

In the
Court of Appeals of Virginia

Record No. 1054-05-4

JEREMY JAYNES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

**BRIEF *AMICUS CURIAE* OF
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.**

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Virginia Foundation, Inc. is a non-profit Virginia corporation affiliated with the American Civil Liberties Union (ACLU), the oldest and largest citizen membership organization devoted to preservation and furtherance of Constitutional rights in the United States. The ACLU of Virginia has over 9000 members in the Commonwealth of Virginia.

One of the ACLU's core principles is the First Amendment freedom of speech. The ACLU has been a prominent participant – as party, counsel, and *amicus curiae* – in most of the landmark cases in the developing area of free speech on the Internet. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

Amicus adopts the Statement of the Nature of the Case and Material Proceedings in the Trial Court set forth in the Brief of Appellant.

QUESTION PRESENTED

Whether Virginia Code Section 18.2-152.3:1 facially violates the First Amendment to the United States Constitution.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts set forth in the Brief of Appellant.

SUMMARY OF ARGUMENT

The Transmission of Unsolicited Bulk Electronic Mail (Spam) statute, Virginia

Code § 18.2-152.3:1 (TUBES), makes it a crime to:

Use[] 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.

In other words, the statute holds that whenever a person sends out large amounts¹ of unsolicited electronic mail, he may not intentionally disguise the origin of such mail. The statute appears criminalize *all* such email; it does not distinguish between the commercial and noncommercial contexts.² That is, unsolicited bulk email is equally prohibited regardless of whether the email seeks to sell the recipient a prescription drug, entice the recipient to participate in a Ponzi scheme, or persuade the recipient to support the repeal of a statute.

Because the only way to send an anonymous email is to disguise some or all of the routing information, the TUBES statute prohibits all anonymous or pseudonymous mass emails that are not solicited by the recipient. As the Supreme Court has repeatedly held, however, speakers have a First Amendment right to speak anonymously, particularly on matters of public concern. Because it prohibits this kind of speech, the TUBES statute violates the First Amendment.

¹ As the appellant observes, the term “unsolicited bulk electronic mail” is nowhere defined in the statute, raising additional constitutional problems that are not addressed in this brief.

² This brief assumes that, consistent with its plain language, the TUBES statute criminalizes both commercial and noncommercial email. *Amicus* takes no position on whether the Court may adopt a limiting construction of the statute, or whether such a construction would be constitutional.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS ANONYMOUS INTERNET SPEECH

A. The Constitutional Significance of Anonymous Speech

The Supreme Court has long recognized that the right to express one's view anonymously is an aspect of the freedom of speech protected by the First Amendment. Most recently, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court struck down an ordinance requiring identifying information on any campaign leaflets. The Court explained that there are a variety of reasons why a speaker may wish to remain anonymous, many of which serve important First Amendment values. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by desire to preserve as much of one's privacy as possible." 514 U.S. at 341-42. "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.* at 342, quoting *Talley v. California*, 362 U.S. 60, 64 (1960). Finally, "quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent." *Id.* at 342. Thus, "[a]nonymity is a shield from the tyranny of the majority."

Significantly, our country has a long tradition of anonymous speech as a means of political argumentation. "That tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed 'Publius.'" *Id.* at 343 n. 6. In his concurrence in *McIntyre*, Justice Thomas demonstrates

at length that Americans at the time of the Constitution’s framing viewed anonymity as an essential element of “freedom of the press.” As Justice Thomas explained:

The large quantity of Newspapers and pamphlets the Framers produced during the various crises of their generation show the remarkable extent to which the Framers relied upon anonymity. During the break with Great Britain, the revolutionaries often employed pseudonyms both to conceal their identity from Crown authorities and to impart a message. Often writers would choose names to signal their point of view or to involve specific classical and modern “crusaders in an age-long struggle against tyranny.” . . . The practice was even more prevalent during the great outpouring of political argument and commentary that accompanied the ratification of the Constitution. . . . The practice of publishing one’s thoughts anonymously or under pseudonym was so widespread that only two major Federalist or Ant-Federalist pieces appear to have been signed by their true authors, and they may have had special reasons to do so.

McIntyre, 514 U.S. at 367-68 (Thomas, J., concurring.)

In short, anonymous speech has been crucial to public discourse for centuries, and the Supreme Court has therefore protected the right to anonymity in a variety of contexts in addition to leafleting. *See, e.g., Watchtower Bible and Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 166 (2002) (striking down permit requirement for door-to-door canvassers in part because “[t]he requirement that a canvasser must be identified in a permit application filed in the mayor’s office and available for public inspection necessarily results in a surrender of [] anonymity”); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (invalidating statute that required initiative petition circulators to wear identification badges); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (protecting confidentiality of NAACP membership lists on the grounds that “disclosure of the membership lists . . . would work a significant interference with the freedom of association of their members”).

B. Anonymous Internet Speech

The Internet promises to transform the First Amendment “marketplace of ideas” from ideal to reality. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”). With a relatively small initial investment, any Internet user can bypass editors and publishers to speak directly to an audience of millions. Freedom of the press is no longer limited to those who own one. The democratic nature of discussion on the Internet means that the Internet speakers need not win the approval of the mainstream media in order to be heard: Internet speakers are free to define for themselves what topics are worthy of discussion.

The use of pseudonyms contributes to the robust nature of debate online. As one commentator explains, the extensive use of pseudonymous identities in cyberspace discussion fora not only allows speakers to experiment with unconventional ideas; it also “promises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity and age that allow elite speakers to dominate real-world discourse.” Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 101, 142-43 (Feb. 2000).

Speech on the Internet is entitled to no less First Amendment protection than speech in any other medium. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Anonymous speech is no exception. “The free exchange of ideas on the Internet is driven in large part

by the ability of Internet users to communicate anonymously.” *Doe v. 2themart.com, Inc.*, 140 F.Supp.2d 1088, 1092 (W.D. Wash. 2001). As one court has explained:

People are permitted to interact pseudonymously and anonymously with each other [on the Internet] so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment.

Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

Courts have typically considered the issue of First Amendment protection of anonymous online speech when a party seeks a subpoena to discover the identity of an anonymous speaker. Most recently, for example, in *John Doe No. 1 v. Cahill*, ___ A.2d ___, 2005 WL 2455266 (Del. 2005), the trial court had ordered an Internet Service Provider (ISP) to disclose the identity of the John Doe defendant, who had allegedly defamed the plaintiff on line. The Delaware Supreme Court reversed, holding that the trial judge had used a standard insufficiently protective of Doe’s free speech rights. The court observed that “[a]nonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering.” *Id.* at *3. But “[t]he possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.” *Id.* In order to balance the defendant’s right of anonymity with the plaintiff’s right to pursue a defamation action, the court held that the plaintiff may not force disclosure of the defendant’s identity unless it produces sufficient evidence to meet a summary judgment standard. *Id.*

Courts have differed over the standard to be used when plaintiffs seek to discover the identity of anonymous online speakers. *Cf. Cahill, supra*, and *Dendrite Intl., Inc. v.*

Doe, 775 A.2d 756 (N.J. Super .Ct. App. Div. 2001) (applying the “summary judgment” standard) with *Columbia Ins. Co. v. seescandy.com*, *supra* (holding that plaintiff need only demonstrate that his complaint would survive a motion to dismiss). Nonetheless, all of the courts to consider the issue have found that the right to speak anonymously online is entitled to some First Amendment protection, and that plaintiffs must make some showing that their complaint is valid before they can discover the identity of an online defendant. “People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identity.” *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. at 578. “If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v. 2themart.com*, 140 F.Supp.2d at 1092.

While the cases above deal mainly with speech posted on Internet message boards and chat rooms, the same principles apply to anonymous email. Mass emails espousing political opinions can be considered the First Amendment equivalent of leaflets. It is a cheap and easy way for a person to broadcast his opinions widely to those whom he wishes to persuade. “Through the use of Web pages, mail exploders, and newsgroups, [an] individual can become a pamphleteer.” *Reno v. ACLU*, 521 U.S. at 870. *See also ACLU of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1228) (providing First Amendment protection for anonymous e-mails).

II. THE VIRGINIA TUBES STATUTE UNCONSTITUTIONALLY IMPINGES ON THE RIGHT TO SPEAK ANONYMOUSLY ON THE INTERNET.

The TUBES statute violates the First Amendment in at least two respects: First, it is an unconstitutional content-based restriction. Second, it is unconstitutionally overbroad.

Laws that prohibit anonymous speech are content-based restrictions subject to strict scrutiny. As the *Miller* court explained:

[B]ecause “the identity of the speaker is no different from other components of a documents contents that that the author is free to include or exclude,” the statute’s prohibition of internet transmissions which “falsely identify” the sender constitutes a presumptively invalid content-based restriction. The state may impose content-based restrictions only to promote a “compelling” state interest and only through use of ‘the least restrictive means to further the articulated interest.’ Thus, in order to overcome the presumption of invalidity, defendants must demonstrate that the statute furthers a compelling state interest and is narrowly tailored to achieve it.

Miller, 977 F. Supp. at 1228 (quoting *McIntyre*, 514 U.S. at 340-42 and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)) (additional internal citation omitted).

Whatever compelling interests the state may have in prohibiting anonymous *commercial* bulk e-mail, those concerns have no relevance when anonymous *noncommercial* speech is at issue. If the purpose of the statute is to prevent fraud, deceit and false advertising then the statute should be limited to those forms of speech. “[I]t will not do for the State simply to say that the circulation of all anonymous [e-mail] must be suppressed in order to identify the distributives of those that may be of an obnoxious character.” *Talley*, 362 U.S. at 66-67 (Harlan, J., concurring). As in *McIntyre*, the statute here “contains no language limiting its application to fraudulent, false, or libelous

statements.”³ *McIntyre*, 514 U.S. at 344. Similarly, if the purpose of the statute is to protect ISP’s from a glut of bulk emails that threaten to overwhelm their capacity, the purpose could be achieved by prohibiting only commercial bulk email, as there is no showing that noncommercial email poses such a threat. *See* Pub. L. No. 108-187, § 2, Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003 (making Congressional finding that “[t]he convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited *commercial* electronic mail. Unsolicited *commercial* electronic mail is currently estimated to account for over half of all electronic mail traffic . . . and the volume continues to rise.”)

For similar reasons, the statute is also unconstitutionally overbroad. “The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). “Overbreadth attacks are successful when the challenged statute is not drawn narrowly enough so that the statute’s sweep encompasses protected speech or associations.” *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239 (1988). As in *Miller*, “[o]n its face, the act prohibits such protected speech as the use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy” The prohibition on these broad categories of protected speech renders the statute overbroad.

³ In the context of anonymous, non-commercial e-mail, the disguising of sender information cannot, by itself, be considered “fraudulent” or “deceptive,” as such disguise is the only way to preserve the anonymity of e-mail.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to reverse the judgment of the trial court and hold the TUBES statute unconstitutional on its face.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA, INC.

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 5A:19(f)

I, Rebecca K. Glenberg, do hereby certify that I have complied with Rule 5A:19(f) by filing seven copies of the foregoing brief with the Court of Appeals, and mailing one copy of the same by United States mail, postage pre-paid, to each of the following counsel of record:

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