Before the New York State Senate
Committee on Consumer Protection

Public Hearing on Charitable Solicitation
Thursday, January 30, 2003

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Chairman Fuschillo and the members of the New York State Senate Committee on Consumer Protection, on behalf of the Free Speech Coalition, Inc., I want to extend our appreciation for the opportunity to submit these written comments for the Committee's consideration as it conducts the January 30, 2003 public hearing on charitable solicitation.

The Free Speech Coalition, Inc. ("FSC"), founded in 1993, is a nonprofit, nonpartisan group of ideologically diverse nonprofit organizations, and the for-profit firms which help such organizations raise funds and implement programs. FSC is tax-exempt under Section 501(c)(4) of the Internal Revenue Code ("IRC"). Our purpose is to protect First Amendment rights through the reduction or elimination of excessive regulatory burdens which have been placed on the exercise of those rights. (The education and litigation sister organization of FSC is The Free Speech Defense and Education Fund, Inc. ("FSDEF"), established in 1996.) FSDEF is tax-exempt under IRC Section 501(c)(3). It seeks to protect human and civil rights secured by law, study and research such rights, and educate its members, the public, and government officials concerning such rights by various means, including publishing papers, conducting educational programs, and supporting public interest litigation.

Introduction

The Committee requested comments regarding the "public disclosure of charities rates of donor retention and use, industry regulation and the adequacy of current laws pertaining to charitable telemarketing solicitation." The case of Ryan v. Telemarketing Associates, Inc., et al. (Supreme Court Docket No. 01-1806), currently before the U.S. Supreme Court on a writ of certiorari to the Supreme Court of Illinois, is instructive on these issues and provides an excellent example of the overreaching and abusive tactics to which regulators are resorting in an effort to end charitable solicitation by all but a few favored charities.

The Unites States Supreme Court has made it clear that the States may not regulate the terms of contracts between a charity and a professional fundraiser with regard to the percentage of solicited funds retained by the fundraiser in payment for its services. Additionally, the Court has ruled that the States may not force charities or retained fundraisers to disclose, at the point of solicitation, the percentage of solicited funds to be retained by the fundraiser. Recognizing these limitations, the Illinois Attorney General has attempted to impose these exact restrictions and requirements under the guise of anti-fraud litigation.

Overview of the Challenged Solicitation Agreement

VietNow National Headquarters ("VietNow"), a tax-exempt charitable organization, negotiated a contract with Telemarketing Associates, Inc. and Armet Inc. ("Telemarketers") for planning and conducting VietNow's communications (the "Marketing Program"), including the solicitation of funds on the behalf of veterans. In addition to raising funds, the Marketing Program included producing, publishing, editing, and paying all costs for the annual publication of more than 2,000 copies of a magazine designed to increase community

awareness of VietNow, and the production of a quarterly publication, at least 30 percent of which was devoted to editorial content provided by VietNow, as part of an advertising and public awareness campaign. Pursuant to the terms of this contract, Telemarketers, retained 85 percent of the gross collections as their total compensation for all efforts and costs associated with the Marketing Program.

Illinois Attorney General's Fraud Complaint

The Illinois Attorney General found this arrangement to be problematic and filed a fraud complaint against Telemarketers and their owner. There was nothing in the complaint suggesting that Telemarketers had not fully complied with the terms of their contract, or that VietNow had ever expressed dissatisfaction with the fundraising services provided by them. However, on the strength of affidavits from 44 VietNow donors who assert that they would not have given money to the charity had they known how little of their donation was directed to the intended cause, the Attorney General contended that the complaint set forth all of the elements necessary to state a valid cause of action for common law fraud. The Attorney General coupled this effort at a common law fraud charge with a claim that Telemarketers had breached their duty as fiduciaries of charitable assets. Both charges were made because the fees charged by Telemarketers for conducting the solicitation were, according to the Attorney General, excessive in amount and an unreasonable use and waste of charitable assets, and because Telemarketers did not advise donors that only 15 percent of the funds raised would be turned over to VietNow.

Illinois Supreme Court Opinion

The Illinois Supreme Court recognized that, contrary to its alleged anti-fraud purpose, the Attorney General's complaint actually sought to regulate Telemarketers' ability to engage in charitable solicitation based upon the percentage rate paid for Telemarketers' services. Having found that the complaint incorrectly presumed that there is a nexus between high solicitation costs and fraud, the court ruled that the complaint was indistinguishable from the regulatory programs struck down 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 Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). Ryan v. Telemarketing Associates, 763 N.E.2d 289, 299 (Ill. 2001). Oral argument is scheduled for March 3, 2003, and a decision by the U.S. Supreme Court is expected within the next three months.

Conclusion

The government's claim of plenary regulatory power over these allegedly false or misleading ideas in the marketplace of ideas is constitutionally illegitimate, as consistently ruled by the U.S. Supreme Court in cases dating back many decades. Charitable solicitations belong in the First Amendment marketplace of ideas, not in the commercial marketplace of goods and services, and the Illinois Attorney General is mistaken in his attempt to justify the complaint as having complied with the Supreme Court's First Amendment rulings governing commercial speech.

Any legitimate interest that the Illinois Attorney General may have in prohibiting fraud is not served by his effort to regulate charitable solicitations under the pretense of an action for

fraud. His actions abridge the charity's freedoms of speech and the press by taking unconstitutional control over the way that solicitations are made and by imposing an unconstitutional prior restraint on First Amendment activities.

The *amicus* brief filed by the Free Speech Defense and Education Fund in support of Telemarketers is attached. This brief provides greater detail about the facts of this case as well as FSDEF's arguments demonstrating that the Illinois Attorney General's actions are unconstitutional. As the brief demonstrates, the permissible scope of governmental regulation of charitable solicitation is extremely limited. In the past, the U.S. Supreme Court has not hesitated to strike down state laws that fail to recognize such solicitations for what they are, protected First Amendment speech inextricably intertwined with the underlying mission of the soliciting charity. In essence, the States have no more right to regulate the terms of a contract for communications services between VietNow and Telemarketers that they would to regulate advertising contracts between VietNow and the *New York Times*. This restriction on the regulatory ability of the States includes both regulation of the amount paid to the profession communications firm and imposition of mandatory disclosures in communications by either the charity or the communications firms assisting them. Furthermore, as we expect the U.S. Supreme Court to verify in deciding Ryan v. Telemarketers, this restriction applies whether it is done openly in the form of direct regulation, or under cover in the guise of enforcing anti-fraud laws.

FSC urges the Committee to review the Illinois Supreme Court decision in the Ryan case, as well as the various U.S. Supreme Court decisions cited above, and to realize that,

under the U.S. Constitution, it is not the permissible province of the government to regulate either the fundraising or program activities of nonprofit organizations.

Attachment.