

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 LISA MADIGAN, ATTORNEY GENERAL :

4 OF ILLINOIS, :

5 Petitioner :

6 v. : No. 01-1806

7 TELEMARKETING ASSOCIATES, :

8 INC. , ET AL. :

9 - - - - -X

10 Washington, D. C.

11 Monday, March 3, 2003

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:02 a.m.

15 APPEARANCES:

16 RICHARD S. HUSZAGH, ESQ., Assistant Attorney General,
17 Chicago, Illinois; on behalf of the Petitioner.

18 PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D. C. ; on behalf of
20 the United States, as amicus curiae, supporting the
21 Petitioner.

22 M ERROL COPILEVITZ, ESQ., Kansas City, Missouri; on
23 behalf of the Respondents.

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	RICHARD S. HUSZAGH, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	PAUL D. CLEMENT, ESQ.	
7	On behalf of the United States, as amicus curiae,	
8	supporting the Petitioner	18
9	ORAL ARGUMENT OF	
10	M ERROL COPILEVITZ	
11	On behalf of the Respondents	28
12	REBUTTAL ARGUMENT OF	
13	RICHARD S. HUSZAGH, ESQ.	
14	On behalf of the Petitioner	51
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in Number 01-1806, Lisa Madigan, Attorney General of
Illinois, versus Telemarketing Associates.

Mr. Huszagh.

ORAL ARGUMENT OF RICHARD S. HUSZAGH
ON BEHALF OF THE PETITIONER

MR. HUSZAGH: Mr. Chief Justice, and may it
please the Court:

It cannot be true that charitable solicitors are
free to commit fraud just because they are charitable
solicitors. Under long-established common law fraud
principles, it is unquestionably fraudulent to induce
someone to make a gift of money by saying it will be used
for a specific charitable purpose when, in fact, only a
nominal amount goes to that purpose and the solicitor
keeps the vast majority. The First Amendment does not --

QUESTION: What about --

MR. HUSZAGH: -- displace these principles.

QUESTION: What about 25 percent going to the
charitable purpose?

MR. HUSZAGH: 25 percent may or may not be a
misrepresentation, depending upon what the public was told
about the ultimate purpose of --

1 QUESTION: The public's told, you know, I'm --
2 I'm soliciting for X charity, would you -- would you give
3 money, please, for X charity --
4 MR. HUSZAGH: If the public --
5 QUESTION: -- to help children in Cambodia.
6 MR. HUSZAGH: Well --
7 QUESTION: 25 percent of the money actually goes
8 to that purpose, 25 percent.
9 MR. HUSZAGH: If the public reasonably
10 understands that significantly more than that amount goes
11 to that purpose --
12 QUESTION: I -- I --
13 MR. HUSZAGH: -- then it would be a
14 misrepresentation to rely upon --
15 QUESTION: What do we --
16 MR. HUSZAGH: -- that assumption --
17 QUESTION: -- public opinion poll as to whether
18 the public reasonably understood it was going to be more
19 than 25 percent?
20 MR. HUSZAGH: Assumptions form a fundamental
21 part of human communication, assumptions about the meaning
22 of language, assumptions -- assumptions about events and
23 conditions. If somebody were to say that they were
24 soliciting money to -- for -- for the family of people who
25 died on September 11, and the people they were referring

1 to were their parents who died of natural causes in
2 Topeka, Kansas, on September 11 of 1995, that's a
3 misrepresentation, because people are entitled to make a
4 reasonable --

5 QUESTION: Sure.

6 MR. HUSZAGH: -- assumption about what that
7 language means.

8 QUESTION: That was misleading, but it is not
9 misleading to say, I'm going to -- this money is going to
10 go to this charitable cause when, in fact, you acknowledge
11 many charities have to pay substantial amounts,
12 substantial percentages in order to, in order to get
13 organizations to solicit for them, and who -- who is to
14 say that the 25 percent is too much. I've no idea whether
15 it is.

16 MR. HUSZAGH: I think that --

17 QUESTION: You're just going to give that to a
18 jury and leave the fundraising to be liable criminally or
19 not, depending upon whether this jury thinks that
20 25 percent is too little to go, or -- I -- I just -- I'm
21 not comfortable with that at all.

22 MR. HUSZAGH: I -- I think the Court needs to
23 distinguish between two different types of circumstances.
24 One is the fact that there may be legitimate reasons why a
25 charity could have expenses above a certain level. It

1 could be that they're an unpopular charity. It could be
2 that it's a charity that's small, or has recently started
3 up, but those are the types of reasons that the Court used
4 to invalidate laws that declared expenses above a certain
5 threshold to -- to establish that the charity was a sham
6 entirely. Those don't negate --

7 QUESTION: It would still be a misrepresentation
8 even if they had good reasons for -- for giving the
9 fundraiser 90 percent of the money.

10 MR. HUSZAGH: And --

11 QUESTION: It would still be a
12 misrepresentation, wouldn't it?

13 MR. HUSZAGH: And that's my point, that the
14 First Amendment should not displace that principle where
15 misrepresentations are determined based upon whether the
16 defendant made a material misrepresentation of fact, and
17 it's -- it is no different from --

18 QUESTION: Well, would this prosecution have
19 been brought if the fee, if the amount given to the
20 charity had been more substantial?

21 MR. HUSZAGH: There's a substantial likelihood,
22 or there's less likelihood that such a prosecution would
23 be brought, been brought, because --

24 QUESTION: How would anyone know when the
25 Attorney General would be likely to charge them?

1 MR. HUSZAGH: I think really the ultimate
2 question is not whether they're going to know whether the
3 Attorney General is going to bring the case, but whether
4 they've committed fraud. Ultimately, the Attorney General
5 is not going to prosecute every case of fraud that exists,
6 and --

7 QUESTION: Is -- is there an intent requirement,
8 an intent to defraud requirement under the Illinois law?

9 MR. HUSZAGH: As to what we've alleged for
10 common law fraud, yes, there is, and we've made that
11 allegation as -- with respect to all of the statutory
12 antifraud counts as well, and to the extent that there is
13 a concern about the uncertainty as to whether a specific
14 statement may be a misrepresentation, depending upon the
15 inability to predict exactly what the public may know,
16 then certainly there's no such objection if the defendant,
17 it can be proved knew that they were creating a false
18 impression.

19 QUESTION: But one of your affidavits says that
20 one of the solicitees expressly asked and was told that
21 90 percent or more goes to the vets. Now, certainly
22 that's a classic misrepresentation, is it not?

23 MR. HUSZAGH: Yes, it is, but our position goes
24 further, which is that there is no constitutional value in
25 intentional half-truths or artificial, contrived ways of

1 stating something that may be literally true --

2 QUESTION: No, but the concern that we have is
3 that there's no -- there is no way to predict in advance
4 what is going to be treated or what is going to be found
5 as the half-truth.

6 Let me put the question to you this way. Leave
7 to the side the moment the particular cases that in --
8 that you include among -- among those you have brought in
9 which at least the allegation is that a very specific
10 misrepresentation was made, no labor cost, 90 percent goes
11 to the -- to the -- the objects of the charity. Put them
12 aside, and consider only the cases in which no
13 representation is made beyond the fact that we are
14 collecting money for this charity, and no representation
15 is made about the amount of money that's going to go for
16 overhead and the amount that's actually going to get to
17 the charitable donees.

18 I don't see where any charitable fundraiser
19 could in advance draw a line and say, I don't have to
20 disclose anything under risk of being prosecuted. I would
21 suppose that any charitable fundraiser, if you win this
22 case, would say, there's only one way I can cover myself,
23 and that is to disclose the percentages when I make the --
24 the solicitation. Otherwise, I'm vulnerable to a
25 prosecution. If that is the way the charitable

1 fundraisers are going to be forced to operate, then, in
2 fact, we have totally undercut the precedent that says you
3 can't require that disclosure, so my question is, how can
4 we, how could we sanction a system on your theory that
5 would be fair, without, in practical terms, whether we say
6 it or not, requiring the very disclosure that we have said
7 previously need not be required?

8 MR. HUSZAGH: I would agree that if that were
9 the conclusion as to what would occur in -- in -- if the
10 law that we advocate were permitted, then the Court would
11 effectively be forced to reevaluate the validity of its
12 precedents, and we are not --

13 QUESTION: And maybe we should. I'm not saying
14 one way or the other there, but --

15 MR. HUSZAGH: But in this case we are not urging
16 the Court to do so, but it is our -- our premise that
17 the -- that that conclusion does not necessarily follow,
18 and it has not been established in this case.

19 Ultimately, these speakers know how much is
20 going to be used for various purposes, or they certainly
21 have the ability to know that, and they are the masters of
22 their own speech, and to suggest that they have no ability
23 to know what the public is going to believe, or be led to
24 believe when they make specific representations about
25 seeking money for charity I think is somewhat unrealistic.

1 QUESTION: Okay, let's assume that it's
2 unrealistic in this particular case. 85/15, okay, let's
3 assume you win. 65/35, 60/40, 55/45 -- it's those cases
4 that we've got to worry about.

5 MR. HUSZAGH: But I think that the -- the
6 question then becomes whether the Court should displace
7 common law fraud principles, which already provide a
8 measure of breathing room for that type of uncertainty.
9 Ultimately --

10 QUESTION: I suppose the breathing room is that
11 there has to be a false statement, a misrepresentation,
12 let's assume with knowledge of its falsity, which is
13 relied upon by the -- by the listener, that there's
14 some -- has to be damage and so forth. Is that what
15 you -- what do you tell the jury, what a reasonable person
16 would believe?

17 MR. HUSZAGH: No. It is important for the jury
18 to decide what, in fact, the donating public did believe
19 as to how much was going to be used for the purposes
20 described, that this is not some normative imposition by
21 the Government as to what's reasonable. This is an
22 adjudicatory process to determine what the understanding
23 of the public was, and ultimately --

24 QUESTION: What would the instruction, though,
25 to the jury be under the Illinois law? What must the

1 State prove here?

2 MR. HUSZAGH: The State would have to prove that
3 there were a material misrepresentation of fact, leaving
4 aside for a moment the intent requirement. The material
5 misrepresentation of fact includes three elements which
6 provide the defendant with a breathing space for some of
7 the uncertainties that the Court seems to be sensitive to.
8 First, the assertion must be factual, not some type of
9 representation like, this charity is a humdinger that
10 can't be disproved in a court of law.

11 The interpretation, the meaning to that statement has
12 to be a reasonable one, which is an objective requirement
13 subject to supervision by the courts, so if somebody
14 believed that 150 percent of every donation was going to
15 go to charity, that is objectively unreasonable, and the
16 Court would eliminate that.

17 QUESTION: Well, what -- what you say would be
18 very impressive and would eliminate my problems if you
19 were willing to go further and say, whenever you say, I'm
20 raising money for Vietnamese orphans, oh, 100 percent of
21 the money you collect is understood by the public to be
22 going to Vietnamese orphans, but you're not willing to say
23 that.

24 MR. HUSZAGH: No, because that's not reasonable.
25 It's not reasonable --

1 QUESTION: Because that's not reasonable.

2 MR. HUSZAGH: It's not reasonable for the public

3 to assume --

4 QUESTION: 25 percent.

5 MR. HUSZAGH: The -- there is no --

6 QUESTION: So -- so the --

7 QUESTION: So it has a reasonable understanding.

8 QUESTION: -- what does -- what does the judge

9 instruct the jury? Ladies and gentlemen of the jury, if

10 you think it's reasonable to send -- or -- or what? No,

11 no, it wouldn't be whether it's reasonable. It's what you

12 think the average person would have thought, right?

13 MR. HUSZAGH: It's what the Government proves

14 that the donating public understood based upon what they

15 were told, what they were reasonably led to believe. That

16 may include their background assumptions about how much

17 normally goes to fundraising costs or other administrative

18 overhead, and that can depend upon the nature of the

19 charity, as well as the statements made by the defendants.

20 The other elements, to finish my answer to

21 Justice O'Connor's and Justice Kennedy's questions, is

22 that there is in addition a materiality requirement. It

23 is not enough that the statement be technically false,

24 like a difference between 95 percent and 93 percent. The

25 difference has to be material, and that again provides

1 that certain falsity will go unprohibited because the
2 materiality requirement already gives a buffer zone.

3 QUESTION: Look at all -- think of all of the --
4 of the green, dark green briefs. Those briefs are filled
5 with examples of instances where the telemarketer kept a
6 large, maybe 90, maybe 100 percent, which seem perfectly
7 legitimate. For example, it's a start-up campaign, and at
8 the beginning they have to keep up more, keep more. For
9 example, it's an educational campaign, and what the
10 charity thinks is, we want to spend this money so people
11 will have heard our name, or will examine themselves for
12 possible breast cancer, or whatever.

13 Or, it could even be the Nature Conservancy,
14 where for accounting reasons the money that's going to
15 purchase land is not treated as if it were an expense on
16 behalf of the charity, so they're filled with examples.

17 MR. HUSZAGH: Well --

18 Now, suppose in your case the defendant proved
19 that he was within one of those examples. Would you then
20 say, if the jury believes that, that you should win, or
21 the defendant, and the reason I ask is that I think most
22 people feel, and the relevance of your case is that the
23 money is going to help the charity, indeed, most of it,
24 and what they will have shown is that the money did go to
25 help the charity, but in this instance, helping the

1 charity was consistent with the telemarketer keeping a
2 very large percentage, so could you explain how, in your
3 view, the law works with all those examples in the dark
4 green briefs?

5 MR. HUSZAGH: I -- I think there are two basic
6 answers to your question, Justice Breyer, and one is that
7 the reasonableness of the manner in which the expenditures
8 are made is not a proper subject of the Government's
9 paternalistic bureaucratic oversight to second-guess that
10 judgment, and I think the Court made that clear both in
11 Munson and more specifically in Riley, and we are not
12 arguing that the -- whether the -- the plaintiff's fraud
13 claim for actual specific misrepresentations turns -- they
14 will win or lose, depending upon whether there is some
15 reasonableness element to the manner of the .
16 expenditures --

17 QUESTION: No, well, if you're saying that they
18 lose, the telemarketer, even if all the money is being
19 used to help the charity, then I agree with the thrust of
20 the questions that have gone before.

21 MR. HUSZAGH: Well --

22 QUESTION: I don't see how you can possibly
23 prosecute people for fraud where there is no fraud --

24 MR. HUSZAGH: But that leads to --

25 QUESTION: -- and -- and that would seem to me a

1 case where there is no fraud.

2 MR. HUSZAGH: That leads to the second point
3 that I was going to make.

4 QUESTION: And it's a charity, too, so there's a
5 First Amendment right.

6 MR. HUSZAGH: And I don't dispute that, but --

7 QUESTION: Why -- why is there no fraud, just
8 because the charge is reasonable? Fraud exists if you
9 have represented to the public something, whether the
10 something you've represented is reasonable or unreasonable
11 or not. If the public is unaware that 95 percent is a
12 perfectly reasonable charge for this kind of fundraising,
13 and the public therefore believes, given what you've said,
14 I'm raising money for Vietnamese orphans, that at least
15 50 percent of that is going to go to Vietnam, then it
16 seems to me you have a fraud case.

17 MR. HUSZAGH: That is my answer to the second
18 part of Justice Breyer's question.

19 QUESTION: All right. In other words, you
20 intend to convict people -- you intend to convict them,
21 and this may be one of them. You intend to convict the
22 Nature Conservancy because 98 percent of its revenue is --
23 is accounted for as -- as telemarketing expense, where in
24 reality, they're buying land with that.

25 MR. HUSZAGH: No, I --

1 QUESTION: Or you intend to convict the -- the
2 organization that is simply trying to inform women about
3 the importance of self-examination for cancer. Is that
4 the answer?

5 MR. HUSZAGH: No, it is not.

6 QUESTION: Okay, then -- then why don't you
7 elaborate on your answer.

8 MR. HUSZAGH: Let me deal with the Nature
9 Conservancy first. I think that's an example in which the
10 public who gives money to the Nature Conservancy
11 understands realistically that their money is going to be
12 used for the purpose of buying land, and to suggest in
13 some artificial sense by a prosecutor that no, really they
14 thought it was going to be used in an accounting format to
15 be treated as -- as an expense as opposed to a capital
16 acquisition establishes fraud is -- is simply unrealistic.

17 The other example again focuses upon the
18 specific nature of the representation made, and there --
19 there is a wide variety of differences, but if the
20 representation is made that the money is going to be used
21 to feed hungry orphans in Vietnam, it does not somehow
22 become, per se, nonfraudulent if, in fact, those funds are
23 being used to -- to get out the word about the plight of
24 Vietnam veterans, which is different, and materially
25 different from what the representation was to the donors.

1 I think that is our basic --

2 QUESTION: Counsel, let me ask you this. Is --

3 is the State taking the position that there is a material

4 misrepresentation of fact here because the amount given to

5 the charity was a trifling amount?

6 MR. HUSZAGH: It -- yes, because it was a

7 trifling amount --

8 QUESTION: Is that -- is that how you bill the

9 material misrepresentation?

10 MR. HUSZAGH: Well, materiality doesn't always

11 have to rise to the level that there will only be a

12 trifling amount that would go to the charity, but there

13 was a significant --

14 QUESTION: But in this case?

15 MR. HUSZAGH: Yes.

16 QUESTION: And your -- the respondent's brief

17 says, well, the Governor had a charity ball, and just

18 17 percent --

19 MR. HUSZAGH: Well, I -- I don't --

20 QUESTION: -- was kept and no prosecution.

21 MR. HUSZAGH: I'd rather not use my time to try

22 and explain the misleading --

23 QUESTION: Uh-huh.

24 MR. HUSZAGH: -- impression given by that

25 example.

1 Let me just say that the facts of that case are
2 dramatically different than were represented, and the --
3 the argument that there has been any impermissible
4 selective prosecution in this case based upon some type of
5 discriminatory element that would violate the Equal
6 Protection Clause, there's nothing in the record to that.
7 If there were such a case, the Court has said that there
8 is a reserved ability to do so. What I would --

9 QUESTION: Do you want to reserve the balance of
10 my time, Mr. Huszagh?

11 MR. HUSZAGH: Yes, I would. Thank you,
12 Mr. Chief Justice.

13 QUESTION: Mr. Clement, we'll hear from you.

14 ORAL ARGUMENT OF PAUL D. CLEMENT
15 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE PETITIONER

17 MR. CLEMENT: Mr. Chief Justice, and may it
18 please the Court:

19 This Court has repeatedly reaffirmed the
20 Government's authority to protect the public from fraud,
21 even though virtually every representation involves
22 speech.

23 Indeed, while striking down broad prophylactic
24 laws, every time this Court has addressed the issue of
25 charitable solicitation, it has reaffirmed the

1 constitutional viability of individual fraud actions.

2 Now, part of the reason that this Court has
3 distinguished between individual fraud actions and broad
4 prophylactic rules is that an individual fraud action can
5 bring into bear the entire context of a misrepresentation.
6 The difficulty with a statute like that before the Court
7 in Riley was that it necessarily focused on a single
8 factor, fundraising costs, and didn't take into account
9 what was told to individual donors or anything else, and
10 then categorically --

11 QUESTION: But isn't that essentially,
12 Mr. Clement, what is happening here? That is, these
13 are -- to the extent that these are telephone calls, and
14 say, like you to contribute to Vietnam, and this money's
15 going to be spent on veterans, and that's the extent of
16 it, it seems that the Illinois Attorney General is
17 measuring the decision whether to bring a fraud claim by
18 the percent that goes to the charity in comparison to
19 this -- this portion that goes to the fundraiser.

20 MR. CLEMENT: I think that the fundraising costs
21 are part of the analysis of the fraud action, but I
22 wouldn't have read Riley as making that factor wholly
23 immaterial, and I think the important thing is that in the
24 calls in this case, they weren't just saying, we're here
25 to raise money for Vietnam vets. The record suggests that

1 there was an emphasis on particular charitable services.
2 We're raising money for food baskets. We're raising money
3 to help veterans here in DuPage County.

4 QUESTION: Well, that's fine. I mean, those
5 specific misrepresentations that turned out to be false,
6 and some of them said 90 percent is going to go there,
7 those are no problems. The ones we're concerned with are
8 the -- the fraud allegations that are sustained simply on
9 the basis of the fact this money is going to go to this
10 cause and, in fact, only 15 percent of it is going to that
11 cause.

12 MR. CLEMENT: Well, two responses, Your Honor.
13 First of all, since there are these specific
14 misrepresentations in this case, that alone is a reason to
15 reverse the decision, because the Illinois Supreme Court
16 seemed to be laboring under the misimpression that those
17 cases were wholly off-limits because the fundraising
18 percentage --

19 QUESTION: We do have to write an opinion
20 though, you know.

21 MR. CLEMENT: Absolutely.

22 QUESTION: Okay.

23 MR. CLEMENT: So let me bring you to the second
24 part of the question, which is, I think there are problems
25 when you have a situation where the only thing that is

1 said is, we're here to raise money for charity, but I
2 think in reality, you have to give -- you have to trust
3 juries in common law fraud actions a little bit to take
4 into account the broad nature of the representations that
5 are made. The -- the virtue of a fraud action as opposed
6 to a broad prophylactic rule is that a fraud action can
7 take into account the entire mosaic of the representations
8 that are made, and there's no need to focus on one
9 particular tile and see whether it's literally true or
10 literally false.

11 QUESTION: Would you be able to show to the jury
12 how reasonable it is for this particular fundraiser to --
13 to retain 85 percent?

14 MR. CLEMENT: I -- I think so.

15 QUESTION: Why?

16 MR. CLEMENT: If every --

17 QUESTION: Why? What does that have to do with
18 what the effect of the representation was upon the public?

19 MR. CLEMENT: Because there are other elements
20 of a common law fraud action. You also have to show
21 materiality, and reasonable reliance. If every single
22 person raised --

23 QUESTION: How does that go to materiality?
24 How does it go to reasonable reliance?

25 MR. CLEMENT: Because if every single person

1 raising money has had these astronomical fundraising
2 costs, which of course is not true, but if that were true,
3 then a -- an individual donor who recognized that might
4 well not have any reasonable reliance on the
5 representations that money is going to charity, because
6 no -- no charity, apparently, can get any money to the
7 actual services that money is being raised, but that's not
8 true.

9 A very important element of common law fraud
10 that I think can provide sufficient protection to
11 legitimate charities is the intent to deceive, and the
12 intent to deceive I think is going to make a big
13 difference, because if you have a legitimate charity
14 that's asked by a donor what percentage of the money goes
15 to the specific service that you're raising money for,
16 let's say, food baskets, and that charity responds and
17 provides forthcoming information, then I don't see how the
18 prosecution or plaintiff can ever show an intent to
19 deceive.

20 On the other hand --

21 QUESTION: Okay, but let's take -- let's take
22 the cases, leaving aside the specific misrepresentations
23 here, let's take the case that we've got. 15 percent is
24 going. I take it you believe that on the basis of that,
25 a -- a jury could infer that there was an intent to

1 deceive, from the silence?

2 MR. CLEMENT: I -- I think that's right, but

3 I -- I would say --

4 QUESTION: Okay.

5 MR. CLEMENT: -- that part of the evidence I'd

6 like to put before the jury on intent to deceive --

7 QUESTION: May I ask --

8 MR. CLEMENT: -- is when a donor asks that

9 question --

10 QUESTION: But the donor --

11 QUESTION: This is not a jury trial, is it?

12 Isn't this an equity proceeding? Everybody's talking

13 about the jury all the way through, but I think it's a --

14 QUESTION: A fraud action for damages is a

15 jury --

16 QUESTION: I thought it was a proceeding in --

17 before -- in Chancery in this case.

18 MR. CLEMENT: I'm reliably informed that this

19 particular proceeding would go as a bench trial, which I

20 think would provide even further protection for free

21 speech.

22 QUESTION: Yes.

23 MR. CLEMENT: I think that -- my answer is in

24 terms of the jury because I do think that the -- the

25 decision that this Court announces is going to affect jury

1 trials as well, but what I'm saying is, I'd like to get
2 before the jury the fact that when these particular
3 fundraisers were asked the question, well, where does the
4 money go, at least the record suggests that they flatly
5 misrepresented where the money --

6 QUESTION: You -- you bet, and that's -- that's
7 what you've got in this case, but as Justice Scalia said,
8 we've got to write the opinion, and -- and if we consider
9 the case in which there were not these quite specific
10 misrepresentations, all you've got is silence about the
11 percentage, and a statement that the object of the charity
12 is Vietnamese orphans or whatever it may be, it seems to
13 me that when you start getting below the 85/25, you get
14 into an area in which the -- the result is a dice throw,
15 and if that is the case, the only way the charitable
16 fundraiser can protect himself, with the greatest good
17 faith in the world, is to disclose the percentage, and if
18 that's what we are going to require in fact, then we
19 better face the fact that we're going to have to retreat
20 from -- from what we've already held.

21 What's your answer to that?

22 MR. CLEMENT: Well, I would say first that we
23 wouldn't have any objection if you wanted to retreat from
24 what you said in Riley.

25 (Laughter.)

1 QUESTION: You wouldn't mind.

2 MR. CLEMENT: But -- but --

3 QUESTION: But isn't that what -- that's what
4 we've got to do, isn't it?

5 MR. CLEMENT: No, that is not what you have to
6 do, and I think the important thing is the type of hypo of
7 just all they do is call up and say, I'm here to raise
8 money for charity, what that hypothetical tends to do is
9 force the analysis into the single variable analysis
10 that's reflected in broad prophylactic rules, and the
11 answer in these cases, and I think what the opinion should
12 suggest, is that the context does matter terribly, so to
13 take some of the questions --

14 QUESTION: Okay --

15 MR. CLEMENT: -- that concern Justice Breyer, if
16 I could, when he's worried about the start-up charity,
17 well, if a start-up charity says, hi, we're a start-up
18 charity, but we are trying to raise money for a new cause,
19 and here's what we hope to do with the money, that's very
20 different than if a start-up charity picks up the phone
21 and says, we're a start-up charity, and we're going -- if
22 you give us money, we're going to help this particular
23 child in this foreign country.

24 I mean, if a start-up charity avoids fraudulent
25 statements, then that's going to have a reasonable effect

1 on the mind of the donor, and the donor's going to
2 recognize that, okay, a) start-up charities may have
3 higher cost, but more importantly, the representation that
4 I received was not that you were going to provide food
5 baskets in DuPage County, but that you hoped to provide
6 special services that weren't being provided currently by
7 any extant charity, and I think that context can make all
8 the difference.

9 And there are many elements of common law fraud
10 actions. You have to show knowledge of falsity, intent to
11 deceive, materiality, and reasonable reliance. In
12 Illinois, as is typical, you have to show those factors by
13 clear and convincing evidence. All of that is going to
14 provide substantial breathing room for First Amendment
15 values.

16 Indeed, much of this Court's jurisprudence in
17 the libel and defamation area has been a process of taking
18 the requirements of the common law for fraud, which were
19 much more onerous, and superimposing them on the law of
20 libel and defamation, where things like falsity was
21 presumed, and damages could be presumed, upon a showing of
22 defamation, and I think if you put it in that context,
23 that all of the safeguards that this Court has carefully
24 constructed over the years in the libel and defamation
25 context are in place to protect the -- the First Amendment

1 rights and provide breathing room, then I think that the
2 idea that the sky is falling is really mistaken in these
3 cases.

4 And I think to the contrary, if this Court were
5 to suggest in a case where the reality is that not just
6 85 percent is going to the professional fundraiser, but
7 fully 97 percent is going to something other than program
8 services, because VietNow only spends 20 percent of the
9 money they receive on program services, if this were --
10 Court were to suggest in this case that there's not a
11 fraud action, then it really will be open season for
12 charitable solicitation fraud.

13 And I think this Court has been particularly
14 concerned about broad prophylactic rules in the First
15 Amendment area. This is reflected in -- in, most
16 critically in its prior restraint doctrine, and that --
17 that instinct is reflected in Schaumburg, Munson, and
18 Riley, but at the same time, there's a corollary
19 principle, which specific instances of fraud can be
20 prosecuted by the Government, and that instinct is also
21 reflected in Munson, Schaumburg, and Riley, and there's
22 simply nothing in the First Amendment that suggests that
23 charitable solicitation fraud need go unpunished, and with
24 respect, I think what the Illinois Supreme Court did here
25 in creating a broad prophylactic immunity for charitable

1 solicitation from the law of fraud is just as unjustified
2 as the broad prophylactic rules limiting charitable
3 solicitation that this Court struck down in Schaumburg,
4 Munson, and Riley.

5 If there are no further questions --

6 QUESTION: Thank you, Mr. Clement.

7 Mr. Copilevitz, we'll hear from you.

8 ORAL ARGUMENT OF M ERROL COPILEVITZ

9 ON BEHALF OF THE RESPONDENTS

10 MR. COPILEVITZ: Mr. Chief Justice, members of
11 the Court:

12 What charities spend or pay for fundraising,
13 whether based upon a percentage or otherwise, are a
14 measure of the charity's judgment about how much to invest
15 in persuasion, a fully protected activity and it cannot be
16 second-guessed. The First Amendment guarantees the right
17 of unpopular organizations to zealously pursue their
18 causes.

19 The petitioner comes to this Court having pled
20 one case, but having argued another case. The
21 petitioner's denial of any intent to impose a cost
22 limitation on charitable appeals, and the petitioner's
23 claim that its only purpose is to combat fraud, is simply
24 not supported in this record. What is clear is that the
25 petitioner's claim is focused exclusively on the amount of

1 the respondents' fee.

2 QUESTION: Well now, I don't read the record
3 quite that way, Mr. Copilevitz. The affidavit that I
4 mentioned earlier on page 169, where the -- the woman said
5 that she specifically asked the question and was told
6 90 percent or more goes to the vets, that strikes me as a
7 straight common law fraud action. Are you saying that
8 that -- that the State is prohibited by the First
9 Amendment from prosecuting that case?

10 MR. COPILEVITZ: No, I'm not, Your Honor. What
11 I'm saying is that if that violation had been pled in this
12 case, we would have a different result at the Illinois
13 Supreme Court. Paragraph 74, at page 104 of the appendix,
14 is the paragraph that incorporates these affidavits, and
15 the allegation is simply that if the fee of the fundraiser
16 had been disclosed, they would not have made
17 contributions.

18 The Illinois Supreme Court specifically found,
19 as did the Illinois appellate court and the trial court,
20 that there were no affirmative misstatements made. In
21 order for the petitioner's case to be sustained, it has to
22 have two legs. We know that cost alone is not an
23 indication of fraud, so it has to have some other positive
24 statement.

25 QUESTION: Well, what if --

1 QUESTION: Why -- why is it that if -- if we
2 assume that the donors would not have given the money had
3 this statement been made, that that is not a large part of
4 showing a misrepresentation, I mean, I assume people
5 wouldn't buy automobiles or toasters if they knew that the
6 manufacturer was getting 95 percent of -- of the cost and
7 there was -- only 5 percent went into raw materials, so
8 there's always some problems here, but let's suppose that
9 95 percent, 100 percent of the donors would not have given
10 the money if they had known the facts. Isn't that the
11 beginnings, at least, of a misrepresentation?

12 MR. COPILEVITZ: Well, you're dealing with the
13 lesser of two evils. High undisclosed fundraising costs
14 are a lesser evil than compelling a point of solicitation
15 disclosure of information that is inaccurate, that this
16 Court has held is not material, and risk creating for
17 smaller --

18 QUESTION: Well, why isn't it material if -- if
19 the money would not have been given had the -- had the
20 fact been disclosed?

21 MR. COPILEVITZ: The percentage doesn't --

22 QUESTION: That doesn't -- isn't that another
23 way of saying the person is acting under a misimpression?

24 MR. COPILEVITZ: No, because the whole concept
25 is built on the only return the nonprofit received is the

1 net dollars, and as this Court recognized in Riley, there
2 is a wide range of values that the organization receives
3 from the appeal itself.

4 QUESTION: Mr. Copilevitz, it seems to me you
5 have to respond to Justice Kennedy, no, that it doesn't
6 constitute fraud simply to refuse to tell somebody
7 something which, if he knew, he would not have made the
8 contribution. I mean, perhaps someone would not have made
9 the contribution if they knew what an inefficient charity
10 this particular charity was, or knew that, you know, for
11 the past several years there had been a lot of
12 organizational problems. Does the person have to come out
13 with all this upon pain of being guilty of fraud?

14 MR. COPILEVITZ: No.

15 QUESTION: Certainly you don't have to tell
16 someone everything which, if he knew, would make a
17 difference. That doesn't constitute fraud.

18 MR. COPILEVITZ: I agree.

19 QUESTION: But if you ask a question and you
20 give a false answer, the two examples were given -- I was
21 struck by another -- one of the affidavits' comments.
22 This is the one at joint appendix 1 -- 182. The receipt
23 says it's tax deductible, and now the donor asks, on being
24 told that only 20 percent went to the charity, is it?

25 MR. COPILEVITZ: Is it tax deductible? Yes.

1 QUESTION: Is the 100 percent tax deductible
2 when 80 percent goes to the fundraiser?

3 MR. COPILEVITZ: That presume -- the answer to
4 your question is yes. The organization receives a benefit
5 beyond the net dollars. The purpose of the organization,
6 and if you look at the appendix, Article 5 of the articles
7 of incorporation at joint appendix 16 says that one of the
8 primary purposes of this organization is to increase the
9 community awareness of the problems faced by Vietnam
10 veterans. The contract that my client had with the
11 Vietnam veterans incorporated a part of that. It
12 incorporated a magazine. It incorporated an 800 number.
13 It incorporated distributing information.

14 The difference between the 15 cents on the
15 dollar that was received and the fee is value that this
16 organization received, so certainly the entire amount of
17 any contribution is tax deductible, and it's not fair or
18 proper to say that the organization received no benefit
19 other than the dollars.

20 QUESTION: May I ask a question that's not
21 entirely hypothetical? Suppose Congress, trying to get a
22 handle on fundraising operations that are really operating
23 to line the pockets of the fundraiser, rather than for the
24 benefit of the charity, would say, if more than 40 percent
25 of what is collected goes to the fundraiser, then the

1 donor will get a tax deduction only for the amount that
2 actually goes to the charity.

3 In other words, taking your theory, up to
4 40 percent, but saying if the fundraiser gets more than
5 40 percent, then the donor will not get a deduction for
6 everything the donor gave, but only for the part that went
7 to the charity, would that be -- would that violate the
8 First Amendment?

9 MR. COPILEVITZ: Yes. An organization like
10 Mothers Against Drunk Driving exists to advocate a change
11 of attitude. They could well enter into a contract that
12 says, every cent you raise I am giving to you to call that
13 many more people in order to -- to deliver our message, in
14 which case they would have 100 percent cost of fundraising
15 under the approach of the petitioner in this case, and
16 they would be justified, and your gifts to that
17 organization would be fully deductible, as they should be,
18 and they have the First Amendment right to spend what they
19 believe --

20 QUESTION: I'm -- I'm sorry, I don't -- that may
21 be the purpose of the organization, so that's for the
22 charitable purpose, to spread the word about drunk
23 driving, but the example that I gave you is, the
24 fundraiser says, you're not a very appealing charity. If
25 you want us to raise money for you, we're going to charge

1 a great deal, and you get -- you'll get something, where
2 if you were doing it on your own, you'd get nothing. In
3 that kind of case, not the example of MADD, where the word
4 about drunk driving is being spread, but just, the
5 economics of it is that the fundraiser takes 80 percent.

6 MR. COPILEVITZ: You presume that the contract
7 is made at arm's length in the marketplace. Unpopular
8 charities have the same right to have their message
9 circulated as does a popular organization.

10 QUESTION: Well, I -- I presume that just as
11 some charities pay too much for fundraisers, some of them
12 may pay too much for their corporate offices. They may
13 enter into exorbitant leases that they could have gotten
14 for half of that had they been better negotiators. Surely
15 we wouldn't reduce the tax deduction because some of those
16 expenses were unreasonable. It seems to me that's simply
17 the way the tax deduction works. If it's an expense of
18 the charity, it's an expense of the charity.

19 MR. COPILEVITZ: And the charity may have all
20 manners of expense that may be relevant to one donor but
21 not be relevant to another.

22 QUESTION: Mr. Copilevitz, a moment ago you said
23 that in the opinion of the Supreme Court of Illinois there
24 was a statement that the defendants had made no
25 affirmative representation. I had not read the opinion

1 that way. Could you either locate it during your
2 argument, or if you can't, file a statement afterwards
3 telling us on what page of the petition for writ of
4 certiorari that -- that statement appears?

5 MR. COPILEVITZ: It appears in page 348 of the
6 opinion, and I quote: Further, VietNow has never
7 expressed dissatisfaction with the fundraising services
8 provided by the defendants, and there is no allegation
9 that defendants made affirmative misstatements to
10 potential donors.

11 QUESTION: What about the allegation in
12 paragraph 63, from 1987 through the present, in conducting
13 their charitable solicitations, the donors made
14 representations which induced the donors to contribute
15 funds for charitable purposes by representing that the
16 funds they contributed would go to charitable purposes.
17 Now, that doesn't say what the particular representations
18 were, but they had a lot of affidavits attached which did.

19 MR. COPILEVITZ: But the affidavits were
20 inherently unreliable. They're -- the --

21 QUESTION: No, no, I'm saying, in terms of
22 whether there is an allegation in the complaint.

23 MR. COPILEVITZ: It's not -- those -- those
24 affidavits are incorporated for the sole purpose of
25 demonstrating that there was not a disclosure of the fee

1 paid. If those affidavits were true and correct, each one
2 of them would have supported an independent action in
3 violation of a specific statute in the Illinois Charitable
4 Association Act --

5 QUESTION: I'm not understanding.

6 QUESTION: No.

7 QUESTION: I thought that the question is simply
8 whether they've alleged that there were specific
9 affirmative representations, and the status, I gather from
10 the SG's brief and what I've just read, is that they
11 allege there were representations, and then they attached
12 affidavits which have in them, and there's a footnote in
13 the SG's brief that list the affidavits, statements as to
14 particular affirmative representations, and -- and
15 therefore, I want to know is that, if that issue isn't in
16 the case, fine, but -- but I'm somewhat puzzled as to why
17 it isn't.

18 MR. COPILEVITZ: It's not in the case. There
19 are no allegations -- those would have constituted
20 violations of specific sections of the statute.

21 QUESTION: But --

22 MR. COPILEVITZ: There was no allegation in the
23 complaint. The only place they're found are in the
24 affidavits which are incorporated as a reference that the
25 fee was not disclosed and, had it been, they would not

1 have given it.

2 QUESTION: Yes, but the --

3 MR. COPILEVITZ: That's the sole purpose of it.

4 QUESTION: The Supreme Court of Illinois didn't
5 go off on the ground that there was a separate statute
6 regulating solicitation, and that therefore you couldn't
7 have a common law fraud action in Illinois.

8 MR. COPILEVITZ: I'm not sure I understand the
9 Chief Justice's question.

10 QUESTION: Well, I -- I thought you were
11 suggesting that these allegations would have been a -- a
12 violation of a specific statute governing fraud, governing
13 charitable solicitation, but the Supreme Court of Illinois
14 didn't say that because there's a statute governing
15 solicitation you could not bring a common law fraud action
16 in this case. What they said was that the First Amendment
17 prohibits you from doing it, as I understood their
18 opinion.

19 MR. COPILEVITZ: Yes, sir. What they said is
20 that the only allegation was that the fees were excessive
21 and they weren't disclosed, that there was no allegation
22 of any affirmative misrepresentation. They did not say
23 that an action couldn't be brought for fraud if there was
24 an affirmative misrepresentation.

25 QUESTION: This case --

1 QUESTION: But I took the --

2 QUESTION: This is -- this case -- something you
3 said I thought was not quite right. This case went off on
4 a motion to dismiss, so there was no trial. There was no
5 findings of anything and, given the liberality of
6 complaint amendments, even if you're right that they
7 didn't make those allegations, they surely could, so one
8 thing is to say, I thought your position was, no matter
9 what they said in the complaint, this kind of operation
10 must be allowed to go on, not simply that they -- they --
11 there's a defect in pleadings here, but no claim could be
12 stated, not that these -- these pleadings didn't state a
13 claim

14 MR. COPILEVITZ: Well, maybe I'm not clear,
15 then. What I am saying, that high fund-raising costs
16 alone, and the failure to disclose those costs, consistent
17 with Schaumburg, Munson, and Riley, are not an indication
18 of fraud in and of themselves. The State needed two legs
19 to stand on.

20 They might have had the high fundraising costs,
21 but they needed some form of misrepresentation connected
22 with the use of the money, and what the Illinois Supreme
23 Court found, what the appellate court found, and what the
24 trial court found on the motion to dismiss, that the
25 second leg did not exist, and therefore, the claim could

1 not stand, because to do so would have been contrary to
2 this Court's holdings --

3 QUESTION: And --

4 QUESTION: Well, why wouldn't --

5 QUESTION: And supporting your, what you're
6 saying, the question presented gives us the naked question
7 if the 85 percent is enough. There -- there's nothing in
8 the question presented that talks about these fringe
9 issues. You're -- you're dead right on that.

10 MR. COPILEVITZ: Thank you.

11 QUESTION: Well, why can't -- why -- why isn't
12 it appropriate for us to say that the affidavits can
13 function for First Amendment purposes like a bill of
14 particulars, and that the Illinois Supreme Court ought to
15 consider that, and if, under Illinois practice, they could
16 function as a bill of particulars, then there's nothing in
17 our First Amendment jurisprudence that prohibits the
18 prosecution.

19 That leaves open the broader question, but in
20 this particular case, why wouldn't that at least be an
21 appropriate response for this Court to make with respect
22 to the affidavits?

23 MR. COPILEVITZ: Those violations of the statute
24 are certainly subject to prosecution. That's not the case
25 that was brought by the State of Illinois. They amended

1 the complaint two times.

2 QUESTION: No, I realize that that's not the way
3 it was originally brought. All I'm saying is, isn't it
4 appropriate for us to say, if -- if we otherwise believe
5 it, that the affidavits can function consistently with the
6 First Amendment, consistently with our First Amendment
7 cases as a bill of particulars --

8 MR. COPILEVITZ: The --

9 QUESTION: -- and -- and when you get to that
10 particular level, it's okay to prosecute?

11 MR. COPILEVITZ: The Illinois Supreme Court
12 found as a matter of law that those affidavits were not
13 part of the complaint, and this Court certainly has the
14 authority to --

15 QUESTION: So just as a matter of State
16 procedure you can't do that, is what you're saying.

17 MR. COPILEVITZ: That's what the Illinois
18 Supreme Court found --

19 QUESTION: I -- I see.

20 MR. COPILEVITZ: -- as a matter of law.

21 QUESTION: And they said that in this opinion,
22 too?

23 MR. COPILEVITZ: It's the quote that I just
24 read, Your Honor.

25 QUESTION: Could you give me --

1 QUESTION: It's all there, isn't it?

2 QUESTION: Give me the citation in the
3 petition -- the petition for writ of certiorari. If you
4 can't find it now, file it with -- file it with the Clerk
5 later.

6 MR. COPILEVITZ: Yes, sir.

7 QUESTION: Could I ask you, taking it just as
8 you want to present it, fine, and I think -- I'm -- I'm
9 convinced that there are a lot of instances in which
10 somebody keeping 85 percent of the money would be
11 perfectly consistent with a charitable purpose, but there
12 may also be quite a lot of instances where keeping
13 85 percent of the money serves no charitable purpose, and
14 really, it isn't much of a charity, and there the public
15 is deceived.

16 Now, is there anything wrong with prosecuting
17 that kind of charity, and if it turns out to be the first
18 instead of the second, you could raise the claim later,
19 after the prosecution, or during the trial, that we don't
20 know what'll happen in such a circumstance?

21 MR. COPILEVITZ: Well, my reservation in
22 answering the question yes is, again, you are focused
23 simply on the value of the net dollars that are received.

24 QUESTION: That -- that's correct. That's
25 exactly my question. I understand that there are

1 circumstances where that fact, that virtually all the
2 money goes to the telemarketer and little to the charity,
3 is absolutely justified in terms of charitable purpose,
4 but my question, which I'm repeating, is, there may be
5 many, many, many instances where it isn't, and so what's
6 wrong with prosecuting those people for fraud?

7 MR. COPILEVITZ: Well, I would -- I would refer
8 to the decision of Judge Posner in the UCC case, where we
9 had virtually that very set of facts, and the Solicitor
10 for the Internal Revenue Service proposed that, in dealing
11 with how would we know, the notice issue and the standard,
12 is there would be a case-by-case analysis, and it would
13 evolve, and Judge Posner, I believe correctly determined
14 that that's no standard at all, and if there's no
15 standard, we're back to the lesser evil.

16 QUESTION: Oh, no, there's a perfectly good
17 standard, that if you're going to keep 85 percent of the
18 money, you better have documents showing that you're doing
19 it for a good, charitable reason, that's all, and the
20 people who will be prosecuted are the people that can't
21 show that. Now --

22 MR. COPILEVITZ: Well --

23 QUESTION: Now, I'm not saying that's a
24 constitutional standard. I'm not saying it's a State law
25 standard. I don't know what standard it would be. I want

1 to get your answer.

2 MR. COPILEVITZ: I don't believe that you can
3 measure the worth of an organization based upon its
4 financial efficiency.

5 QUESTION: Would -- would you say that the State
6 of Illinois or any State could require charities every 6
7 months to report the percentage of money going to
8 telemarketers and the percentage going to the ultimate
9 beneficiaries in -- in direct payments and file this every
10 6 months?

11 MR. COPILEVITZ: Yes, sir, and there are some
12 States that do require that.

13 QUESTION: I assume that the State Attorney
14 General or the State Secretary of State can, indeed, close
15 down charities which are being used as -- as private
16 money-making ventures. Aren't -- aren't -- isn't
17 that possible?

18 MR. COPILEVITZ: There is statutory -- yes, Your
19 Honor, there's statutory authority --

20 QUESTION: Not -- not through a fraud action,
21 but through investigating the books of the charity.

22 MR. COPILEVITZ: Yes, sir, and under section --

23 QUESTION: The thing I don't understand, though,
24 is the difference between good charities and bad charities
25 doesn't seem to me to have a particle to do with the

1 question of whether the State was a -- was a
2 misrepresentation or not. You can get 85 percent from a
3 good charity, and 85 percent from a bad charity and keep
4 it, but the statement to the public is equally misleading
5 in either case. I mean, maybe that's not enough, but
6 maybe it is.

7 MR. COPILEVITZ: Well --

8 QUESTION: I don't see how the character of the
9 charity has any bearing on the -- on the kind of --
10 whether there's fraud or not.

11 MR. COPILEVITZ: I would agree, and I would
12 point to the petitioner's reply brief at the footnote
13 referring to the brief that was filed by Disabled American
14 Veterans, explaining the problem of donor acquisition
15 mailings, that it can cost \$1 or more to acquire \$1, and
16 that that should be something that the petitioner should
17 give deference to, and in footnote 13 of the petitioner's
18 reply, they took exactly the opposite position and said
19 the fact that it was donor acquisition mailings, trying to
20 acquire new donors, was not a reason to set aside the
21 principles that they've enunciated in their complaint.

22 QUESTION: Let make -- let's make an assumption
23 that 95 percent of the donors in the case of your client's
24 charity would not have given the money had they known of
25 the amount being kept by the telemarketers. Is there

1 anything the State can do to protect the people of -- of
2 the State from having -- from parting with their money
3 under those circumstances?

4 MR. COPILEVITZ: Yes, sir. The State of
5 Illinois has a series of -- of disclosure requirements.
6 They're content-based, neutral disclosures. You must,
7 before you ask for a donation in Illinois, if you're a
8 compensated professional fundraiser, disclose your
9 professional status.

10 You must also disclose that you can obtain
11 copies of financial records for the organization from the
12 Office of the Attorney General.

13 You must also answer, if asked, what your fee
14 is. You must disclose it.

15 You must disclose, if asked, what portion of the
16 monies will go to the charitable organization.

17 You must disclose the primary purpose of, the
18 charitable purpose of the organization.

19 The State of Illinois can publish reports, the
20 State of Illinois maintains a web site. There are 800
21 numbers. There are -- there is a requirement that, prior
22 to anyone parting with consideration, in the mail piece
23 that is sent, when you are sitting in the privacy of your
24 own home, having made simply a pledge in the mail, in
25 writing, there is a disclosure that you can obtain copies

1 of the financial information. There is a disclosure --

2 QUESTION: You can -- you said many times you
3 can ask, you can obtain. It seems that, then, the
4 sophisticated person is protected, the sophisticated
5 person will ask, but the person who isn't, who doesn't
6 know, I mean, your -- your position is, it's okay, if
7 asked, must tell, but if doesn't ask, then it's against
8 the First Amendment to require a statement of how much
9 goes to the fundraising?

10 MR. COPILEVITZ: Yes, Your Honor, because it's
11 the breathing space of New York Times versus Sullivan and
12 Riley and Schaumburg and Munson that we require. It's the
13 lesser of two evils. A compelled point of solicitation
14 disclosure will disproportionately adversely affect
15 smaller, newer, and less popular charities.

16 QUESTION: And disproportionately affect donors
17 who are unsophisticated, because those are the ones, by
18 and large, that don't ask.

19 MR. COPILEVITZ: I would point to the concurring
20 opinion written by Justice Scalia in the Riley case that
21 the -- that it's the normal presumption of people to
22 believe that someone is being compensated. They know when
23 they get something in the mail that you had to pay for the
24 stamps, you had to pay for the printing.

25 You have in Illinois a step further, the

1 disclosure of the professional status and the information
2 before you part with any consideration how you can obtain
3 all the information if cost --

4 QUESTION: Is it -- is it --

5 MR. COPILEVITZ: Excuse me.

6 QUESTION: In looking at this picture of this
7 fundraiser, one of the things that was alleged, it seemed
8 to me, is odd. It said that the fundraiser does not give
9 the names of the donor to the charity, to VietNow. In
10 other words, the fundraiser keeps the donor list itself,
11 and it seems if it were in business to collect for the
12 charity, rather than in business to collect for itself, it
13 would surely give the charity the -- the names of the
14 donors.

15 MR. COPILEVITZ: That's a subject of contract,
16 and I would suggest that that's something Illinois could
17 address. There are State laws in New Hampshire and
18 Arkansas that I can recall off the top of my head that
19 specifically require as a condition of a contract that the
20 list and the names be made available.

21 There is nothing in this record to refer to the
22 fact that this contract wasn't entered into at arm's
23 length and, in fact, the Attorney General's web site cites
24 the percentage of this contract as being the common amount
25 that professional fundraisers routinely charge, and as the

1 Court addressed in Riley, that the State's paternalistic
2 instinct in protecting attorneys --

3 QUESTION: Can we go over that again? That this
4 is the common amount that fundraisers usually charge,
5 80 percent?

6 MR. COPILEVITZ: It can be. That -- it's on the
7 web site of the Attorney General, that professional
8 fundraiser fees generally run between 80 and 90 percent.

9 There's also footnoted in the brief a reference
10 to a report that was done that veterans groups are among
11 the lowest receiving organizations because of the nature
12 of their appeal, and Nation-wide averaged 17 percent, and
13 in this case they allege 15 percent, but the reality is
14 something different than that. Because of the magazines
15 that were published in the last contract they got \$20,000
16 in addition to their percentage. If no phone call had
17 been made, they would have received 100 percent of the
18 money.

19 They got the benefit of a Nationwide 800 number.
20 They got the benefit of 2,200 magazines. They got the
21 opportunity to talk to nine of --

22 QUESTION: You're arguing that it's a good
23 charity, and I'll -- I'll -- we'll assume that for
24 purposes of the decision, that they're -- they're perfect,
25 but it still seems to me --

1 (Laughter.)

2 QUESTION: -- you've raised the suggestion that
3 maybe we should use the New York Times standard, and if
4 that were the case, would it not be arguable that your
5 people knowingly made these statements with the
6 understanding they would believe that they were literally
7 true, and that there was not an over -- you know, that
8 the -- that the charity was going to get a larger amount
9 of the money.

10 MR. COPILEVITZ: Well, Your Honor --

11 QUESTION: It seems to me the New York Times
12 standard might cut against you, in other words.

13 MR. COPILEVITZ: Well, it -- it's for me in the
14 breathing space concept, but what they allege is, in the
15 complaint is that they raised money for the charitable
16 purpose. What they don't allege is that no money went to
17 the charitable purpose.

18 It's a question of degrees. Again, we come back
19 down to what portion of the gross dollar in hard dollars
20 went to the program purpose.

21 What we can't --

22 QUESTION: No, the question is how -- how true
23 was the statement? What is the reasonable understanding
24 of the person who listened to this solicitation? I think
25 everybody sort of agrees that if they knew the facts, they

1 wouldn't have given the money and, as Justice Kennedy
2 suggests, therefore they were misled, and then the New
3 York Times standard suggests to me that you knew they
4 would be misled, because you say it in your own brief.

5 MR. COPILEVITZ: No, they would -- there was a
6 value -- the -- one of the primary program services was to
7 raise the awareness of the plight of the Vietnam veteran
8 and, as a result of a phone call, 9 out of 10 people
9 called do not make a contribution, but the organization
10 got the benefit of every one of those conversations, and
11 maybe next year or next month they got a bequest, or they
12 got a donation of a car, or they acquired a donor by
13 direct mail. They're only focusing on one campaign. They
14 don't look at every campaign.

15 In the footnote in the DAV, referring to them,
16 they did not limit themselves. It can be campaign-by-
17 campaign.

18 QUESTION: Well, that's an argument that the
19 85 percent is an incorrect figure. That's -- then I think
20 the case that's presented by the -- the certiorari
21 position is, assume that 85 percent is the correct figure,
22 then, is it -- you know, is it fraud?

23 MR. COPILEVITZ: No, sir.

24 QUESTION: Yes.

25 MR. COPILEVITZ: Thank you.

1 QUESTION: Thank you, Mr. Copilevitz.
2 Mr. Huszagh, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF RICHARD S. HUSZAGH

4 ON BEHALF OF THE PETITIONER

5 MR. HUSZAGH: I'd like to first correct two
6 clarifications in the record. In fact, the Illinois
7 Supreme Court never said that the affidavit should not
8 properly be treated as part of the complaint. They refer
9 to the affidavits, but our allegations stand on their own
10 without the need for those affidavits, which would simply
11 be an elaboration of the types of misrepresentations made
12 to donors.

13 A second, the web site that the Illinois
14 Attorney General keeps does not hold up 90 percent kept by
15 fundraisers as the ordinary and usual thing that's
16 regularly practiced in this area. They indicate that as
17 another one of several egregious examples that people
18 should be warned against, but that is not the only weapon
19 they should have in their arsenal against actual fraud.

20 This case is not a claim based upon a mere
21 nondisclosure of a high fee. It is a claim based upon a
22 particular instance of actual deception based upon
23 statements made to donors that constitute
24 misrepresentations under the common law of fraud, not
25 explicit misstatements as the Illinois Supreme Court said,

1 or affirmative misstatements, not explicit lies, but
2 misrepresentations in the form of half-truths, and we ask
3 this Court not to hold that half-truths are
4 constitutionally protected. I think the Court said as
5 much in Milkovich and the Masson cases, and no different
6 rule is warranted here. There is that semantic
7 distinction.

8 Let me point out, however, that the key
9 allegation in this complaint, in the body of the text at
10 joint appendix page 9, paragraph 34, says that the effect
11 of representations that were made was that people were
12 told that a significant amount of each dollar donated
13 would be paid over to VietNow, and the defendants knew
14 that was false because 15 cents or less of each dollar
15 would be given to VietNow for its purposes.

16 The allegation is that people were told that
17 their money was going to be paid to VietNow and used to
18 buy food baskets, to provide job training for veterans.
19 That is an actual representation. Whether it constitutes
20 a misrepresentation turns upon whether it reasonably led
21 people to believe something that was false, and we ask the
22 Court to continue to uphold those principles in this
23 context.

24 There is no plausible claim that in this case
25 what these defendants are alleged to have done is beyond

1 the State's power to prohibit by a properly drafted law,
2 that these circumstances are egregious, and there is also
3 no possible claim that -- that any law invoked here cannot
4 be applied against anybody.

5 The fallback position of the defendants in this
6 case is that the Court should take the draconian step of
7 saying that unless there is an explicit misrepresentation
8 of fact, not an implied one, that there should be blanket
9 immunity for charitable fundraisers to lead people to
10 believe that their money is going to be used for specific
11 purposes and have no liability if that is one percent
12 true. That is not something that's justified by the First
13 Amendment.

14 They have conjured up dire scenarios about all
15 sorts of charities disappearing from the landscape simply
16 by the type of examples that they have given for a
17 chilling effect. There is nothing in the record to show
18 that, and there is nothing in common experience to show
19 that, but what they're asking the Court is to say no, it's
20 not enough for as-applied claims of that variety to be
21 brought in other cases, but that there should be no
22 prosecution ever. The State is categorically prohibited
23 from bringing a fraud claim in such circumstances. That
24 is not a value that the First Amendment supports.

25 The First Amendment value that's most important

1 here is the donor's right to be able to make informed
2 decisions.

3 I see the light's on.

4 CHIEF JUSTICE REHNQUIST: Thank you,
5 Mr. Huszagh. The case is submitted.

6 (Whereupon, at 11:59 a.m., the case in the
7 above-entitled matter was submitted.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25