



Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

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Thomas W. Kirby
202.719.7062
tkirby@wrf.com

Hon. Patricia S. Conner, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street
Richmond, VA 23219

Re: PSINet, Inc., et als. v. Chapman, et als., No. 01-2352

Dear Ms. Connor:

Appellants' Rule 28(j) letter of September 19, 2003, reports the decision of the Virginia Supreme Court not to answer certified questions and argues that this Court now must narrow Virginia's statute for itself.

"Federal courts have the power and the duty to adopt narrowing constructions of federal statutes to avoid constitutional difficulties if such a construction is fairly possible but federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Va. Soc. For Hum. Life, Inc. v. Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998) (citations and internal quotations deleted). On the other hand, the Virginia Supreme Court has considerably "broader" authority" over Virginia statutes. *Id.* at 272.

Appellants urged the Virginia Supreme Court to broadly re-write the challenged statute, arguing that otherwise the statute would be struck down. (Inclement weather has hindered obtaining a recording of the oral argument, but one is being sought.) The Virginia Supreme Court declined to act.

The radical re-writings that appellants urge are not a fair construction of the statute and are not "reasonable and readily apparent," and hence are not within this Court's power. Nor would they alleviate the Commerce Clause defects of the statute. Having invited the Virginia Supreme Court to consider limiting the statute and having been turned down, this Court now should rule that the statute, fairly read, is unconstitutional.

Sincerely yours,

Thomas W. Kirby
Counsel for Appellees

Cc: Counsel for Appellants