No. 08-765

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

JEREMY JAYNES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When confronted with a claim that a statute is substantially overbroad and, thus, facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications?

2. Does a statute which prohibits falsifying the headers identifying the sending server of an e-mail, but which does *not* require public identification of the author of its content, prohibit a substantial amount of protected speech?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to criminal justice in order to protect and advance the rights of victims of crime and the law-abiding public.

In some crimes, such as murder or rape, a single violation causes grievous loss. At the other end of the scale, there are crimes where each violation is minor, perhaps even trivial, but the cumulative effect of many

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

repetitions is serious damage to society. See James Q. Wilson, Introduction, in K. Scheidegger, A Guide to Regulating Panhandling 2 (CJLF 1993), available at http://www.cjlf.org/publctns/Panhandling/Pcvr_bio.htm.

Spam is an extreme example of the latter type. A single unwanted e-mail is a microscopic burden on the receiving server, and it is a trivial matter for the recipient to delete it. However, when a user's inbox is flooded with hundreds of spams a day, sorting through them to find the occasional valid and possibly important message becomes a time-consuming, productivity-destroying chore. Using an automated filter creates the danger that a "false positive" will erroneously block a valid message, see Federal Trade Commission, National Do Not Email Registry: A Report to Congress 11-12 (2004), seriously detracting from the reliability of e-mail.

Spamming thus detracts from the important advantages that e-mail has to offer. The crime in this case consists of an intentional evasion of the measures that e-mail customers and their service providers have taken to protect themselves from a tsunami of unwanted communications. Such evasion is and should be a crime, and the decision of the Virginia Supreme Court is therefore contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant Jeremy Jaynes engaged in the practice of sending large volumes of advertisements by electronic mail. Such messages are commonly called "spam," a term derived from a Monty Python comedy skit in which that word is repeated a maddening number of times. See Templeton, Origin of the Term "Spam" to Mean Net Abuse, available at http://www.templetons.

com/brad/spamterm.html (as visited Dec. 29, 2008); see also AOL Video, Monty Python—Spam!, http://video.aol.com/video-detail/monty-python-spam/2731045573 (as visited Jan. 6, 2009). "Unsolicited commercial e-mail ('UCE' or 'spam') poses a serious threat to electronic communication over the Internet for consumers and businesses." Federal Trade Commission, National Do Not Email Registry: A Report to Congress 1 (2004) ("FTC Report").

Spam has been the subject of both federal and state legislation. See *id.*, at i (describing "CAN-SPAM Act"). This case involves a state statute which prohibits intentionally falsifying the header information that is used to identify the transmitting server of an e-mail. See Pet. for Cert. 3 (quoting statute); FTC Report, at 4-8 (describing function of e-mail headers).

The header information identifying the source of an e-mail is not required by any governmental enactment but rather by a technical standard, the Simple Mail Transfer Protocol (SMTP), established by private agreement and adhered to by the providers of Internet e-mail services. See App. to Pet. for Cert. 21-22, and n. 11; FTC Report, at 4. If the header information were accurate, it would be a simple matter to block unwanted spam by blocking transmission from known spammers or from sources transmitting unusual volumes of e-mail. See FTC Report, at 11. The purpose of falsifying header information is to defeat the efforts of recipients and their service providers to protect themselves from the deluge of unwanted junk mail. See FTC Report, at 8.

Defendant violated the Virginia statute by using various computers and false header information to make it appear that his e-mails were coming from many different sources. From his home in North Carolina, he sent over 50,000 e-mails to subscribers of America

Online (AOL), located in Virginia. App. to Pet. for Cert. 2. The information on AOL customers had been stolen by a former AOL employee and was found in a search of defendant's home. *Id.*, at 3. He was convicted on three counts and sentenced to three years in prison on each, to be served consecutively for a total of nine years. *Id.*, at 4-5.

On appeal, the Virginia Court of Appeals affirmed. Among other arguments, the appellate court rejected Jaynes's First Amendment challenge to the statute:

> "The VCCA proscribes no speech. Rather, the statute proscribes intentional falsity as a machination to make massive, uncompensated use of the private property of an ISP [Internet Service Provider]. Therefore, the statute cannot be overbroad because no protected speech whatsoever falls within its purview." App. to Pet. for Cert. 106 (footnote omitted).

The Virginia Supreme Court initially rejected the First Amendment argument on standing grounds. See App. to Pet. for Cert. 54-55, 63. On rehearing, that court decided that Jaynes did have standing to challenge the statute as applied to noncommerical speech even though his e-mails were commercial. App. to Pet. for Cert. 10-18. The court then found that the statute burdens "core political speech" by proscribing anonymous e-mails, see *id.*, at 23, and that it is substantially overbroad and therefore unconstitutional in its entirety. See *id.*, at 25-27.

The Commonwealth filed a timely petition for writ of certiorari in this Court.

SUMMARY OF ARGUMENT

The Commonwealth has asked the Court to review this case to correct the Virginia Supreme Court's incorrect method of comparing the statute's valid applications to the invalid ones. In addition, the state court's assessment of the invalid applications was seriously in error on an important point that requires clarification.

In comparing the statute at issue with statutes that compel disclosure, the state court gave insufficient attention to the distinction between speech mandated by the government, on one hand, and government prohibition of a false response to a disclosure demanded by a private party, on the other. *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.* drew this distinction with regard to the fundraiser's "cut" of charitable contributions. A grant of certiorari is needed in the present case to clarify whether that distinction applies to a demand for the identity of the source of a communication.

The state court's assessment of invalid applications of the statute was based on the false premise that this statute prohibits anonymous political or religious speech by e-mail. It does not. Identification of the transmitting server is not the same as identification of the sender of the e-mail. A person who wishes to send anonymous e-mail in reasonable quantities can easily do so by making an agreement with an internet service provider to keep his identity confidential.

The Virginia Court of Appeals got it right the first time. "[T]he statute cannot be overbroad because no protected speech whatsoever falls within its purview."

ARGUMENT

I. The distinction between government-compelled disclosure and government-forbidden misrepresentation requires clarification.

"[T]he 'intentional lie' is 'no essential part of any exposition of ideas.' " *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 612 (2003) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974)). The present case does not involve a government mandate to say something when the speaker would prefer to say nothing. Cf. *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). This is a case where the defendant elected to tell bald-faced lies in order to receive services from a private entity under false pretenses, and the government prohibits such fraud. The distinction is an important one, and it needs to be made more explicit.

Riley and *Telemarketing* both involved the division of contributions between the charity for which the contributions were solicited and the for-profit fundraiser doing the soliciting. In *Riley*, the government mandated disclosure of the fundraiser's slice of the pie. See 487 U. S., at 795. The Court held that this "content-based regulation is subject to exacting First Amendment scrutiny." *Id.*, at 798. In striking down this requirement, the Court noted that the prospective "donor is free to inquire," *id.*, at 799, and that the State can punish "making false statements." *Id.*, at 800.

Riley's suggested alternative is precisely the situation in *Telemarketing*. In that case, a recipient of a solicitation "asked what percentage of her contribution would be used for fundraising expenses; she 'was told 90% or more goes to the vets.' " 538 U. S., at 608. That

was a lie; only 15% went to the charity. See *id.*, at 607. *Riley* was "plainly distinguishable." *Id.*, at 619.

The distinction that was so plain between *Riley* and *Telemarketing* appears to have eluded the Virginia Supreme Court in the present case. Disclosure of the sender's domain and Internet Protocol (IP) address in this case, like disclosure of the fundraiser's percentage in *Riley*, is required by private parties as a condition of their cooperation, not by the government as a condition of speech. The Simple Mail Transfer Protocol (SMTP) "is the product of private collaboration and not established by a governmental entity." App. to Pet. for Cert. 22, n. 11.

When it comes to stating a fact within his knowledge, a speaker has three choices: (1) tell the truth; (2) say nothing; or (3) lie. *Riley* held that the government cannot rule out choice 2 for the fundraiser's percentage. *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 166-167 (2002), similarly held that the government cannot compel disclosure of the identity of the speaker. When a private party demands disclosure and effectively rules out choice 2, *Telemarketers* held that the government *can* forbid choice 3, the deliberate lie, for the fundraiser's percentage. This case presents the same question for the source of the message.

The question is an important one, given the great importance of electronic mail in modern life. *Amicus* CJLF will not belabor this point because we understand it will be covered by another *amicus*. It is sufficient to note that electronic mail has had a pervasive effect on the conduct of business, even in the most tradition-bound of professions. See, *e.g.*, Supreme Court Rule 25.8. The utility of this marvelous advance in technology is threatened by persons such as defendant Jaynes, who force e-mail users to install "spam filters" and risk

that a genuine, important e-mail will be erroneously flagged as "spam" and not reach its addressee. See *supra*, at 2.

II. The Virginia statute does not prohibit anonymous e-mail.

The state court's decision rests on a false premise. The Virginia Supreme Court held that the statute is substantially overbroad under the standard of *United States* v. *Williams*, 553 U. S. __, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650, 662 (2008).

> "Applying that inquiry under *Williams* in this case is relatively straightforward as Code § 18.2-152.3:1 would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech. For example, were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute." App. to Pet. for Cert. 26-27.

This analysis is mistaken for two reasons. First, it conflates nondisclosure with affirmative misrepresentation, as discussed in Part I above. By using the obvious pseudonym "Publius," Hamilton, Madison, and Jay identified the essays as coming from one source without disclosing the source. If they had signed the essays "Patrick Henry," affirmatively misrepresenting the source, that would be closer to the present case.

Second, disclosure of the transmitting server of an e-mail is not necessarily disclosure of the author of the content of the e-mail. In traditional terms, knowing the identity of the publisher is not the same as knowing the identity of the author. Using the Federalist Papers again as an example, the essays were published in New York newspapers, and while "the identity of Publius

was a well-guarded secret," Rossiter, Introduction, in The Federalist Papers x (C. Rossiter ed. 1961), the identity of the publisher of a newspaper is common knowledge.

If the sender of an e-mail has a private domain, the owner of that domain is typically discoverable through the registrar, as the Virginia Supreme Court says. See App. to Pet. for Cert. 22.[2] However, transmission from one's own domain is not the only, or even the primary, way to send noncommercial e-mail. Most individuals do not send personal e-mail from their own domain. The "little people" the *Watchtower* Court was concerned about, see 536 U. S., at 163, typically have an account with a service provider who owns the domain. Service providers run the spectrum from huge operations with millions of subscribers, such as America Online, Inc. (AOL), to tiny operations, some run by a sole proprietor.

To send an e-mail anonymously requires nothing more than opening an account with a provider who agrees to keep the customer's identity confidential. For example, Alexander Hamilton may open an account with Small ISP, Inc., owner of the smallisp.net domain. The Federalist Papers then go out with the IP address for smallisp.net, and the sender is identified as publius@smallisp.net. The fact the Publius is Hamilton is kept confidential by Small ISP, Inc. Unlike the situation in *Watchtower*, 536 U. S., at 166, the identity of the speaker is not in any government file, and it is not open for inspection by the public. There is, of

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2. We say "typically" because some registrars are now offering private registration that protects the contact information from disclosure. See Network Solutions, Inc., Private Domain Registration, http://www.networksolutions.com/domain-name-registration/private.jsp (last visited Dec. 29, 2008).

course, a risk of disclosure by infidelity of the provider, theft of the information, or legal process such as a search warrant, but those risks also exist in more traditional forms of publication of anonymous works.

The reason why defendant Jaynes did not avail himself of this simple alternative is itself simple. He wanted to send so many e-mails as to make a nuisance of himself—the digital-age equivalent of the obnoxious sound truck. See *Kovacs* v. *Cooper*, 336 U. S. 77, 87-88 (1949) (plurality opinion). If Small ISP, Inc. allowed a user to do this, it would soon find all of its e-mails blocked by the major providers, much to the consternation of its other customers, and it would terminate the user's account. This is not censorship, but rather enabling the recipients of communications to decide what they want to receive. Laws to assist in such private choice are clearly constitutional. See, *e.g.*, *Watchtower*, 536 U. S., at 168 ("No Solicitation" signs); *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 738 (1970) (barring mail from a particular source).

In short, the government has not prohibited anonymous speech in the present case. Private parties, not the government, compel the speaker to disclose the source of the e-mail, and the government merely forbids a false representation. In addition, disclosure of the transmitting e-mail server and the sender's domain need not disclose the author's identity. The Virginia Supreme Court's premise that this law "would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech," App. to Pet. for Cert. 26, is simply false.

The statute at issue in this case has little, if any, invalid scope. See *supra*, at 4 (quoting Court of Appeals opinion). It is not substantially overbroad under the test established by this Court and summarized in

Williams, *supra*. The statute is clearly constitutional as applied in this case.

CONCLUSION

The petition for a writ of certiorari to the Virginia Supreme Court should be granted.

January, 2009

Respectfully submitted,

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