No. 01-1806

In the
Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* LISA MADIGAN, 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

REPLY BRIEF FOR PETITIONER

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I. Introduction

Nothing in the arguments of Respondents and the *amici* supporting them justifies the conclusion that the First Amendment categorically precludes a State from pursuing a fraud action against a professional fundraiser who solicits money by representing that it will be used for specific charitable purposes but keeps the vast majority of all donations. Respondents essentially ignore the Court's repeated statements that individual fraud actions are a valid means for government to protect its citizens from charitable solicitation fraud. Instead, in an apparent attempt to bring Illinois' claims within the reach of the Court's holdings in *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Joseph A. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988), Respondents have misdescribed both those holdings and Illinois' claims.

The Court's precedents establish that a State may not prohibit all appeals for charitable contributions *solely* because the percentage of donations devoted to fundraising expenses exceeds some statutorily prescribed level. In *Riley* the Court further held that a State may not require all professional fundraisers to disclose what share of donations they have turned over to charity before asking for a contribution. 487 U.S. at 795-801. Clearly trying to fit the present case within those principles, Respondents assert that Illinois' fraud claim is based *exclusively* on the allegations that Respondents' fees were "excessive" and that they did not voluntarily disclose those fees to donors. That characterization is unsupportable. Illinois' complaint includes claims for actual fraud and alleges that Respondents told donors their contributions would be used to provide specific forms of assistance to needy veterans. *Schaumburg*, *Munson* and *Riley* do not forbid such claims, but instead affirm that they represent a valid means for a State to protect its citizens from fraudulent charitable appeals.

Respondents concede that fraudulent charitable solicitations are unprotected speech under the First Amendment. They nonetheless maintain that, for several reasons, what Illinois has alleged here does not amount to such fraud. These arguments are unconvincing. Although Respondents repeatedly assert, without elaboration, that they did not make any "affirmative misrepresentations" to donors, they make no attempt to defend the view that half-truths or other implied misrepresentations of fact for pecuniary gain are protected speech. Instead, they argue that, under this Court's holdings in *Schaumburg*, *Munson* and *Riley*, their representations to donors cannot be fraudulent because fundraising fees are "immaterial" to fraud as a matter of law and because donors knew *some* part of their donations would be used for fundraising costs. Respondents further argue that donors were not "harmed" because their contributions did support VietNow's broader charitable goals, including advocacy and the dissemination of information about veterans. The Court's precedents provide no support for these arguments. To the contrary, the Court has held that materiality is an issue to be decided on the specific facts of each particular case. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976).

Respondents' other contentions likewise have no merit. Application of the well-established definition of a "misrepresentation" to deceptive statements about how charitable donations will be spent will not silence substantial amounts of protected speech, but instead will reduce the incidence of unprotected fraudulent speech and promote the type of nondeceptive charitable appeals that enhance the public's ability to make informed choices about charitable giving. To combat the evil of fraudulent charitable solicitations, States are not constitutionally compelled to forego individual fraud actions in favor of dramatically less effective alternatives, like general public education efforts and making corrective information available in government offices or on the internet. History has amply demonstrated the potential for fraudulent

practices in one-on-one communications in which the speaker has a financial stake in the outcome. Limiting government to mere half-measures against actual fraud perpetrated in the name of charity would merely invite rampant exploitation of the public's generosity without any substantial benefit to legitimate free speech interests.

II. Illinois' Complaint Alleges That Respondents Committed Actual Fraud by Misrepresenting to Donors How Their Contributions Would Be Used.

In an apparent attempt to pound a square peg into a round hole, Respondents insist that Illinois' claims are no different than those rejected in *Schaumburg*, *Munson* and *Riley*. The statutes struck down in those cases prohibited the solicitation of donations for charity based *solely* on the percentage of donations devoted to fundraising fees or administrative expenses. Illinois' claims for common law fraud and violations of its anti-fraud statutes, by contrast, include allegations that year after year Respondents "represent[ed] to donors that the funds they contributed would go to charitable purposes," when in fact almost none of these funds were used for such purposes because, throughout the entire 13-year period, Respondents' contracts entitled them to keep 85 percent or more of every donation. J.A. 86, 102, 105. The donor affidavits attached to the complaint, which the Illinois Supreme Court acknowledged, Pet. App. 6,[1] specifically listed

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[1] Respondents wrongly contend that these affidavits were not part of Illinois' complaint or properly considered in connection with their motion to dismiss. Resp. Brf at 14, n.7. This contention—which they did not advance below and which the Illinois Supreme Court never considered—is contrary to well-established Illinois law, under which attached exhibits referred to in a pleading (as here, J.A. 104) are considered part of that pleading "for all purposes." 735 Ill. Comp. Stat. 5/2-606 (2000); see also *Pure Oil Co. v. Miller-McFarlane Drilling Co.*, 376 Ill. 486, 34 N.E.2d 854, 859 (1941); 3 R. Michael, *Illinois Practice* § 23.9, at 332-33 (1989).

some of these purposes (*e.g.*, "rehabilitation services," "job training" and "food baskets" for Vietnam War veterans who were "disabled," "injured," "homeless" or "unemployed.") J.A. 107-194. These allegations clearly bring this case within the Court's statements that States may vigorously enforce their laws against fraud. *Riley*, 487 U.S. at 795, 800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11.

Remarkably, Respondents totally ignore the complaint's allegations regarding their representations to donors about how contributions would be spent. Instead, Respondents (and many *amici* supporting them) repeatedly mischaracterize Illinois' claims as being based exclusively on allegations that Respondents' fees were "excessive," and that Respondents therefore had an affirmative duty to disclose their fees to donors. Resp. Brf at i, 1, 6-7, 10- 11, 13. Having set up this "straw man" characterization, Respondents and the *amici* supporting them proceed to knock it down, arguing that government has no business regulating whether fundraising costs are "excessive"; that such costs are a meaningless concept which cannot be measured in any reliable fashion; and that requiring all charities to volunteer their fundraising fees to donors if the government considers them excessive violates the First Amendment prohibition against forced speech. These arguments, based on a misdescription of Illinois' complaint, provide no guidance on the issue actually presented to the Court. Respondents' attempts to side-step that issue are therefore unavailing.[2]

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[2] Similarly, a claim that a person induced another to enter into a financial transaction with an *implied* misrepresentation of fact, as Illinois alleged, is one for actual fraud, not constructive fraud, as *amicus* the American Teleservices Association incorrectly contends. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 252 (1951); W. Keeton, *et al.*, *Prosser and Keeton on The Law of Torts* § 106 at 738-39 (5th ed. 1984) ("*Prosser*").

III. Respondents' Fundraising Fee Is Not Immaterial to Whether They Committed Actual Fraud.

Respondents argue that Illinois' claim against them is constitutionally deficient because, they maintain, the Court's precedents in *Schaumburg*, *Munson* and *Riley* establish that Respondents' fees are "immaterial" to whether they defrauded donors. This argument misreads the Court's precedents. The statutes challenged in *Schaumburg*, *Munson* and *Riley* prohibited charitable solicitations based solely on the percentage of donations devoted to fundraising expenses and administrative costs *without regard to what donors were told*. The claim that expenses above the statutory ceiling were "fraudulent" thus depended on the premise "that any organization using more than [the maximum allowed] percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent." *Schaumburg*, 444 U.S. at 636; see also *Munson*, 467 U.S. at 961. The flaw in this assumption, the Court held, is that there are many legitimate reasons why a *bona fide* charity might have expenses above this level, so there is no "*necessary* connection" between high fundraising or administrative costs and fraud. *Munson*, 467 U.S. at 961 (emphasis added); see also *id.* at 966; *Riley*, 487 U.S. at 794 n.8. Illinois has no quarrel with this observation.

Respondents erroneously contend, however, that the Court went further in *Riley* and, by reaffirming its "clear holding in *Munson* that there is no *nexus* between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," 487 U.S. at 793 (emphasis added), declared fundraising costs to be "immaterial" as a matter of law to whether *specific* representations made by a fundraiser are fraudulent. Resp. Brf at 25-26. As noted in Illinois' initial brief (at 43, n.32), such a reading of this passage in *Riley* ignores the issue before the Court, does violence to the language of the opinion, and disregards the

actual holdings in *Schaumburg* and *Munson*. Respondents' contention that fundraising costs are categorically immaterial to whether fraud occurred in a specific situation also defies logic, for if that were true a professional fundraiser would be exempt from fraud liability for affirmatively misstating his fee—a position even Respondents do not defend.

In a further leap of illogic, Respondents contend that because, as the Court noted in *Riley*, "[d]onors are . . . undoubtedly aware that solicitations incur costs, to which part of their donation might apply," 487 U.S. at 799, *any* share of donations devoted to fundraising expenses is immaterial. Resp. Brf at 43-44. A key purpose of the concept of materiality in the law of fraud, however, is to separate misrepresentations that are objectively substantial from those that are not. See, e.g., *TSC Indus.*, 426 U.S. at 445-49; Restatement (2d) of Torts § 538 and cmt. e (1977); *Prosser* § 108 at 753-54; J. Story, *Commentaries on Equity Jurisprudence* § 195 (1884). Thus, just because *some* differences in degree may be immaterial does not mean that *all* such differences are immaterial, and the understanding of donors that *some* of their contributions would be spent on fundraising costs does not automatically render non-fraudulent *any* level of such costs (including, as Respondents maintained below, 99 percent of all donations).

Respondents also claim that fundraising costs are unimportant to donors, or relevant only to those who specifically inquire about such costs. Resp. Brf at 41-43. These factual propositions are hardly self-evident. Indeed, the donor affidavits attached to the complaint directly refute them.[3] Moreover, affirmative representations to donors that their

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[3] Similarly, the survey summarized in the Better Business Bureau's *amicus* brief (at 8) reveals that the information most highly desired by people who give money to charity relates to a charity's finances, and in particular the percentage of donations that go to the charity's program.

contributions will be used for specific types of assistance will naturally tend to deflect any further inquiry by reassuring them that their donations will go to those purposes rather than other ends. And when people are told their donations will be used for a charitable purpose, at some point the gap between how much they reasonably understand will be used for that purpose and the truth becomes material. There is therefore no basis for the Court to erect a rule of constitutional law that fundraising and administrative costs are *per se* immaterial to all donors except those who specifically inquire about them.[4]

Finally, Respondents maintain that fundraising costs are immaterial to whether a charitable solicitation is fraudulent, and that donors who are told their contributions will be devoted to specific charitable programs are not "harmed," because the Court has recognized that such solicitations also provide non-monetary benefits, like "public education and advocacy for a cause." Resp. Brf at 8-9, 26-27 and n.15, 43-44. As *amici* Thirty-Two Commercial Fundraisers and Fundraising Consultants put it (*Amicus* Brf at 2): "[D]onors . . . were offered an opportunity to help advance VietNow's charitable mission and that is precisely what they got." This argument ignores what donors were actually told and misreads the Court's precedents.

As noted above (at 5), the justification offered for the

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[4] Illinois law does not support Respondents' contention—which they also did not raise below and the Illinois Supreme Court never considered—that Section 460/17 of Illinois' Solicitation for Charity Act, 225 Ill. Comp. Stat. 460/17 (2000), requiring professional fundraisers if specifically asked to disclose the amount of donations they respectively keep and turn over to the charity, impliedly repeals the common law of fraud to the extent it prohibits deceptive half-truths about the use of donations. See, e.g., *Acme Fireworks Corp. v. Bibb*, 6 Ill. 2d 112, 119, 126 N.E.2d 688, 691 (1955); *Reeves v. Eckles*, 77 Ill. App. 2d 408, 410, 222 N.E.2d 530, 531 (1966).

statutes in *Schaumburg*, *Munson* and *Riley* was that expenses above a certain level demonstrated that an organization soliciting donations was not a legitimate charity at all, but instead a for-profit enterprise masquerading as a charity. This premise was flawed, the Court held, because *bona fide* charities may have expenses above the statutory ceiling for a number of legitimate reasons, including that they or paid fundraisers acting on their behalf engage in public advocacy or education efforts. See, e.g., *Riley*, 487 U.S. at 798-99. The existence of such "mixed" messages as part of many charitable appeals was accordingly a proper reason to invalidate blanket rules treating *all charities* with fundraising expenses above a statutorily fixed level as illegitimate. It does not follow, however, that the mere possibility of such education or advocacy efforts, however small, makes fundraising fees *per se* immaterial to whether a *particular solicitation* is fraudulent. Illinois' complaint alleges that Respondents told donors their contributions would be used to provide specific types of assistance to needy veterans. If, as the complaint further alleges, those representations were false and misleading, they are not less so because VietNow or Respondents devoted some resources to other charitable purposes.[5]

IV. Individual Fraud Actions Like This One Represent a Narrowly Tailored Means to Prevent Fraudulent Charitable Solicitations.

The Court was correct when it stated that individual fraud actions constitute a valid means for government to prevent charitable solicitation fraud. *Riley*, 487 U.S. at 795,

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[5] Even representations to donors that contributions will be used for public education or advocacy can be fraudulent if only a token amount is devoted to those purposes. Like the merits of Illinois' claim here, such issues should be decided in the context of individual cases, not by a blanket rule that such representations can never be the subject of a fraud claim.

800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11. It should reaffirm that principle here. In opposition to this conclusion, Respondents contend that fraud claims like this one are a form of content-based regulation of speech and, as such, are valid only if they further a "compelling" governmental interest by the "least restrictive means." Resp. Brf at 24, citing *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115 (1989). But that test applies to laws that regulate the content of "constitutionally *protected* speech" in order to accomplish another objective, *Sable*, 492 U.S. at 126 (emphasis added), not laws that directly prohibit *unprotected* speech, which instead are governed by the requirement that they further a "substantial" governmental interest by "narrowly tailored means." *Riley* 487 U.S. at 792; see also *Munson*, 467 at 960-61; *Schaumburg*, 444 U.S. at 637; see generally *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 476-81 (1989).[6] The relevant inquiry, therefore, is not whether Illinois law represents the least restrictive means for preventing fraud, but whether this objective would be "achieved *less effectively* absent the [law]," and the law does not "burden substantially more speech than

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[6] Such a standard for laws that expressly prohibit unprotected speech makes practical sense. Where a law regulates *protected* speech, the least restrictive means requirement helps ensure that government's articulated goal is not actually a pretext for suppressing particular views or ideas. See *Burson v. Freeman*, 504 U.S. 191, 212-13 (1992) (Kennedy, J., concurring). That concern is absent where a law specifically targets one of the few categories of speech that may be prohibited *because of its unprotected content* and is, by its terms, limited to the source of the evil sought to be proscribed. The core requirement of "narrow tailoring" and the rule against viewpoint discrimination (see below at 18) provide ample assurance that such laws neither sweep too broadly, by prohibiting a substantial amount of protected speech, nor focus too narrowly, by singling out particular ideas for suppression.

necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (emphasis added); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, ___, 122 S. Ct. 1389, 1404 (2002).

By prohibiting factual misrepresentations for pecuniary gain, Illinois common law and anti-fraud statutes directly target unprotected speech and reach no farther than necessary to achieve that goal. They are not, like the statutes in *Schaumburg*, *Munson* and *Riley*, "aimed at something else in the hope that [they will] sweep fraud in during the process." *Munson*, 467 U.S. at 969-70. By focusing precisely only on actual fraud, such laws are, as the Court indicated, a constitutionally valid means to accomplish this goal. *Riley*, 487 U.S. at 795, 800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11.

Respondents profess to embrace the view that less restrictive means for government to combat fraudulent charitable solicitations include "prosecution for fraud." Resp. Brf at 9, 28. They never explain, however, why they believe this case does not fit within that category. And while they repeatedly assert—incorrectly—that Illinois does not allege they made any "affirmative misrepresentations," *id.* at 1, 9, they make no attempt to defend the notion that implied misrepresentations by charitable solicitors are entitled to categorical First Amendment immunity. As Illinois' opening brief demonstrates (at 15-23), that notion is indefensible.

The alternative means to prevent fraud proposed by Respondents and the *amici* supporting them—*e.g.*, greater government efforts at public education and making charities' financial information available in public offices or on the internet—cannot possibly compare in effectiveness with a law proscribing actual fraud. Such alternatives thus do not undermine the constitutionality of Illinois' common law and anti-fraud statutes as applied to deceptive charitable solicitations. Cf. *Nixon v. Shrink Missouri Government PAC*, 528

U.S. 377, 395-96 and n.7 (2000) (upholding campaign contribution limits as a means to prevent actual and apparent corruption because they "focu[s] precisely on the problem" sought to be addressed, whereas the proposed "less restrictive mechanisms" of "disclosure requirements and bribery laws" represent less effective "partial measure[s]").

Personal solicitations for an immediate charitable donation entail a well-recognized danger of fraud, especially for the most vulnerable members of the public. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 705-06 (1992) (Kennedy, J., concurring) ("requests for immediate payment of money create a strong potential for fraud or undue pressure, in part because of the lack of time for reflection"); cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (noting that in-person solicitation of accident victims by lawyers for pecuniary gain is "inherently conducive to overreaching and other forms of misconduct").[7] It is not a sufficient response to such dangers that the most astute and skeptical among us could, by researching public records or locating information available on the internet, eventually correct a false impression created by a solicitor pressing for an immediate gift or pledge of money. For large segments of the population, such cumbersome and untimely measures would be no match for unscrupulous charitable solicitors if, as Respondents advocate, they were given First Amendment immunity to obtain donations with "implied" misrepresentations about how that money will be spent. See Restatement (2d) of Torts § 540 cmt. b ("The recording acts are not intended as a protection for fraudulent liars"); *Prosser* § 108 at 752; cf. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 392 (1992) (rejecting system of regulating expression which

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[7] AARP's *amicus* brief (at 7-14) highlights the danger to many elderly citizens and other vulnerable segments of society from the essentially unregulated environment Respondents advocate.

authorizes "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). And while a substantial portion of the population now has access to the internet and many individuals could eventually figure out how to obtain information on how a charity spends its funds, the intended—and frequently successful—effect of a misrepresentation about such expenditures is often to give the listener a false sense of confidence and discourage him or her from any further inquiry.[8] The only adequate weapons against such fraud are laws specifically prohibiting it.

Respondents dispute that Illinois' laws invoked in this case give fundraisers "fair notice" of what is prohibited. Indeed, they claim that these laws are so vague as to violate the substantive due process requirement of the Fourteenth Amendment (and, presumably, that similar federal laws violate the Fifth Amendment). If that were true, however, the entire body of civil and criminal law relating to fraud and false pretenses, including mail and wire fraud, would be void. There may be hypothetical situations in which the long-established definition of a "misrepresentation" is so uncertain as to raise constitutional concerns, but this case is not one of them, and the possibility of such concerns in other cases does not warrant invalidating long-established fraud principles for all charitable solicitations. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (noting the Court's reluctance "to invalidate [a law] 'on the basis of its hypothetical application to situations not before the Court'") (quoting *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 743 (1978)); see also *id.* at 587; *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).

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[8] The survey described in the Better Business Bureau's *amicus* brief (at 8) points out, though, that close to half of donors say it is difficult to obtain financial information on charities, and that the elderly are more likely to be frustrated in their search for such information. Moreover, if such information is relevant if available elsewhere, it cannot be immaterial when the solicitation is made.

Ultimately, Respondents' position advocates a "Catch 22" under which almost no law prohibiting charitable solicitation fraud is constitutional. On the one hand they insist that "[c]harities need uniform, consistent and specific advance notice of what is prohibited," Resp. Brf at 7-8; yet on the other hand they argue that, under this Court's precedents, any "bright line" rule is unconstitutionally overbroad. This is a false choice. Existing fraud principles, combined with traditional procedural protections where First Amendment interests are implicated (see Pet'r Brf at 24-27), adequately guard against the type of unfair surprise prohibited by the Constitution.

The well-established definition of a "misrepresentation," along with the normal procedural safeguards for claims that particular speech is unlawful, likewise refute the contention that "chilling" principles (to the extent they apply, see Pet'r Brf at 36, n.26) categorically preclude claims of charitable solicitation fraud based on half-truths or other implied misrepresentations about how charitable donations will be spent. Respondents and several *amici* emphasize that there is no perfect, universally accepted formula for measuring fundraising costs as a percentage of charitable donations. This observation—which seems designed to topple the straw man argument that Illinois' claim merely challenges the reasonableness of how donations to VietNow are spent—misses the mark. Respondents allegedly misrepresented that donations would be used to provide specific forms of assistance to needy veterans, and such representations are verifiably true or false based on the share of donations actually used for such assistance regardless of any possible debate about the best way to measure fundraising costs.

Respondents alternatively suggest that they are not mind readers and cannot know with certainty whether donors will understand their representations to mean something that is factually untrue. This concern does not justify depriving

government of any ability to pursue fraud claims like the one here. See *Broadrick*, 413 U.S. at 608; *Grayned v. City of Rockford*, 408 U.S. 104, 108-11 and n.15 (1972); cf. *Finley*, 524 U.S. at 584. There is no basis for fundraisers generally, or Respondents in particular, to complain they are unable to know how the charitable donations they raise are spent. Cf. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 564 n.6 (1980); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Any objection is thus limited to a solicitor's ability to anticipate with certainty how specific representations will be understood. This objection is overstated for several reasons.

The law treats as misrepresentations only words or actions whose allegedly false meaning is "reasonable" in light of the surrounding circumstances, and it is the courts' duty to enforce this limitation. See Pet'r Brf at 17-18. Thus, the mere fact that some donors may attribute a particular meaning to a solicitor's statements is not enough for those statements to qualify as misrepresentations. Cf. *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 383 (7th Cir. 1976) (noting that, under trademark law, "isolated instances of actual confusion . . . have been held insufficient to sustain a finding of likelihood of confusion"). Further, the solicitor, as the source of the representations, has a unique ability to control his message and the meaning it conveys. Cf. *TSC Indus.*, 426 U.S. at 448 (noting that "the content of the proxy statement is within management's control"). And to the extent language is subject to some irreducible indefiniteness, see *Grayned*, 408 U.S. at 110; *Arnett v. Kennedy*, 416 U.S. 134, 161-64 (1974); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.), rules prohibiting deceptive speech are more likely to encourage accurate and nonmisleading statements by charitable solicitors than to produce silence. Cf. *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24. This difference is important because the interests of fundraisers, as "speakers,"

cannot be elevated to the point that they effectively nullify the interest of donors, as "listeners," in information that helps them make informed choices about charitable giving—a goal that laws against fraud validly promote. See *Schaumburg*, 444 U.S. at 637-38.

The significance of any chilling effect is also reduced by the nature of the expression allegedly chilled. As Illinois noted in its initial brief (at 37-38), Respondents' alleged misrepresentation involved how donations would be used, not some matter of general public concern. The potential harm to protected speech is accordingly greatly mitigated. Cf. *United States v. National Treasury Employees Union*, 513 U.S. 454, 465-66 (1995) (noting First Amendment distinction between government employee speech on private matters and matters of public importance); but cf. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 45 P.3d 243 (2002) (finding a company's statements on matters of public debate to be commercial speech subject to less protection), *cert. granted* ___ U.S. ___, 123 S. Ct. 817 (2003).[9]

Existing limitations on fraud claims further minimize the risk that substantial amounts of protected expression will be deterred. Illinois, like many other jurisdictions, requires a claim of common law or statutory fraud to be alleged with specificity, thereby reducing the likelihood that claims for non-actionable representations will proceed.[10] The materiality

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[9] The line beyond which the First Amendment would preclude liability for charitable solicitation fraud might well be higher if liability was premised on statements of fact regarding matters of public concern. See also below at n.11.

[10] See *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 419, 775 N.E.2d 951, 961 (2002); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496-97, 501, 675 N.E.2d 584, 591, 593 (1996); see also Fed. R. Civ. P. 9(b); *Clark v. Olson*,726 S.W.2d 718, (Mo. 1987). Respondents never objected to the complaint on this ground below.

element, which imposes an objective standard subject to judicial control, also limits the scope of potential claims. Where fraud is based on an allegedly deceptive half-truth, liability arises only if what is undisclosed constitutes a material fact, which is determined based on the individual circumstances of the particular case. See *TSC Industries*, 426 U.S. at 445; Restatement (2d) of Torts § 538 cmt. e; 37 C.J.S. *Fraud* §§ 19, 21, 24 (1997); 1 *A Treatise on the Law of Fraud on the Civil Side*, 474-76, 503-04 (1884) ("*Bigelow*"). Finally, the procedural requirements normally imposed under the First Amendment—*e.g.*, placing the burden of proof on the party seeking to impose liability on particular speech, allowing such claims only after the speech has occurred, and independent judicial review—further reduce the risk that legitimate speech will steer a wide berth around what is unprotected.[11]

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[11] Although *amicus* the United States argues that charitable solicitation fraud claims which include an allegation of knowing falsity avoid any possible chilling concerns, the Court should not hold in this case that such an element is required in *all* charitable solicitation fraud actions. First, Illinois clearly alleged that Respondents acted with knowledge of the falsity of their representations; Respondents never contested the constitutional sufficiency of the allegations regarding their intent; and the Illinois courts never addressed that issue. Second, the common law of misrepresentation, based on years of judicial experience, treats the defendant's state of mind as relevant to a host of issues. These include whether a statement constitutes a "misrepresentation" (*e.g.*, predictions and promises are "false" only if the defendant when making them has reason to know they will not be fulfilled, Restatement (2d) of Torts §§ 525 cmt. f, 530; *Prosser* § 109 at 762-65; *Bigelow* at 474-76, 483-86), and what remedies are available (*e.g.*, whereas recovery of compensatory damages requires knowledge of falsity, substantial doubts as to the truth, or the absence of any belief one way or the other, *Cooper v. Schlesinger*, 111 U.S. 148, 152-55 (1884); Restatement (2d) of Torts § 526; *Prosser* § 107 at 740-42, even an innocent misrepresentation generally suffices to obtain rescission of a contract or gift, Restatement (First) of Restitution §§ 26, 28 and

Balanced against any such chilling effect, of course, is the danger that restricting fraud liability as advocated by Respondents will effectively cripple government's ability to protect its citizens from truly harmful deceptive practices. This is clearly illustrated by Respondents' insistence below that, under their view of the First Amendment, they could have no liability for the representations they made even if they kept *99 percent* of the donations they induced people to make with these representations. See Pet'r Brf at 16. The most effective way—indeed the only truly effective way—to redress that evil is by individual fraud actions like this one.[12]

V. Illinois' Anti-Fraud Laws Do Not Have the Impermissible Purpose or Effect of Discriminating Against the Expression of Particular Charities.

Respondents also contend that allowing the pursuit of fraud claims like this one violates the First Amendment

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cmt. a (1937); *Prosser* § 105 at 729; G. Palmer, *The Law of Restitution* § 3.19 1978); F. James, Jr. and O. Gray, *Misrepresentation —Part II*, 37 Md. L. Rev. 488, 537 (1978); *Bigelow* at 410-15, 520; see generally *Securities and Exchange Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-95 (1963)). Given these refinements and the Court's prior holding that even negligence is enough to sustain defamation liability by a private plaintiff on matters of *public concern*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-47 (1974), there is no reason to impose a constitutional requirement of "actual malice" for *every* form of liability by charitable solicitors who misrepresent the use of donations.

[12] Notably, many of the charities and other *amici* supporting Respondents approve of actions against charities or fundraisers who commit actual fraud, including by implied misrepresentations about how donations will be used, and they condemn how such fraud tarnishes the public's view of philanthropy generally. See, e.g., Brf of Public Citizen, Inc. at 4-5, 27; Brf of Ass'n of Fundraising Professionals at 2.

because doing so will burden small or unpopular charities and invite discriminatory enforcement against charities whose views the government disfavors. These arguments also fail.

Respondents apparently concede that Illinois' generally applicable anti-fraud laws do not discriminate on their face against any particular viewpoint. Rather, they suggest that permitting claims like the one asserted here will have the impermissible *effect* of burdening unpopular and newly formed charities most heavily. See *Turner*, 512 U.S. at 642-43; cf. *Finley*, 524 U.S. at 586-87. This suggestion proceeds from a mistaken assumption about basic First Amendment principles. The core principle of neutrality protects speakers from laws intended to suppress or disadvantage their particular ideas or views, but at the same time it entitles no speaker to special privileges over others. See *R.A.V.*, 505 U.S. at 386 ("The government may not regulate [speech] based on hostility—*or favoritism*—towards the underlying message expressed") (emphasis added). Any *bona fide* charity therefore has the right to seek financial support from the public; but no charity—regardless of how unpopular its cause or how recently it was formed—has the right to solicit donations by deceptive means. The fundamental purpose of the First Amendment is to safeguard robust competition in the marketplace of ideas, not to subsidize unpopular views to ensure their survival.[13]

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[13] So-called "donor acquisition campaigns" are no exception. That generating a base of repeat donors may entail substantial up-front costs does not justify representations that mislead donors about the nature of the charity or how it spends donations. *Amicus* Disabled American Veterans' suggestion that recurring campaigns of this type by established charities could be deemed fraudulent is based on the artificial premise that new donors should be "viewed in isolation" from other donors and grouped only with persons solicited for the first time, including all those who made no donation. DAV Brf at 6. Moreover, where a charity's alleged fraud consists of a false

The Court's decisions in *Schaumburg*, *Munson* and *Riley* do not support a contrary conclusion. As noted above, the Court in those cases held that blanket limits on fundraising expenses cannot be justified on the assumption that no organization exceeding those limits is a legitimate charity. In support of this conclusion, the Court in *Munson* and *Riley* noted that there are myriad reasons why legitimate charities, and especially small or unpopular ones, would have expenses above the blanket percentage rate limitation set by such statutes. *Riley*, 487 U.S. at 794; *Munson*, 467 U.S. at 967. Such reasons would directly negate the justification offered for declaring these charities "fraudulent," *i.e.*, not legitimate charities at all. The same reasons do not, however, negate a claim of *specific fraud* based on allegations that the charity or outside fundraiser obtained donations through factual misrepresentations. That a charity is unpopular or newly established (neither of which is true here) does not provide a constitutional shield against liability for obtaining funds through specific acts of deception, including misrepresentations about how those funds will be spent. The great diversity among charities also counsels in favor of the fact-specific approach taken under traditional fraud principles, as donors are likely to know that unpopular or newly-formed charities, or ones whose mission is largely public education or advocacy, will devote a lower share of donations to assistance programs.

Nor is there any basis for Respondents' suggestion that Illinois' action is motivated by an unconstitutional "hostility" toward them or VietNow. Resp. Brf at 13, 25, 26, 30. The

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promise or prediction, a necessary element is that the defendant lacked a good faith belief that his promise or prediction would be fulfilled. (See Pet'r Brf at 19; see also above at 16 n.11.) Thus, if a fundraiser is accused of misrepresenting that a charity will devote substantial funds to particular charitable activities, evidence that the fundraiser in good faith expected the charity to do so would be relevant to this issue. See *Prosser* § 109 at 764.

record in this case, in which Respondents never even filed an answer, contains nothing to support the accusation that Illinois brought this suit for any reason other than their deceptive representations to donors about how contributions would be spent; it certainly does not support the extraordinary showing needed to sustain a claim of unlawful selective prosecution. See *Wayte v. United States*, 470 U.S. 598, 608 (1985).

VI. The General Prohibition Against Compelled Speech Does Not Give a Person the Right to Make Deceptive Statements for the Purpose of Obtaining Donations to Charity.

There is, finally, no substance to Respondents' claim that prohibiting deceptive half-truths about how charitable donations will be used is legally equivalent to the compelled disclosures struck down in *Riley*. As the courts have repeatedly acknowledged, fraud can be perpetrated just as much by selective statements that are literally "true" as by ones that constitute explicit falsehoods. See Pet'r Brf at 15-21. The law of fraud thus provides that "if the defendant does speak, he must disclose enough to prevent his words from being misleading." *Prosser* § 106 at 738; see also F. James, Jr. and O. Gray, *Misrepresentation–Part II*, 37 Md. L. Rev. at 523-26. Nothing in the First Amendment precludes the straightforward application of this principle to charitable appeals. The representation that a charity will use a donation for a particular purpose is actionable fraud when the intentionally undisclosed amount actually devoted to that purpose materially differs from what the donor is reasonably led to believe. The notion that a party may utter a deceptive half-truth and then hide behind the First Amendment's general ban on forced speech is specious.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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