UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

BRYAN ROTHAMEL,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 3:11cv0002
v.	)	
	)	
	)	
FLUVANNA COUNTY, VIRGINIA	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OF THE COMMONWEALTH AS *AMICUS CURIAE*
IN SUPPORT OF FLUVANNA COUNTY'S
MOTION FOR SUMMARY JUDGMENT

This case is a dispute between a political subdivision of the Commonwealth and a private party over the constitutionality of a local ordinance that mirrors an enactment of the Commonwealth. The Commonwealth, as amicus curiae, offers its perspective concerning the proper interpretation of Virginia law. The Commonwealth supports Fluvanna County because the challenge to the County's ordinance implicates a state statute.

Plaintiff alleges that the Fluvanna ordinance, which mirrors the Commonwealth's statute protecting its state seals, is unconstitutional as applied to his blog and that the ordinance is facially overbroad. (Pl. Am. Com. ¶¶ 15, 16.) The Commonwealth asks this Court to dismiss Plaintiff's motion for summary judgment and grant Defendant's cross-motion for summary judgment. Defendant is entitled to judgment as a matter of law because a plain reading of the statute does not implicate Plaintiff's First Amendment rights and the statute is not overbroad.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The burden on the moving party may be discharged by 'showing'–that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "The question [when ruling on a motion for summary judgment] is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) (emphasis in original). "[E]vidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. "Disposition by summary judgment is appropriate, however, where the record as a whole could not lead a rational trier of fact to find for the non-movant." *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Here, there are no material disputes of fact and Plaintiff's claims fail as a matter of law.

ANALYSIS

I. PROPER CONSTRUCTION OF THE STATUTE DOES NOT IMPLICATE PLAINTIFF'S FIRST AMENDMENT RIGHTS.

A. The Commonwealth's and Fluvanna County's laws Prohibit use of the Seal except for governmental purposes and uses authorized by Law.

Fluvanna Code § 2-7-2 and § 1-505 of the Code of Virginia state that "no persons shall exhibit, display, or in any manner utilize the seal[s] or any facsimile or representation of the seal[s] of Fluvanna County [the Commonwealth] for nongovernmental purposes *unless such use is specifically authorized by law*" (emphasis added). It has been the longstanding construction of

this Office that no person may use the State Seal unless they are authorized by law. 1971-1972 *Va. Op. Att'y Gen.* 360 (1972) (stating that private security guards may not wear badges with State Seal); 1982-1983 *Va. Op. Att'y Gen.* 462 (1982) (stating that private organization is prohibited from using facsimile of State Seal on stationery unless there is a governmental purpose or authorized by law).

In restricting the use of its Seal, Virginia is hardly unique. The Federal government has sought to protect the use of its seal since 1905[1] and has prohibited the unauthorized use of its seal since 1966.[2] Several states have similar statutes that control the usage of their seals.[3] Nor are such laws anything new. Historically at common law and by statute in England, counterfeiting the crown's seal was an offense of high treason. *George Leak's Case*, 77 Eng. Rep. 1297, 12 Co. Rep. 15 (K.B. 1607).

B. Plaintiff's construction of the statute is inconsistent with its plain language and rules of construction adopted by the Supreme Court of Virginia.

The opportunity for courts to construe this provision of the Virginia Code has not arisen before now. "In interpreting a state law, we apply the statutory construction rules applied by the state's highest court." *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 300 (4th Cir. 2009). "Courts must apply the plain language of a statute" except in cases of absurdity or the legislative intent is clearly to the contrary. *Nat'l Coal. For Students With Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir. 1998). The Supreme Court of Virginia has routinely held that "courts have a duty when construing a statute to avoid any conflict with the Constitution" and that "General Assembly [has] the intent to enact statutes that comply with the

[1] *See* 15 U.S.C. § 1052(b), c. 592, § 5, 33 Stat 725.
[2] *See* 18 U.S.C. § 713 (Added by Pub. L. No. 89-807, § 1(a), 80 Stat. 1525 (Nov. 11, 1966)). The Virginia provision at issue was enacted the same year.
[3] *See, e.g.,* Conn. Gen. Stat. § 3-106a; Oh. Rev. Code Ann. § 5.10, Nev. Rev. Stat. § 235.010, N.J. Stat. Ann. § 52:2-4; La. Rev. Stat. Ann. § 33:21.

Constitution in every respect.*"* *Com. v. Doe*, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009). "[T]here is no stronger presumption known to the law" than the presumption that an act of the legislature is constitutional. *F.F.W. Enterprises v. Fairfax County*, 280 Va. 583, 590, 701 S.E.2d 795, 799 (2010) (quoting *Whitlock v. Hawkins*, 105 Va. 242, 248, 53 S.E. 401, 403 (1906)). "[The Supreme Court of Virginia] will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions." *Marshall v. N. Virginia Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008). "[The Supreme Court of Virginia] will interpret statutory language in a manner that avoids a constitutional question." *Id.* Additionally, if a statute can be given two interpretations, the court is "required to adopt the interpretation that conforms with the Constitution." *Doe*, 278 Va. at 230, 682 S.E. 2d at 908.

The Commonwealth urges this Court to adopt a reading of the statute that is consistent with its plain meaning. The statute and ordinance at issue here prohibit the use of the Seal "unless specifically authorized by law". The Plaintiff would read the statute as "unless … specifically authorized by ~~law~~ *a legislative act*." A plain reading of the term "law" includes the Constitution of Virginia, statutes passed by the General Assembly, the U.S. Constitution, federal law, the common law, and decisions of the Supreme Court of the United States and the Virginia Supreme Court. Federal courts have long recognized that the decisions of state Supreme Courts are law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision"). "Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other.'" *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009) (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)).

The statute, given its proper construction, does not collide with speech that is specifically authorized by the law of the First Amendment of the United States Constitution, the Virginia Constitution, and judicial decisions on expressive speech. The First Amendment provides that, "Congress shall make no law … abridging the freedom of speech ...." U.S. Const. amend. I. Art. I, § 12 of the Virginia Constitution provides that "any citizen may freely speak, write, and publish his sentiments on all subjects" and that "the General Assembly shall not pass any law abridging the freedom of speech ...." Also, judicial opinions that protect satirical, political, and expressive speech authorize the plaintiff to use the Seal in those manners. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (protecting publication of advertisement parody); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) ("the demonstration is expressive conduct protected to some extent by First Amendment"); *Baumgartner v. United States*, 322 U.S. 665, 673-74, (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures-and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."). Using the proper construction, the statute does not apply to speech that is protected by the Virginia and Federal constitutions. This Court should reject Plaintiff's construction of the statute as erroneous based on the statute's plain language.

Even if two interpretations of the statute are possible,[4] this Court, when interpreting a Virginia statute, is required to adopt the interpretation that avoids the Constitutional conflict. *Doe*, 278 Va. at 230. The Supreme Court of Virginia will go to great lengths to avoid

[4] To the extent there is ambiguity and the statute is capable of a construction that avoids or substantially modifies the federal challenge, it is prudent to certify such questions of state law for interpretation by the state's highest court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997). Virginia's Supreme Court allows for certification when the statute is case determinative, the statute has not been construed, and there is no controlling precedent. Va. Sup. Ct. R. 5:40.

constitutional issues as evidenced in *Kolpachik v. Catholic Diocese of Richmond*, where the Court addressed two constructions of a statute that expanded the time *ex post* in which a civil suit could be brought against defendants. 274 Va. 332, 645 S.E.2d 439 (2007). In response to a prior ruling, a constitutional amendment was passed to allow the General Assembly to retroactively change the statute of limitations for "natural persons." The enactment that defined the statute of limitations, however, only referred to "persons." *Id.* at 337-38, 645 S.E.2d at 441-42. Plaintiff argued that the retroactive change to the statute of limitations applied to a diocese, but the Court refused Plaintiff's construction because the law would be unconstitutional. *Id.* at 338-43, 645 S.E.2d at 442-43. The Court held that the enactment retroactively changing the accrual time only applied to natural persons and chose the construction of the statute that was constitutional under the Virginia Constitution. *Id.* at 343, 645 S.E.2d at 443.

Virginia courts will sometimes avoid unconstitutional interpretations presented by the express language of a statute. In *Yap v. Commonwealth*, a criminal defendant argued that Virginia's driving while intoxicated laws created mandatory presumptions of guilt that violated his due process rights. 49 Va. App. 622, 627, 643 S.E.2d 523, 525 (2007). The Supreme Court of the United States has held that mandatory or conclusive presumptions against criminal defendants were unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979). In a prior case, the Virginia court had determined that VA. CODE ANN. § 18.2-266 created a presumption that "the blood alcohol concentration while driving was the same as indicated by the results of the subsequent test," *Davis v. Commonwealth*, 8 Va. App. 291, 300, 381 S.E.2d 11, 16 (1989), and the other statute stated "the amount of alcohol or drugs in the blood of the accused at the time of the alleged offense… shall give rise to the following rebuttable presumptions" including one of intoxication, if the blood alcohol content proved to be more than the specified level. VA.

CODE ANN. § 18.2-269. The Court held that the statutes were constitutional because although the statutes use the word "presumption" the statutes did "not establish a mandatory presumption but allow[ed] only a permissive inference". *Yap,* 49 Va. App. at 528, 643 S.E.2d at 633-34. Even though the statute expressly declares that certain findings create a presumption of intoxication, Virginia courts interpreted these statutes in a manner that obviated a constitutional difficulty. *See Wilson v. Commonwealth*, 225 Va. 33, 42, 301 S.E.2d 1, 5 (1983) (holding that a presumption of guilt of an element of the offense is to be analyzed as a permissive inference).

In this case, a proper interpretation of the statute effectively avoids the constitutional issues using the plain meaning of the statute and should be preferred over the construction offered by the Plaintiff. To the extent the plaintiff is reproducing a photograph of a county official or document in which the Seal is present, or to the extent he is engaged in satire, those uses are specifically authorized by law, namely, the First Amendment and court cases interpreting its scope. To the extent the plaintiff is engaged in fraudulent or misleading uses of the Seal, those are not protected by law.

II. PLAINTIFF'S OVERBREADTH CLAIM FAILS AS A MATTER OF LAW.

As noted above, a proper construction of the ordinance and state statute establishes that it allows for uses that are specifically authorized by law, and that would include First Amendment caselaw. Assuming there might be some uses of the Virginia or County Seal that are not "specifically authorized" by caselaw, but are nevertheless protected by the First Amendment, these outlier scenarios would be rare and would not constitute a significant or substantial number of such applications and, therefore, the overbreadth claim fails.

The Supreme Court has consistently held that invalidating a statute for overbreadth is "strong medicine" and should be employed as a last resort. *United States v. Williams*, 553 U.S.

285, 293 (2008). A "law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n. 6 (2008)). "To succeed in its challenge, [plaintiff] must demonstrate from the text of [the law] and from *actual fact* that a substantial number of instances exist in which the Law cannot be applied constitutionally." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (emphasis added). It is incumbent on the plaintiff to show a substantial number of actual applications that are overbroad under the statute. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *Chappell v. United States*, 1:10CR42 (LMB), 2010 WL 2520627 (E.D. Va. June 21, 2010) (statute prohibiting impersonation of law enforcement officer not overbroad).

A. The uses of the Seal the plaintiff complains about are not prohibited by the ordinance.

Plaintiff alleges that there are three applications in which the ordinance as applied is unconstitutional: (1) a satirical representation of the Seal, (2) depictions of the Seal when used by a county official, and (3) depictions of the Seal on his blog. (Pl.'s Am. Compl. ¶¶ 15-16.) First, as noted above, a parody or an editorial cartoon does not does not fall within the sweep of the statute because such depictions are specifically authorized by law, *i.e.* court cases making clear that such parodies are protected by the First Amendment. *Hustler*, 485 U.S. at 50.

Plaintiff errs in his allegation that the display of the Seal "when it is an accurate depiction of a county official speaking from a podium with the Seal or with the Seal in the background" would incur criminal liability. (Pl.'s Am. Compl. ¶ 15.) Plaintiff mistakes which party uses or displays the Seal in that case. The county official is the party using and displaying the Seal, not the newspaper editor or blogger who prints or posts a photograph of the event later. The media

publisher in this example is merely transmitting that the county official was engaged in county business. For a similar reason, it would not violate the statute for an individual to view on a home or public computer the official Fluvanna County website even though the computer would be "displaying" the County Seal located on the page. Therefore, such postings do not violate the statute.

Finally, the plaintiff mentions the posting of the Seal on his blog. If the plaintiff is engaged in a fraudulent or misleading posting of the Seal on his website, such a posting is not protected by the First Amendment and the ordinance can be enforced against him. *See Illinois Ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003) (public deception not protected speech under the First Amendment).

The three uses the plaintiff identifies as colliding with the ordinance do not in fact violate the ordinance. Therefore, there is no overbreadth. Assuming the plaintiff can identify actual examples of uses of the Seal that would be prohibited by the ordinance, such examples would not rise to the level of substantial overbreadth relative to the legitimate applications of the statute.

Plaintiff's claim that this application of the ordinance chills his speech is refuted by his own conduct. Plaintiff had notice as of April 13, 2011 that the Commonwealth's Seal is protected by a parallel state statute, and he has continued to display photos of county officials with the Seal of the Commonwealth in the background.[5] If the example set forth in his brief was

[5] The Commonwealth filing of April 13, 2011 served as notice that "The ordinance governing the use of the Fluvanna County Seal parallels state law dealing with the use of the Official Seal of Virginia." (Mem. Law Supp. Mot. Leave File Amicus Curiae Br. 1-2). There have been at least three instances since then that Plaintiff has engaged in the exact "speech" that he complains the ordinance chills. *See* Posting of Bryan Rothamel to FlucoBlog, *Supervisors need ordinance to give bonuses*, http://flucoblog.com/supervisors-need-an-ordinance-to-give-bonuses/4466 (June 1, 2011, 19:30 EDT); Posting of Bryan Rothamel to FlucoBlog, *Gooch running for another term*, http://flucoblog.com/gooch-running-for-another-term/4341 (May 20, 2011, 14:06 EDT); Posting of Bryan Rothamel to FlucoBlog, *Fluvanna exploring possible partnership with Aqua Virginia*,

valid, Plaintiff would have refrained from using the Seal of the Commonwealth on his blog as well as the Fluvanna County Seal.

B. The statute has a plainly legitimate sweep: protecting significant state interests in controlling the use of its Seal.

Governmental seals perform a crucial role identifying and authenticating official actions. All levels of government, and government entities, use seals to identify actions that they take within their lawful authority. The daily lawful applications of the statute are too numerous to be counted. Every day, state and local agencies send stationery with the official seals of their department. It is sewn on government officials' uniforms, and official government websites also display them. The Virginia State Police displays the Seal on most of its cruisers. In *United States v. Jaensch*, the Court found that the use of the Great Seal of the United States in identification papers was a valid restriction not subject to First Amendment scrutiny. 678 F. Supp. 2d 421, 431 (E.D. Va. 2010).

The court in *Chappell* held that the statute criminalizing "pretending to be [a law enforcement] officer was not overbroad, even though it potentially reached citizens in costume for legitimate reasons." 2010 WL 2520627 at *3. The court found that the state's interest in protecting the public from the danger of persons impersonating police officers to be a "plainly legitimate sweep" of the statute that outweighed the narrow protected interests of costumed individuals. *Id.* The same public safety concern of private individuals eroding the public trust in state authorities is at issue here. Private individuals using the Seal for their own purposes can deceive the public into believing that those individuals are acting with legitimate, state power. The Commonwealth has a significant interest in maintaining the public trust in its seals.

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http://flucoblog.com/fluvanna-exploring-possible-partnership-with-aqua-virginia/4249 (May 4, 2011, 21:39 EDT).

The Commonwealth's interest is magnified when private citizens place an official seal next to private speech. Federal, state, and local governments use official websites and blogs to inform the public.[6] Using modern technology, a private individual is able to make professional websites that appear as authentic as the official ones. For example, the Sunlight Foundation created a mock up of a better, more user friendly website for the Supreme Court of the United States that used the Supreme Court's Seal.[7] In that instance, the Sunlight Foundation was encouraging the Supreme Court to upgrade its website, but it is a salient example of how professional a private website with an official seal can appear. Prohibiting private speech from using an official seal ensures that when the public encounters the official seal they are certain it is the result of government action.

In short, assuming some outlier applications that are protected by the First Amendment might be chilled by the ordinance, (1) the plaintiff has failed to plead any real world examples of such applications, as he is required to do to show overbreadth; (2) the plainly legitimate sweep of the statute is far, far broader than any applications that might be chilled due to their lack of clarity under the First Amendment; (3) the uses the plaintiff complains about are not, in fact, prohibited by a proper reading of the statute.

CONCLUSION

The County's motion for summary judgment should be **GRANTED**.

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[6] Each State has its own official website, and some state officials have blogs and twitter accounts. Although Virginia's official website and the Governor's blog does not carry the Seal of the Commonwealth, other States and the branches of the Federal Government use their official seals. *See* Commonwealth of Virginia Home Page, http://portal.virginia.gov/ ; Governor Robert F. McDonnell Blog, http://www.governor.virginia.gov/Blog/; *See also* State of Texas Home Page http://www.texas.gov/en/Pages/default.aspx (using the Seal of Texas); and United States Department of Justice Home Page, http://www.justice.gov/ (using the seal of the Department of Justice).

[7] Daniel Schuman, *The Supreme Court Website: An Updated Redesign*, THE SUNLIGHT FOUNDATION, Aug. 27, 2009, http://sunlightfoundation.com/blog/2009/08/27/scotus-redesign/

COMMONWEALTH OF VIRGINIA
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2011, the MEMORANDUM OF THE COMMONWEALTH IN SUPPORT OF FLUVANNA COUNTY'S MOTION FOR SUMMARY JUDGMENT has been filed with the Clerk of Court using the CM/ECF system and a copy has been mailed by first class, postage prepaid, U. S. Mail to the following counsel who are registered CM/ECF users:

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