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**SUPREME COURT OF THE UNITED STATES**

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ILLINOIS EX REL. MADIGAN, ATTORNEY GENERAL  
OF ILLINOIS *v.* TELEMARKETING ASSOCIATES,  
INC., ET AL.

## CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 01-1806. Argued March 3, 2003—Decided May 5, 2003

Respondents, Illinois for-profit fundraising corporations and their owner (collectively Telemarketers), were retained by VietNow National Headquarters, a charitable nonprofit corporation, to solicit donations to aid Vietnam veterans. The contracts between those parties provided, among other things, that Telemarketers would retain 85 percent of the gross receipts from Illinois donors, leaving 15 percent for VietNow. The Illinois Attorney General filed a complaint in state court, alleging, *inter alia*, that Telemarketers represented to donors that a significant amount of each dollar donated would be paid over to VietNow for specifically identified charitable endeavors, and that such representations were knowingly deceptive and materially false, constituted a fraud, and were made for Telemarketers' private pecuniary benefit. The trial court granted Telemarketers' motion to dismiss the fraud claims on First Amendment grounds. In affirming, the Illinois Appellate and Supreme Courts placed heavy weight on *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U. S. 947, and *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781. Those decisions held that certain regulations of charitable solicitation barring fees in excess of a prescribed level effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment. The state high court acknowledged that this case involved no such prophylactic proscription of high-fee charitable solicitation. Instead, the court noted, the Attorney General sought to enforce the State's generally applicable antifraud laws against Telemarketers for specific instances of deliberate deception. However, the Illinois Supreme Court said, Telemarketers' solicitation

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statements were alleged to be false only because Telemarketers contracted for 85% of the gross receipts and failed to disclose this information to donors. The court concluded that the Attorney General's complaint was, in essence, an attempt to regulate Telemarketers' ability to engage in a protected activity based upon a percentage-rate limitation—the same regulatory principle rejected in *Schaumburg*, *Munson*, and *Riley*.

*Held:* Consistent with this Court's precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used. The Illinois Attorney General's allegations against Telemarketers therefore state a claim for relief that can survive a motion to dismiss. Pp. 8–21.

(a) The First Amendment protects the right to engage in charitable solicitation, see, *e.g.*, *Schaumburg*, 444 U. S., at 632, but does not shield fraud, see, *e.g.*, *Donaldson v. Read Magazine, Inc.*, 333 U. S. 178, 190. Like other forms of public deception, fraudulent charitable solicitation is unprotected speech. See, *e.g.*, *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 164. This Court has not previously addressed the First Amendment's application to individual fraud actions of the kind at issue here. It has, however, three times held unconstitutional prophylactic laws designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. Pp. 8–13.

(b) In those cases, *Schaumburg*, *Munson*, and *Riley*, the Court took care to leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations. See, *e.g.*, *Schaumburg*, 444 U. S., at 637. As those decisions recognized, there are differences critical to First Amendment concerns between fraud actions trained on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high. Simply labeling an action one for "fraud," of course, will not carry the day. Had the State Attorney General's complaint charged fraud based solely on the percentage of donations the fundraisers would retain, or their failure to alert donors to fee arrangements at the start of each call, *Riley* would support swift dismissal. Portions of the Attorney General's complaint against Telemarketers were of this genre. But the complaint and annexed affidavits, in large part, alleged not simply what Telemarketers failed to convey. They also described what Telemarketers misleadingly represented. Taking into account the affidavits, and reading the complaint in the light most favorable to the Attorney General, that pleading described misrepresentations this Court's precedent does not place under the First Amendment's cover. First, the complaint asserted that

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Telemarketers affirmatively represented that a significant amount of each dollar donated would be paid over to VietNow to be used for specific charitable purposes while in fact Telemarketers knew that 15 cents or less of each dollar would be available for those purposes. Second, the complaint essentially alleged that the charitable solicitation was a façade: Although Telemarketers represented that donated funds would go to VietNow's charitable purposes, the amount of funds paid over to the charity was merely incidental to the fundraising effort, which was made for Telemarketers' private pecuniary benefit. Fraud actions so tailored, targeting misleading affirmative representations about how donations would be used, are unlike the prophylactic measures invalidated in *Schaumburg*, *Munson*, and *Riley*: So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees *per se*, fraud actions need not impermissibly chill protected speech. Pp. 13–16.

(c) The prohibitions invalidated in *Schaumburg*, *Munson*, and *Riley* turned solely on whether high percentages of donated funds were spent on fundraising. Their application did not depend on whether the fundraiser made fraudulent representations to potential donors. In contrast to the prior restraints inspected in those cases, a properly tailored fraud action targeting specific fraudulent representations employs no “[b]road prophylactic rul[e],” *Schaumburg*, 444 U. S., at 637 (citation omitted), lacking any “nexus . . . [to] the likelihood that the solicitation is fraudulent,” *Riley*, 487 U. S., at 793. Such an action thus falls on the constitutional side of the line “between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process.” *Munson*, 467 U. S., at 969–970. The Attorney General’s complaint has a solid core in allegations that home in on Telemarketers’ affirmative statements designed to mislead donors regarding the use of their contributions. Of prime importance, to prove a defendant liable for fraud under Illinois case law, the State must show by clear and convincing evidence that the defendant knowingly made a false representation of a material fact, that such representation was made with the intent to mislead the listener, and that the representation succeeded in doing so. In contrast to a prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful, the State bears the full burden of proof in an individualized fraud action. Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech. See, e.g., *New York Times Co. v. Sullivan*, 376 U. S. 254, 279–280. As an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court’s

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findings. Cf. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485, 498–511. What the First Amendment and this Court’s case law emphatically do not require, however, is a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations. While the percentage of fundraising proceeds turned over to a charity is not an accurate measure of the amount of funds used “for” a charitable purpose, *Munson*, 467 U. S., at 967, n. 16, the gravamen of the fraud action in this case is not high costs or fees, but particular representations made with intent to mislead. The Illinois Attorney General has not suggested that a charity must desist from using donations for legitimate purposes such as information dissemination, advocacy, and the like. Rather, the Attorney General has alleged that Telemarketers attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, knowing full well that was not the case. Such representations remain false or misleading, however legitimate the other purposes for which the funds are in fact used. The Court does not agree with Telemarketers that the Attorney General’s fraud action is simply an end run around *Riley*’s holding that fundraisers may not be required, in every telephone solicitation, to state the percentage of receipts the fundraiser would retain. It is one thing to compel every fundraiser to disclose its fee arrangements at the start of a telephone conversation, quite another to take fee arrangements into account in assessing whether particular affirmative representations designedly deceive the public. Pp. 16–19.

(d) Given this Court’s repeated approval of government efforts to enable donors to make informed choices about their charitable contributions, see, e.g., *Schaumburg*, 444 U. S., at 638, almost all States and many localities require charities and professional fundraisers to register and file regular reports on their activities, particularly their fundraising costs. These reports are generally available to the public and are often placed on the Internet. Telemarketers do not object on First Amendment grounds to these disclosure requirements. Just as government may seek to inform the public and prevent fraud through such requirements, so it may vigorously enforce antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. *Riley*, 487 U. S., at 800. High fundraising costs, without more, do not establish fraud, see *id.*, at 793, and mere failure to volunteer the fundraiser’s fee when contacting a potential donee, without more, is insufficient to state a claim for fraud, *id.*, at 795–801. But these limitations do not disarm States from assuring that their residents are positioned to make informed choices about their charitable giving. Pp. 19–21.

198 Ill. 2d 345, 763 N. E. 2d 289, reversed and remanded.

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GINSBURG, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined.