Before the New York State Senate
Committee on Consumer Protection

Public Hearing on Charitable Solicitation
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I thank Chairman Fuschillo and the members of the New York State Senate Committee on Consumer Protection for the opportunity to submit these written comments for consideration in conjunction with the Committee's January 30, 2003 hearing on charitable solicitation.

The notice of the January 30, 2003 public hearing on the subject of charitable solicitations included the purposes of "seek[ing] testimony relative to charitable solicitations, especially those made by professional fundraisers," and "public disclosure of charities rates of donor retention and use, industry regulation and the adequacy of current laws pertaining to charitable telemarketing and solicitation."

My interests in providing these comments stem from my work as president of a marketing company that provides services to nonprofit entities, and as a constitutional lawyer who has attempted to deal with the harmful encroachments by the government on the rights, privileges and immunities of nonprofits, their agents, and the citizens whose rights of association are also affected. American Target Advertising, Inc. (ATA) is a Virginia corporation with no offices outside of Virginia. ATA provides various services to tax-exempt organizations that rely financially on voluntary contributions from citizens and generally receive no government funding. Those entities include charities (by Internal Revenue Service designation, section 501(c)(3) organizations), education and advocacy groups (section 501(c)(4) organizations), political action committees (section

527 organizations) and political candidate committees (also exempt from tax under section 527).

I wish to share with the Committee just some observations about the constitutional issues, practical impediments and harmful effects of existing regulations on nonprofits, their agents, and ultimately the citizens of New York and other states.

New York State is one of 42 states and a growing number of counties and cities that require nonprofit organizations (other than section 527 organizations) that conduct national campaigns, and their fundraising services providers, to register before they promulgate their communications that include solicitations to the public. These laws, therefore, act as a prior restraint on those communications. As the United States Supreme Court has made clear, charitable solicitation is not commercial speech, but involves far more constitutionally protected interests involving the interactive dissemination of information, and is thus deserving of the highest First Amendment protections from government interference. Current regulation under the guise of "consumer protection" harms the rights, privileges and immunities of "citizens."

So that these comments are properly construed, I wish to state upfront that nonprofit organizations and their commercial agents have a vested interest in law enforcement that eliminates real fraudulent activity. Since many nonprofits ultimately rely on the public's confidence for their financial support, and thus for their very existence, nonprofits and their agents are highly aware of how the publicity of bad actors in this area may discourage public support. Proper law enforcement helps nonprofits.

That being acknowledged, current regulation is misdirected, excessive and suppressive of rights guaranteed by the United States Constitution. These regulations also contribute to misleading, harmful statements and actions by some political officials and other persons or entities who would benefit from the lack of competition for contributions—or from the suppression of criticism and differing points of view by many nonprofits.

I also share with this Committee my concerns that many efforts to regulate charitable solicitation under the guise of consumer protection seem to be an attempt, whether intentional or not, to undermine the protections under the United States Constitution. Some the harmful affects of regulation on important rights have already

been addressed by the United States Supreme Court in many opinions including *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*, 487 U.S. 781 (1988). Constitutional rights impaired by regulation of charitable solicitation may be further clarified through existing and future litigation. Responsible legislation, however, may protect those rights and lessen the need for expensive litigation.

As to New York's own Solicitation and Collection of Funds for Charitable Purposes Act (the "Charitable Solicitation Law"), which was most recently amended last year, there are many problems with the law both as to its questionable constitutionality and its harmful affects on nonprofits and the citizens of New York. The attached article, *Making a Bad Law Worse: New York's Amended Charitable Solicitation Law* (*Philanthropy Monthly*, Vol. 35, Nos. 1&2), which I co-authored with William Olson, Esquire, of William J. Olson, P.C. and legal co-counsel to the Free Speech Coalition, McLean, Virginia, points out just some of the problems with the most recent amendments. See Exhibit A, attached hereto. Among those problems was the expansion of certain conflicts of interest within the Office of the New York Attorney General. That one office, which is charged with regulating charitable solicitations, has been given a troubling conflict of powers ranging from administrative, legislative, prosecutorial and even judicial authority over nonprofit entities and their agents.

These comments do not identify each and every part of the Charitable Solicitation Law to which objections ought to be made. Rather, these comments seek to elucidate merely a few of the important constitutional and public policy reasons why the Charitable Solicitation Law needs to be substantially revamped to eliminate costly and unconstitutional burdens.

I. Constitutional Considerations.

The Committee may be briefed by others about the most recent instance of constitutional litigation before the United States Supreme Court, *Ryan v. Telemarketing Associates*, No. 01-1806. At issue in the *Ryan* case is whether Illinois Attorney General can bring a cause of action for fraud against an Illinois telemarketing agency that had

contracted with an Illinois charity to provide a number of marketing and promotional goods and services, including telephone solicitations. The telemarketing agency entered into a contract with the charity under which the telemarketer received 85 percent of the contributions collected for its multiple services, and the remaining 15 percent was turned over to the charity. General Ryan's principal charge was that the telemarketer committed fraud by not disclosing to potential donors that it was paid 85 percent of the collected funds for its services.

The Illinois Supreme Court, in upholding the lower state court's dismissal of the lawsuit, cited the U.S. Supreme Court opinions in *Schaumburg*, *Munson*, and *Riley*, *supra*, and concluded that a cause of action for fraud could not be sustained for multiple reasons. *See*, *People ex rel. Ryan v. Telemarketing Associates, Inc. et al.*, 763 N.E.2d 289 (Ill. 2001). Principally among the reasons for upholding the dismissal of General Ryan's complaint is that high fundraising costs are not an indicia of fraud, and it is a violation of the First Amendment for the government to compel speech. The parties and various *amici*, including approximately 230 nonprofit organizations, have briefed the U.S. Supreme Court. Oral arguments are scheduled to take place on March 3, 2003.

Fundraising communications have been accorded the strongest First Amendment protections.

> [C]haritable appeals for funds . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes . . . . [S]olicitation 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 . . . without solicitation the flow of such information and advocacy would likely cease.

Schaumburg, *supra* at 632. The U.S. Supreme Court has refused to apply the tests applicable to regulation of commercial speech to charitable solicitations even when fundraising is conducted using the services of professional or commercial agents. *See*, *Riley, supra* at 787 –88.

New York's Charitable Solicitation Law already pushes the constitutional envelope, if not outright violates certain constitutional protections of charities and the rights of citizens to be informed. In *Riley*, the Court stated that

> "The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities.

Id., at 791. The U.S. Supreme Court, acknowledging the vital First Amendment issues at stake, has stated that the highest protections of speech, or "exacting scrutiny," must be applied to laws that would regulate charitable solicitation. *Id.*, at 788-89.

It has yet to be tested whether the current New York law regulating charities would pass the "exacting scrutiny" test. Section 172 of the New York Charitable Solicitation Law places a prior restraint on nonprofit communications by requiring that nonprofits obtain a license before they mail or otherwise make solicitations in the state. That prior restraint is compounded by the requirement that the agents of nonprofits ("solicitors," "fund raisers," and "fund raising counsel" as the statute terms these agents) also obtain licenses before the nonprofits make their communications.

There are more than ample grounds on which the Charitable Solicitation Law could be challenged as unconstitutional. Exhibit A, attached hereto, addresses just some of those reasons. Laws similar to the Charitable Solicitation Law have been declared unconstitutional on First Amendment grounds (*Gospel Missions of America v. Bennett*, 951 F. Supp. 1429 (D.C. Ca. 1997)), and on due process grounds (*American Charities for Reasonable Fundraising Regulation v. Pinellas County*, before the 11th United States Circuit Court of Appeals). In considering how or whether to amend the Charitable Solicitation Law, it may certainly be desirable to make amendments consistent with certain constitutional principles rather than in avoidance of them.

The content of the forms that nonprofits and their agents must file with the New York Attorney General, and thus the essential requirements for obtaining licenses, is left to the discretion of the Attorney General. ("Application for registration or re-registration shall be in writing and signed under penalties of perjury *in the form prescribed by the attorney general* . . . Section 173-b.1 of the Charitable Solicitations Law (emphasis added).) Also, fundraisers and solicitors must file bonds as a condition of their being licensed. ("A professional fund raiser shall at the time of filing each application for

registration or re-registration, file with, and have approved by, the attorney general a bond." Section 173.1 of the Charitable Solicitation Law.)

The New York law is, in many respects, similar to the Utah law that ATA challenged in federal court. ATA argued that the court should apply exacting scrutiny to Utah's charitable solicitation law and declare as unconstitutional on its face Utah's registration, bonding and provisions giving the state licensing official discretion to request "any additional information the [licensor] may require" as part of the license application process. The United States Court of Appeals for the 10th Circuit, in upholding the licensing requirements, did not apply the "exacting" judicial scrutiny standard that ATA argued was required under U.S. Supreme Court rulings. *See, American Target Advertising, Inc. v. Giani*, 199 F.3d 1241 (10th Cir. 00), *cert. denied*, ___ U.S. ___ (2000). Despite the lower level of judicial scrutiny applied in that case, the 10th Circuit Court of Appeals did hold as "unconstitutional on its face" both the bonding requirement and the discretion in the licensing application.

A. <u>New York's Violation of Privacy</u>.

Besides being a violation of the U.S. Constitution on its face, which in and of itself is sufficient grounds to amend Section 173-b.1 of the Charitable Solicitation Law and remove such unconstitutional discretion given to the Attorney General as licensor, that discretion has resulted in serious breaches of the privacy of those who engage in solicitation activity. The Charitable Solicitation Law requires that the "[f]orms, financial reports . . . and other documents required to be filed pursuant to this article become *public records* of the attorney general." Section 172.8 of the Charitable Solicitation Law (emphasis added). Under the registration discretion given to the Office of the Attorney General, individuals who work for telemarketing agents of nonprofits must file in those public records their names, home addresses, methods of compensation and *social security numbers*. It has been pointed out to the Attorney General's office that such data is frequently used by identity thieves. The Federal Trade Commission recently reported that identity theft is the number one consumer protection complaint. See, *FTC Releases Top 10 Consumer Complaint Categories in 2002*, Federal Trade Commission Press Release, January 22, 2003, www.ftc.gov/opa/2003/01/top10.htm.

Besides the Attorney General's own office being a potential source of data for identity thieves, the collection and disclosure of such personal information seems to violate the protections of privacy and anonymous speech described in *Talley v. California*, 362 U.S. 60 (1960). That case held unconstitutional a Los Angeles ordinance that required persons who distributed handbills to place on the handbills such information as who printed, wrote, compiled or manufactured the handbill, and who caused the distribution of the handbill.

B. New York's Law Fosters Litigation to Protect Constitutional Rights.

Although New York is not within the 10th Circuit, and therefore is not technically bound by the decision in *American Target Advertising v. Giani, supra*, New York has taken what is more akin to a litigator's jurisdictional defense to the problem rather than a more responsible approach. That New York is not within the 10th U.S. Circuit does not excuse it from amending parts of its law are that are unconstitutional on their face, nor does it mean that New York should ignore other parts of its law that are also likely in violation of the U.S. Constitution. Unless New York were to amend its law to protect the rights of nonprofits to communicate, and the rights of citizens to receive information from nonprofits, charities, their agents and citizens would need to resort to litigation to enforce those rights. That would likely prompt litigation challenges not only to the parts of the law that have been declared unconstitutional in other jurisdictions, but to other parts of the law that may be susceptible to constitutional challenges as well.

Another factor to consider is that unconstitutional enforcement of the laws may expose state officials to charges of violating constitutional rights under color of state law. Under 42 U.S.C. 1983, such officials are potentially subject to personal liability. The New York legislature may wish to amend its law not only to protect the constitutional rights of nonprofits and citizens, but also to thereby limit the exposure of its own officials who may susceptible to causes of action for depriving others of their constitutional rights.

A review of constitutional decisions affecting fundraising will hopefully prompt the New York legislature to act in a manner that can both avoid litigation and still protect the rights and higher interests of all citizens.

Nonprofit solicitations, as stated in *Schaumburg, Munson* and *Riley*, involve a number of interests protected by the First Amendment. These include the freedoms of (1) speech, (2) the press, (3) association, (4) the exercise of religion and (4) petitioning the government for redress of grievances.

"Freedom of speech and freedom of the press . . . . are protected . . . from infringement by Congress . . . and . . from invasion by state action." *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). "The liberty of the press is not confined to newspapers and periodicals." *Id.*, at 452. As to the freedom of speech and of the press, "it has been generally, if not universally, considered that it is the chief purpose [of those liberties] to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). And "the freedom of speech . . . embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

That nonprofit solicitations are an important source of political, social, moral, religious or other information is no longer a matter of question. The letters, calls and Internet communications of nonprofit organizations provide valuable information that is often otherwise unavailable from big corporate media and news outlets, or other sources of information that may have vested corporate or political interests. Nonprofit solicitations are often the source of important information that provides ideological perspectives not found on Fox News, CNN, the three major television networks or from other news services.

Regulation of nonprofit solicitation, therefore, must be absent of prior restraint or compelled speech. As the U.S. Supreme Court stated:

> [T]he First Amendment guarantees "freedom of speech," a term necessarily comprising the decision both what to say and what *not* to say, [whether that decision] involve[s] compelled statements of opinion [or] with compelled statements of "fact": either form of compulsion burdens protected speech.

Riley, supra, at 796 – 98 (emphasis original).

C. The Rights of Association and to Petition are Abridged by New York's Law.

Nonprofit entities are often the organizers of grassroots appeals to petition the government for redress of grievances. These petition drives are usually intertwined with appeals for donations to help pay the costs of these activities. As noted by the U.S. Supreme Court, "the circulation of petitions involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421 – 22 (1988).

Prohibitions on the circulation of petitions using the guise of regulating the commercial elements necessarily or willingly associated with such activities is likewise unacceptable. "The First Amendment protects [the] right not only to advocate [one's own] cause but also to select what [one] believe[s] to be the most effective means for doing so." *Id.*, at 424. The choice of nonprofits to pay professional agents, therefore, does not abrogate the First Amendment protections. "It is well-settled that a speaker's rights are not lost merely because compensation is received." *Riley, supra* at 801.

New York's Charitable Solicitation Law already places the government in the position of being an unconstitutional interloper between nonprofits and the citizens of New York. "The First Amendment mandates that we presume that speakers, not the government know best both what to say and how to say it." *Riley*, *supra* at 790 – 91. As Justice Holmes said in dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), "the best test for truth is the power of a thought to get itself accepted in the competition of the market," not whether the statement meets some standard of truthfulness as set forth by a government official, legislative, executive or judicial. *See, Hustler Magazine v. Falwell*, 485 U.S. 46, 50 – 51 (1988).

The freedom of association, which is a right of the citizens of New York, is clearly implicated in solicitations as well. Solicitation activity is a "mechanism by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify the voice of their adherents.'" *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 495 (1985).

> To say that [citizens'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those with modest means as opposed to

> those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Id., at 490. "Virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper and circulation costs." *Id.*, at 494.

The government has a long history of attempts to deprive citizens of their associational rights, particularly with the civil rights movement and other causes that challenged the *status quo*. *See, for example, NAACP v. Alabama*, 357 U.S. 449 (1958). But no matter what creative guises the government may use to interpose itself between citizens and nonprofit organizations, the right of association and its freedom from government intervention cannot be abridged in any prophylactic manner. By labeling these rights as "fundraising" and the purported state interest in interloping as "consumer protection" is of no consequence because "a state cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

Arguments in favor of these laws that intrude on rights under the First Amendment have included the fact that the object of the laws is the act of soliciting money, not the other freedoms that are otherwise harmed by these laws. Those arguments, however, fail because they ignore what the U.S. Supreme Court has acknowledged, i.e., "that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg, supra,* at 632. The costs and burdens imposed on soliciting are in fact licenses, taxes and other unconstitutional burdens on the freedoms of speech, the press, religion, assembly and petitioning the government. Labeling these unconstitutional charitable solicitation laws as "consumer protection" may deceive some people, but the resulting deprivation of rights causes more serious harm to citizens than any short-term political gains.

II. Public Policy Considerations.

The January 30 hearing, as I understand from the press release, will address use of commercial agents by nonprofits and the costs associated therewith. The reasons why

nonprofits may use professional agents vary, but can be summed up in one word: expertise.

Large, wealthy and established nonprofits often can afford both the personnel and capital resources needed to conduct national campaigns. But small, new and unpopular nonprofits often do not have the financial resources to conduct national campaigns relying on in-house staff or equipment. In fact, not only might the use of professionals be less expensive, but many nonprofits might not even be able to conduct such programs at all but for the use of outsiders. Therefore, those who cite high "fundraising" costs as a need to add more regulation miss the point that many nonprofits would otherwise be excluded substantially or entirely from participating in the marketplace of ideas.

Many state regulators have been critical of the percentage of fundraising dollars paid to professional fundraisers. But those criticisms ignore several key facts such as (1) the goals that the nonprofits want to achieve, such as promotion of the nonprofit or of an issue versus simply raising money, (2) the knowledge of the professionals about complex promotional techniques, and (3) the economies of scale that professionals may be able to achieve. The fact of the matter is that professional agents not only provide small or new charities access to the means of mass communications that might not otherwise be available to those nonprofits, but they may in fact achieve the goals of the nonprofits at less cost despite what appear to be higher fundraising percentages.[1]

A professional agency typically will know where to get better printing and other vendor prices, how to access lists of potential donors and other recipients of the nonprofits' appeals, precisely what lists are likely to work better, and how to otherwise write direct mail letters and telemarketing scripts. Also, it is important to distinguish between the various types of nonprofits and their multiple goals in soliciting support.

Some nonprofits communicate with many citizens of ordinary means and seek low-dollar contributions. These appeals typically are combined with interactive purposes

[1] Most proponents of more regulation fail to disclose themselves that the cost of more compliance diverts donor money from its rightful purposes. Compliance with state registration laws costs nonprofits upwards of $20,000, and even $40,000, annually. Some promoters of more regulation mislead the public by claiming that payments to professional agents who conduct many services on behalf of a nonprofit's mission are not "related" to the nonprofit mission. To the contrary, extra compliance costs with the 42 state licensing laws is in fact unrelated to the nonprofit mission, and such costs ultimately come out of donor money intended to support the nonprofit organization.

such as seeking responses to surveys or petitioning the government. Thus, their high-cost, low-dollar appeals will necessarily have high fundraising ratios. Such fundraising ratios cannot be fairly compared to those of organizations that contact fewer wealthy donors simply to obtain a few very high-dollar contributions, or organizations that receive substantial funding from the government thereby incurring lower costs of fundraising versus income. Additionally, it is no longer debatable that nonprofits often must lose money on donor-acquisition appeals, so organizations that are small or new but wanting to build their supporter files will also have high fundraising-to-income ratios.

Those who seek to regulate fundraising by using high fundraising costs as a gauge are in fact harming the public. Proponents of more regulation often mislead the public for political or economic gain. Many regulators seek to substitute their judgment for that of the nonprofits or even the supporters of those nonprofits.

History shows us that the marketplace of ideas is also the field of competition for donor funds. Many upstart organizations that had challenged the *status quo* many years ago are now considered mainstream organizations simply because their ideas were received into the marketplace of ideas and resulted in winning over many people by the power of those ideas. Regulation that stifles small and unpopular organizations results in fewer ideas being floated before the public.

Larger powers that want neither competition with their ideas nor competition for the voluntary contributions of citizens have promoted more regulation of nonprofit solicitation as a means to suppress that upstart competition. Those with political power, or wealthy nonprofits and their highly paid lobbyists, benefit from a lack of competition. The field of health care provides a good example.

Back some 30 years ago, alternative cures for certain life-threatening diseases were being touted by some upstart nonprofit organizations. The issues of diet combined with other natural treatments outside of mainstream, highly pharmaceutical approaches were called "quackery" by certain established charities. The upstart competition, which was not popular, tried to promote alternative cures by educating the public through direct mail appeals. The established charities tried to keep out this competition by encouraging regulators, the press and the public focus on the higher fundraising costs of the upstart competitors. Charges of fraud were tossed around based on high "fundraising" costs

when in fact such costs were attributable to the grassroots, low-dollar appeals of the educational efforts by those upstart nonprofits.

Now, many of these alternative approaches to treating diseases, such as holistic health, are considered mainstream treatments in many areas. In fact, these natural treatments are sometimes used where expensive drugs are unaffordable or by people who otherwise cannot be treated with certain drugs or invasive medical procedures. Alternative treatments, once criticized and even suppressed, have helped save lives. And many nonprofit groups that educated the public in the face of criticism from establishment charities, the mainstream press and even regulators are now vindicated.

It is a fact that regulation of charitable solicitation suppresses the marketplace of ideas. Impediments to solicitation, therefore, harm the public. By focusing in on the field of competition for donor money, regulation of nonprofit solicitation suppresses new ideas that may inform the public, empower citizens, and even save lives.

III. Political Fundraising Considerations.

Since ATA not only provides services to nonprofits but also to political candidates and committees as well, I can testify as to the methods and costs of political fundraising. Fundraising for political candidates often employs many of the same techniques and methods used by nonprofits, such as telemarketing, direct mail and the Internet. The motives of citizens and corporations for contributing to political candidates vary greatly. As with the motives of donors for contributing to nonprofits, it is difficult to discern all of the factors used by donors in deciding to voluntarily write checks to political candidates. However, one factor that generally separates the motives of some donors to nonprofits from donors to candidates is self-interests.

Donors to nonprofit organizations may wish to support eleemosynary, patriotic, religious, social or other causes for altruistic reasons. But political power of those organizations to control the day-to-day financial interests of citizens and businesses is quite limited if not totally nonexistent. Donors to political candidates, however, may be motivated by how certain public officials will have an effect over their self interests (which is not to say that donors to political candidates do not have the other altruistic incentives in contributing to political leaders, or that all contributors to candidates have

selfish interests). Other motivations for donors to contribute to candidates include their mutual association with a political party.

Many candidates and political officials have the benefit of their campaigns being covered by the media. They may use their offices for press releases and franked mail, and other ways to reach the attention of citizens and businesses. These factors give political candidates and office holders an advantage over nonprofits in many ways, which in turn affects the need to spend money in their fundraising communications. And while I provide no empirical data to show my point, it is safe to conclude that the next potential governor or legislator from a person's or business' district is likely to hold a certain amount of interest to a potential donor that a nonprofit organization does not have, especially when the candidate makes the appeal in person.

Holding candidates and their fundraising agents to the same or even similar disclosure standards as nonprofits and their agents would seem to pose at least some of the constitutional and practical problems as described above. But let me, by example, show the practical problems that candidates would otherwise face if they were held to the same disclosure and compelled speech standards that have been applied (or proposed) for nonprofits.

New York candidates for federal office are subject to the requirements of the federal election laws and regulations. *See* 11 CFR 100 *et seq.* Candidate committees, like nonprofit organizations, are exempt from income tax by federal tax laws, but under Internal Revenue Code section 527 rather than section 501 for non-political entities. Candidates now have certain discretion in how they use their campaign funds to pay for expenses, including those charged by commercial agents and vendors who assist in the conduct of the political campaign's tax-exempt activities.

Many candidates use their campaign funds from contributors to support other causes or campaigns. Donors are not typically informed of the commercial expenses or other causes for which the candidate committee might use contributions. Arguably, donors might otherwise object to such expenditures much in the same way that state charitable regulators prompt complaints about fundraisers for nonprofits.

Fundraising agents for political candidates are not required to inform potential donors of their fees, or what portion of the donor's contributions will be used for various

expenditures on commercial costs and services. Federal election law provides that candidate committees may actually pay the candidates a salary and other expenses such as food, (sometimes expensive) hotels and transportation and other expenses, whether incurred by choice or by necessity. *See*, 11 CFR 113.1. Thus, even candidates who do not use professional agents, strategists, and communications specialists, if held to the same standards as nonprofits, may be deemed to be deceiving donors by not disclosing upfront these expenditures in the course of their solicitations.

The relative ease by which certain political candidates raise vast sums for their campaigns, which contributes to their lower fundraising cost ratios, should not be used as a gauge by which political office holders impose unconstitutional and unwise restrictions on nonprofit fundraising. As referenced in the *amicus* brief filed by the Free Speech Defense and Education Fund *et al*. in the *Ryan v. Telemarketing Associates* U.S. Supreme Court case, the Petitioner in that case, Illinois Attorney General Jim Ryan, had raised substantial sums of money in his 2002 race for Governor of Illinois. A review of his Committee's fundraising and expenditures reveals certain startling discrepancies in his own fundraising versus his litigation posture.

In one six-month reporting period, General Ryan had total receipts of $4,878,715 and expenditures of $6,848,084, thus his Committee's expenditures exceeded its receipts (including loans) by $1,969,369 just within six months.[2] The Committee raised $3,266,835 in itemized contributions from individuals and corporations, and $96,867 in non-itemized contributions. The average itemized contribution was $1,365 based on a sample using the first 248 contributions reported. The campaign also received $1,515,012 in that same six-month period from other sources including other political committees and loans. Thus, the costs of the low-dollar appeals and voter-mobilization projects resulting in the $96,867 of non-itemized contributions were subsidized considerably by the wealthy high-dollar corporate and individual donors. Undoubtedly, without that subsidy, the fundraising ratio for the low-dollar, non-itemized contributions would have been substantially higher, but the high-dollar contributions and loans subsidized the low-dollar appeals.

[2] See, Citizens for Jim Ryan D-2 Semi-Annual Report 1/1/02 – 6/30/02, www.elections.state.il.us/CDS/pages/D2Semi.asp?FiledDocID=234538&ID=1453&Re . . . Non-itemized contributions consisted of those under $50.

A review of the Committee's expenditures, which exceeded its receipts, shows that it exercised great discretion far beyond what the Committee's fundraising appeals may have disclosed.[3] Given these facts, one can easily criticize General Ryan's *Telemarketing Associates* litigation challenge even in the kindest light as a measure of high hypocrisy, all of the constitutional and practical arguments stated above notwithstanding.

IV. Conclusion.

This is not just an expose of politicians who may throw stones but live in glass houses. The intent is to set forth certain constitutional considerations for those who make these laws. New York's Charitable Solicitation Law needs to be amended in the most extensive way to protect constitutional rights of nonprofits and citizens. The alternatives of either keeping the unconstitutional provisions of the law as they exist today, or making them worse, exposes that law to potential and serious constitutional challenges that, if upheld, could void that law completely.

The foresight of the Founders in protecting the freedoms of speech, religion, the press, assembly and petitioning the government does not preclude states from engaging in their police powers to protect citizens from harmful acts. However, the state should be careful to narrowly target its regulations to prevent fraud rather than redefining concepts of fraud to meet its licensing and taxing laws in derogation of its obligations under the United States Constitution.

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[3] The expenditures in the six-month period ranged from the typical salaries and rent to, for example, $278,978 to one Michigan polling company, $49,647 for phone recordings, $47,895 to one Ohio Internet company, $16,125 to AT&T which was just one of several telephone service companies used by the Committee, $4,966 for a single fundraiser photography expense, $5,491 to Panther Creek Golf Club, $2,126 to Coleman's Custom Catering, $1,000 to the American Cancer Society, $1,750 for dinner tickets to NAACP Dinner Headquarters, and $1,000 in a returned contribution to Enron Corporation.