No. 99-1680

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF AMICUS CURIAE OF AMERICAN CHARITIES FOR REASONABLE FUND RAISING REGULATION, INC. IN SUPPORT OF PETITIONER

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INTRODUCTION[1]

The speech purveyed by adult bookstores such as Petitioner City News and Novelty (hereinafter, CNN) stands as a lonely sentinel on the outer perimeter of the First Amendment. But, just as the attack on the outpost of Pearl Harbor nearly two decades prior to statehood for Hawaii was correctly perceived as an attack on all Americans, so too is an attack on CNN's free speech rights an attack on all Americans committed to the First Amendment.

Unlike Petitioner CNN, amicus curiae American Charities for Reasonable Fundraising Regulation, Inc. (hereinafter, "ACFRFR") is not an adult business, nor are any of its members adult businesses. ACFRFR and its members engage in a much more popular form of speech – charitable speech. Many believe that such speech is qualitatively more important than the speech purveyed by adult businesses such as CNN, and there is language in some of this court's decisions which lends support to that evaluation. However, while the First Amendment allows ACFRFR (as well as all private citizens of the United States) to make such a determination, it specifically prohibits the government from ever making that same determination. The First Amendment cannot be selectively applied, for in order for it to mean anything it must apply to everyone. To paraphrase Voltaire, while

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ACFRFR may disagree with the message purveyed by those such as CNN, it will fight side by side with CNN to protect CNN's right to engage in such speech activities.

The true test of a principle comes when it is applied to its least popular situation in a given context. One encounters the phrase "bedrock principle" often when reading Supreme Court decisions involving the First Amendment. However, the use of the second word in that phrase makes the first superfluous, for a principle must be firm lest the principle be surrendered in favor of the whim of the decisionmaker. It is for this reason that ACFRFR submits the following brief.

INTEREST AND IDENTIFY OF AMICUS CURIAE

ACFRFR is a Delaware nonprofit corporation with offices located in Virginia. It is a membership organization representing the interests of charities and the philanthropic community as a whole. ACFRFR's members include charities that communicate their messages throughout the United States. Its purposes include engaging in litigation to protect the constitutional interests of all of its members.

Charities, almost by definition, are dependent upon the goodwill of prospective donors in the general public. As such, they are very concerned with public perceptions, and threats of criminal and civil enforcement actions by government officials are taken very seriously. Charities attempt to comply with all government regulation if at all possible, even where such compliance is onerous and

even when such compliance calls into question fundamental but abstract constitutional guarantees. The price of being a "test case" can be the loss of the charitable organization's reputation and goodwill with the public while the organization seeks to protect its rights through legal action. Even if ultimately vindicated, such a victory may be a pyrrhic one if the donating public only remembers the press releases issued by overzealous government regulators. Once the donating public associates a charitable organization with the images of fraud contained in an Attorney General's statement to the press, that may well be all the public remembers when it channels charitable donations to other "safer" organizations that have not raised the ire of government officials.

Of particular concern to ACFRFR and the charitable community as a whole has been the recent erosion of the First Amendment principles established in *Freedman v. Maryland*, 380 U.S. 51 (1965). Not long after winning a long and drawn out struggle with government regulators to have courts recognize that charitable messages to the public are imbued with full First Amendment protections, which included all of the *Freedman* protections, government regulators began to chip away at those precious freedoms. Emboldened by the apparent retreat (at least in the adult use context) by some members of this Court from the clear bright line test enunciated in *Freedman*, many charity regulators have stepped up the practice of issuing "cease and desist" letters to charitable speakers. Such "cease and desist" letters demand an immediate cessation of ***all*** charitable speech being purveyed by a particular speaker into the jurisdiction upon mere suspicion by the regulators that the solicitation is improper.

Such demands always come without a stay, and without any time whatsoever for a court to subsequently validate the judgment of the would-be charitable censor.

Moreover, often times the charitable speaker is one who previously had been licensed, but whose license had been "revoked" without any *Freedman* judicial review whatsoever. The regulators know full well that the last thing a charitable organization wants is a front page story in the local newspaper with quotes from local government officials detailing allegations of "fraud," even if they are only allegations. As such, those "cease and desist" letters have an in terroram and chilling effect on the charitable community as a whole, since no charity is willing to go to court to challenge such license revocations as violative of *Freedman* principles. It is this principle which ACFRFR seeks to vindicate on behalf of the philanthropic community as a whole in submitting the instant brief.

ARGUMENT

I. Charitable Solicitations are fully protected core speech entitled to the full panoply of First Amendment protection, including *Freedman* standards

A. This Court's 1980's trilogy imbuing charitable appeals with First Amendment protections

This Court's decision in *Schaumburg v. Citizens for a Sound Environment,* 444 U.S. 620 (1980) established that charitable appeals for funds are fully protected "core speech" for First Amendment purposes. Government

actions that have more than an incidental effect upon such speech are therefore entitled to the highest level of judicial scrutiny.

Four years after this Court decided *Schaumburg*, it decided *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984). That case reaffirmed the *Schaumburg* holding that charitable solicitations are indeed core speech entitled to the highest level of judicial scrutiny, and also established that close solicitation agents of a charity have standing to present those arguments to a court.

The third case in this trilogy was *Riley v. National Federation of the Blind of North Carolina*, 481 U.S. 781 (1988). That case similarly reaffirmed that strict scrutiny must be applied to all government action having a more than incidental impact upon charitable speakers. 481 U.S. at 789. Additionally, *Riley* explicitly stands for the proposition that *Freedman v. Maryland* principles apply in the context of charitable speech. 481 U.S. at 802. This aspect of the *Riley* opinion was followed shortly thereafter in *Famine Relief Fund v. West Virginia*, 905 F.2d 747, 753-4 (4th Cir. 1990) (holding that *Riley* established that *Freedman v. Maryland* principles apply in the charitable speech context).

B. Prior restraints on speech come to this Court with a strong presumption of invalidity

It is well settled law that any prior restraint imposed by government officials upon speech activities violates the rule in *Near v. Minnesota*, 283 U.S. 697 (1931). Such prior restraints are presumptively unconstitutional, and

the government bears a heavy burden in justifying them. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *see also, Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). A prior restraint has an immediate and irreversible sanction on speakers: if the threat of criminal or civil sanctions after publication "chills" speech, a prior restraint "freezes" it, at least for a time. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This reasoning has been held to apply with equal force in the context of charitable speech. *See, Riley, Famine Relief Fund*, and *Keefe, supra*.

Freedman v. Maryland, 380 U.S. 51 (1965) provided a bright line rule for when the government could get away with a prior restraint on First Amendment activities. This Court held in *Freedman* that the following procedural safeguards are essential to protecting First Amendment rights when the government seeks to restrain speech prospectively: (1) the government must bear the burden of persuasion to show that the speech is not protected and of going to court to restrain the speech; (2) only a *judicial* determination suffices to impose a valid final restraint on speech; and (3) the government may only institute a non-final prior restraint on speech for the shortest time possible, so as to maintain the status quo while the would-be censor decides whether to allow the speech or seek a final restraining order from a court. 380 U.S. at 58-9.

This test enunciated in *Freedman* was a bright line test that regulator and regulated alike could easily follow, and which similarly presented few problems to the Courts, at least in the charitable speech context. As mentioned previously, in the charitable speech First Amendment context

that concerns ACFRFR, this Court as well as the Fourth Circuit applied *Freedman* with little or no trouble at all. *See, Munson, Riley, Famine Relief Fund,* and *Keefe, supra.* This bright line rule was the right rule.

Only after this Court's splintered decision in *F/W PBS Inc. v. City of Dallas,* 493 U.S. 215 (1990) did problems begin to arise for charitable speech. Many regulators around the United States have interpreted Justice O'Connor's plurality opinion in *F/W PBS* as a green light for lowering the bar for regulations of not just adult use speech, but for ***all*** speech – even the most strongly protected speech such as charitable and political speech. As will be detailed below, lower courts have begun to use some of this Court's decisions in the adult use context (including *F/W PBS*) to accede to that view.

C. This Court has departed from otherwise clear First Amendment principles in the adult use context, and the abandonment of principle has led to erosion of First Amendment rights in other realms of speech

This Court has sanctioned content based regulations of adult use speech on the grounds that the secondary effects of that speech can properly be regulated by government. *Young v. American Mini Theaters,* 427 U.S. 50 (1976); *Renton v. Playtime Theaters, Inc.,* 475 U.S. 41 (1986). First Amendment "narrow tailoring" and "least restrictive means" principles would generally require the government to simply prohibit and punish those secondary effects rather than restrict the particular type of speech (which inherently makes the restriction content based)

which allegedly gives rise to those effects. *Cf. Posadas de Puerto Rico Ass'n. v. Tourism Co.*, 478 U.S. 328 (1986); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-512(1996) (disavowing secondary effects type analysis approved in *Posadas*).

Instead, this Court has treated such content based regulations of adult use speech under a relaxed, content neutral analysis. *Young* and *Renton, supra; F/W PBS Inc. v. City of Dallas*, 493 U.S. 215 (1990). This Court has held that governments need to be able to experiment to be able to control secondary effects, at least in the adult use context. *Young, supra*, 427 U.S. at 71; *Renton, supra*, 475 U.S. at 50-52.

However, this stands First Amendment principles on their head. As this Court held in *NAACP v. Button*, 371 U.S. 415, 433 (1963) and *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940), it is First Amendment freedoms that need breathing space, not government regulations of those freedoms. To the contrary, governments do not get to experiment with our First Amendment freedoms. Inverting this bedrock First Amendment principle is to sanction censorship by a virtually unlimited government, which would likely have the authors of the First Amendment spinning in their graves.

Once this principle has been abandoned in the adult use context, there is no stopping the erosion of First Amendment protections in other contexts that had been previously based on that principle. Indeed, that has been the experience of both ACFRFR as well as its members in the philanthropic community.

D. Effect of these decisions on the First Amendment protections of charitable speech

The core speech protections for charitable speech won in the *Riley* trilogy have come under siege as a result of the aforementioned adult use decisions. ACFRFR wishes to bring to this Court's attention the following attacks on the First Amendment rights of charities that have resulted from the erosion of the bright line test of *Freedman*: (1) rogue regulators have begun to revoke charitable speech licenses without any judicial process or other *Freedman* safeguards whatsoever, instead simply relying on "cease and desist" orders by State Attorneys General (or their equivalents); and (2) the recent decision of the Tenth Circuit in *American Target Advertising v. Giani*, 199 F.3d 1241 (10th Cir. 2000), which held that charitable speech is entitled to only intermediate level scrutiny rather than strict scrutiny on the basis of this Court's decisions in *Renton* and *F/W PBS, supra.*

1. Issuance of judicially unsupervised "cease and desist" letters to revoke charitable speech licenses

Perhaps the most pernicious development during the past ten years has been the increased frequency with which State and local licensors of charitable speech have dispensed with all *Freedman* factors. Currently, at least forty three states (as well as numerous counties and municipalities) license charitable speech within their

borders.[2] At least seven of those state statutes facially violate *Freedman* in their enforcement sections in that they empower regulators to issue "cease and desist" orders to restrain future charitable messages by a speaker whose

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[2] *See* Ala. Code §§ 13A-9-70 to 13A-9-84 (1998), Alaska Stat. §§ 45.68.010 to 45.68.900 (1998), Ariz. Rev. Stat. Ann. §§ 44-6551 to 44-6561 (1998), Ark. Code Ann. §§ 17-41-101 to 17-41-111 (Michie 1998), Cal. Bus & Prof. Code §§ 17500 to 17510.85, 17200 to 17209 (1998), Cal. Gov. Code §§ 12599 to 12599.5 (1998), Colo. Rev. Stat. tit. 6 art. 16 (1998), Conn. Gen. Stat. §§ 21a-175 to 21a-1901 (1998), Fla. Stat. ch. 496 (1999), Ga. Code Ann. §§ 43-17-1 to 43-17-23 (1998), Haw. Rev. Stat. §§ 467B-1 to 467B-13 (1998), Ill. Rev. Stat. ch. 23 para. 5100-5121 (1998), Ind. Code §§ 23-7-8-1 to 9, 24-5-12-25 (1998), Iowa Code §§ 13C.1 to 13C.8 (1998), Kan. Stat. Ann. §§ 17-1759 to 17-1775 (1998), Ky. Rev. Stat. Ann. §§ 367.650 to 367.670 (Baldwin 1998), La. Rev. Stat. Ann. §§ 1901 et seq. (West 1998), Me. Rev. Stat. Ann. tit. 9, ch. 385 §§ 5001-5016 (1998), Md. Code Ann., Bus. Reg. §§ 6-101 to 6-701 (1998), Mass. Gen. L. ch. 12, § 8 (1998), Mich. Comp. Laws §§ 400-271 to 400-294 (1998), Minn. Stat. §§ 309.50 to 309.72 (1998), Miss. Code Ann. §§ 79-11-501 to 79-11-529 (1998), Mo. Rev. Stat. §§ 407.450 to 407.472 (1998), N.M. Stat. Ann. §§ 57-22-1 to 57-22-11 (Michie 1998), N.Y. Exec. Law Art. 7-A §§ 171-A to 177 (1998), N.C. Gen. Stat. §§ 137-10-015 to 137-10-030 (1998), N.D. Cent. Code §§ 50-22-01 to 50-22-05 (1998), Ohio Rev. Code Ann. §§ 1716-01 to 1716-17, 1716-99 (1998), Okla. Stat. §§ 552.1 to 552.18, 553.3 (1998), Or. Rev. Stat. ch. 137 div. 10 (1998), 10 Pa. Cons. Stat. Ann. Solicitation of Funds for Charitable Purposes Act §§ 162.1 to 162.24 (1998), R.I. Gen. Laws §§ 5-53-1 to 5-53-14 (1998), S.C. Code Ann. §§ 33-56-10 to 33-56-200 (Law Co-op. 1998), Tenn. Code Ann. §§ 48-101-501 to 48-101-522 (1998), Tex. Rev. Civ. Stat. Ann. §§ 9023-1 to 9023-24 (1998), Utah Code Ann. §§ 13-22-1 to 13-22-21 (1998), Vt. Stat. Ann. tit. 9 §§ 2451a to 2479 (1998), Va. Code Ann. §§ 57-48 to 57-69 (Michie 1998), Wash. Rev. Code §§ 434-120-010 to 434-120-350 (1998), W. Va. Code § 29-19-1 to 29-19-15b (1998), and Wis. Stat. §§ 440.41 to 440.48 (1998).

license was only revoked by means of the cease and desist order itself.[3] By statute this occurs without any judicial review whatsoever (prompt or otherwise) of such executive decisionmaking. This amounts to an effective "rule by decree" by charitable speech licensors.

Even in the jurisdictions whose laws facially comply with *Freedman* (in that they purport to require a court to issue such orders rather than the executive enforcers of the statute), the common experience of charities is that regulators issue identical "cease and desist" orders there as in the jurisdictions where they are specifically authorized by statute. Regulators in such jurisdictions do not fear the repercussions of acting either extra-constitutionally or extra-statutorily for the simple reason that they know that charitable organizations are loathe to take them to court. Regulators know that charities depend on the goodwill of their names in the eyes of the donating public, and that mere allegations of "fraudulent" activity by the Attorney General (or his equivalent) are sufficient to deter even the least submissive charitable organizations from risking a lawsuit from the Attorney General – even if the "fraudulent" activity that is at the heart of such a lawsuit amounts to nothing more than a refusal to submit to the unconstitutional demands of the regulator. This practice has increased dramatically during the past decade since this Court's decision in *F/W PBS Inc. v. City*

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[3] *See* Conn. Gen. Stat. 21a-190l(a); Fla. Stat. ch. 496.419(4), (5)(b)(c)(f); Ga. Code Ann. §§ 43-17-7, 43-17-13(a)(1); Ill. Rev. Stat. ch. 23 para. 5109(j); La. Rev. Stat. Ann. § 1909C; Miss. Code Ann. § 79-11-509(4)(a)(b)(c); N.C. Gen. Stat. ch. 131F-23(d)(e); and Wis. Stat. § 440.475(1)(2).

of Dallas, 493 U.S. 215 (1990), which has had the effect of emboldening regulators who believe that the *Freedman* stay pending judicial review is no longer relevant. Of all the issues facing the charitable community, this is the one which most prompts ACFRFR to file this amicus brief.

2. The recent decision of the Tenth Circuit in *American Target Advertising v. Giani*

The Tenth Circuit's decision in *American Target Advertising v. Giani*, 199 F.3d 1241 (10th Cir. 2000) evidences a host of chickens coming home to roost. In that case, a charity engaged in core political speech hired a fundraising consultant, who in turn challenged various provisions of Utah's speech licensing laws as violative of the First Amendment. Early in the opinion, the Tenth Circuit cited *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) for the proposition that charitable speech is only entitled to an intermediate level of judicial scrutiny. 199 F.3d at 1242-3. This is notwithstanding the fact that all three cases of the *Riley* trilogy discussed *supra* clearly hold that regulations of charitable speech must be subjected to the most exacting level of judicial scrutiny. *Riley*, 487 U.S. at 788-9. The Tenth Circuit's rationale relies in part on the secondary effects test of *Renton*: "[t]he Utah Act [at issue] targets the secondary effects of professional charitable solicitations, i.e., increased fraud and misrepresentation." *American Target*, 199 F.3d at 1243. Thus, what started as an exception to traditional content based First Amendment analysis in adult use cases – the "secondary effects" analysis –

has now been interpreted by the Tenth Circuit as a general rule affecting the most sensitive type of political and charitable speech.[4]

Renton is not the only chicken that comes home to roost in the Tenth Circuit's decision in *American Target*, however. The Tenth Circuit also cited *F/W PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) to justify the prior restraint of American Target Advertising's charitable client, Judicial Watch. Again, what started as an exception relaxing First Amendment standards in the adult use context is now applicable to core, political speech engaged in by a charity.[5]

ACFRFR and the philanthropic community as a whole are very concerned by the fact that speech whose First Amendment protection this Court has described as

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[4] American Target Advertising has filed a petition for a writ of certiorari to this Court, asking that the Tenth Circuit's watering down of the level of judicial scrutiny applied to charitable speech be reviewed by this Court. That petition is currently still pending, Case No. 99-1647.

[5] This portion of the Tenth Circuit opinion is parallel to a decision by a federal district court in Florida which similarly held that *F/W PBS* modified *Freedman* in *all* speech contexts rather than merely the adult use speech at issue in *F/W PBS*. *See American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 32 F.Supp.2d 1308 (M.D.Fla. 1998), *rev'd* on other grounds, Slip Op. 99-10945A (11th Cir. August 10, 2000). The district court opinion in that case holds even more clearly and with much greater discussion than the Tenth Circuit opinion in *American Target* that *F/W PBS* modified *Freedman* for all speakers, not just those engaged in adult businesses. The Eleventh Circuit opinion in the *American Charities* case summarily dismissed the prior restraint claim without discussion.

"manifest of a wholly different, and lesser, magnitude than the interest in untrammeled political debate" is dragging down the protections afforded to speech that is of self-evidently greater value to the Court. *Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976). ACFRFR urges this Court to adopt the concurring opinion of Justice Brennan in *F/W PBS*, which held that *Freedman* principles must apply to *all* prior restraints that come before the Court. *F/W PBS*, 493 U.S. at 239-242. Justice Brennan correctly noted that this Court's decision in *Riley* mandates application of all three *Freedman* factors, including a stay maintaining the status quo while the government seeks judicial validation for its proposed prior restraint of speech.

Charities all over the United States have been put to a constant state of fear by the erosion of First Amendment protections started in the adult use context. ACFRFR urges this Court to reaffirm the continued vitality of *Freedman* – all three prongs of *Freedman* – in sustaining Petitioner's appeal. Any further retreat from *Freedman* will be used not just to regulate adult businesses, but also to bludgeon the First Amendment rights of relatively defenseless charitable organizations.

CONCLUSION

For all of the foregoing reasons, this Court should sustain the Petitioner's appeal and reverse the decision of the Court below.

Dated this 31st day of August, 2000.

Respectfully submitted,

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