No. 08-08-765

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JEREMY JAYNES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

ROBERT F. MCDONNELL
Attorney General of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General
Counsel of Record

WILLIAM E. THRO
Special Counsel

WILLIAM C. MIMS
Chief Deputy
Attorney General

LISA M. HICKS-THOMAS
Deputy Attorney General

SAMUEL E. FISHEL, IV
Senior Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

December 11, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Virginia Code § 18.2-152.3:1(A) prohibits an individual from falsifying his identity to circumvent e-mail security measures and send unsolicited bulk e-mail. Although the statute is constitutional as applied to commercial e-mail spam, the Supreme Court of Virginia found that it was unconstitutional as applied to hypothetical political and religious e-mail spam. Without comparing the constitutional applications to the unconstitutional applications, Virginia's highest court declared that the statute was substantially overbroad and, thus, facially unconstitutional. The question presented is:

> 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?

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Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

INTRODUCTION

Unsolicited bulk e-mail messages ("e-mail spam") are a highly profitable but very costly nuisance for both internet service providers and their customers. By bombarding internet service providers with millions of messages peddling all manner of products and schemes, many of them fraudulent, spammers force businesses into expensive countermeasures. In response, Congress and many state legislatures have enacted prohibitions on e-mail spam. The Supreme Court of Virginia invalidated on its face, as substantially overbroad, an anti-spam law because it believed that some imagined spammer might be prosecuted for sending political or religious spam. The court never determined whether political or religious spam is sent with any degree of frequency relative to the tsunami of commercial spam, or even whether religious or political spam is sent at all. In other words, the court invalidated a statute on its face based on a hypothetical application that occurs very infrequently, if it occurs at all.

The Virginia Supreme Court's holding is flatly contrary to this Court's overbreadth jurisprudence,

which requires an assessment of a statute's actual overbreadth, which is then compared with its legitimate applications. The Supreme Court of Virginia's misapplication of substantial overbreadth was not an isolated one. Other courts have similarly misunderstood the substantial overbreadth inquiry. Moreover, given the costs associated with overbreadth challenges, it is vital that the lower courts apply a comparative rather than an absolutist assessment.

OPINIONS BELOW

The decision of the Supreme Court of Virginia on rehearing is published as *Jaynes v. Virginia*, 666 S.E.2d 303 (Va. 2008), and reprinted in the Appendix at 1. The initial decision of the Supreme Court of Virginia is published as *Jaynes v. Virginia,* 657 S.E.2d 478 (Va. 2008), and is reprinted in the Appendix at 30. Finally, the decision of the Court of Appeals of Virginia is published as *Jaynes v. Virginia*, 634 S.E.2d 357 (Va. Ct. App. 2006), and may be found in the Appendix at 84.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on September 12, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the following constitutional and statutory provisions:

1. The First Amendment, incorporated against the States through the Due Process Clause of the Fourteenth Amendment, provides:

   > Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. *Virginia Code* § 18.2-152.3:1(A) provides, in relevant part, that any person is guilty of a crime if he:

   > Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers.

The Act elevates the crime to a felony if "[t]he volume of unsolicited bulk e-mail (UBE) transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted

recipients in any one-year time period." *Virginia Code* § 18.2-152.3:1(B)(1).

STATEMENT OF THE CASE

1. Unsolicited bulk e-mail ("e-mail spam") is a significant problem. Congress has found that e-mail spam imposes significant financial costs and technological burdens on internet service providers and their customers. 15 U.S.C. §§ 7701(a)(3)-(4), (a)(6). The Senate Report accompanying those findings noted that Americans have become "deluged" by unwanted spam messages "that increasingly contain fraudulent and other objectionable content," sent by those "who seek to defraud consumers and make a living by preying on unsuspecting e-mail users." S. Rep. No. 108-102, at 2 (2003) (Report of the Committee on Commerce, Science and Transportation on the Can-Spam Act of 2003). Just five years ago, spam comprised ten percent of e-mail traffic and represented merely an annoyance to its recipients. Today, e-mail spam comprises almost eighty percent of all e-mail traffic and imposes significant burdens. *Id.* In 2003, Congress estimated that more than two trillion spam messages are sent each year and the worldwide cost of spam to businesses will surpass $113 billion by 2007. *Id.* at 3, 7. The report noted that, in particular, the use of fraudulent transmission information leaves recipients "with no effective ability" to manage their mailboxes and "is threatening to overwhelm . . . the network systems

of ISPs, business, universities, and other organizations." *Id.* at 3. At present, a majority of all e-mail messages received by internet service providers are considered spam. *App.* 102.

The individual computers linked through the Internet communicate using Internet Protocol (IP) addresses comprised wholly of numbers. Because numbers are difficult to remember, most IP addresses have a pseudonym—called a "domain name" consisting of words. For example, the domain name for the computers used by the Clerk of this Court is "supremecourtus.gov." The Domain Name System is composed of software and computers that translate domain names into their matching IP address and vice versa. *App.* 87.

When one sends an e-mail, the computers use Simple Mail Transfer Protocol (SMTP) to transmit the message. SMTP requires that the receiving computer perform a "HELO" verification of both sending IP address and the sending domain. Without the HELO information, the message is not delivered to the intended recipient. *App.* 87-88.

As part of their efforts to block spam, internet service providers utilize filters to examine the HELO information. If one particular domain or IP address is sending a large number of e-mail messages or if some of the HELO information is suspect, the internet service provider will classify messages as spam and will prevent the delivery of the e-mail messages. *App.* 88-89.

One can circumvent those security measures by falsifying one's identity. To explain, if one sent thousands of e-mails from the same computer and used the true IP address and true domain name, the spam filters easily would identify the e-mail messages as spam. However, if one used a wide variety of false IP addresses and false domain names to make it appear that the messages were coming from many different computers and many different domains, the spam filters would be less likely to block the messages. *App.* 89.

The Federal Trade Commission notes several other ways that spammers seek to circumvent the anti-spam security measures employed by internet service providers about the source of their messages. Some spammers use "spoofing" to falsify transmission information, while others use open relays or open proxies to effectively "launder" their messages and hide their tracks. Still others send viruses, worms, or "Trojan horses" to hijack infected computers and send spam from them. *See* Federal Trade Commission, NATIONAL DO NOT EMAIL REGISTRY: A REPORT TO CONGRESS (2004) (available at http://www.ftc.gov/reports/dneregistry/report.pdf.).

The profits from these operations are substantial. The Washington Post reports that one spam operation netted on average between $7,000 and $9,000 a day. Brian Krebs, *How Can So Much Spam Come from One Place?* Wash. Post, Nov. 19, 2008. To secure this profit, however, required sending a prodigious

amount of spam e-mails: only one in every 12 million spam e-mails turned into a sale. *Id.*

2. Virginia's Transmission of Unsolicited Bulk Electronic Mail (spam) Act, *Virginia Code* § 18.2-152.3:1(A), prohibits individuals from falsifying their identities in order to send e-mail spam. Under the statute, both the internet service provider and its subscribers are victims. Like the federal statute, 15 U.S.C. §§ 7701-7713 and the criminal statutes of many other States, the Virginia Act applies only when the sender falsifies his identity.[1] Unlike the federal statute, which prohibits only spam that involves commercial speech, the Virginia Act applies to all spam, regardless of its content.[2]

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[1] *See, e.g., Connecticut Gen. Stat.* § 53-451(a); *Delaware Code* tit. 11, §§ 937, 939; *Georgia Code Ann.* §§ 16-9-101, 102; *Iowa Code* § 716A.2; *Louisiana Rev. Stat. Ann.* § 14:73.6; *Michigan Comp. Laws* § 445.2507; *Nevada Rev. Stat.* § 205.492(2); *Ohio Rev. Code Ann.* § 2913.421; 18 *Pennsylvania Cons. Stat. Ann.* § 7661.

[2] Many States follow the federal model and only prohibit spam that involves commercial speech. *See, e.g., California Bus. & Prof. Code* § 17529.5; *Delaware Code* tit. 11, §§ 937, 939; *Georgia Code Ann.* §§ 16-9-101, 102; *Michigan Comp. Laws* § 445.2507; *Ohio Rev. Code Ann.* § 2913.421. Ten other States have statutes that apply to *all* spam regardless of content. *See Connecticut Gen. Stat.* § 53-451(b)(7); *Illinois Comp. Stat.* § 5/16 D-3(a)(5); *Idaho Code Ann.* § 48-603E; *Iowa Code* § 716A.2; *Louisiana Rev. Stat. Ann.* § 14:73.6; *Nevada Rev. Stat.* § 205.492(2); *Oklahoma Stat.* tit. 15, § 776.1(A); 18 *Pennsylvania Cons. Stat. Ann.* § 7661; *Tennessee Code Ann.* § 39-14-603; *West Virginia Code* § 46A-6G-2.

The respondent, Jeremy Jaynes, violated the Virginia Act by falsifying his identity and sending exclusively *commercial* e-mail spam. *App.* 4, 10, 32. While acknowledging that the Act is constitutional as applied to him, Jaynes asserts that it is unconstitutional as applied to someone who falsifies his identity to send e-mail spam that involves political or religious speech. *App.* 10, 24. He further contends that these unconstitutional applications are sufficient to render the statute substantially overbroad and, thus, facially unconstitutional. *App.* 10.

3. The facts surrounding Jaynes' crime are not in dispute. Jaynes falsified his identity to circumvent America On-Line's (AOL) spam filters and send spam to individuals who maintain e-mail addresses with AOL.[3] *App.* 2. Specifically, the domains in the "from" lines of the e-mails that Jaynes sent through AOL servers were registered by Network Solutions. In order to register a domain, the registrant must enter a contract/agreement and provide information to the registrar. The information required for registration includes name and contact information and it must be truthful and accurate. In this case, all of the

[3] At the time of Jaynes' actions, AOL's mail servers alone received approximately one *billion* spam e-mails every day, and spam comprises at least seventy to eighty percent of the e-mail traffic. Despite AOL's best efforts to block spam, AOL's subscribers generated seven to ten million complaints per day. *App.* 102.

contact information given to Network Solutions was false. *App.* 91.

According to AOL's database, Jaynes was responsible for 12,197 e-mails on July 16, 2003, 24,172 e-mails on July 19, 2003, and 19,104 e-mails on July 26, 2003. *App.* 2. Jaynes' e-mails offered three products: (1) a product to purportedly make money by processing FedEx refund claims; (2) a "Penny Stock Picker"; and (3) a "History Eraser" product. *App.* 4. All of these e-mails originated from IP addresses and domains that ultimately traced back to Jeremy Jaynes. *App.* 2. Furthermore, Jaynes was in possession of AOL's stolen database containing 107 million e-mail addresses of its customers. *App.* 3-4, 33. Because Jaynes sent more than 10,000 e-mails in a single day, the felony provisions of the Virginia Act apply.

Jaynes was indicted by a grand jury of the Circuit Court of Loudoun County. Jaynes moved to dismiss his indictment on a variety of constitutional grounds including lack of jurisdiction, vagueness, a violation of the Dormant Commerce Clause, and a violation of the First Amendment. *App.* 4. The trial court rejected all of these arguments. Following an eight-day trial, a jury convicted Jaynes of violating the felony provisions of the Act. The jury then recommended that Jaynes serve nine years in prison. The trial judge agreed with this recommendation. *App.* 4-5.

4. On appeal, Virginia's intermediate appellate court unanimously affirmed. *App.* 84-120. The Court of Appeals of Virginia rejected the contention that the Virginia Act is unconstitutionally overbroad because it prevents the sending of anonymous e-mails. *App.* 99-100. Specifically, the court found that "the statute does not prevent anonymous speech, as appellant argues, but prohibits trespassing on private computer networks through intentional misrepresentation, an activity that merits no First Amendment protection." *App.* 100. The court subsequently denied Jaynes' request for *en banc* review.

5. The Supreme Court of Virginia granted discretionary review on all issues and also granted Virginia's petition for a cross-appeal on the issue of whether, as a matter of state law, Jaynes could bring a facial challenge alleging overbreadth.

Virginia's highest court unanimously rejected Jaynes' jurisdictional, vagueness, and Dormant Commerce Clause arguments. *App.* 36-39, 55-63, 63. Relying on *Virginia v. Hicks*, 539 U.S. 113, 120 (2003), the court found that (1) the issue of standing to bring an overbreadth claim was an issue of state law, *App.* 43-45; and (2) as a matter of state law, Jaynes could not bring an overbreadth claim. *App.* 45-55.

6. Jaynes sought rehearing on the sole issue of whether he could bring an overbreadth challenge. Virginia's highest court granted rehearing and concluded that, as a matter of federal constitutional

law, the court must entertain such a challenge.[4] *App.* 10-18. Turning to the merits of Jaynes' overbreadth claim, it found the Virginia Act unconstitutional as applied to one who falsifies his identity to send political or religious e-mail spam. *App.* 21-25.

Having determined that the statute is unconstitutional in some instances, Virginia's highest court then focused on whether the Virginia Act is substantially overbroad. In making this determination, the court did not compare the statute's legitimate sweep (the constitutional applications) to the purported overbreadth (the unconstitutional applications). Instead, the court focused exclusively on the *nature* of the purported overbreadth. As the court explained, the Virginia Act:

> 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. Such an expansive scope of unconstitutional coverage is not what the Court in *Williams* referenced "as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." We thus reject the Commonwealth's argument that Jaynes' facial challenge to [the Virginia Act] must

[4] While Virginia disputed this point in the Supreme Court of Virginia, it does not contest the issue in this Court.

> fail because the statute is not "substantially overbroad."

App. 26-27 (citations omitted). Because the court found substantial overbreadth, the court declared the Virginia Act to be facially unconstitutional under the First Amendment.[5] *App.* 28-29.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons. First, the Virginia Supreme Court's decision directly conflicts with this Court's decisions setting forth the test for determining substantial overbreadth. Instead of engaging in an analysis of comparing the constitutional applications (legitimate sweep) to the

[5] The Supreme Court of Virginia's determination of substantial overbreadth turned entirely on its understanding of this Court's overbreadth doctrine interpreting the United States Constitution. "Because it is the Commonwealth of Virginia, not [Jaynes], that has invoked the authority of the federal courts by petitioning for a writ of certiorari, [this Court's] jurisdiction to review the First Amendment merits question is clear." *Hicks*, 539 U.S. at 120.

This is the third time in less than ten years that the Virginia Supreme Court has invalidated a statute or policy as facially overbroad under the First Amendment. The first two occasions were reversed by this Court. *See Virginia v. Hicks*, 563 S.E.2d 674 (Va. 2002) (invalidating trespass policy by public housing authority because of First Amendment overbreadth), *rev'd* 539 U.S. at 124; *Black v. Virginia*, 553 S.E.2d 738 (Va. 2001) (invalidating cross-burning statute), *rev'd Virginia v. Black*, 538 U.S. 343 (2003).

unconstitutional applications, the court below engaged in an absolutist analysis that assessed whether the statute reached constitutionally protected expression. The Supreme Court of Virginia did not examine whether the First Amendment problem it identified actually occurs at all or whether it occurs with any frequency. Had the court adhered to this Court's precedent, it would necessarily have rejected Jaynes' overbreadth claim. Jaynes conceded, and the Virginia Supreme Court did not question, that the statute is constitutional as applied to commercial speech. It is difficult to imagine a case where application of the overbreadth doctrine is *less* warranted.

Second, the Virginia Supreme Court's decision deepens an existing conflict among the lower appellate courts. The First, Third, and Tenth Circuits adhere to this Court's requirement that courts follow a comparative approach to the overbreadth analysis—comparing the constitutional applications to the unconstitutional applications in light of the government's interest. In contrast, the Virginia Supreme Court, the Eighth Circuit, and the Hawaii Supreme Court, along with other courts, have disregarded this Court's direction and have instead employed an absolutist approach that examines whether the statute conceivably chills protected speech and expression.

Third, it is vitally important that the lower courts apply the correct test for determining substantial overbreadth. The comparative test

utilized by this Court ensures the overbreadth doctrine is limited. The absolutist test utilized by the Virginia Supreme Court casts doubt on every statute that regulates expression.

I. THE VIRGINIA SUPREME COURT'S DECISION CONTRADICTS THIS COURT'S TEST FOR DETERMINING SUBSTANTIAL OVERBREADTH.

A. This Court's Precedents Require that, Before a Court Strikes Down a Statute on Its Face Under the Overbreadth Doctrine, the Court Must Compare the Statute's Constitutional and Unconstitutional Applications.

Unlike an as-applied challenge where the litigant simply asks that a law be declared unconstitutional in the circumstances presently before the court, *County Court of Ulster County v. Allen,* 442 U.S. 140, 154-55 (1979), a facial challenge asks that the law be declared "invalid *in toto*" and, thus, "incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). While this "Court has expressed increasing skepticism of facial challenges in recent years," *Warshak v. United States*, 532 F.3d 521, 529 (6th Cir. 2008) (*en banc*), it continues to entertain facial challenges in two contexts. First, a litigant may bring a typical facial challenge alleging "that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745

(1987), or that the statute lacks "a plainly legitimate sweep." *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (Stevens, J., joined by Roberts, C.J., & Kennedy, J., announcing the judgment of the Court). Second, in some limited contexts, litigants may bring a facial challenge alleging overbreadth. *Sabri v. United States*, 541 U.S. 600, 609-10 (2004). In a facial challenge alleging overbreadth, the law is invalidated in *all* applications "because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party,* 128 S. Ct. 1184, 1190 n.6 (2008) (citation omitted).

Because "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct," *Hicks*, 539 U.S. at 119, it is "strong medicine that is used sparingly and only as a last resort." *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 14 (1988) (citation and internal quotations omitted). Facial challenges often "rest on speculation," "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with

the Constitution." *Washington State Grange*, 128 S. Ct. at 1191 (internal quotation marks omitted). "It is neither [the courts'] obligation nor within [their] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007).

These concerns have led this Court to place significant restrictions on the application of the overbreadth doctrine. Because "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects," *United States v. Williams,* 128 S. Ct. 1830, 1838 (2008), the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge," *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984). Rather, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The requirement of substantial overbreadth avoids invalidation of a statute "where, despite some possibility of impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65 (1984) (citation omitted). "The overbreadth claimant bears

the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (brackets original, citation omitted).

Ultimately, the substantial overbreadth inquiry is a comparative analysis—an assessment of both the constitutional applications and the unconstitutional applications. This comparison must consider "whether there is an appropriate balance of the affected speech and the governmental interests that the [statute] purports to serve." *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150, 165 (2002). Even if a statute has unconstitutional applications, "that assumption would not justify prohibiting all enforcement of the law unless its application to protected speech is substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 207 (2003) (internal quotation marks and citation omitted). There must be "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Taxpayers for Vincent,* 466 U.S. at 801. Quite simply, if "the vast majority of its applications" raise "no constitutional problems whatever," the statute cannot be substantially overbroad. *Williams,* 128 S. Ct. at 1844.

B. The Virginia Supreme Court Struck Down the Anti-Spam Statute on Its Face Without Comparing Its Constitutional Applications to the Unconstitutional Applications.

In direct conflict with this Court's holdings, the Virginia Supreme Court failed to determine whether the Virginia Act's "application to protected speech is substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *McConnell*, 540 U.S. at 207. Had it done so, it could not possibly have struck down the statute on its face, for no one disputed that "the vast majority of its applications" raise "no constitutional problems whatever." *Williams,* 128 S. Ct. at 1844.

First, the broad legitimate sweep of the Act is clear. The Supreme Court of Virginia accepted that the Virginia Act is constitutional as applied to *all commercial* e-mail spam. *See App.* 5, 24, 40-41.[6] To be

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[6] The correctness of that conclusion is not before this Court. As noted, Jaynes has conceded from the outset of this case that the statute is constitutional as applied to commercial spam; and the Virginia Supreme Court struck down the statute on its face notwithstanding its recognition that commercial spam can be proscribed. The issue presented to this Court is the Virginia Supreme Court's deeply flawed application of the overbreadth doctrine, not its underlying rulings regarding what types of spam the State may, and may not, prohibit.

The Virginia Supreme Court's conclusion that the State can block commercial e-mail spam accords with the holdings of almost all the lower courts that have addressed the issue. *See White Buffalo Ventures, LLC v. University of Texas,* 420 F.3d 366,

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sure, the Virginia Act is not limited to commercial e-mail spam, but this is not "a constitutional defect. The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Hill v. Colorado*, 530 U.S. 703, 730-31 (2000).

Second, the purported overbreadth is limited. The only purported unconstitutional application identified by the Virginia Supreme Court is when someone falsifies his identity and sends political or religious e-mail spam. *App.* 21-25. Yet, the court below did not attempt to quantify how–if ever–often this purported unconstitutional application occurs. Although Jaynes has the "heavy burden," *McConnell,*

374-78 (5th Cir. 2005) (upholding state university's exclusion of commercial e-mail spam); *Verizon Online Servs. v. Ralsky*, 203 F. Supp. 2d 601, 617 (E.D. Va. 2002) ("the sending of spam to and through an ISP's e-mail servers constitutes the tort of trespass to chattel in the state of Virginia."); *United States v. Gray,* 78 F. Supp. 2d 524, 532 (E.D. Va. 1999) ("[u]nauthorized access into a . . . computer is analogous to breaking and entering in the physical world."); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451-52 (E.D. Va. 1998) (granting summary judgment to ISP on theory that transmission of bulk e-mail constitutes trespass to chattels); *America Online, Inc. v. IMS,* 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (sending unauthorized spam constitutes trespass to chattels); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (granting preliminary injunction and holding that electronic signals sent over computer network are sufficiently tangible to support a trespass claim). *But see Intel Corp. v. Hamidi*, 71 P.3d 296, 302-12 (Cal. 2003) (refusing to allow owner of computer network to block e-mail spam sent by former employee).

540 U.S. at 207, "of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists," *Hicks*, 539 U.S. at 122 (brackets original, citation omitted), he failed to produce any evidence that persons actually falsify their identity to send political and religious e-mail spam. Because of "the tendency of [the] overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals," *Williams*, 128 S. Ct. at 1843, overbreadth analysis requires "realistic" threats to protected speech, not imagined ones. *Taxpayers for Vincent,* 466 U.S. at 801. Assuming the Virginia Supreme Court is correct in its description of the purported overbreadth, the Virginia Act is constitutional in the vast majority of actual applications.[7] *Cf. New York v. Ferber*, 458 U.S. 747,

[7] Although Virginia does not agree with the Virginia Supreme Court that the Virginia Act is unconstitutional as applied to *all* spam containing religious and political speech, the Court need not reach that issue to address the Virginia Supreme Court's deeply flawed overbreadth holding.

In the State's view, the Virginia Act is constitutional as applied to all e-mail spam—including religious and political spam—sent to internet service providers or recipients who seek to exclude it by using anti-spam security measures. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). This principle extends to door-to-door solicitation, *Martin v. City of Struthers*, 319 U.S. 141, 147-48 (1943); regular mail, *Rowan,* 397 U.S. at 736-37, radio waves; *Federal Commc'n Comm'n v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978); and other forms of amplified sound, *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949). An aspect of the broader "right to be let alone," *Olmstead v. United States*, 277

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772 (1982) ("a single impermissible application" is insufficient to deem a statute or policy invalid).

Neither Jaynes nor the Virginia Supreme Court disagreed that the Virginia Act's "plainly legitimate applications" vastly outnumber its "application[s] to protected speech." Nevertheless, in direct conflict with this Court's precedents, the Virginia Supreme Court failed to undertake that inquiry. Although the court mouthed the test, *App.* 26, it never actually engaged in the comparison. Instead, the court held that the statute's unconstitutional applications are "substantial" because "were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute." *App.* 26-27. But this Court's overbreadth doctrine does not look to the inherent value of the protected speech. Rather, it requires courts to make a realistic comparison

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U.S. 438, 478 (1928) (Brandeis, J., dissenting), the right to avoid unwelcome speech applies in the home, *Rowan*, 397 U.S. at 738, its immediate surroundings, *Frisby v. Schultz*, 487 U.S. 474, 487 (1988), and in transit to one's employment, *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, 204 (1921). The person who sends e-mail spam to recipients who do not wish to receive it is indistinguishable from the picketer who stays in front of a particular house, *Frisby*, 487 U.S. at 487, the firm that continues to send junk mail, *Rowan*, 397 U.S. at 736-37, or the salesperson who refuses to leave. *Martin*, 319 U.S. at 147-48. As noted, the Court need not reach this question because the statute's unconstitutional applications are plainly not "substantial" even if the Virginia Supreme Court is correct that the State may not proscribe *any* political and religious spam.

between permissible applications and those applications that would be constitutionally impermissible. A statute that is constitutionally applied to hundreds of thousands, or even millions, of instances of commercial speech and only a handful of instances of political speech is not overbroad under the First Amendment.

To the extent there are realistic circumstances where the Virginia Act is unconstitutional, any such application may be avoided through case-by-case litigation. *Hicks*, 539 U.S. at 124. "As-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales*, 127 S. Ct. at 1639. Because the statute is constitutional as applied to Jaynes, a fact he does not dispute, *App.* 5, 24, 40-41, there is no need for the draconian remedy of declaring the Virginia Act invalid in all applications. When confronted with a statute that is unconstitutional in some applications, courts should "try not to nullify more of a legislature's work than is necessary, [because] '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006).

In sum, the reasoning of the Virginia Supreme Court directly contradicts this Court's decisions concerning substantial overbreadth. At worst, the Virginia Act is constitutionally problematic in a hypothetical case when someone falsifies his identity to send political or religious e-mail spam. "In determining whether a law is facially invalid, we

must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 128 S. Ct. at 1190. On this record, there is no evidence that such a situation ever occurs. Indeed, given the sharp conflict of the decision below with this Court's overbreadth jurisprudence, this Court may wish to consider summary reversal.

II. THE VIRGINIA SUPREME COURT'S DECISION DEEPENS A CONFLICT AMONG THE COURTS CONCERNING HOW TO DETERMINE SUBSTANTIAL OVERBREADTH.

Because this "Court has not addressed precisely the factors relevant to a determination whether a statute is substantially overbroad," *Aiello v. City of Wilmington,* 623 F.2d 845, 854 (3rd Cir. 1980), the lower appellate courts are divided as to how to determine if a statute is substantially overbroad. The Supreme Court of Virginia's decision only deepens the conflict.

Some courts properly determine substantial overbreadth by making a comparative assessment—measuring the constitutional applications against the unconstitutional applications in light of the government's interest. For example, the Third Circuit examines "(1) the number of valid applications, (2) the historic or likely frequency of conceivably impermissible applications, (3) the nature of the

activity or conduct sought to be regulated, and (4) the nature of the state interest underlying the regulation." *Borden v. Sch. Dist. of Tp. of East Brunswick*, 523 F.3d 153, 165 (3rd Cir. 2008) (internal quotation marks and citation omitted).[8] Similarly, the First Circuit's approach involves "a rough balancing of the number of valid applications compared to the number of potentially invalid applications. Some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is probable." *Magill v. Lynch*, 560 F.2d 22, 30 (1st Cir. 1977).

The Tenth Circuit focuses on whether "the number of [unconstitutional] applications is insubstantial compared to the number of [constitutional] applications," *ACORN v. City of Tulsa*, 835 F.2d 735, 744 (10th Cir. 1987), and rejects overbreadth claims if the challenger fails "to show in this case that more than a small percentage of conceivable applications will raise serious [constitutional] questions." *Nat'l Advertising Co. v. City and County of Denver*, 912 F.2d 405, 411 (10th Cir. 1990).

In sharp contrast, other courts—such as the Supreme Court of Virginia—apply an absolutist

[8] *Borden* simply is a reaffirmation of the four factors adopted by the Third Circuit in *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 226 (3rd Cir. 2004), and originally enunciated by Judge Sloviter. *See Aiello*, 623 F.2d at 860 (Sloviter, J., concurring and dissenting).

assessment under which the law is facially invalid "if the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 541 F.3d 785, 792 n.7 (8th Cir. 2008) (quoting *Taxpayers for Vincent,* 466 U.S. at 788-89), *pet. for rehearing en banc denied* (8th Cir. Dec. 5, 2008). The Supreme Court of Virginia invalidated the Virginia Act because the Act might prevent someone from sending e-mail spam containing *The Federalist*. *App.* 26-27. The Eighth Circuit applied a similar analysis in *Milavetz*. The court of appeals struck down on its face a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that prohibited debt relief agencies from advising a person "to incur more debt in contemplation of such person" filing a bankruptcy action. 11 U.S.C. § 526(a)(4). The court concluded that the provision violates the First Amendment because there are "situations where it would likely be in the assisted person's . . . best interest . . . to incur additional debt in contemplation of bankruptcy." *Milavetz*, 541 F.3d at 793. The court did not compare the comparative frequency of that situation with the provision's constitutional applications (*e.g.*, when the advice is given "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge"). *Id.* Instead, the court found substantial overbreadth because the statute was not written "to prevent only that speech which the government has an interest in restricting." *Id.* at 794. *See also id.* at 799 (Colloton,

J., dissenting) (criticizing the majority because, "[e]ven under Milavetz's broad construction of the statute, a facial challenge resting on a few hypothetical situations . . . is unlikely to justify invalidating a statute in *all* of its applications") (internal quotation marks and citations omitted).

Likewise, the Supreme Court of Hawaii finds substantial overbreadth if the statute "conceivably may" include activities protected by the First Amendment. *Hawaii v. Beltran,* 172 P.3d 458, 464 (Haw. 2007). And the Iowa Supreme Court found that a juvenile curfew ordinance was substantially overbroad based upon hypothetical juveniles who might attend late prayer vigils or labor union meetings lasting past 11:00 p.m. *City of Maquoketa v. Russell,* 484 N.W.2d 179, 185-86 (Iowa 1992). The court did not engage in a quantitative assessment of the legitimate sweep of the ordinance with its problematic applications. *Id.* These highly unrealistic and infrequent hypotheticals were sufficient to invalidate the ordinance on its face. *See also Scope, Inc. v. Pataki*, 386 F. Supp. 2d 184, 194-95 (W.D.N.Y. 2005) (invalidating as substantially overbroad a portion of a statute regulating gun sales without any comparison of its legitimate sweep with its impermissible applications); *Idaho v. Casey*, 876 P.2d 138, 141-42 (Idaho 1994) (Silak, J., dissenting from facial invalidation of interference with hunting statute, reasoning that the petitioner had failed to show that "the overbreadth of this statute is substantial in light of the number of valid

applications compared to the number of potentially invalid applications."); *Florida v. Montas*, ___ So. 2d ___, ___, 2008 WL 4753740 at * 2 (Fla. Dist. Ct. App. 2008) (invalidating statute regulating the wearing of a military uniform because the court could "conceive of situations when a person might wear some part of a military uniform to communicate a message. For instance, a person might do so to express his support of the troops or to protest military action.").

Under this absolutist approach, there is only one consideration—does the statute conceivably reach constitutionally protected speech or expression? There is no comparison between the actual constitutional and unconstitutional applications. A statute that is constitutional in ninety-nine percent of its applications may be invalidated as substantially overbroad. Just last Term, in *United States v. Williams*, this Court reaffirmed that "a statute's overbreadth [must] be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." 128 S. Ct. at 1838. Nonetheless, the lower courts remain divided over application of the doctrine, as some of them refuse to abide by this Court's mandate that courts compare constitutional applications with unconstitutional applications.

III. IT IS VITALLY IMPORTANT THAT THE LOWER APPELLATE COURTS APPLY THE PROPER TEST FOR DETERMINING SUBSTANTIAL OVERBREADTH.

While "judicial power includes the duty 'to say what the law is,'" *Sanchez-Llamas v. Oregon,* 548 U.S. 331, 353 (2006), the judiciary must not "frustrate the expressed will of Congress or that of the state legislatures." *Barrows v. Jackson,* 346 U.S. 249, 256-57 (1953). The comparative approach—comparing constitutional applications to unconstitutional applications—strikes the proper balance.

In contrast, the absolutist approach—focusing only on the purported unconstitutional applications—threatens to undermine the democratic process and expand the role of the judiciary. Under the absolutist approach, the validity of numerous statutes is in serious doubt. Most obviously, those state statutes that prohibit civilly or criminally all e-mail spam rather than simply commercial e-mail spam now are needlessly suspect.[9] Less obviously, because it is conceivable that there might be unconstitutional applications, the federal statute and those state statutes that criminalize commercial spam are at

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[9] *See Connecticut Gen. Stat.* § 53-451(b)(7); *Illinois Comp. Stat.* § 5/16 D-3(a)(5); *Idaho Code Ann.* § 48-603E; *Iowa Code* § 716A.2; *Louisiana Rev. Stat. Ann.* § 14:73.6; *Nevada Rev. Stat.* § 205.492(2); *Oklahoma Stat.* tit. 15, § 776.1(A); 18 *Pennsylvania Cons. Stat. Ann.* § 7661; *Tennessee Code Ann.* § 39-14-603; *West Virginia Code* § 46A-6G-2.

risk.[10] Moreover, as *Milavetz, Beltran,* and *Montas* demonstrate, the ramifications of the absolutist approach are not limited to cyberspace. Quite simply, any regulation of speech or expression theoretically can chill constitutionally protected speech in some unrealistic hypothetical circumstance, and therefore is constitutionally suspect.

Since the overbreadth doctrine is strong medicine, its dosage must be limited. This Petition presents the ideal case to determine the correct dosage. There is no dispute that Jaynes violated the Virginia Act or that the Virginia Act is constitutional as applied to Jaynes. *App.* 40-41. While Jaynes raised a variety of other constitutional arguments, none of them are at issue. *App.* 5-9, 36-39, 55-62, 63. There are no alternative grounds to affirm the judgment. The decision of the Supreme Court of Virginia turned exclusively on its analysis of the United States Constitution and facial overbreadth.

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[10] *See, e.g.,* 15 U.S.C. §§ 7701-7713; *California Bus. & Prof. Code* § 17529.5; *Delaware Code* tit. 11, §§ 937, 939; *Georgia Code Ann.* §§ 16-9-101, 102; *Michigan Comp. Laws* § 445.2507; *Ohio Rev. Code Ann.* § 2913.421.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General
Counsel of Record

WILLIAM E. THRO
Special Counsel

WILLIAM C. MIMS
Chief Deputy
Attorney General

LISA M. HICKS-THOMAS
Deputy Attorney General

SAMUEL E. FISHEL, IV
Senior Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

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