

**Rethinking Riley: Applying Commensurate and Intermediate Scrutiny Standards to
Judicial Evaluation of Charitable Solicitation Regulation**

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ABSTRACT

In *Riley v. National Federation of the Blind*,¹ the Supreme Court struck down as unduly burdensome and unconstitutional a North Carolina statute requiring professional fundraisers to disclose to those solicited the average percentage of gross receipts actually turned over to the charity for all charitable solicitations conducted in the state within the previous twelve months. The Court applied a strict scrutiny standard of review of the regulated speech, rather than a more deferential intermediate or rational standard of scrutiny. The Court's reasoning was that the commercial speech elements of the charity's message were inextricably intertwined with the fully protected educational portions. It also held North Carolina's regulations governing application of the statute were not narrowly tailored to achieve the state's valid interests in protecting charities and informing donors how money contributed was spent.

This article disagrees with *Riley*'s rationale that the educational elements in charitable solicitations are always so interwoven with commercial speech that a governmental regulation that impinges on a charity's message should always be subject to strict judicial scrutiny review, and as a matter of course protected by the First Amendment.² The reality is that the educational component of many charitable solicitations is formulaic or an afterthought unconnected to the

¹ 487 U.S. 781 (1988).

² Fraudulent solicitations do not receive constitutional protection.

solicitation message. The article contends that if a charity's costs of fundraising over several years exceeds eighty-five percent of the amount raised, and the actual amount that is used for the charity's philanthropic mission is miniscule, should create a rebuttable presumption that the charitable program is not commensurate with the resources contributed to the organization. Absent certain exceptions, such organizations should lose their tax exempt status.

Judicial review of such revocations should be subject to a lesser, intermediate standard of scrutiny of review by the courts. There are both common law and federal tax precedents for using a commensurate standard in evaluating whether a charity serves a public purpose relative to its resources and abilities. This approach should pass constitutional muster, and will protect the public from deception and manipulation.