WALTERS LAW GROUP
A PROFESSIONAL ASSOCIATION

LAWRENCE G. WALTERS◊
NEIL D. BRASLOW◊Δ

JENNIFER M. KINSLEY◊‡
COREY D. SILVERSTEIN±ϕ□
OF COUNSEL

◊ ADMITTED IN FLORIDA
Δ ADMITTED IN NEW JERSEY
‡ ADMITTED IN OHIO
± ADMITTED IN ARIZONA
ϕ ADMITTED IN MICHIGAN
□ ADMITTED IN DISTRICT OF COLUMBIA

195 W. PINE AVENUE
LONGWOOD, FL 32750-4104
PHONE (407) 975-9150
FAX (407) 774-6151

November 3, 2016

VIA FACSIMILE AND EMAIL
DOS.GeneralCounsel@DOS.MyFlorida.com
(850-245-6127)

Adam S. Tanenbaum, General Counsel
Florida Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

RE: Use of the Great Seal of the State of Florida – Jay Critchley

Dear Mr. Tanenbaum:

Our law firm represents Mr. Jay Critchley. We are in receipt of your office's (unsigned) correspondence dated August 29, 2016, instructing our client to cease and desist any further use of the "Great Seal of the State of Florida" (hereinafter the "Seal") without prior approval from the Florida Department of State. A copy of the letter is enclosed for reference. As discussed below, our client enjoys a First Amendment right to continue his publication of the Seal in his political speech. We therefore request that your office retract the demand.

Our country was founded on the right of citizens to criticize the government, and speak out on matters of public concern. Mr. Critchley's use of the Seal is obviously satirical and his publications are intended to call the public's attention to the State's position on climate change, rising sea levels, and population density in the Miami Beach area. The Seal forms the "O" in the phrase "Mobile Warming" as shown below:

Our client's publication of the Seal in connection with government criticism constitutes core political speech, which is entitled to the highest degree of First Amendment protection.

Just as citizens are entitled to burn the flag (despite statutes to the contrary), our client is entitled to use the Seal in his satirical political expression. *Texas v. Johnson*, 491 U.S. 397 (1989). The one court that considered this precise issue held that statutory prohibition on use of a governmental seal violates the First Amendment, and must be enjoined. *Rothamel v. Fluvanna*, 810 F.Supp.2d 771 (W.D. Va. 2011).

The First Amendment defects in § 15.03, *Fla. Stat.* (2016) and Rule 1-2.0021, F.A.C. are numerous. These laws impose a content-based prior restraint on speech, and are presumptively unconstitutional. *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015) (imposing broad prohibitions on content-based speech restrictions); *Near v. Minnesota*, 283 U.S. 697 (1931) (roundly rejecting prior restraints on publication). The Statute facially prohibits anyone from using the Seal in any way, without first obtaining permission from the State, under penalty of criminal prosecution. This is a textbook prior restraint. The Statute further restricts publication of a specific image; i.e., the Seal. This is the essence of a content-based restriction on speech.

The Rule imposes arbitrary and capricious standards governing who is permitted to publish images of the Seal. One of those standards requires that any permitted use "promote a stated governmental goal." Rule 1-2.0021(6)(g), F.A.C. It is difficult to imagine how criticism of government policy could ever meet this requirement, and thus the State has provided itself with unlimited authority to censor any publication of the Seal that does not serve its own interests. Such unfettered discretion to decide who will be given permission to engage in speech is unconstitutional. *Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750 (1988).

The Statute and the implementing regulations are both overbroad and vague. The failure to provide any exemptions for non-commercial speech or political expression render the laws substantially overbroad. *Greyned v. City of Rockford*, 408 U.S. 104 (1972). Reliance on standards such as "whether the dignity of the Great Seal will be preserved" render the Rule unconstitutionally vague as well. *Greyned*, *supra*.

Aside from the substance of the prohibitions, the Rule contains none of the procedural safeguards mandated by the courts to protect First Amendment rights, such as issuance of a decision in a specified, brief time period, and the availability of prompt judicial review to challenge any denial of permission to use the Seal. *Freedman v. Maryland*, 380 U.S. 51 (1965); *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). In fact, there are no time frames within which the State must issue or deny a permit, and there is no reference to judicial review.

Our client is not required to apply for permission to use the Seal under these circumstances. Laws which impose an unconstitutional permitting scheme, such as those at issue here, may be disregarded with impunity. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

Given the flagrant First Amendment violation generated by transmission of the cease and desist letter, we can only presume that the demand was improvidently issued without considering the constitutional ramifications. We look forward to your reply once you have had an opportunity to consider these issues.

Sincerely,

DRAFT

Lawrence G. Walters, Esq.
Larry@FirstAmendment.com

Encls.
cc: Client