Virginia Supreme Court Rejects State's Anti-Spam Law on First Amendment Grounds

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Despite the decision by the highest court in Virginia striking down an anti-spam law, other state statutes aimed at limiting commercial e-mail spam — not to mention the federal anti-spam law — should be enforceable.

The Virginia Supreme Court recently ruled that Virginia's anti-spam statute — one of the first laws enacted by a state to try to deal with e-mail spam — violates the First Amendment and is unconstitutional. Given the existence of a federal anti-spam law, and given that most other states have enforceable anti-spam laws, the decision in *Jaynes v. Commonwealth of Virginia*[1] probably will have its largest practical impact on Jeremy Jaynes — who had been convicted under the law and sentenced to a nine year prison term — rather than on computer users, who are unlikely to see an increase in e-mail spam following the court's opinion.

BACKGROUND

As the Virginia Supreme Court explained in its decision, Jaynes used several computers, routers, and servers from his home in Raleigh,

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North Carolina, to send over 10,000 e-mails within a 24 hour period to subscribers of America Online, Inc. ("AOL") on each of three separate occasions. On July 16, 2003, Jaynes sent 12,197 pieces of unsolicited e-mail with falsified routing and transmission information onto AOL's proprietary network. On July 19, 2003, he sent 24,172, and on July 26, 2003, he sent 19,104. None of the recipients of the e-mails had requested any communication from Jaynes. The court said that Jaynes had intentionally falsified the header information and sender domain names before transmitting the e-mails to the recipients.[2] However, investigators used a sophisticated database search to identify Jaynes as the sender of the e-mails. Jaynes was arrested and charged with violating Virginia Code § 18.2-152.3:1, which provides in relevant part:

> A. Any person who:
>
> 1. 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…is guilty of a Class 1 misdemeanor.
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> B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:
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> 1. The volume of 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….

While executing a search of Jaynes' home, police discovered a cache of compact discs ("CDs") containing over 176 million full e-mail addresses and 1.3 billion e-mail user names. The search also led to the confiscation of storage discs that contained AOL e-mail address information and other personal and private account information for millions of AOL subscribers. The AOL user information allegedly had been

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stolen from AOL by a former employee and was in Jaynes' possession. During Jaynes' trial, evidence demonstrated that Jaynes knew that all of the more than 50,000 recipients of his unsolicited e-mails were subscribers to AOL, in part, because the e-mail addresses of all recipients ended in "@aol.com."[3]

An expert witness testified at the trial that the e-mails sent by Jaynes were not consistent with solicited bulk e-mail, but rather constituted unsolicited bulk e-mail (sometimes referred to as "spam" e-mail) because Jaynes had disguised the true sender and header information and had used multiple addresses to send the e-mails. Other evidence at trial demonstrated that all of AOL's servers were located in Virginia, with some in Loudoun County and others in Prince William County.

Jaynes moved to dismiss the charges against him on the grounds that the statute violated the dormant Commerce Clause, was unconstitutionally vague, and violated the First Amendment. The circuit court denied that motion. Jaynes filed a separate motion to strike in which he challenged the jurisdiction of the circuit court. The court determined it had jurisdiction and denied the motion to strike.

A jury convicted Jaynes of three counts of violating Virginia Code § 18.2-152.3:1 — the first felony conviction for "spamming" in the United States. The circuit court thereafter sentenced Jaynes to three years in prison on each count, with the sentences to run consecutively for an active term of imprisonment of nine years. The court of appeals affirmed his convictions, and Jaynes appealed to the Virginia Supreme Court.

WAS THERE A VIRGINIA CRIME?

Before considering Jaynes' constitutional challenges to the statute, the Virginia Supreme Court analyzed whether Jaynes was subject to Virginia's jurisdiction. Jaynes asserted that the court of appeals had erred in holding that the circuit court had jurisdiction over him for violating Virginia Code § 18.2-152.3:1 because he had not used a computer in Virginia. He contended that a violation of that statute could occur only in the location where the e-mail routing information was falsified.

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Jaynes maintained that because he had only used computers to send the e-mails from his home in Raleigh, North Carolina, he committed no crime in Virginia. Further, because he had no control over the routing of the e-mails, he argued his actions did not have an "immediate result" in Virginia and could not be the basis for jurisdiction over him by Virginia courts. Therefore, according to Jaynes, the circuit court had no jurisdiction over him and his conviction was void.

The Virginia Supreme Court explained that to successfully prosecute a crime under Virginia Code § 18.2-152.3:1(B), the government had to establish all the elements of that crime. In addition to the element of the volume of transmissions within a specific time period, the government had to prove that the sender used a computer and that such use was with the intent of falsifying routing information. The government also had to prove that the transmission of such false routing information occurred in connection with the use of an e-mail provider's computer network for that transmission. Thus, the court explained, the crime was not complete until there was e-mail transmission passing through or into the computer network of the e-mail provider or subscriber containing the false routing information.

The court then rejected Jaynes' argument that he "merely sent e-mails that happened to be routed through AOL servers." It found that the evidence established that all e-mail had to flow through the recipient's e-mail server to reach the intended recipient. By selecting AOL subscribers as his e-mail recipients, it explained, Jaynes knew and intended that his e-mails would utilize AOL servers because he had clearly intended to send e-mail to users whose e-mails ended in "@aol.com." The court found that the evidence established that the AOL servers were located in Virginia, and that the location of AOL's servers was information easily accessible to the general public. Accordingly, the court concluded that the evidence supported the conclusion that Jaynes knew and intended that the e-mails he sent to AOL subscribers would utilize AOL's servers which are located in Virginia. Thus, it found, an intended and necessary result of Jaynes' action — the e-mail transmission through the computer network — had occurred in Virginia.

Furthermore, the court continued, a state may exercise jurisdiction

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over criminal acts that were committed outside the state, but were intended to, and in fact did, produce harm within the state. "It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which the evil is the fruit," the court declared.

Jaynes argued that this principle, referred to as the "immediate result doctrine," was not applicable if third parties intervened between the out-of-state conduct and the in-state harm. He asserted that an e-mail could be routed through a number of different mail handling networks before the e-mail reached its destination, and that an e-mail sender could not control the route used. According to Jaynes, the intervention of intermediate e-mail routers and servers prior to arrival of the e-mails at the AOL servers showed that the alleged harm through the AOL servers in Virginia was not the "immediate result" of Jaynes' actions in North Carolina.

The court did not accept Jaynes' argument, finding that his "affirmative act" of selecting AOL subscribers as recipients of his e-mails insured the use of AOL's computer network to deliver the e-mails and ruling that such use was the "immediate result" of Jaynes' action, regardless of any intermediate routes taken by the e-mails. Because the use of the computer network of an e-mail service provider or its subscribers was an integral part of the crime charged and because the use of AOL's e-mail servers was the "immediate result" of Jaynes' acts, the court held that Jaynes was amenable to prosecution in Virginia for a violation of Virginia Code § 18.2-152.3:1. Accordingly, it decided, the circuit court had jurisdiction over Jaynes.

FIRST AMENDMENT OVERBREADTH ANALYSIS

Jaynes contended that Virginia Code § 18.2-152.3:1 was constitutionally deficient as overbroad under the First Amendment and therefore the statute could not be enforced. He argued that the court of appeals had erred in affirming the circuit court's ruling denying his motion to dismiss on that basis.

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The Virginia Supreme Court observed that the court of appeals had assumed without deciding that Jaynes had standing to raise a First Amendment challenge, but had concluded that Virginia Code § 18.2-152.3:1 was in the nature of a trespass statute, thereby eliminating the need to address the First Amendment issue. The government, in addition to arguing that the court of appeals had correctly construed the statute as a trespass statute, contended that Jaynes lacked standing to raise a First Amendment challenge to Virginia Code § 18.2-152.3:1 and therefore the First Amendment issues raised by Jaynes should not be considered. The Virginia Supreme Court addressed the issue of standing.

Standing

The government contended that Jaynes had no standing to raise a First Amendment overbreadth defense. Citing the decision of the United States Supreme Court in *Virginia v. Hicks* ("*Hicks II*"),[4] the government argued:

> [T]here is no federal law obligation for state courts to hear facial challenges alleging overbreadth. While the question of whether a statute is overbroad is a matter of federal constitutional law, the question of who may bring a facial challenge alleging overbreadth is a matter of *state law*.
>
> …
>
> In other words, the fact that Jaynes could bring his facial challenge alleging overbreadth in federal court is irrelevant. The issue is whether Jaynes may bring his facial challenge alleging overbreadth in the Virginia state courts.

The government concluded that based on *Hicks II*, except where there was no set of circumstances where the statute was constitutional, or where a litigant was engaged in noncommercial speech, the court, as a matter of state law, should entertain only "as-applied challenges."

Jaynes responded that *Hicks II* did not support the rule on standing

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advocated by the government. He contended although *Hicks II* permitted state courts to allow *more* facial challenges than federal law would permit, it did not authorize state courts to accept *fewer* facial challenges. Citing *New York v. Ferber*,[5] Jaynes maintained that the overbreadth doctrine was a "constitutional *exception* to state and federal rules of standing, which ordinarily limit parties to as-applied challenges to statutes."

The Virginia Supreme Court noted that the government based its position on the following discussion of standing in the Hicks II opinion:

> [O]ur standing rules limit only the *federal* courts' jurisdiction over certain claims. State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law. Whether Virginia's courts should have entertained *this* overbreadth challenge is entirely a matter of state law.[6]

The Virginia Supreme Court stated that, on its face, and without context, this passage from *Hicks II* appeared to support the rule of standing advocated by the government. In a nutshell, it continued, that rule would be that state courts were not required to apply the same standing requirements to a claimant who raised a First Amendment overbreadth challenge to a state statute in a state court as would be accorded that claimant in a federal court considering a similar First Amendment overbreadth claim. However, the court stated, when viewed in the context of the standing issue actually presented in *Hicks II*, and the "longstanding Fourteenth Amendment jurisprudence" by which First Amendment rights were made applicable in state court proceedings, it disagreed with the government's arguments.

The court explained that, in *Commonwealth v. Hicks* ("*Hicks I*"),[7] it accorded standing to the defendant to raise a First Amendment overbreadth challenge to certain policies of the Richmond Redevelopment and Housing Authority ("RRHA"). Hicks had been banned from RRHA property because of prior trespass and property damage offenses, but continued to trespass on RRHA property. Upon his subsequent trespass arrest and conviction, Hicks asserted that he had a right to assert that the

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RRHA policies determining which persons would be barred from access to its properties were overbroad under the First Amendment and thus his conviction was invalid. Although Hicks had not contended that he had engaged in any expressive conduct or that the trespass statute under which he was convicted was invalid, the court in *Hicks I* reversed his conviction because it concluded the RRHA trespass policy also prohibited speech and conduct that were "clearly protected by the First Amendment."

Upon appeal to the United States Supreme Court, the government did "not ask the Court to abolish the overbreadth doctrine, only to place meaningful limits on its use."[8] The government argued that "the Supreme Court of Virginia treated the [overbreadth] doctrine as if it were virtually unbounded," and consequently *Hicks I* represented "a radical expansion of the overbreadth doctrine." This was so, the government argued, because the *Hicks I* view of overbreadth standing had "no precedent in this Court's jurisprudence," and urged the Court to limit First Amendment overbreadth standing to persons who "at least show (1) that his own conduct involved some sort of expressive activity, and (2) that his conduct falls within the particular prohibition he challenges as overbroad." Because Hicks conceded his trespass was not expressive activity and he did not challenge the trespass statute under which he was convicted as overbroad, the government's position before the United States Supreme Court in *Hicks II* was that Hicks' conduct had failed to meet its proposed overbreadth standing rule. The Virginia Supreme Court declared that at no point before the Supreme Court did the government argue that state courts were free to set their own standing rules in cases involving First Amendment overbreadth claims. Indeed, the Virginia Supreme Court explained, the government argued the exact opposite: that state court standing rules should be constrained.

The Virginia Supreme Court found that the oral argument in *Hicks II* made this conclusion "unmistakable" and reflected the government's "clear acknowledgement of a First Amendment overbreadth rule" that was directly contrary to the position the government advanced in the Jaynes case. In discussing the Virginia Supreme Court's resolution of standing in *Hicks I*, it noted that the following colloquy took place

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between members of the court and the government's counsel:

> QUESTION: The issue is whether — whether [Virginia] adopted a broader interpretation under State law than Federal law would require.
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> ....
>
> [ANSWER]: That is correct. A — a State may well be able to adopt a broader interpretation of standing than this Court requires, but it cannot adopt a narrower interpretation. *It cannot disregard this Court's direction that you give overbreadth standing according to the Federal constitutional standards*....
>
> QUESTION: And if they were correct about what our standing rules are, they would have to follow those standing rules, wouldn't they? They could not apply a narrower...basis for standing, could they?
>
> [ANSWER]: That is absolutely correct, Your Honor. T*he State supreme court has no discretion to disregard this Court's application of the First Amendment through its overbreadth doctrine.*[9]

The Virginia Supreme Court stated that it therefore was clear that the opinion of the United States Supreme Court in *Hicks II* addressed the issue of First Amendment standing only in the context by which that issue was placed before the Court: whether a state's *expansion* of First Amendment standing was subject to review by federal courts. When the *Hicks II* opinion states "[w]hether Virginia's courts should have *entertained this* overbreadth challenge is entirely a matter of state law,"[10] the Virginia Supreme Court stated that the term "this" "plainly limit[ed] the standing issue to what was before the Court in *that* case: an expansion, not a restriction, of state court standing."

Thus, the Virginia Supreme Court decided, read in context, the seemingly broad language about standing in the *Hicks II* opinion could "not have the meaning" espoused by the government in the Jaynes case. It added that this view was "amply verified by decades of Fourteenth

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Amendment jurisprudence" that established First Amendment rights, among others, as applicable in state court proceedings. The Virginia court noted that, in 1925, the United States Supreme Court enunciated the principle "that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[11]

The Virginia Supreme Court also noted that the Supreme Court had recognized that the assertion of a First Amendment overbreadth claim was not the application of a procedural rule, but a substantive part of the First Amendment. "[O]verbreadth is a function of substantive First Amendment law."[12] As a matter of substantive law, the Virginia Supreme Court added, the First Amendment overbreadth doctrine is a constitutional exception to state and federal rules of standing that would otherwise limit a party to an as-applied challenge to a statute. Thus, "[a] state court is not free to avoid a proper facial attack on federal constitutional grounds."[13]

The Virginia Supreme Court then stated that to accept the government's view of *Hicks II* would permit, under the guise of standing, a state court to ignore the substantive constitutional rights of citizens in contravention of the Fourteenth Amendment. It found that to be "an untenable position" because the right to assert the protection of the First Amendment (by overbreadth or otherwise) could "no more be restricted by a state rule of standing than the exclusionary rule applied to impermissible searches and seizures could be limited by state evidence law."

Thus, the Virginia Supreme Court decided, read in context, *Hicks II* did not support the argument on standing advanced by the government. To the contrary, it ruled, as Virginia had expressly admitted before the United States Supreme Court, a state supreme court has no discretion to disregard the United States Supreme Court's application of the First Amendment through its overbreadth doctrine because it cannot disregard the Court's direction that overbreadth standing be given according to the federal constitutional standards.[14] Accordingly, the court held that Jaynes had standing to raise the First Amendment overbreadth claim.[15]

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Trespass

The Virginia Supreme Court next analyzed whether, as the government argued, if Jaynes had standing to raise a First Amendment overbreadth claim, that claim was not proper for consideration because his conduct was a form of trespass and thus not entitled to First Amendment protection. Virginia Code § 18.2-152.3:1, in the government's view, was like a trespass statute, prohibiting trespassing on the privately owned e-mail servers through the intentional use of false information and that no First Amendment protection is afforded in that circumstance. The Virginia Supreme Court noted that the court of appeals had adopted this position and held Jaynes' First Amendment argument was "not relevant."[16] Concluding that Virginia Code § 18.2-152.3:1 "prohibits lying to commit a trespass," the court of appeals determined that the "statute proscribes intentional falsity as a machination to make massive, uncompensated use of the private property of an ISP. Therefore, the statute cannot be overbroad because no protected speech whatsoever falls within its purview." The Virginia Supreme Court disagreed.

It explained that trespass is the unauthorized use of or entry onto another's property.[17] The court found it significant that Virginia Code § 18.2-152.3:1 did not prohibit the unauthorized use of privately owned e-mail servers but only prohibited the intentional use of false routing information in connection with sending certain e-mail through such servers. Thus, the court found, even if an e-mail service provider specifically allowed persons using false IP addresses and domain names to use its server, the sender could be prosecuted under Virginia Code § 18.2-152.3:1 although there was no unauthorized use or trespass. Therefore, the court held, Virginia Code § 18.2-152.3:1 was not a trespass statute.

The court dismissed the government's argument that there was no First Amendment right to use false identification to gain access to private property. First, it said, in making this argument the government used the terms "false" and "fraudulent" interchangeably — but those concepts were not synonymous.[18] At issue in this case was the statute's prohibition of "false" routing information. Second, the court found that the cases on which the government relied were civil cases between Internet service providers and the entities engaged in sending commer-

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cial unsolicited bulk e-mails: *CompuServe, Inc. v. Cyber Promotions, Inc.*,[19] *Cyber Promotions, Inc. v. America Online, Inc.*,[20] and *America Online, Inc. v. IMS*.[21] The court stated that in the litigation between these private parties, the courts held that the unauthorized use of the Internet service providers' property constituted common law trespass and that a First Amendment claim could not be raised against the owner of private property. The Virginia Supreme Court found that these cases had no relevance to the Jaynes case because this was not a trespass action by a private property owner and the First Amendment right was not being asserted against the owner of private property, but against government action impacting the claimed First Amendment right. Accordingly, it rejected the government's argument and held that the court of appeals had erred in this regard.

Constitutionality of Virginia Code § 18.2-152.3:1

The Virginia Supreme Court next turned to Jaynes' contention that Virginia Code § 18.2-152.3:1 was unconstitutionally overbroad. It first reviewed certain technical aspects of the transmission of e-mails. As the court noted, in transmitting and receiving e-mails, e-mail servers use a protocol that prescribes what information one computer must send to another.[22] This SMTP requires that the routing information contain an IP address and a domain name for the sender and recipient of each e-mail. Domain names and IP addresses are assigned to Internet servers by private organizations through a registration process. To obtain an IP address or domain name, the registrant pays a fee and provides identifying contact information to the registering organization. The domain names and IP addresses are contained in a searchable database, which can associate the domain name with an IP address and vice versa.

The IP address and domain name do not directly identify the sender, but if the IP address or domain name is acquired from a registering organization, a database search of the address or domain name can eventually lead to the contact information on file with the registration organizations. A sender's IP address or domain name that is not registered will not prevent the transmission of the e-mail; however, the identity of the sender may not be discoverable through a database search and use of

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registration contact information.[23]

The court noted that because e-mail transmission protocol requires entry of an IP address and domain name for the sender, the only way such a speaker can publish an anonymous e-mail is to enter a false IP address or domain name. Therefore, it explained, like the registration record on file in the mayor's office identifying persons who chose to canvass private neighborhoods in *Watchtower Bible & Tract Society v. Village of Stratton*,[24] registered IP addresses and domain names discoverable through searchable data bases and registration documents "necessarily result[] in a surrender of [the speaker's] anonymity."[25] The right to engage in anonymous speech, particularly anonymous political or religious speech, is "an aspect of the freedom of speech protected by the First Amendment."[26] The Virginia Supreme Court then explained that, by prohibiting false routing information in the dissemination of e-mails, Virginia Code § 18.2-152.3:1 infringed on that protected right. It added that the Supreme Court has characterized regulations prohibiting such anonymous speech as "a direct regulation of the content of speech."[27]

State statutes that burden "core political speech," as this statute did, were presumptively invalid and subject to a strict scrutiny test. Under that test, a statute can be deemed constitutional only if it was narrowly drawn to further a compelling state interest.[28] The Virginia Supreme Court found "no dispute" that Virginia Code § 18.2-152.3:1 was enacted to control the transmission of unsolicited commercial bulk e-mail, generally referred to as "spam."

It added, however, that there was nothing in the record or arguments of the parties suggesting that unsolicited noncommercial bulk e-mails were the target of this legislation, caused increased costs to the Internet service providers, or were otherwise a focus of the problem sought to be addressed by the Virginia General Assembly through its enactment of Virginia Code § 18.2-152.3:1.

Jaynes did not contest the government's interest in controlling unsolicited commercial bulk e-mail as well as fraudulent or otherwise illegal e-mail. However, the Virginia Supreme Court emphasized, Virginia Code § 18.2-152.3:1 was "not limited to instances of commercial or fraudulent transmission of e-mail," nor was it "restricted to transmission

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of illegal or otherwise unprotected speech such as pornography or defamation speech." Therefore, it held, viewed under the strict scrutiny standard, Virginia Code § 18.2-152.3:1 was "not narrowly tailored to protect the compelling interests" advanced by the government.

Substantial Overbreadth

The government argued that the Virginia Supreme Court should not preclude enforcement of Virginia Code § 18.2-152.3:1 because, even if unconstitutionally overbroad, that remedy was limited to those statutes that were "substantially" overbroad. The court explained that the concept of substantial overbreadth was not a test of the constitutionality of a statute, but a policy related to the remedy flowing from a successful facial challenge: A successful facial overbreadth challenge precluded the application of the affected statute in all circumstances. The court observed that, recognizing the sweep of this remedy, the United States Supreme Court has stated that it would not impose such an expansive result where the chilling effect of an overbroad statute on constitutionally protected rights could not justify prohibiting all enforcement of the law. "For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech…."[29] Thus a statute should be declared facially overbroad and unconstitutional only if the statute "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"[30]

The government argued that Virginia Code § 18.2-152.3:1 was not substantially overbroad because it did not impose any restrictions on the content of the e-mail and "most" applications of its provisions would be constitutional, citing its application to unsolicited bulk commercial e-mail, unsolicited bulk e-mail that proposed a criminal transaction, and unsolicited bulk e-mail that was defamatory or contained obscene images. According to the government, an "imagine[d] hypothetical situation where the Act might be unconstitutional as applied does not render the Act substantially overbroad."

The Virginia Supreme Court was not persuaded by this argument. It noted that the United States Supreme Court recently reviewed the First

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Amendment overbreadth doctrine in *United States v. Williams*.[31] The Court noted:

> [i]n order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.
>
> …[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.[32]

The Virginia Supreme Court stated that applying the inquiry under *Williams* to the Jaynes situation was "relatively straightforward" as Virginia Code § 18.2-152.3:1 would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech. For example, it stated, 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 was not what the Supreme Court in *Williams* referenced "as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals."[33] It therefore rejected the government's argument that Jaynes' facial challenge to Virginia Code § 18.2-152.3:1 had to fail because the statute was not "substantially overbroad."

Narrowing Construction

Finally, the government asserted that the Virginia Supreme Court did not have to declare Virginia Code § 18.2-152.3:1 unconstitutional because a limiting construction could be adopted that would prevent invalidating the statute. Such a construction, according to the government, would be a declaration that the statute did not apply to "unsolicited bulk non-commercial e-mail" that did "not involve criminal activity, defamation or obscene materials." Alternatively the government suggested that the court hold the statute applied only in instances where the receiving Internet service provider "actually objects to the bulk e-mail."

The Virginia Supreme Court conceded that its jurisprudence

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required it to interpret a statute to avoid a constitutional infirmity.[34] Nevertheless, it continued, construing statutes to cure constitutional deficiencies was allowed only when such construction was reasonable.[35] Explaining that a statute could not be rewritten to bring it within constitutional requirements,[36] the court decided that the construction urged by the government was "not a reasonable construction of the statute" in that nothing in the statute suggested the limited applications advanced by the government. The court declared that if it adopted the government's suggested construction, it would be rewriting Virginia Code § 18.2-152.3:1 "in a material and substantive way." That task was within the province of the General Assembly, not the courts, it stated.[37]

CONCLUSION

Earlier this year, before rendering the decision discussed in this article, the Virginia Supreme Court upheld the Jaynes conviction and the application of the statute to him. That the court agreed to reconsider the matter and then reversed — unanimously — is in and of itself quite a fascinating development. As discussed in this article, the newer decision quite clearly holds that the circuit court properly had jurisdiction over Jaynes, that Jaynes had standing to raise a First Amendment overbreadth claim as to Virginia Code § 18.2-152.3:1, and that the peculiarly written statute was unconstitutionally overbroad on its face because it prohibited the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious, or other speech protected by the First Amendment to the United States Constitution. Accordingly, the court reversed the judgment of the court of appeals and vacated Jaynes' conviction for violating Virginia Code § 18.2-152.3:1.

It must be emphasized that this ruling does not mean that governments are without power to prohibit commercial bulk e-mail. For example, in enacting the federal CAN-SPAM Act, Congress was focused on spam used to promote a business or for other commercial purposes, stating that commercial bulk e-mail threatened the efficiency and convenience of e-mail.[38] Moreover, many other states have regulated unsolicited bulk e-mail but, unlike Virginia, have restricted such regulation

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to commercial e-mails.[39] These statutes remain valid even after the Virginia Supreme Court's analysis. It is possible that the government of Virginia might bring the Jaynes case to the United States Supreme Court, so this case may yet continue. A more prudent action might be to revise the statute so that it focuses solely on commercial e-mail spam.

NOTES

[1] No. 062388 (Va. Sept. 12, 2008).
[2] Simple Mail Transfer Protocol ("SMTP") is what an e-mail server uses to transmit an e-mail message, and the SMTP requires verification of the sender's IP address and domain. Evidence at trial demonstrated that Jaynes had sent the e-mails with domain names that did not correspond to the domain names assigned to the sending IP addresses.
[3] Jaynes' e-mails advertised one of three products: (1) a FedEx refund claims product, (2) a "Penny Stock Picker," and (3) a "History Eraser" product. To purchase one of these products, potential buyers would click on a hyperlink within the e-mail, which redirected them outside the e-mail, where they could consummate the purchase.
[4] 539 U.S. 113, 118-19 (2003). Unlike a "facial" or "as-applied" challenge, an overbreadth challenge "suffices to invalidate all enforcement of that law" upon showing that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Hicks II*, 539 U.S. at 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).
[5] 458 U.S. 747, 767 (1982).
[6] *Hicks II*, 539 U.S. at 120 (citation omitted) (emphasis added).
[7] 563 S.E. 2d 674 (Va. 2002).
[8] Brief of Petitioner, Virginia v. Hicks, No. 02-371, at 18 (Mar. 7, 2003).
[9] Oral Arg. Tr., *Virginia v. Hicks*, No. 02-371, at 5 (Apr. 30, 2003) (emphasis added).
[10] *Hicks II*, 539 U.S. at 120.
[11] *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *accord Stromberg v. California*, 283 U.S. 359, 368 (1931) ("the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech").
[12] *Sabri v. United States*, 541 U.S. 600, 610 (2004) (citing Henry P.

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Monaghan, *Overbreadth*, 1981 S.Ct. Rev. 1, 24).

[13] *New York v. Ferber*, 458 U.S. 747, 767 (1982).

[14] Oral Arg. Tr., *Virginia v. Hicks*, No. 02-371, at 5.

[15] The government also argued an alternate standing rule: that standing in First Amendment overbreadth cases not extend to persons who engage only in commercial speech. The Virginia Supreme Court observed that that rule was rejected in *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975); *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) ("commercial speech, like other varieties, is protected").

[16] *Jaynes v. Commonwealth*, 634 S.E. 2d 357, 367 (Va. App. 2006).

[17] *See, e.g., Vines v. Branch*, 418 S.E.2d 890, 894 (Va. 1992) ("Where a person has illegally seized the personal property of another and converted it to his own use, the owner may bring an action in *trespass*, trover, detinue, or assumpsit.") (emphasis added); Code § 18.2-119, -125, -128, -132.

[18] Fraud involves a false representation of a material fact, made intentionally, which induces reliance on that false representation, and resulting damage. *Klaiber v. Freemason Assocs.*, 587 S.E. 2d 555, 558 (Va. 2003).

[19] 962 F.Supp. 1015 (S.D. Ohio 1997).

[20] 948 F.Supp. 436 (E.D. Pa. 1996).

[21] 24 F.Supp.2d 548 (E.D. Va. 1998).

[22] The protocol is the product of private collaboration and not established by a governmental entity.

[23] In this case, Jaynes used registered IP addresses, although the domain names were false.

[24] 536 U.S. 150 (2002).

[25] 536 U.S. at 166.

[26] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

[27] *Id.* at 345.

[28] *Id.* at 347.

[29] *Hicks II*, 539 U.S. at 119.

[30] *Id.* at 118-19 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[31] 553 U.S. ___, 128 S.Ct. 1830 (2008).

[32] 553 U.S. at ___, 128 S.Ct. at 1838.

[33] 553 U.S. at ___, 128 S.Ct. at 1843.

[34] *Burns v. Warden*, 597 S.E.2d 195, 196 (Va. 2004).

[35] *Virginia Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814, 816-17 (Va. 1998).

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[36] *Reno v. ACLU*, 521 U.S. 844, 884-85 & nn.49-50 (1997); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

[37] *Jackson v. Fidelity & Deposit Co.*, 608 S.E. 2d 901, 906 (Va. 2005) ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.").

[38] 15 U.S.C. § 7701(a)(2). The CAN-SPAM law would not apply to Jayne because it was enacted after he sent the e-mail that led to the Virginia charges.

[39] *See, e.g.*, Ariz. Rev. Stat. § 44-1372.01; Ark. Code Ann. § 4-88-603; Cal. Bus. & Prof. Code § 17538.45; Fla. Stat. § 668.603; Idaho Code § 48-603E; Ill. Comp. Stat., tit. 815 § 511/10; Ind. Code § 24-5-22-7; Kan. Stat. Ann. § 50-6, Md. Code Ann., Commercial Law § 14-3002. See also http://www.ncsl.org/programs/lis/legislation/spamlaws02.htm (collecting state laws).

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