.E.2d 859, 861-62 (Ill. 1947); *People v. Mau*, 36 N.E.2d 235, 237-39 (Ill. 1941). The Criminal Code of 1961 (Ill. Rev. Stat. 1975, ch. 38, par. 17 -- 3), defines fraud as:

> (b) An intent to defraud means an intention to cause another to assume, create, transfer, alter or terminate any right, obligation or power with reference to any person or property.
>
> (c) A document apparently capable of defrauding another includes, but is not limited to, one by which any right, obligation or power with reference to any person or property may be created, transferred, altered or terminated.

As set forth in *Riley*, high fundraising costs do not necessarily mean that any donor has been harmed. First, this presumes that the charity receives no benefit from funds it does not directly receive. *Supra.* II.A. This is not the case because there are many ways a charity could benefit, and decide to solicit, besides the amount of money returned by a campaign. *Riley*, 487 U.S. at 798. One easy example of a nonmonetary benefit is the persuasion of individuals contacted to refrain from drinking and driving, or polluting our planet.

Second, donors are undoubtedly aware that "solicitations incur costs, to which part of their donation might apply." *Riley*, 487 U.S. at 799. The Petitioner knows VietNow's costs and may educate the public concerning them. *Supra.* at III.A. Failing to disclose something which the donor already "undoubtedly" knows is not material or misleading nor could the donor be harmed by such an omission.[26]

IV. Respondents' Fourteenth Amendment Right to Due Process Would Have Been Violated Had the Quasi-Criminal Action for Fraud Proceeded.

Petitioner also failed to give Respondents fair warning that their conduct could result in the imposition of punitive measures in violation of fundamental due process under the Fourteenth Amendment.

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[26]". . . Since donors are assuredly aware that a portion of their donations may go to solicitation costs . . . it is not misleading in the great mass of cases for a professional solicitor to request donations 'for' a specific charity without announcing his professional status." *Riley*, 487 U.S. at 804 (Scalia, J., dissenting.)

Respondents had no reason to know their conduct could subject them to quasi-criminal liability. Illinois failed to provide any notice that such conduct could subject Respondents to penal sanctions. Respondents' conduct conformed to the requirements of Illinois statutes regulating solicitations by professional fundraisers and, moreover, occurred within the sphere of First Amendment protections announced in *Schaumburg, Munson* and *Riley*.

The Due Process Clause of the Fourteenth Amendment requires states to provide fair notice of the types of conduct which will subject the actor to criminal or quasi-criminal sanctions. *See United States v. Lanier*, 520 U.S. 259 (1997). Where, as here, fully protected First Amendment interests are subject to state control, strict standards should be applied to constructions of laws "having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959). Especially where First Amendment values are at stake, special care must be taken to require the State to provide fair warning of the types of conduct which will subject the actor to punitive sanctions. *Marks v. United States*, 430 U.S. 188, 196 (1977); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976). As demonstrated below, the sanctions Petitioner sought were akin to criminal penalties; thus, Petitioner must afford Respondents fair notice of the types of conduct which will be punished with penal sanctions.

Respondents could not have been forewarned their conduct would subject them to quasi-criminal sanctions. Indeed, Respondents relied upon the decisions of this Court in *Schaumburg*, *Munson*, and *Riley*, as well as Illinois statutes, to assure them that they were acting entirely within the law. Therefore, permitting the underlying action to proceed would deprive Respondents of fundamental due process protections under the Fourteenth Amendment.

A. Respondents Did Not Have Reason to Believe Their Conduct Would Subject Them to Quasi-Criminal Sanctions; There Was No "Fair Warning" in Violation of the Fourteenth Amendment.

Because Petitioner seeks punitive sanctions, akin to criminal penalties, Respondents were entitled to fair warning that their conduct could subject them to criminal sanctions.[27] Such notice is fundamental to the preservation of constitutional liberty in an ordered society. *See, e.g., Marks v. United States*, 430 U.S. 188 (1977).

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *Id.* at 58, quoting *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939).

Respondents believed their conduct was within the scope of First Amendment protections afforded professional fundraisers in *Schaumburg*, *Munson*, and *Riley*. In particular, *Riley* invalidated a North Carolina statute which mandated disclosure by a professional fund-raiser of his fees in the context of a solicitation on behalf of a charity. Respondents also relied on

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[27] By seeking the forfeiture of Respondents' compensation and a surcharge "for all proceeds, fees, and salaries paid," Petitioner seeks "payment to a sovereign as punishment for some offense." *Browning-Ferris Indus. of Vt, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 265 (1989). Petitioner's purpose in seeking the forfeiture of Respondents' compensation is neither compensatory nor remedial but punitive. These remedies are meant to deter future conduct and act as retribution for the offense which Petitioner alleges to have been committed. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (these are the "traditional aims of punishment"). Petitioner also seeks punitive damages against Respondents. J.A. 106. This form of sanction "serve[s] punitive goals." *See Day v. Woodworth*, 13 How. 363, 371 (1852).

Illinois statutes, *supra* at III.A., to conclude their solicitations were lawful.

The Complaint predicates its allegations of "fraud" on Respondents' retention of 85% of funds raised for fees and expenses.[28] Petitioner ignored *Munson's* holding, *i.e.*, that no nexus exists between the amount the fundraiser retains and the likelihood of fraud and, therefore, a state may not restrict the amount of money a charity may spend on fund raising activities which would otherwise operate as "a direct restriction on protected First Amendment activity." 467 U.S. at 967. Petitioner similarly disregards the *Riley* maxim that "the State's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test." 487 U.S. at 792.

Petitioner even ignores its own Solicitation for Charity Act which mandates disclosure of the amount a fund raiser retains only if requested by the person solicited.[29] The Complaint does not allege that Respondents failed to comply with this statute.

Petitioner asserts in paragraphs 37 and 38 of the Complaint that "...Defendants did not advise the donors that the campaign was being conducted pursuant to private for-profit contracts whereunder a negligible amount, or only 15%, of all funds raised would be given to VietNow and used for its charitable purpose . . . . The totality of the foregoing, including the numerous

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[28] *See, e.g.*, J.A. 9: "...in charging the fee amounts they [Respondents] charged they breached their duty and defrauded the donating public."

[29] "If the professional fund raiser employs or uses a contract which provides that it will be paid or retain a certain percentage of the gross amount of each contribution or shall be paid an hourly rate for solicitation, or the contract provides the charity will receive a fixed amount or a fixed percentage of each contribution, the professional fund raiser and person soliciting shall disclose to persons being solicited the percentage amount retained or hourly rate paid to the professional fund raiser and solicitor pursuant to the contract, and the amount or the percentage to be received by the charitable organization from each contribution; if such disclosure is requested by the person solicited."225 Ill. Comp. Stat. 460/17(b) (2000).

solicitations, the similar results over several years of solicitations, the consistently high level of retention of private compensation by the Defendants and their agents, the consistently low level of overall charitable use of large amounts of donations, and the *Defendants' failure to inform the donating public of the known minimal percentage of funds donated being made available for charitable use*, establishes that a willful knowing fraud was perpetrated upon the public by Defendants." (emphasis added.) J.A. 10.

Petitioner seizes upon Respondents' alleged failure to inform potential donors that they retained 85% of the funds raised as *prima facie* evidence of fraud.[30] This assertion conflicts with this Court's holding in *Riley*, *i.e.,* that fundraisers cannot be compelled to disclose their compensation at the point of solicitation. *Riley,* 487 U.S. at 795-800.

Moreover, Petitioner ignores Section 460/17 of the Act which requires such a disclosure only if the potential donor requests such information. Additionally, Section 460/17 requires professional fundraisers to identify themselves and disclose to potential donors "that contracts and reports regarding the charity are on file with the Illinois Attorney General..." 225 Ill. Comp. Stat. 460/17 (a) (2000).[31] This disclosure affords potential donors the ability to obtain copies of fundraisers' contracts from the Illinois Attorney General which would disclose the financial

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[30]These allegations pervade Petitioner's complaint. For example, in ¶ 67K of the Complaint, Petitioner alleges: "The failure of [Respondents] to disclose that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent would be used for fund raising and other expenses, constitutes a violation of section 2 of CFDBPA [Consumer Fraud and Deceptive Business Practices Act]..." (J.A. 87). In ¶ 67L of the Complaint, Petitioner alleges: "the failure of [Respondents] and their agent solicitors to disclose that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent or more would be used for fund raising and other expenses also constitutes a violation of section 2 of the Uniform Deceptive Trade Practices Act..." *Id.*

[31]Petitioner does not allege that Respondents failed to provide this disclosure.

arrangements between the fundraiser and its clients.

Respondents reasonably relied on *Riley* and Section 460/17 as guides to permissible conduct. Conversely, Petitioner completely failed to provide fair warning that by not disclosing to potential donors the amount retained (when such information was not requested by potential donors and, in any event, was readily available, if requested, from the Illinois Attorney General), Respondents had committed "fraud."

B. The Doctrine of Fair Notice Applies to Judicial Constructions.

This Court has held that retroactive application of law imposing criminal liability without fair warning will not be upheld. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Court reversed trespass convictions based on an unforseen construction of a trespass statute. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids...If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54. *See also*, *Rabe v. Washington*, 405 U.S. 313 (1972) (conviction under a state obscenity law reversed because it resulted from unforeseeable judicial construction.); *Douglas v. Buder*, 412 U.S. 430 (1973) (court's construction of "arrest" to include a traffic ticket in connection with probation revocation was unforeseeable and violated due process.) *See generally Rogers v. Tennessee*, 532 U.S. 451 (2001).

"The fundamental principle that the 'required criminal law must have existed when the conduct in issue occurred'. . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'

it must not be given retroactive effect." *Bouie v. City of Columbia*, 378 U.S. at 354.

In his dissent in *Rogers v. Tennessee*, Justice Scalia stated:

> The 'fair warning' to which *Bouie* and subsequent cases referred was not 'fair warning' that the law might be changed," but fair warning of *what constituted the crime at the time of the offense*...It expressed disapproval of "*judicial construction* of a criminal statute" that is "unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue.* It thus implicitly approved only judicial construction that was an expected or defensible application of prior cases interpreting the statute. Extending this principle from statutory crimes to common-law crimes would result in the approval of retroactive holdings that accord with prior cases expounding the common law, and the disapproval of retroactive holdings that clearly depart from prior cases expounding the common law. According to *Bouie*, not just 'unexpected and indefensible' retroactive changes in the common law of crimes are bad, but *all* retroactive changes.

532 U. S. at 470.

Respondents' fundraising practices were guided by the standards of *Schaumburg*, *Munson* and *Riley*, *i.e.,* the state could not require charitable solicitors to devote a specific percentage of funds raised for charitable purposes; states could not prescribe a limit as to the percentage of funds collected which the fundraiser could retain; states could not dictate the "reasonableness" of the fee to be charged; and states could not compel charities to disclose at the point of solicitation the percentage of contributions collected during a period which was distributed to the charity.

Petitioner attempts to characterize such practices, which heretofore are consistent with this Court's established precedents, as tantamount to criminal violations without fair warning to Respondents that such conduct could be characterized as quasi-crimes. The Fourteenth Amendment proscribes this action by Petitioner.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

ERROL COPILEVITZ **WILLIAM E. RANEY**
MACKENZIE CANTER, III **MARK DISKIN**

COPILEVITZ & CANTER, LLC
423 W. 8th Street , Suite 400
Kansas City, Missouri 64105
(816)472-9000
Attorneys for Respondents