In the

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment categorically prohibits a State from pursuing a fraud action against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps the vast majority (in this case 85 percent) of all funds donated.

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PETITION FOR A WRIT OF CERTIORARI

The People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois, respectfully petition this Court for a writ of *certiorari* to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1 - 17) is reported at 198 Ill. 2d 345 and 763 N.E.2d 289. The opinion of the Illinois Appellate Court (App. 19 - 29) is reported at 313 Ill. App. 3d 559 and 729 N.E.2d 965. The final judgment of the Illinois Circuit Court (App. 30 - 31) is unreported.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on November 21, 2001. The Illinois Supreme Court denied the petitioner's timely petition for rehearing on February 2, 2002. (App. 18.) On April 25, 2002, Justice Stevens extended the time within which to file a petition for writ of *certiorari* to June 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend. I.

STATEMENT OF THE CASE

Telemarketing Associates, Inc. ("Telemarketing") is a for-profit company engaged in the business of telephoning people at home and asking for donations on behalf of various not-for-profit organizations. This case involves Telemarketing's activities on behalf of VietNow, whose national headquarters is in Illinois. Pursuant to its agreements with VietNow, Telemarketing calls individuals to ask for donations, telling them that their contributions will be used for charitable purposes, including providing food, shelter and financial support for hungry, homeless and injured Vietnam War veterans. A common representation is that donations will be used to buy food baskets for needy veterans. In fact, Telemarketing keeps 85 percent of the donations it generates pursuant to its agreements with VietNow, which in turn spends only about 3 percent of all the money raised by Telemarketing to provide such charitable services to veterans.[1]

Petitioner, the People of Illinois *ex rel.* James E. Ryan, the Illinois Attorney General ("Illinois"), sued Telemarketing, its owner, Richard Troia, and Armet, Inc., an affiliated company (collectively "Respondents"), in the Circuit Court of Cook County, Illinois, alleging common law fraud and violations of Illinois' general anti-fraud statutes. The complaint alleged that Respondents' representations regarding how donors' contributions would be used were false and misleading, were made for the purpose of deceiving people for Respondents' financial gain, and had the actual effect of doing so.

[1] VietNow's revenues, fundraising and program expenses are reported in its IRS Form 990 for 2000, which is published by the California Attorney General and available on the internet at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp, and is summarized by the Better Business Bureau Wise Giving Alliance at http://www.give.org/reports/vn.asp.

Respondents moved to dismiss the complaint, arguing that the fraud claims against them were barred by the First Amendment. The trial court granted this motion, and its judgment was affirmed by the Illinois Appellate Court (App. 19-29) and by the Illinois Supreme Court (App. 1-17). The Illinois Supreme Court acknowledged "the potential for donor confusion which may be presented with fundraising solicitations of the sort involved in the case at bar." (App. 17.) However, believing its judgment to be "compel[led]" by this Court's decisions in *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the court held that the First Amendment categorically precluded any reliance on the percentage of charitable donations kept by Respondents to support a fraud claim against them. (App. 5-6, 12-17.)

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* to resolve a constitutional issue of substantial public importance: whether the First Amendment categorically prohibits a State from pursuing a fraud action against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps almost all the funds donated. This is an issue reserved by the Court's prior decisions regarding charitable solicitations, all of which involved facial challenges to statutes regulating solicitation costs, not an individual action for fraud.

The Illinois Supreme Court was right that "this case has far-reaching implications for all fundraisers." (App. 16.) Charitable solicitation generates over $200 billion a year, with an ever greater volume handled by professional telemarketing companies. By holding that the percentage of charitable donations kept by a fundraiser may *never* be

used to support a claim that it committed fraud, the Illinois Supreme Court did more than misinterpret this Court's precedents. It transformed the First Amendment into a license for unscrupulous fundraisers to defraud the public in the name of raising money for charity, thereby dealing a crippling blow to one of the States' principal weapons against telemarketing fraud. The Court should grant *certiorari* to rectify this serious constitutional error and to provide much-needed guidance regarding any limits the First Amendment imposes on generally applicable fraud principles in the context of charitable solicitations.

I. The Illinois Supreme Court Misread this Court's Opinions When it Held that the First Amendment Gives Fundraisers the Right to Mislead the Public that Donations Will Be Used for Charitable Purposes.

Because this case involves an "as applied" challenge to Illinois' general anti-fraud laws, the question presented is whether the First Amendment gives Respondents the right to do what Illinois alleged. *See New York v. Ferber*, 458 U.S. 747, 767-68, 773-74 and n.28 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 615-16 (1973); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945). Stated generically, that question is whether a professional fundraiser has a First Amendment right to mislead people into giving money by representing that it will be used for charitable purposes, when actually the fundraiser keeps the vast majority of all money donated. Answering this question in the affirmative, the Illinois Supreme Court misapplied this Court's precedents in *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). Those cases did not impose any constitutional limits on common law fraud

claims in the area of charitable solicitations, but instead invalidated statutory schemes that, in the name of preventing fraud, "aimed at something else in the hope that [they] would sweep fraud in during the process." *Munson*, 467 U.S. at 969-970.

Indeed, this case, involving an individual action alleging actual fraud, represents precisely what the Court in *Schaumburg*, *Munson* and *Riley* said was a constitutionally permissible means for States to further their important interest in protecting the public from fraud. *See, e.g.*, *Riley*, 487 U.S. at 795 ("we do not suggest that States must sit idly by and allow their citizens to be defrauded"); *id.* at 800; *Schaumburg*, 444 U.S. at 637 and n.11. Those decisions accordingly do not support the Illinois Supreme Court's decision in this case, which seriously impairs the States' ability to stop actual fraud committed under the guise of collecting money for charitable activities.

A. This Court's Prior Decisions Addressed Only State Statutes Restricting Charitable Fundraising Expenses Above a Fixed Percentage.

In *Schaumburg*, *Munson* and *Riley*, the Court sustained "facial" challenges to statutes under which charitable fundraising expenses above a certain percentage (which in those cases ranged from 25 percent to 35 percent) were declared *per se* unlawful or shifted to the fundraiser the burden of proving that its fee was "reasonable." The central teaching of those cases is that a statutorily-prescribed level of fundraising expenses is not *alone* a constitutionally valid basis to restrict charitable solicitations. It does not follow, however, that where a professional fundraiser *does* represent that donations will be used for charitable purposes, the percentage it turns over to the charity in whose name it seeks donations—and, conversely, the percentage it keeps—is *never* relevant to support a claim that the fundraiser committed fraud.

Two principal justifications were offered in defense of the statutes challenged in *Schaumburg*, *Munson* and *Riley*: maximizing the amount of money actually devoted to charitable activities, and protecting the public from fraud. *See Riley*, 487 U.S. at 789-90, 792. The Court found neither of these justifications sufficient.

The Court first concluded that, even though charitable solicitations may contain a component of commercial speech, they are entitled to heightened First Amendment scrutiny, with the consequence that any statutory restrictions must be narrowly tailored in furtherance of an important governmental interest. *See, e.g., Munson*, 467 U.S. at 960-61. The Court then noted a number of legitimate reasons why a charity might have high fundraising costs, including that it was recently formed, is unpopular, or devotes most of its revenues to public advocacy. *Id.*, 467 U.S. at 966-67; *Riley*, 487 U.S. at 791-92.

Addressing the first offered justification for fixed percentage limits on fundraising expenses, the Court held that restricting speech based on the government's view of what is "reasonable" violates the core First Amendment principle that the government may not play favorites in the marketplace of ideas. *See Riley*, 487 U.S. at 790-91. The additional feature of the statute challenged in *Riley* which, instead of treating fundraising expenses above 35 percent as *automatically* unlawful, required the fundraiser to prove the "reasonableness" of its expenses, simply substituted one constitutional deficiency for another, inasmuch as it improperly imposed on the party engaged in protected speech the burden of proof regarding its right to do so. *Riley*, 487 U.S. at 793-94; *see also Speiser v. Randall*, 357 U.S. 513, 524 (1958).

With respect to the second proposed justification, the Court held that, although protecting the public from fraud is an important governmental interest, high solicitation costs, *without more*, do not closely equate with actual fraud.

As the court noted in *Munson*, the statute challenged in that case improperly assumed that there is a "necessary connection between fraud and high solicitation and administrative costs" and operated on the "fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Munson*, 467 U.S. at 961, 966. Thus, the Court held, a statutorily prescribed percentage limit on solicitation costs is facially invalid because it not only covers a substantial amount of constitutionally protected speech, but also uses a criterion—*i.e.*, high solicitation costs *alone*, without regard to what the public was told—that is inherently inadequate to identify actual fraud. *Id.* at 964-68 and n.13.

B. This Court Expressly Approved of State Fraud Actions Against Deceptive Charitable Solicitations, Which Illinois Attempted to Bring.

In *Schaumburg*, *Munson* and *Riley*, the Court repeatedly emphasized that to further their compelling interest in combatting actual fraud, States may vigorously enforce their general laws against fraud. *Schaumburg*, 444 U.S. at 637 and n.11, 639; *Riley*, 487 U.S. at 800. Indeed, the Court has never considered fraud protected speech under the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 191 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *Schneider v. State*, 308 U.S. 147, 164 (1939). In this case, Illinois has pursued the very avenue for attacking fraud that this Court left it.

Consistent with the law of most other States, Illinois defines fraud as the express or implied assertion of a material fact that is false, that is made with the intent to deceive another person, and that the other person reasonably relies on to her detriment. *In re Witt*, 145 Ill. 2d 380, 390-91, 583 N.E.2d 526, 531 (1991); *Glazewski v. Coronet*

Ins. Co., 108 Ill. 2d 243, 249-50, 483 N.E.2d 1263, 1266 (1985); *see also Pence v. United States*, 316 U.S. 332, 338 (1942) (listing traditional elements of fraud); *see generally* Page Keeton, *et al.*, *Prosser and Keeton on The Law of Torts*, §§ 106-110 (5th ed. 1984). Illinois also follows the generally prevailing view that statements which are ambiguous or even literally true may be fraudulent where they are intended to create a misleading impression, such as asserted facts that are deceptive in light of other undisclosed information. *In re Witt*, 145 Ill. 2d at 390, 583 N.E.2d at 531; *Glazewski*, 108 Ill. 2d at 250, 483 N.E.2d at 1266; *People v. Gilmore*, 345 Ill. 28, 46, 177 N.E.2d 710 (1931); *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill. App. 3d 237, 247-48, 511 N.E.2d 1330, 1336 (Ill. App. 1987); *see also Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 426 (1941) ("a statement of a half-truth is as much a misrepresentation as if the facts stated were untrue") (applying Iowa law); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948) (construing mail fraud statute); *Prosser and Keeton on The Law of Torts*, *supra*, § 106 at 736-38; Restatement (2d) of Torts, § 525, comments *b*, *e*, § 526, comment *f*, § 527, § 529, comments *a*, *b* (1977).[2]

In accord with these principles, Illinois' complaint against Respondents alleges all of the elements of common law fraud, as well as the similar elements of Illinois' generally-applicable anti-fraud statutes. In particular, the complaint alleged that Respondents made an assertion of "fact"

[2] Particularly relevant is *United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000), in which the court affirmed a wire fraud conviction against the head of a company that solicited charitable donations, noting that "the pitch's claim that 'FEED AMERICA . . . feeds the homeless of America' was *hardly true* given that over $2 million went into Ciccone's account" and "only $149,286.65 [went] to legitimate charities." 219 F.3d at 1080-81, 1084 (emphasis added).

when they told potential donors that contributions would be used for charitable purposes; that they did so with the intent to mislead and defraud the public; that members of the public reasonably understood this representation to mean that much more than 15 percent of their donations would actually go to such charitable uses; and that they would not have made such donations if they knew Respondents actually kept 85 percent of all the money they raised.

C. This Court's Precedents Do Not Preclude Using Evidence of a Fundraisers's Fee to Support a Claim of Actual Fraud.

The Illinois Supreme Court did not question the sufficiency under state law of Illinois' complaint, including the allegation that Respondents' representations that donations would be used for charitable purposes were "false" because they kept 85 percent of all the money they raised. Instead, the court held that the First Amendment categorically precluded Illinois from relying on the percentage of donations kept by Respondents to prove the falsity of these representations. (App. 13.)[3] Establishing fraud in this fashion, the Illinois Supreme Court held, was "indistinguishable" from the statutory provisions struck down in *Schaumburg*, *Munson* and *Riley*, and therefore invalid. (App. 17.) Any reliance on Respondents' 85 percent fundraising fee to prove they committed fraud, the court concluded, constitutes "an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation" and incorrectly "presume[s]

[3] Although the concluding paragraph of the court's opinion stated that Illinois' complaint "does not state a cause of action for fraud" (App. 17), the only flaw it identifies is a violation of the First Amendment (*id.* at 5-17).

that there is a nexus between high solicitation costs and fraud." (App. 13, 17.) Neither statement is correct.[4]

By pursuing a claim of *actual fraud* against Respondents, Illinois is not attempting to regulate the "reasonableness" of their fee. The complaint alleges that Respondents committed fraud when they told the public how their donations would be used. Whether Respondents *actually* committed fraud depends on what the public reasonably understood by Respondents' representations, whether that was true, and whether Respondents intended to deceive them—not on whether Respondents were inefficient fundraisers or lacked legitimate reasons for having high solicitation costs.[5]

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[4] Although the Illinois Supreme Court did not explicitly embrace Respondents' argument that the First Amendment categorically protected them from any fraud liability unless they made a positive misstatement of fact that is entirely false (*i.e.*, one that did not rely on any intended inference or selective disclosure to create a misleading impression), that is the practical effect of the decision, even though it finds no support in this Court's precedents. *See Riley*, 487 U.S. at 800 ("the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on *false pretenses or* by making false statements") (emphasis added); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20 and n.7 (1990) (rejecting categorical First Amendment immunity from defamation liability for "anything that might be labeled 'opinion'" and noting that "the issue of falsity relates to the defamatory facts *implied* by a statement") (emphasis added, original emphasis omitted); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991); *Donaldson v. Read Magazine, Inc.*, 333 U.S. at 189-91; *Schneider v. State*, 308 U.S. at 164.

[5] Likewise, because the principal inquiry in this case is whether the *public* was deceived by what Respondents told them about how their donations would be used, the fact that Respondents' contracts with VietNow expressly provided for Respondents to keep 85 percent of the money raised does not resolve the issue.

Nor does Illinois' allegation that Respondents' representations were false because they kept 85 percent of all donations impermissibly rely on any legal "presumption" of fraud. Illinois is not proceeding under any statute that declares solicitation costs above a certain percentage automatically or presumptively unlawful. The State is proceeding under the common law of fraud, as well as its generally applicable anti-fraud statutes, under which the plaintiff has the burden of proving all of the necessary elements. The fact that Respondents kept 85 percent of all donations did not create a legal "presumption" of fraud, but merely constituted evidence of fraud in light of their representations to the public that donations would be used to provide food and shelter for needy veterans. *See generally* 31A C.J.S. Evidence § 131.c (1996); *cf. Yates v. Evatt*, 500 U.S. 391, 402 n.7 (1991). *Schaumburg*, *Munson* and *Riley* therefore do not support, much less "compel," the barrier erected by the Illinois Supreme Court against the pursuit of a fraud claim against Respondents in this case.[6]

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[6] The Illinois Supreme Court also relied on misinterpretations of several statements by the Court concerning the relationship between high solicitation costs and fraud. Given the context of a facial challenge, which looks at both overinclusiveness and whether the statutory rule itself is otherwise valid, *see Munson*, 467 U.S. at 965 n.13; *see also New York v. Ferber*, 458 U.S. 747, 768 n.21 (1982) (citing, *inter alia*, Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 10-14), the Court's statement in *Munson* that the challenged statute was invalid "in all its applications" simply reflected a rejection of using solicitation costs above a fixed percentage as a proxy for actual fraud, not a rejection of the commonsense notion that high solicitation costs *may* be relevant to whether a particular fundraiser has committed fraud in a given case. *Riley's* description of the Court's "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,"

(continued...)

There is also no validity to the Illinois Supreme Court's conclusion that Illinois is unconstitutionally "compelling" Respondents to disclose their fundraising fee (App. 15-16), for it was Respondents' *own* representation that donations would be used to feed and house needy veterans that makes the nondisclosure of their 85 percent fee deceptive under traditional fraud principles. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) ("Minnesota law simply requires those making promises to keep them").

Finally, the Illinois Supreme Court also erred in holding that any uncertainty in determining on a case-by-case basis whether fraud has been committed in a particular situation renders the process for making such determinations itself unconstitutional. (App. 16.) Unlike the facial challenges raised in *Schaumburg*, *Munson* and *Riley*, the present case involves an "as applied" challenge to laws that do not specifically target charitable solicitations,[7] but instead contain "viewpoint-neutral" standards applicable to fraud generally. *See R.A.V. v. City of St. Paul*, 514 U.S. 335, 387 (1992); *cf. Cohen v. Cowles Media*, 501 U.S. at 669-71. In similar circumstances, the traditionally recognized means for deciding whether someone had a First Amendment right to engage in particular speech is a trial conducted *after* the speech occurs, and at which the relevant facts are determined by a judge or jury in accordance with established principles. *New York v. Ferber*, 458 U.S. 747, 767-78, 773-

[6] (...continued)
487 U.S. at 793, likewise did not declare that high solicitation costs and fraud are mutually exclusive, but merely reiterated the invalidity of a statutory rule declaring that such costs *alone* establish fraud. *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

[7] The only exception is the claim under the anti-fraud provisions of Illinois' Charitable Solicitation Act, 225 ILCS 460/15(b)(5) (2000).

74; *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, Circuit Justice); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989); *cf. Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973); *Miller v. California*, 413 U.S. 15, 23-27 and n.5 (1973).

This does not mean there are no First Amendment concerns in a case alleging that a party soliciting charitable donations committed fraud. Such concerns can be adequately addressed, however, without *totally* foreclosing the pursuit of fraud claims against persons who misrepresent that donations will be used for specific charitable purposes. Certainly, less drastic means to accommodate such concerns include procedural protections commonly used in other First Amendment contexts, such as requiring the plaintiff to bear the burden of proof on all elements of the claim, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), or heightened appellate review, *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

In short, the Court's precedents hold that a State may not legislatively declare high fundraising expenses *per se* fraudulent, not that such expenses are *per se* irrelevant to whether actual fraud has occurred. The Illinois Supreme Court's confusion about this distinction, while supposedly faithful to these precedents, improperly reads the First Amendment as a broad license for persons soliciting charitable donations to defraud the public.

II. The Issue Presented Here Is of Great Practical and Constitutional Importance.

This Court should grant *certiorari* because the constitutional issue presented here is of substantial public importance. Charitable giving in this country exceeds $200 billion

each year,[8] with a substantial amount of that money generated by professional fundraisers.[9] And, unfortunately, abuses are only too common. *See* Note, *Developments in the Law, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1635 (1992) ("Donor ire is aroused time and again by media exposés of solicitation campaigns in which a charity has received only five cents on the dollar").[10]

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[8] *See* U.S. General Accounting Office, *Tax-Exempt Organizations, Improvements Possible in Public, IRS, and State Oversight of Charities*, April 2002, at 1 (available at http://www.gao.gov/new.items/d02526.pdf). This report surveys the regulatory framework for charitable organizations, as well as possible federal law reforms. *See also* American Association of Fundraising Counsel, *Giving USA, 2001* (summarized at http://www.aafrc.org/press3.html).

[9] For example, the New York Attorney General's publication *Pennies for Charity, Where Your Money Goes, Telemarketing by Professional Fund Raisers, December 2001* (available at http://www.oag.state.ny.us/charities/pennies01/penintro.html) reports that professional fundraisers generated almost $190 million in charitable contributions in New York in 2000; that more than $125 million of this amount was generated by fundraisers who turned over to charity less than 40 percent of what they raised (with the average in this group being about 18 percent); and that more than $70 million was collected by fundraisers who turned over to charity less than 20 percent of what they raised (with the average in this group being about 12 percent of the total raised). Similar reports are available at: http://caag.state.ca.us/charities/publications/cfrreport.pdf (California); http://www.ago.state.ma.us/charity/telrep01.pdf (Massachusetts); and http://www.ag.state.oh.us/charitab/char1999.pdf (Ohio).

[10] *See also* National Crime Prevention Council, *Preventing Charity Fraud*, 2002 (available at http://www.ncpc.org/publications/charfraud/charfraud.htm) (noting increased "concerns about fraudulent solicitation schemes" following September 11, 2001); Richard T. Penciak, *Charity Donors Get Taken*, N.Y. Daily News, June 2, 2002.

The issues raised in this case are also ones the Court specifically reserved in its prior decisions in *Schaumburg*, *Munson* and *Riley*. The analysis in those cases, which was addressed to facial challenges to statutory schemes that applied rigid rules in an attempt to regulate the "reasonableness" of fundraising expenditures, does not answer the entirely different question presented here, where the focus is on whether, and in what manner, common law fraud principles must be modified to accommodate the First Amendment in a particular factual situation. Nonetheless, in the wake of those decisions States have been unsure how they may proceed, consistent with the First Amendment, to deal effectively with the serious problem of fraud committed by persons soliciting charitable donations.[11]

The Illinois Supreme Court's decision in this case dramatically illustrates the undesirable consequences of this uncertainty. Based on its misreading of *Schaumburg*, *Munson* and *Riley*, which rejected attempts to fight charitable solicitation fraud with sweeping legislative generalizations,

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[11] This concern has also received significant scholarly commentary. *See, e.g.*, Stephen H. Block, Note, *The Post-Riley Era: An Analysis of First Amendment Protection of Charitable Fundraising*, 10 Cardozo Arts & Ent. L.J. 101, 102 (1991) (observing that a "by-product of [the Court's decisions in *Schaumburg*, *Munson* and *Riley*] is the near inability of States to regulate fundraising effectively"); Note, *Developments in the Law, Nonprofit Corporations*, *supra* at 14, pp. 1634-35 ("The increased technological and organizational sophistication of modern charities, coupled with the appearance of extremely profitable professional solicitation firms, has created opportunities for sharp practice beyond the traditional evils of solicitation fraud and small-scale confidence games"); Errol Copilevitz, *The Historical Role of the First Amendment in Charitable Appeals*, 27 Stetson L. Rev. 457, 471 (1997) ("In the decade that has passed since the *Riley* decision, the Supreme Court has not been called upon to rule on any other case involving the fundraising process").

the Illinois Supreme Court has now rendered largely useless the tool that this Court repeatedly said may validly be used to accomplish this objective, namely vigorous enforcement of a State's generally applicable anti-fraud laws. The inevitable result of this misguided decision will be not only financial injury to the public at large, but also a tarnishing of the reputation of charities generally, thereby damaging their efforts to generate donations that *are* used for charitable purposes.[12]

Further, by confusing claims of actual fraud under generally applicable laws with rigid statutory restrictions specifically directed at charitable solicitations, the Illinois Supreme Court has given the First Amendment a meaning that logically knows no limits. Under that court's rationale, a State could not pursue a fraud claim against a professional fundraiser who solicits donations by representing that they will be used to feed starving children but keeps 99 percent of all the money he raises.[13] Indeed, contrary to the Court's warning about lumping together legitimate fundraisers with "organizations . . . that in fact are using the charitable label as a cloak for profitmaking," *Schaumburg*, 444 U.S. at 636-37, the Illinois Supreme Court's reasoning would immunize a fundraiser from any fraud liability for representing that donations will be used for such charitable purposes as long as it includes in each communication some token statement that there are millions of starving children

[12] See GAO Report, *supra* n.8 at 1 ("Although the common belief is that the vast majority of charities strive to meet their charitable purpose, if a few charities abuse the public trust, the support given to the charitable community can be undercut").

[13] In fact, at oral argument before the Illinois Supreme Court, Respondents' counsel specifically stated that, in their view, the First Amendment gives them the right to solicit contributions as they do now even if they keep 99 percent of all the money donated.

who deserve a better chance in life. *Cf. Miller v. California*, 413 U.S. at 25 n.7.

The Illinois Supreme Court's misunderstanding of the First Amendment, based on its failure to appreciate the distinction between actual fraud and statutory generalizations that substitute isolated factors for proof of all the elements of fraud, should not be permitted to stand. This case presents an appropriate vehicle for the Court to provide urgently needed guidance on this issue of great public importance.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

Docket No. 89738–Agenda 37–May 2001.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Appellant, v. TELEMARKETING ASSOCIATES, INC., *et al.*, Appellees.

Opinion filed November 21, 2001.

JUSTICE McMORROW delivered the opinion of the court:

In an amended complaint, the Attorney General, representing the people of this state, alleged that Telemarketing Associates, Inc., and Armet, Inc., corporations which operate as professional fund-raising services, and their director-owner, Richard Troia (collectively, the defendants), committed fraud and breached their fiduciary duty. The charged offenses were premised on the fact that defendants retained 85% of charitable funds collected on behalf of a charity, VietNow National Headquarters (VietNow), and, when soliciting, failed to inform donors that only 15% of their contribution would be distributed to the charity. The circuit court dismissed the complaint, finding that no cause of action had been stated under the facts alleged. The appellate court affirmed. 313 Ill. App. 3d 559. We granted the Attorney General's petition for leave to appeal (see 177 Ill. 2d R. 315) and now affirm the judgment of the appellate court.

BACKGROUND

The circuit court dismissed the Attorney General's amended complaint after defendants brought a motion to dismiss pursuant to section 2–615 of the Code of Civil Procedure (735 ILCS 5/2–615 (West 1998)). A motion to dismiss brought under section 2–615 admits all well-pled facts in the plaintiff's complaint. *Connick v. Suzuki Motor*

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Supreme Court of Illinois.

The PEOPLE of the State of Illinois ex rel. James E. RYAN, Attorney General of Illinois, Appellant,
v.
TELEMARKETING ASSOCIATES, INC., et al., Appellees.

No. 89738.

Nov. 21, 2001.
Rehearing Denied Feb. 4, 2002.

State Attorney General sued professional fundraisers hired by charitable organization for fraud and breach of fiduciary duty based on fundraisers' failure to disclose to potential donors that fundraisers would retain 85 percent of donations. The Circuit Court, Cook County, Thomas A. Hett, J., granted fundraisers' motion to dismiss. Attorney General appealed. The Appellate Court, Zwick, P.J., affirmed, 313 Ill.App.3d 559, 729 N.E.2d 965, 246 Ill.Dec. 314. Granting leave to appeal, the Supreme Court, McMorrow, J., held that Attorney General's proposed percentage-based limitation on fundraisers' ability to engage in protected speech was constitutionally impermissible, and therefore complaint failed to state causes of action for fraud and breach of fiduciary duty.

Judgment of Appellate Court affirmed.

West Headnotes

[1] Pretrial Procedure 687
307Ak687 Most Cited Cases

Motion to dismiss based on insufficiency of pleadings admits all well-pled facts in plaintiff's complaint. S.H.A. 735 ILCS 5/2-615.

[2] Pretrial Procedure 622
307Ak622 Most Cited Cases

Motion to dismiss for failure to state a cause of action challenges the legal sufficiency of the complaint. S.H.A. 735 ILCS 5/2-615.

[3] Appeal and Error 863
30k863 Most Cited Cases

[3] Appeal and Error 919
30k919 Most Cited Cases

When reviewing a dismissal based on legal insufficiency of complaint, reviewing court must determine whether the allegations, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. S.H.A. 735 ILCS 5/2-615.

[4] Appeal and Error 863
30k863 Most Cited Cases

Dismissal for failure to state a claim will be held proper only if it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover. S.H.A. 735 ILCS 5/2-615.

[5] Appeal and Error 893(1)
30k893(1) Most Cited Cases

Supreme Court reviews de novo a motion to dismiss based on legal insufficiency of complaint. S.H.A. 735 ILCS 5/2-615.

[6] Charities 46
75k46 Most Cited Cases

[6] Constitutional Law 90.1(1.1)
92k90.1(1.1) Most Cited Cases

Allegations that professional fundraisers retained 85 percent of gross collections made on behalf of charity and, when soliciting, failed to inform prospective donors that only 15 percent of their contributions would be distributed to the charity, did not support state Attorney General's claims against fundraisers for fraud and breach of fiduciary duty; percentage-based limitation on fundraisers' ability to engage in protected speech was not narrowly tailored to further state's interest in preventing fraud and thus was constitutionally impermissible. U.S.C.A. Const.Amend. 1.

[7] Charities 46
75k46 Most Cited Cases

In fundraising context, it is incorrect to assume, as a matter of law, that there is a nexus between high solicitation costs and fraud; many different factors may contribute to high solicitation costs, and percentage of proceeds turned over to charity is not an accurate measure of the amount of funds used "for" a charitable purpose.

[8] Constitutional Law 90.1(1.1)
92k90.1(1.1) Most Cited Cases

Any rule of law that burdens speech by requiring solicitors to make statistical disclosures, at the point of solicitation, as to the percentage of charitable contributions retained by solicitors is not narrowly tailored to state's interest in protecting the public from being misled about the way their charitable dollars are being spent and thus violates First Amendment. U.S.C.A. Const.Amend. 1.

****290*346***320** James E. Ryan, Attorney General, Springfield (Joel D. Bertocchi, Solicitor General, Jerald S. Post, Floyd D. Perkins, Matthew D. Shapiro, Assistant Attorneys General, Chicago, of counsel), for appellant.

***347** Michael A. Ficaro, Susan G. Feibus, of Ungaretti & Harris, David B. Goroff, of Hopkins & Sutter, Chicago, for appellees.

Justice McMORROW delivered the opinion of the court:

In an amended complaint, the Attorney General, representing the people of this state, alleged that Telemarketing Associates, Inc., and Armet, Inc., corporations which operate as professional fund-raising services, and their director-owner, Richard ****291 ***321** Troia (collectively, the defendants), committed fraud and breached their fiduciary duty. The charged offenses were premised on the fact that defendants retained 85% of charitable funds collected on behalf of a charity, VietNow National Headquarters (VietNow), and, when soliciting, failed to inform donors that only 15% of their contribution would be distributed to the charity. The circuit court dismissed the complaint, finding that no cause of action had been stated under the facts alleged. The appellate court affirmed. 313 Ill.App.3d 559, 246 Ill.Dec. 314, 729 N.E.2d 965. We granted the Attorney General's petition for leave to appeal (see 177 Ill.2d R. 315) and now affirm the judgment of the appellate court.

BACKGROUND

[1] The circuit court dismissed the Attorney General's amended complaint after defendants brought a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1998)). A motion to dismiss brought under section 2-615 admits all well-pled facts in the plaintiff's complaint. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 490, 221 Ill.Dec. 389, 675 N.E.2d 584 (1996). Consequently, the following facts, taken from the Attorney General's complaint, are accepted as true.

Telemarketing Associates, Inc. (Telemarketing), and Armet, Inc. (Armet), are professional, for-profit fund-raising corporations which are wholly owned and controlled ***348** by Richard Troia. In accord with contracts negotiated with VietNow, an Illinois-based, not-for-profit corporation registered as an Illinois charitable trust, Telemarketing and Armet solicited funds on behalf of VietNow beginning in July 1987 and continuing into 1996. Pursuant to its contracts with VietNow, Telemarketing retained 85% of the gross collections in the State of Illinois "as its total compensation for all efforts and costs associated with the Marketing Program." Armet, through Troia, brokered fund- raising contracts between VietNow and various out-of-state, third-party solicitors. Pursuant to these contracts, VietNow received 10% of the gross receipts for out-of-state solicitations, while Armet, as the broker, received between 10% and 20% of these gross receipts.

Annual financial reports submitted to the Attorney General, as required by law (see 225 ILCS 460/4 (West 1998)), show that, from July 1987 until the end of 1995, defendants' fund-raising efforts on behalf of VietNow resulted in collection of $7,127,851. Of that amount, $6,073,887 was retained by defendants, netting VietNow $1,053,964, an amount just under 15% of the gross receipts.

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

In an initial complaint filed on May 30, 1991, the Attorney General charged defendants with common law fraud and breach of their duty as fiduciaries of charitable assets. The complaint alleged that defendants, when making telephone solicitations on behalf of VietNow, ***349** represented that funds donated would go to further VietNow's charitable purpose. However, according to the Attorney General, because the fees charged by defendants for conducting solicitation were "excessive in amount and an unreasonable use and waste of charitable assets," and because defendants did not advise donors that only ****292 ***322** 15% of the funds raised

would be turned over to VietNow, defendants' solicitations were "knowingly deceptive and materially false" and constituted fraud and a breach of their fiduciary duty. The Attorney General asked the circuit court to surcharge the defendants for assets found to have been misspent or misused and to enjoin defendants from further solicitation.

The Attorney General amended his complaint on June 25, 1996, by adding paragraphs which alleged that defendants had renewed their contracts with VietNow and, under the same terms as before, had continued to solicit funds on behalf of VietNow into 1996. It was further alleged that defendants' solicitations were in violation of section 15(b)(5) of the Solicitation for Charity Act (225 ILCS 460/15(b)(5) (West 1996)), which requires professional fund-raisers to identify "fully and accurately" the purpose for which funds are solicited. The Attorney General contended that defendants violated this provision because they materially misrepresented the purpose for which funds were being solicited by telling contributors, either explicitly or implicitly, that funds collected would be used to help veterans, and that these statements were inherently false and misleading in light of the high percentage of funds retained by the defendants.

The complaint further alleged that defendants, by failing to reveal to donors the percentage of the contribution which would actually go to the charity, obtained money from donors under false pretenses. The same conduct was also alleged to constitute fraud under the Illinois ***350** Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 1996)) and under section 2 of the Uniform Deceptive Trade Practices Act (815 ILCS 510/2 (West 1996)). The complaint requested all available remedies and penalties authorized by section 9 of the Solicitation for Charity Act (225 ILCS 460/9 (West 1998)), including an injunction prohibiting defendants from conducting any future fund-raising services and forfeiture of their collected fees.

On September 6, 1996, defendants filed a section 2-615 motion to dismiss, arguing that charitable solicitations were protected speech under the first amendment. Defendants contended that, pursuant to *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), a claim of fraud could not be maintained when the basis for the complaint was the percentage of proceeds retained by the fund-raisers and the failure to volunteer information concerning the amount of the proceeds that would go to the charity.

The trial court granted the motion to dismiss, but allowed the Attorney General to amend his complaint. On December 4, 1996, the Attorney General filed an amended complaint. In addition to the previous allegations, the Attorney General now alleged that defendants' retention of 85% of the gross proceeds, although contracted for and agreed to by VietNow, constituted fraud because defendants retained donor lists from year to year and, accordingly, should have incurred decreased administrative costs. Thus, it was alleged, defendants' retention of donor lists was evidence that defendants' fee was not justified by high administrative costs.

Defendants again filed a section 2-615 motion to dismiss, which was granted. The dismissal was affirmed on appeal. 313 Ill.App.3d 559, 246 Ill.Dec. 314, 729 N.E.2d 965. This court granted the Attorney General's petition for leave to appeal. 177 Ill.2d R. 315.

***351** ANALYSIS

[2][3][4][5] As noted above, the circuit court dismissed the Attorney General's complaint *****323 **293** after defendants brought a section 2-615 motion to dismiss. A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint. *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475, 159 Ill.Dec. 50, 575 N.E.2d 548 (1991). When reviewing a section 2-615 dismissal, the reviewing court must determine whether the allegations, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 490, 221 Ill.Dec. 389, 675 N.E.2d 584 (1996). Dismissal will be held proper only if it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover. *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 86-87, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). We review *de novo* a section 2-615 motion to dismiss. *Neade v. Portes*, 193 Ill.2d 433, 439, 250 Ill.Dec. 733, 739 N.E.2d 496 (2000); *Abbasi v. Paraskevoulakos*, 187 Ill.2d 386, 391, 240 Ill.Dec. 700, 718 N.E.2d 181 (1999).

The Attorney General argues that the circuit court erred in dismissing his amended complaint. He contends that the complaint is legally sufficient because it sets forth all of the elements necessary to state a valid cause of action for common law fraud. According to the Attorney General, it is a material

misrepresentation for defendants to tell prospective donors that funds solicited on behalf of VietNow are to be used for a charitable purpose when, in fact, defendants retain 85% of the funds solicited and fail to reveal that fact to potential donors at the point of solicitation.

The Attorney General further contends that the alleged misrepresentations also constitute constructive fraud and breach of fiduciary duty because the defendants' retention of 85% of the solicited proceeds, even if there was no intent to deceive, is "prejudicial to the public welfare" and a breach of the public's trust and confidence in charitable solicitation. The Attorney General ***352** admits that, ordinarily, donors anticipate that a certain amount of their contributions will be applied to "overhead." However, he claims that retention of 85% of donated funds goes well beyond any reasonable expectation of the public. As support for this position, the Attorney General has attached to his complaint the affidavits of 44 VietNow donors who assert that they would not have given money to the charity had they known how little of their donationwas to be directed to the intended cause.

The Attorney General acknowledges the first amendment precedent relied upon by the circuit and appellate courts. Nevertheless, he claims the representations made by the defendants are actionable, notwithstanding the protections afforded charitable solicitations by the first amendment. We disagree.

We begin by examining the scope of first amendment guarantees afforded charitable solicitations. We use as guidance three decisions of the United States Supreme Court, *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

In *Schaumburg*, a not-for-profit corporation properly registered as a charitable trust under Illinois law was denied a permit to solicit door-to-door by the Village of Schaumburg pursuant to a Village ordinance which required permit applicants to provide "[s]atisfactory proof that at least seventy-five percent of the proceeds of ****294** *****324** such solicitations will be used directly for the charitable purpose of the organization." The charitable corporation sued the Village in federal district court, arguing that the ordinance violated the first and fourteenth amendments. ***353** The charity was granted summary judgment and the court of appeals affirmed.

On review, the United States Supreme Court, after examining prior authority, concluded that charitable appeals for funds fall within the protection of the first amendment because "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and * * * that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632, 100 S.Ct. at 834, 63 L.Ed.2d at 84. Accordingly, the Court found that the 75% limitation in the Village's ordinance was "a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect." *Schaumburg*, 444 U.S. at 636, 100 S.Ct. at 836, 63 L.Ed.2d at 87. The Court then rejected the Village's contention that its ordinance was justified because it was substantially related to the important governmental interests in preventing fraud, crime, and undue annoyance. Although the Court acknowledged that preventing fraud was indeed an important interest, the Court held that the ordinance was not narrowly drawn so as not to interfere with first amendment freedoms. *Schaumburg*, 444 U.S. at 636-37, 100 S.Ct. at 836, 63 L.Ed.2d at 87-88. The ordinance only "peripherally promoted" the asserted governmental interest of protecting against fraud because, as the Court observed, costs incurred by charitable organizations conducting fund-raising campaigns can vary dramatically depending on a wide range of variables, some of which are beyond the control of the organization. *Schaumburg*, 444 U.S. at 637 n. 10, 100 S.Ct. at 836 n. 10, 63 L.Ed.2d at 87 n. 10. Thus, the Court found there was no rational reason to conclude that a charity which uses more than ***354** 25% of the funds it collects on fund-raising, salaries, and overhead should automatically be labeled fraudulent. *Schaumburg*, 444 U.S. at 636-37, 100 S.Ct. at 836, 63 L.Ed.2d at 87.

Four years after rendering its decision in *Schaumburg*, the Supreme Court was asked to consider the constitutionality of a Maryland statute which prohibited charitable organizations from paying or agreeing to pay " 'as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity.' " *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 950 n. 2, 104 S.Ct. 2839,

2843 n. 2, 81 L.Ed.2d 786, 792 n. 2 (1984), quoting Md.Code Ann., Bus. Reg. § 103A (1982). The statute contained a provision which authorized a waiver of the 25% limitation " 'in those instances where the 25% limitation would effectively prevent a charitable organization from raising contributions.' "

Reaffirming its holding in *Schaumburg*, the *Munson* Court held that the Maryland percentage-based statute, like the ordinance in *Schaumburg*, substantially restricted a protected first amendment activity and that "the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech * * *." *Munson*, 467 U.S. at 968, 104 S.Ct. at 2853, 81 L.Ed.2d at 803. Percentage-based limitations, the Court reiterated, are insufficiently related to the governmental interest in preventing fraud. Furthermore, the constitutional deficiencies of the percentage-based ****295 ***325** limitation could not be remedied by the addition of a waiver provision which granted governmental authorities the discretion to dispense with the percentage limitation upon a showing of financial necessity. *Munson*, 467 U.S. at 962, 104 S.Ct. at 2850, 81 L.Ed.2d at 799-800. The *Munson* Court explained:

> ***355** "The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, though restricting solicitation costs, will have done nothing to prevent fraud." *Munson*, 467 U.S. at 966-67, 104 S.Ct. at 2852, 81 L.Ed.2d at 802.

Despite *Munson's* condemnation of percentage-based limitations on charitable solicitation, the Supreme Court was called upon just four years later to decide whether another percentage-based regulation, which had recently been added to the North Carolina Charitable Solicitations Act, suffered from the same constitutional deficiencies as the laws struck down in *Schaumburg* and *Munson*. See *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). The North Carolina statute in *Riley* differed from the laws in *Schaumburg* and *Munson* in that it regulated professional for-profit fund-raisers rather than the charitable organizations themselves.

Responding to a study which showed that professional fund-raisers typically retained fees "well over 50% of the gross revenues collected in charitable solicitation drives," North Carolina enacted a statute which prohibited fund-raisers from charging an "unreasonable" or "excessive" fee. *Riley*, 487 U.S. at 784, 108 S.Ct. at 2671, 101 L.Ed.2d at 681. A three- tiered, percentage-based schedule was used to define the "reasonable fee" that a ***356** professional fund-raiser could charge. Specifically, a fund-raiser could charge up to 20% of its gross receipts without running afoul of the "reasonableness" requirement. A fund-raising fee between 20% and 35% of gross receipts, however, was presumptively unreasonable and excessive "if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation." Finally, the statute provided that, if the fund-raising fee was 35% or more of the gross receipts, the fund- raiser would carry the burden of proving that the fee was "necessary." Necessity, according to the statute, could be proved by evidence (1) that the fee was required due to the dissemination of information, discussion or advocacy for the charitable purpose, or (2) that the charity's ability to solicit would otherwise be "significantly diminished." The statute also required professional fund-raisers to disclose to potential donors, at the point of solicitation, the "average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina *****326 **296** within the previous 12 months." *Riley*, 487 U.S. at 786, 108 S.Ct. at 2672, 101 L.Ed.2d at 682.

After close examination of the statute, the *Riley* Court ruled that the percentage-based definition of an "unreasonable" fee could not pass constitutional muster because "using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." *Riley*, 487 U.S. at 789, 108 S.Ct. at 2673, 101 L.Ed.2d at 684. The Court explained that the statute's defect was that it defined an "unreasonable" and "excessive" fee according to the percentage of total revenues collected, "[d]espite our clear holding in *Munson* that there is no nexus between the percentage ***357** of

funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." *Riley,* 487 U.S. at 793, 108 S.Ct. at 2675, 101 L.Ed.2d at 687.

Moreover, the Court found the North Carolina statute suffered from a "more fundamental flaw" than the one in *Munson*--it placed fund-raisers at risk of having to rebut the presumption of unreasonableness, case by case, based on nothing more than "a loose inference that the fee might be too high." *Riley,* 487 U.S. at 793, 108 S.Ct. at 2676, 101 L.Ed.2d at 687. The Court found it constitutionally unacceptable for fund-raisers to have to wait until "reasonable" fees were "judicially defined over the years." *Riley,* 487 U.S. at 793, 108 S.Ct. at 2676, 101 L.Ed.2d at 687. In the interim, the Court held, fund-raisers would be unable to speak with any level of security and would run the risk of incurring litigation costs, as well as the possibility of a mistaken adverse ruling. *Riley,* 487 U.S. at 793-94, 108 S.Ct. at 2676, 101 L.Ed.2d at 687. As a result, fund-raisers would be less inclined to contract with many charitable organizations, especially less popular ones, and the ability of charities to speak would be substantially diminished. *Riley,* 487 U.S. at 794, 108 S.Ct. at 2676, 101 L.Ed.2d at 688.

The *Riley* Court also found constitutionally offensive the statutory provision which mandated fund-raisers to reveal to potential donors, at the point of solicitation, the amount of charitable proceeds turned over to a charity. The provision, the Court held, was a content-based regulation of protected speech which was unduly burdensome and not narrowly tailored. As the Court explained, a compelled disclosure requirement presumes, incorrectly, that a charity derives no benefit from funds collected but not disbursed to it. Further, a disclosure requirement would "almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent." *Riley,* 487 U.S. at 799, 108 S.Ct. at 2679, 101 L.Ed.2d at 691.

***358** Keeping in mind the holdings of *Schaumburg, Munson,* and *Riley,* we turn to the case at bar. The Attorney General contends that the present case is distinguishable from *Riley* and its predecessors because here the problem of fraud is being attacked, not through the application of " broad prophylactic" ordinances or statutes affecting all fund-raisers (see *Schaumburg,* 444 U.S. at 637, 100 S.Ct. at 836, 63 L.Ed.2d at 88), but through the enforcement of the state's antifraud laws against specific defendants for " specific instances of deliberate deception." See *Riley,* 487 U.S. at 803, 108 S.Ct. at 2681, 101 L.Ed.2d at 694 (Scalia, J., concurring). Thus, the Attorney General reasons, his complaint utilizes the "less intrusive" measures for attacking fraud suggested by the *Schaumburg* Court. *Schaumburg,* 444 U.S. at 637, 100 S.Ct. at 836, 63 L.Ed.2d at 88. The Attorney General argues:

> "The complaint [at issue in this case] is the constitutional alternative to the prohibitive *****327 **297** legislation at issue in *Schaumburg* and the burden-shifting legislation at issue in *Munson* and *Riley.* Here, the people seek to have the judicial process determine, under the specific facts of this distinct case, whether these particular defendants defrauded the public and violated their fiduciary duties as holders of charitable funds."

The Attorney General's argument suggests, in part, that the present action is a "less intrusive" means of combating fund-raising fraud because it is an instance of individual litigation, *i.e.,* a single complaint, and not a broad, regulatory statute. We reject this contention. When the Supreme Court spoke of the government's right to pursue "less intrusive" measures, it plainly meant that the government retained the right to regulate the conduct of fund-raisers in a manner which was "less intrusive" of their *constitutional rights.* The present action is not "less intrusive" within the meaning of the Supreme Court's holdings simply because it is an instance of individual litigation.

[6] ***359** Thus, in this case, to determine whether the Attorney General's complaint is a "less intrusive" means of regulating defendants' speech and, hence, permitted by *Riley* and its predecessors, we must examine the allegations of the complaint and decide whether those allegations offend the first amendment principles set forth in the Supreme Court decisions. Stated otherwise, we must determine whether the Attorney General's complaint operates to limit defendants' ability to engage in solicitation--an activity protected by the first amendment--in a manner found constitutionally impermissible by the Supreme Court in *Schaumburg, Munson* and *Riley.* We conclude that it does.

The Attorney General's complaint seeks to enjoin defendants from conducting any future fund-raising activities based on allegations that defendants, when soliciting on behalf of VietNow, committed "fraud" because they made "false statements" concerning the purpose for which funds were being solicited. However, the statements made by defendants during solicitation are alleged to be "false" only because defendants retained 85% of the gross receipts and failed to disclose this information to donors. Thus, the Attorney General's complaint is, in essence, an

attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage- rate limitation. This is the same regulatory principle that was rejected in *Schaumburg*, *Munson* and *Riley*.

As the Supreme Court has pointed out, high solicitation costs, and a solicitor's high rate of retaining receipts, can be attributable to a number of factors. Certain types of fund-raising campaigns, for example, include a wide range of activities that must be paid for. The present case illustrates this point. The Attorney General has attached defendants' contracts with VietNow to his complaint and made them a part of the pleadings. These ***360** contracts show that, in exchange for its fee, Telemarketing agreed to supply and pay the salaries of all marketing personnel, as well as pay all costs for an office and phones. In addition, Telemarketing agreed to be responsible for producing, publishing, editing and paying all costs for the annual publication of more than 2,000 copies of an advertising magazine which would "increase community awareness of [VietNow]." The contract required Telemarketing to conduct "an efficient and professional marketing program, promote goodwill on behalf of [VietNow], and enhance good public relations."

Contracts between VietNow and Armet provided that third-party professional fund-raisers would conduct an advertising and public awareness campaign in conjunction with the sale of advertising in a quarterly****298** *****328** publication. The quarterly publication would be produced by Armet. At least 30% of the quarterly publication was to be devoted to editorial content provided by VietNow. Armet also agreed to maintain a live, nationwide, toll-free telephone number which individuals could call to obtain information regarding VietNow.

[7] Defendants in this case were contracted to perform a wide range of activities on behalf of VietNow, all of which were to be paid for out of the solicited funds. This example illustrates the principle that, because of the many different factors that may contribute to high solicitation costs, it is incorrect to assume, as a matter of law, that there is a nexus between high solicitation costs and fraud. See *Riley*, 487 U.S. at 793, 108 S.Ct. at 2675, 101 L.Ed.2d at 687.

Further, and more fundamentally, it is incorrect to presume that there is nexus between high solicitation costs and fraud because, as the Supreme Court has explained, the percentage of proceeds turned over to a charity is not an accurate measure of the amount of funds used "for" a charitable purpose. See ***361***Munson*, 467 U.S. at 967 n. 16, 104 S.Ct. at 2852 n. 16, 81 L.Ed.2d at 802 n. 16. Charities often reap nonmonetary benefits by having their message disbursed by the solicitation process. In fact, as the *Schaumburg* Court observed, the solicitation may be so intertwined with informative and persuasive speech that the solicitation itself is part of the charitable purpose. This point is aptly demonstrated in the case at bar. The defendants' contracts with VietNow required defendants to produce publications that "increased community awareness" about VietNow. Defendants were also directed to conduct their solicitations in a manner that would "promote goodwill" on behalf of VietNow. The fund-raising services defendant provided, therefore, were inextricably intertwined with the advancement of VietNow's philosophy and purpose. Moreover, because the solicitation process is so enmeshed with the charitable purpose, it is irrelevant whether or not defendants' administrative costs were reduced, as the Attorney General alleged, because defendants retained donor lists from year to year.

[8] For similar reasons, fraud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity. Compelled disclosure, as the *Riley* Court held, is based on a presumption that the net proceeds returned to a charity are the only benefit that a charity derives from solicitation. This presumption is incorrect. As discussed above, often a large portion of the funds solicited are used "for a charitable purpose" although only a fraction of the proceeds are actually turned over to the charity. The net proceeds returned to a charity do not accurately reflect the amount of funds which go toward the charitable purpose because that figure fails to take into consideration the charity's nonmonetary objectives, such as dissemination of information and advocacy, which are by-products ***362** of the solicitation that cannot be quantified. Consequently, any rule of law which burdens speech by requiring solicitors to make statistical disclosures, at the point of solicitation, is not narrowly tailored to the state's asserted interest of protecting the public from being misled about the way their charitable dollars are being spent. See *Riley*, 487 U.S. at 798-99, 108 S.Ct. at 2678-79, 101 L.Ed.2d at 690-91.

We note, too, that professional fund-raisers who are telemarketers, as the defendants in this case, are particularly disadvantaged by a disclosure requirement. As the *Riley* Court observed, "if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely ****299**

*****329** be given a chance to explain the figure; the disclosure will be the last words spoken as the donor * * * hangs up the phone." *Riley,* 487 U.S. at 800, 108 S.Ct. at 2679, 101 L.Ed.2d at 691.

Finally, we note that, although the Attorney General's complaint is aimed at regulating the fund-raising efforts of the defendants, this case has far-reaching implications for all fund-raisers. If a complaint such as the one at issue in this case was allowed to proceed, all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by- case basis, whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fund-raiser's fee was too high. Fund-raisers, therefore, 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, based on nothing more than a "loose inference that the fee might be too high." See *Riley,* 487 U.S. at 793, 108 S.Ct. at 2676, 101 L.Ed.2d at 687. Such a procedure cannot be condoned.

In light of the foregoing, we conclude that the Attorney General's complaint suffers from the same ***363** "fundamental flaw" described by the Supreme Court in *Schaumburg, Munson* and *Riley.* The complaint incorrectly presumes that there is a nexus between high solicitation costs and fraud and attempts to regulate defendant's constitutionally protected solicitations on that basis. Contrary to the Attorney General's contentions, the complaint is not a "less intrusive" means of regulation but is, instead, indistinguishable from the regulatory measures struck down in *Schaumburg, Munson* and *Riley.* We conclude, therefore, that the Attorney General's complaint is prohibited under first amendment principles and was properly dismissed.

We are mindful of the opportunity for public misunderstanding and the potential for donor confusion which may be presented with fund-raising solicitations of the sort involved in the case at bar. However, the United States Supreme Court decisions in *Riley, Munson* and *Schaumburg* compel us to reach the decision we announce today.

CONCLUSION

The Attorney General's complaint is not legally sufficient. It does not state a cause of action for fraud or breach of fiduciary duty. Although the Attorney General purports to be charging defendants with specific instances of misrepresentation, his complaint is, at its core, a constitutionally impermissible percentage-based limitation on defendants' ability to engage in a protected activity. As such, the complaint is constitutionally deficient pursuant to *Schaumburg, Munson,* and *Riley.* Accordingly, we affirm the judgment of the appellate court, which affirmed the dismissal of the Attorney General's complaint.

Affirmed.

763 N.E.2d 289, 198 Ill.2d 345, 261 Ill.Dec. 319

END OF DOCUMENT

[Dated February 4, 2002]

Docket No. 89738–Agenda 37–May 2001.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Appellant, v. TELEMARKETING ASSOCIATES, INC., *et al.*, Appellees.

The Supreme Court today DENIED the petition for rehearing in the above titled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 15, 2002.

SIXTH DIVISION
MAY 19, 2000

No. 1-99-0038	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	Appeal from the Circuit Court of Cook County
	)	
Plaintiff-Appellant,	)	
v.	)	No. 91 CH 4926
	)	
TELEMARKETING ASSOCIATES, INC., an Illinois business corporation, ARMET INC., an Illinois corporation, and RICHARD TROIA, individually and as an officer, director and fiduciary of TELEMARKETING ASSOCIATES, INC. and ARMET, INC.,	)	The Honorable THOMAS A. HETT, Judge Presiding.
	)	
Defendants-Appellees.	)	

PRESIDING JUSTICE ZWICK delivered the opinion of the court:

The Attorney General filed an Amended Complaint charging the defendants-appellees with common law fraud and breach of fiduciary duty. The amended complaint alleged that the defendants-appellees are professional fund raisers for charity who, over an eight year period, consistently retained more than 85% of the proceeds of their solicitations on behalf of an Illinois-based charity, VietNow Memorial Headquarters (hereinafter "VietNow"). The complaint alleged that defendant-appellees made solicitations on behalf of VietNow without informing prospective donors that only 15 cents out of every dollar they contributed would be made available for charitable purposes—while the balance would be kept by the fund raisers. The trial court

Appellate Court of Illinois,
First District, Sixth Division.

PEOPLE of the State of Illinois, ex rel. James E. RYAN, Attorney General of Illinois, Plaintiff-Appellant,
v.
TELEMARKETING ASSOCIATES, INC., an Illinois business corporation, Armet Inc., an Illinois corporation, and Richard Troia, individually and as an officer, director and fiduciary of **Telemarketing Associates**, Inc. and Armet, Inc., Defendants-Appellees.

No. 1-99-0038.

May 19, 2000.

Attorney general brought common law fraud and breach of fiduciary duty claims against paid professional fundraisers hired by charitable organization, alleging fundraisers' failure to disclose to potential donors the fundraisers' retention of 85 percent of the donations to the charitable organization. The Circuit Court, Cook County, Thomas A. Hett, J., granted fundraisers' motion to dismiss. Attorney General appealed. The Appellate Court, Zwick, P.J., held that the First Amendment free speech right regarding charitable fundraising precluded the common law claims for fraud, misrepresentation, breach of fiduciary duty, constructive fraud, and constructive trust, because the focus on the percentage of donations received by the fundraisers was not narrowly tailored to the state's interest in preventing fraud.

Affirmed.

West Headnotes

[1] Charities 46
75k46 Most Cited Cases

[1] Constitutional Law 90.1(1.1)
92k90.1(1.1) Most Cited Cases

Free speech right regarding charitable fundraising precluded common law claims for fraud, misrepresentation, breach of fiduciary duty, constructive fraud, and constructive trust against paid professional fundraisers hired by charitable organization, for allegedly failing to affirmatively disclose to donors that the fundraisers would keep 85 cents out of every dollar donated, because the focus on the percentage of donations received by the fundraisers was not narrowly tailored to the state's interest in preventing fraud. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 90.1(1.1)
92k90.1(1.1) Most Cited Cases

Government action which would infringe upon free speech right regarding charitable fundraising is subject to strict scrutiny and may only restrict free speech where the restriction is precisely tailored to further a compelling state interest. U.S.C.A. Const.Amend. 1.

****966*560***315** James E. Ryan, Attorney General, Joel D. Bertocchi, Chicago (Floyd D. Perkins, Matthew D. Shapiro, of counsel), for Appellant.

Hopkins & Sutter, Chicago (Michael A. Ficaro, David B. Goroff, of counsel), for Appellee.

Presiding Justice ZWICK delivered the opinion of the court:

The Attorney General filed an Amended Complaint charging the defendants- appellees with common law fraud and breach of fiduciary duty. The amended complaint alleged that the defendants-appellees are professional fund raisers for charity who, over an eight year period, consistently retained more than 85% of the proceeds of their solicitations on behalf of an Illinois-based charity, VietNow Memorial Headquarters (hereinafter "VietNow"). The complaint alleged that defendant-appellees made solicitations on behalf of VietNow without informing prospective donors that only 15 cents out of every dollar they contributed would be made available for charitable purposes--while the balance would be kept by the fund raisers. The trial court granted defendants' motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 1996).

The Attorney General raises the following issues for our review: (1) whether the allegations of the complaint plead a cause of action for common-law-fraud- based misrepresentation, breach of fiduciary duty, constructive fraud and/or for imposition of a constructive trust; (2) whether the First Amendment's prohibition against "forcing speech"

bars the causes of action alleged; and (3) whether the First Amendment bars the claims alleged despite the fact that they are "straightforward" and based upon "content-neutral principles of law."

The original complaint in this case alleges that Telemarketing Associates, Inc. (Telemarketing) and Armet Inc. (Armet) are companies which provide professional fundraising services for charitable organizations. Defendant- Appellee Richard Troia is the owner and an officer and director of these companies (collectively, the "fundraisers"). Telemarketing has entered into contracts with a charitable organization, VietNow, which provide that Telemarketing is to receive approximately 85% of the funds it collects for its professional efforts for VietNow in Illinois. In addition, Armet has contracts under which it retains third party solicitors to raise money for VietNow outside of Illinois. ***561** Under these contracts, the outside solicitors *****316 **967** receive 70%-80% of the proceeds raised, while Armet receives 10-20% of the proceeds for its services.

There is no dispute that the fundraisers have honored their contracts with VietNow. The Attorney General makes no claim that VietNow is dissatisfied with the fundraisers professional services. Similarly, the Attorney General makes no allegation that the fundraisers have affirmatively misstated any information to any donor. The Attorney General instead alleges that the fundraisers fraudulently concealed material information by not affirmatively volunteering their fee arrangement with the donors. By so acting, the complaint claims the fundraisers violated the Charitable Solicitation Act, 225 ILCS 460/1 *et seq.* (West 1998) (the Solicitation Act), the Consumer Fraud and Deceptive Practices Act, 815 ILCS 501/1 (West 1998), and the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2 (West 1998), and breached their fiduciary duty by engaging in fraudulent concealment. The Attorney General also complained that Armet violated the Solicitation Act by failing to register as a professional fundraiser with the Attorney General or ensure that the outside professionals it hired had registered.

The complaint sought broad relief against the fundraisers, including barring them from fundraising in Illinois for five years, forfeiture of their compensation, liability for both compensatory and punitive damages and a requirement that they pay the Attorney General for the costs of investigation and suit.

In dismissing the complaint, the trial court found that the United States Supreme Court's opinion in *Riley v. National Federation of the Blind,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), established unequivocally that charitable solicitation by professional fundraisers is protected speech entitled to full First Amendment protection and that a state may not punish a fundraiser for earning a high fee or treat as fraud the fundraiser's failure to affirmatively explain its fee arrangement to prospective donors. The court, however, allowed the count alleging non-registration by Armet to stand.

The Attorney General then filed certain amendments to the complaint, adding additional allegations but continuing to assert the earlier complaint in its entirety. The crux of the Attorney General's amended complaint continued to be that the fundraisers had earned an excessive fee and failed to disclose this to VietNow's donors. The court again granted dismissal of the complaint with the exception of the non-registration claim against Armet.

On December 1, 1998, the Attorney General voluntarily dismissed ***562** the non-registration claim and the court entered an agreed order in favor of the fundraisers on all claims. The Attorney General then filed this appeal challenging the dismissal of the fraud-based claims directed at the fundraisers' fees.

Initially, we observe that a section 2-615 motion to dismiss challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint. *Vernon v. Schuster,* 179 Ill.2d 338, 344, 228 Ill.Dec. 195, 688 N.E.2d 1172 (1997). The critical inquiry in deciding upon a section 2-615 motion to dismiss is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vernon,* 179 Ill.2d at 344, 228 Ill.Dec. 195, 688 N.E.2d 1172, citing *Bryson v. News America Publications, Inc.,* 174 Ill.2d 77, 86-87, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996), and *Urbaitis v. Commonwealth Edison,* 143 Ill.2d 458, 475, 159 Ill.Dec. 50, 575 N.E.2d 548 (1991). A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Vernon,* 179 Ill.2d at 344, 228 Ill.Dec. 195, 688 N.E.2d 1172, citing *Gouge v. Central Illinois Public Service Co.,* 144 Ill.2d 535, 542, 163 Ill.Dec. 842, 582 N.E.2d 108 (1991). Accordingly, in reviewing the circuit court's ruling on defendants' section 2-615 motion to dismiss, we apply a *de* *****968 ***317*** *novo* standard of review. *Doe v. McKay,* 183 Ill.2d 272, 274, 233 Ill.Dec. 310, 700 N.E.2d 1018 (1998).

[1] The circuit court correctly found that the Attorney General's amended complaint infringes upon the fundraisers' constitutional rights. The United States Supreme Court has repeatedly held that solicitation activity on behalf of a charity is a form of free speech protected by the First Amendment to the United States Constitution. In *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), the Court struck down on First and Fourteenth Amendment grounds an ordinance which prohibited on-street and door-to-door solicitations for contributions by any charitable organization not using at least 75% of its receipts for charitable purposes. In reaching its decision the Court emphasized that:

> "Prior authorities * * * clearly establish that charitable appeals for funds, on the street or door-to-door, 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." *Schaumburg,* 444 U.S. at 632, 100 S.Ct. 826.

The Supreme Court and numerous lower courts have repeatedly affirmed the broad scope of First Amendment protections accorded charitable solicitations. See *e.g., United States v. Kokinda,* 497 U.S. 720, 725, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990)("Solicitation ***563** is a recognized form of speech protected by the First Amendment"); *Meyer v. Grant,* 486 U.S. 414, 422, n. 5, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)("[T]he solicitation of charitable contributions often involves speech protected by the First Amendment and * * * any attempt to regulate solicitation would necessarily infringe that speech"); *Gaudiya Vaishnava Society v. City of San Francisco,* 952 F.2d 1059, 1063 (9th Cir.1990)("The Supreme Court has held that fundraising for charitable organizations is fully protected speech"); *Indiana Voluntary Firemen's Ass'n, Inc. v. Pearson,* 700 F.Supp. 421, 435 (S.D.Ind.1988) (Charitable solicitation is "entitled to the entire panoply of protections afforded by the first amendment").

The Supreme Court has held that these constitutional rights fully apply even where charitable solicitation is done by paid professionals. *Schaumburg,* 444 U.S. at 632, 100 S.Ct. 826. As the Court noted in *Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988):

> "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley,* U.S. at 801, 108 S.Ct. 2667, citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 265-66, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Riley stressed that a "fundraiser has an independent First Amendment interest in the speech, even though payment is received." *Riley,* 487 U.S. at 794, n. 8, 108 S.Ct. 2667. See also *Indiana Voluntary Firemen's Association,* 700 F.Supp. at 437 ("The protected speech overtones of such solicitations are not altered by the fact that the solicitor is a paid professional").

[2] Government action which would infringe upon such speech is subject to strict scrutiny and may only restrict free speech where the restriction is precisely tailored to further a compelling state interest. See *Riley,* 487 U.S. at 799-800, 108 S.Ct. 2667; *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 967-68, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); *Schaumburg,* 444 U.S. at 636, 100 S.Ct. 826. The Attorney General appears to suggest that the mere fact that the fundraisers fees are high gives it a compelling interest to pursue its case, yet a similar argument was made in *Schaumburg* where the Village of Schaumburg claimed that more than 60% of the funds collected by the respondent, Citizens for a Better Government, *****318 **969** were spent for the benefit of employees and not for a charitable purpose. Similarly, in *Munson,* the Court struck down a Maryland statute which forbade contracts between charities and professional fundraisers if they provided that the fundraiser ***564** would retain more than 25% of the money collected. Again, the Court rejected that the state's interest in preventing fraud could justify such a restriction, stating:

> "[T]here is no necessary connection between fraud and high solicitation and administrative costs. A number of other factors may result in high costs; the most important of these is that charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment." *Munson,* 467 U.S. at 961, 104 S.Ct. 2839.

The Court called the statute at issue in *Munson* "fundamentally mistaken" in its premise that high solicitation fees could ever be an accurate measure of fraud. *Munson,* 467 U.S. at 966, 104 S.Ct. 2839. The Court also explained that focusing on the percentage of a donation received by a fundraiser is not narrowly tailored to the goal of preventing fraud, as the First Amendment requires:

> "That the statute in some of its applications actually prevents the misdirection of funds from

> the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is in itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, through restricting solicitation costs, will have done nothing to prevent fraud." *Munson,* 467 U.S. at 966-67, 104 S.Ct. 2839.

The *Munson* decision specially rejected the argument raised by the Attorney General that a fundraiser's receipt of high fees means that a solicitation does not serve a charitable purpose and makes the request for a donation a form of fraud. The dissent in *Munson* made the same argument, which the majority rejected:

> "[T]he dissent * * * 'simply misses the point' when it urges that there is an element of 'fraud' in a professional fundraiser's soliciting money for a charity if a high proportion of those funds are expended in fundraising. [Citation.] The point of the *Schaumburg* court's conclusion that the percentage limitation was not an accurate measure of fraud was that the charity's 'purpose' may include public education. It is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself. And concerns about unscrupulous fundraisers, like concerns about fraudulent charities, can and are accommodated ***565** directly, through disclosure and registration requirements and penalties for fraudulent conduct." *Munson,* 467 U.S. at 967-68, n. 16, 104 S.Ct. 2839.

The Court in *Riley* subsequently emphasized its holding that a fundraiser cannot be prosecuted for fraudulent conduct merely on the fact that he or she charges a high fee. There, the Supreme Court examined the constitutionality of a North Carolina statute that defined the reasonable fee that a professional fundraiser may charge according to a three-tiered schedule. Under that schedule, a fee of up to 20% of receipts collected was deemed reasonable. A fee of between 20% and 30% was deemed unreasonable upon a showing that the solicitation at issue did not involve the dissemination of information or advocacy relating to public issues as directed by the charity. A fee exceeding 35% was deemed unreasonable but the fundraiser was allowed to rebut that presumption by a showing that the fee was necessary. ****970***Riley,* 487 U.S. at 784-86, 108 S.Ct. 2667. *****319** The statute also required professional fundraisers to orally disclose to potential donors before an appeal for funds the percentage of charitable contributions collected during the previous 12 months that were actually turned over to the charity. 487 U.S. at 786, 108 S.Ct. 2667.

The Court held that the state's interest in preventing fraud could not support the restrictions imposed by the statute:

> "Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." *Riley,* 487 U.S. at 789, 108 S.Ct. 2667.

The court repeated that "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, 108 S.Ct. 2667. Although the Attorney General argues vigorously that these statements were not meant to apply to common law actions or those statutory claims based upon commonlaw principles, the same concerns which caused the Court to reject the statute at issue in *Riley* applies with equal force to the cause of action alleged by the Attorney General. Nor do we agree with the Attorney General's argument that the Supreme Court meant only to prohibit "rigid across-the-board limitations" on fundraising fees. Indeed, the threat to constitutionally protected speech is even greater in cases in which the Attorney General or other officials have free rein to decide which fundraisers to target.

***566** The Maryland statute at issue in *Munson* gave the Secretary of State of Maryland the discretion to grant a waiver of the statute "whenever necessary." *Munson,* 467 U.S. at 964, n. 12, 104 S.Ct. 2839. The Secretary of State argued that this made the law constitutional because she had granted such waivers in an extremely liberal manner, and special care shown for the rights of advocacy groups. *Munson,* 467 U.S. at 964, n. 12, 104 S.Ct. 2839. The Supreme Court explained why giving state officials such discretion would pose an even greater threat to free speech:

> "[E]ven if the Secretary of State were correct [and] the waiver provision were broad enough to allow for exemptions 'whenever necessary,' we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a 'license' for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute

> creates a threat of censorship that by its very existence chills free speech. [Citations.] Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitations would simply have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State." *Munson*, 467 U.S. at 964, n. 12, 104 S.Ct. 2839.

See also *Riley*, 487 U.S. at 793-94, 108 S.Ct. 2667 (rejecting a statutory presumption of unreasonableness which the fundraiser is permitted to rebut).

The Attorney General claims that the fundraisers committed fraud because they represented that monies donated would be used for VietNow's charitable purposes but did not inform prospective donors that, pursuant to their contract with VietNow, only 15% of the proceeds raised would be used by VietNow. This was precisely the type of affirmative duty to speak which was struck down in *Riley*. The Supreme Court held that the provision compelled speech and was therefore a content-based restriction subject to exacting First Amendment scrutiny. *Riley*, 487 U.S. at 789, 108 S.Ct. 2667. The Court found that the mandatory disclosure rule could not withstand such scrutiny because the proffered state interest was "not as weighty as the state asserts" and that "the means chosen to accomplish it are unduly burdensome and not narrowly tailored." ****971***Riley*, 487 U.S. at 798, 108 S.Ct. 2667. *****320** Other courts have reached the same conclusion. See *e.g.*, *People v. French*, 762 P.2d 1369, 1375 (Colo.1988); ***567***State v. Events International, Inc.*, 528 A.2d 458, 461 (Me.1987); *Indiana Voluntary Firemen's Assoc.*, 700 F.Supp. 421; *Telco Communications, Inc. v. Barry*, 731 F.Supp. 670 (D.N.J.1990); *Kentucky State Police Professional Ass'n. v. Gorman*, 870 F.Supp. 166 (E.D.Ky.1994).

The Attorney General argues that the fundraisers are fiduciaries to the public who transfers funds to them and, as fiduciaries, the fundraisers should be held to a duty to fully inform the donors about the nature of their donation. See *e.g.*, *Chicago Park District v. Kenroy, Inc.*, 78 Ill.2d 555, 562, 37 Ill.Dec. 291, 402 N.E.2d 181 (1980); *Graham v. Mimms*, 111 Ill.App.3d 751, 761, 67 Ill.Dec. 313, 444 N.E.2d 549 (1982). Yet the fundraisers in the *Riley* case and the fundraisers in the other solicitation cases which preceded it were also fiduciaries with respect to the money they solicited and collected. The cases cited by the Attorney General are neither First Amendment nor charitable solicitation cases. They are, therefore, plainly distinguishable.

In short, we find that the type of allegations made by the Attorney General's complaint violate the First Amendment and have been thoroughly discredited by the Supreme Court. Accordingly, for the foregoing reasons, the judgment of the circuit court dismissing the Attorney General's Amended Complaint is affirmed.

AFFIRMED.

CAMPBELL, J., and SHEILA M. O'BRIEN, J., concur.

729 N.E.2d 965, 313 Ill.App.3d 559, 246 Ill.Dec. 314

END OF DOCUMENT

[Dated December 1, 1998]

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

No. 91 CH 4926

THE PEOPLE OF the STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff,

vs.

TELEMARKETING ASSOCIATES, INC., an Illinois business corporation; ARMET, INC., an Illinois corporation; and RICHARD TROIA, Individually and as an Officer, Director and Fiduciary of TELEMARKETING ASSOCIATES, INC., and ARMET, INC.,

Defendants.

AGREED JUDGMENT ORDER

THIS CAUSE coming before the Court on the motion of Plaintiff THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, for voluntary dismissal of all remaining claims in Plaintiff's Complaint as amended to date, including specifically those statutory claims against Defendants RICHARD TROIA and ARMET INC. based on their alleged failure to register ARMET INC. with the Plaintiff in violation of the Charitable Trust and Illinois Solicitation For Charity Acts, all parties being before the Court by counsel, the Court being fully advised in the premises and being informed that the Defendants have agreed to the relief sought and concur in Plaintiff's Motion,

IT IS HEREBY ORDERED that all remaining claims in said Complaint, including specifically the claims based on the alleged failure of the Defendants to register ARMET INC. with the Plaintiff in violation of the Charitable Trust and Illinois Solicitation For Charity Act, be and the same are hereby dismissed.

December 1, 1998

ENTER:

/s/
JUDGE THOMAS A. HETT

**IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS**

No. 91 CH 4926

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General,

Plaintiff,

v.

TELEMARKETING ASSOCIATES, INC., et al.,

Defendants.

ORDER

Coming upon the Plaintiff's Motion to Vacate Order and to Reconsider, the parties appearing and the court being advised in the premises, the court stating that the count as to statutory violation having not yet been dismissed or disposed of, that the matter is still pending on that count and being otherwise advised in the premises:

IT IS ORDERED:

A) The request for 304(a) language is denied;

B) The Motion to Vacate and Reconsider is denied for reasons stated on the record.

7/24, 1997

ENTER:

/s/
JUDGE THOMAS P. DURKIN

**IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS**

No. 91 CH 4926

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General,

Plaintiff,

v.

TELEMARKETING ASSOCIATES, INC., et al.,

Defendants.

ORDER

Coming upon Defendants' Motion to Dismiss under Section 2-615, the Parties having briefed the motion, the Parties having appeared, the court hearing argument and the court being advised in the premises:

It is Ordered for the reasons stated on the record the Plaintiff's Amended Complaint as to the issues of fraud is dismissed.

5/29, 1997

ENTER:

/s/
JUDGE THOMAS P. DURKIN

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

No. 91 CH 4926

PEOPLE OF THE STATE OF ILLINOIS *ex rel.*
JAMES E. RYAN, Attorney General,

Plaintiff,

v.

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

Defendants.

ORDER

This case having come before the Court on Defendants' motion to dismiss pursuant to § 2-615 of the Illinois Civil Code, 735 ILCS 5/2-615, and the matter having been briefed by both parties and the Court having heard oral argument in the premises.

IT IS HEREBY ORDERED:

For the reasons set forth by the Court in open court:

1) Defendants' Motion is granted insofar as it relates to the fraud claims and allegations made by Plaintiff;

2) Defendants' motion is denied insofar as it relates to the statutory requirement in 245 ILCS 460/6 as to licensing;

3) Plaintiff is given leave to amend, if needed.

11/4, 1996

ENTER:

/s/
JUDGE THOMAS P. DURKIN