No. 01-1107

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In the

Supreme Court of the United States

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Commonwealth of Virginia,

Petitioner,

v.

Barry Elton Black, Richard J. Elliott,
and Jonathan O'Mara,

Respondents.

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On Writ of Certiorari to the Supreme Court of Virginia

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Brief of the States of New Jersey, Arizona, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, Utah, and Vermont as Amici Curiae in Support of Petitioner

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STATEMENT OF AMICI INTEREST

Many State legislatures have been powerless to craft statutes that address the most virulent form of bias-motivated threats or incitements to violence after this Court rendered its decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Cross-burning is known by the actors, the victims, and the State governments to cause unique and significant harm. The States thus have a strong interest in this Court's consideration of the appropriate analysis under the First and Fourteenth Amendments of statutes that prohibit cross-burning with intent to intimidate. The constitutional analysis must be flexible enough to permit State legislatures to address pressing problems that have presented themselves without sweeping within the prohibition other problems of lesser importance.

SUMMARY OF ARGUMENT

The Virginia cross-burning statute, Code § 18.2-423, should be analyzed under traditional strict scrutiny principles, which would allow Virginia to justify its interest in restricting expressive activity and permit the Court to evaluate all the factors informing the State's decision, the nature of the expressive activity, and its unique harm for victims. Insofar as the Court's decision in *R.A.V. v. City of St. Paul* curtails a fully-informed review and forces States seeking to curb such harmful conduct to restrict more speech than may be necessary, the case should be revisited and its analysis rejected in favor of traditional strict scrutiny.

ARGUMENT

TRADITIONAL STRICT SCRUTINY REVIEW, WITH EVALUATION OF THE STATE JUSTIFICATION, THE HARM THE RESTRICTION CAUSES, AND THE NATURE, TYPE, AND CONTEXT OF THE SPEECH, IMPELS A FINDING OF CONSTITUTIONALITY.

In *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001), the Virginia Supreme Court, relying on this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), invalidated a Virginia statute prohibiting cross-burning as violative of the First Amendment. The Virginia Court found that while expressive activity that intimidates others may be restricted, its Legislature may not, consistent with the First Amendment as interpreted in *R.A.V.*, single out one intimidating message, such as cross-burning, for censure. 553 S.E.2d at 743-744.

There were three cases before the Virginia Supreme Court. In two companion cases, Richard J. Elliott and Jonathan O'Mara attempted to burn a cross in an African-American neighbor's yard. 553 S.E.2d at 740. In the third case, Barry Elton Black led a Ku Klux Klan rally at which a cross was burned. *Id.* at 741. All three individuals were prosecuted under Virginia Code § 18.2-423, which provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.
>
> [Va. Code § 18.2-423.]

The defendants were each convicted by a jury, but the convictions were overturned by the Virginia Supreme Court. The Commonwealth of Virginia petitioned for *certiorari*, which was granted. *Virginia v. Black*, __ U.S. __, 122 S.Ct. 2288 (Mem.) (2002).

The Virginia Court held that the analysis in this case mirrors that in *R.A.V. v. City of St. Paul*, *supra*, 505 U.S. 377. *R.A.V.* involved a Minnesota ordinance that prohibited placing a symbol like a burning cross or Nazi swastika on public or private property when the actor knows that it will arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender. *Id.* at 380. The Minnesota Supreme Court, in its review, limited the statute to apply only to conduct that could be considered "fighting words." *Id.* at 380-81.

The *R.A.V.* Court found this ordinance unconstitutional because it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 381. Restriction of this speech is generally permitted; fighting words, like defamation and obscenity, are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). But a legislature may not engage in "content discrimination" by selecting one low-value message to censure: "The government may not regulate use [of fighting words] based on hostility -- or favoritism -- towards the underlying message expressed." *Id.* at 386.

The Court found the Minnesota ordinance to be content-discriminatory, in that intimidating expressive conduct is prohibited only when it is addressed to race, color, creed, religion, or gender. *Id*. at 391. The Court noted that the statute expressed hostility to these messages but not to similar intimidating messages on the basis of, for example, political affiliation, union membership, or sexual orientation. *Id.* at 391.

The Court further found the ordinance to discriminate on the basis of viewpoint, because it bars fighting words communicating racial hatred while permitting fighting words communicating racial tolerance. *Id.* at 391-92. Hence, the Court held that the statute unlawfully favors one side in a dispute.

The Court did, however, find that the ordinance furthered a compelling interest: "the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination . . . ." *Id.* at 395. But the Court found that the ordinance is not *necessary* to serve this compelling interest because a broader ordinance, not limited just to racist speech but to all fighting words and threats, "would have precisely the same beneficial effect." *Id.* at 395-96.

Strict scrutiny of a content-based regulation of speech requires that the restriction be necessary to serve a compelling state interest, and also be narrowly-tailored to achieve that end. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). The Court demands that government employ the least-restrictive alternative to serve the governmental purpose because "[t]o do otherwise would be to restrict speech without an adequate justification . . . ." *Id.* at 813.

By finding that the ordinance is not *necessary* to ensure basic human rights of members of historically-

persecuted groups because a broader ordinance would suffice, the *R.A.V.* Court altered the traditional strict scrutiny review of content-based statutes. "Tailoring" a statute narrowly to achieve its ends ordinarily requires selectivity, so that no more speech is prohibited than that which the government can adequately justify. A broader ordinance, in this context, limits more speech than necessary to achieve the City's goal and would, therefore, be unconstitutional. A ruling that only broader ordinances can be "necessary" dooms all selective restrictions.

The Court has upheld selective prohibitions within a category of speech. In *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103, *reh. den.* 496 U.S. 913 (1990), the Court upheld statutes that restricted only child pornography, a subcategory of sexually-explicit speech. The Court permitted this selection because of the State's interest in protecting children who are the subject of the speech. *Osborne*, *supra*, 495 U.S. at 110. A broader statute that did not single out child pornography would have had the same beneficial effect of protecting children. Child pornography is particularly harmful because it records a crime of sexual abuse, but it also could be addressed in broader, neutral, statutes prohibiting sexual abuse. *See also Watts v. United States*, 394 U.S. 705 (1969) (upholding statute that restricted threats against the President, a subset of threats against political officials).

If one type of speech causes greatest harm, the State should be permitted to craft a statute that addresses only that speech. As this Court has stated, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 504 U.S. 191, 207 (1992). Just as child pornography can be selectively prohibited because of the unique harm it

causes children, so, too, cross-burning may be selectively prohibited because of the unique harm it causes victims from certain groups.

Traditional strict scrutiny analysis permits a meaningful evaluation of the reasons government seeks to restrict speech. Of course, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy Entertainment Group*, *supra*, 529 U.S. at 818. But the government should be permitted to demonstrate that its effort to single out a narrower type of speech is justified. And those efforts should not be thwarted by a doctrine that the regulation is not "necessary" simply because it attempts to pinpoint one activity that causes greatest harm.

Statutes restricting speech must be carefully crafted so that they do not restrict more speech than necessary to achieve their ends. This Court has frequently noted, for example, that the governmental interest in protecting children from pornography does not support a broad suppression of speech addressed to adults. *Playboy Entertainment Group*, *supra*, 529 U.S. at 814; *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997). Similarly, the governmental interest in protecting the human rights of groups that have historically been subject to discrimination, abuse, and persecution may not support a broad suppression of speech directed to other groups.

Of course, a law infringing on speech or expressive activity is properly invalidated when the justification offered by government to support it is insufficient. Close examination of the justification will reveal whether the government interest is truly compelling and narrowly-tailored. Hence, in *Thompson v. Western States Medical Center*, __ U.S. __, 122 S.Ct. 1497 (2002), the Court found that the restrictions on advertisement and

promotion of compounded drugs were more extensive than necessary to achieve the government's interests. *Id.* at __, 122 S.Ct. at 1505-06. The Court concluded: "The Government simply has not provided sufficient justification here." *Id.* at __, 122 S.Ct. at 1507. Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19 (1993), the Court found that a prohibition on newsracks offering "commercial" publications but not newspapers did not adequately serve the City's asserted interest in safety and esthetics. The Court thus ruled that the restriction was not "necessary" to achieve the City's goal.

The government's justification for restricting speech is one part of a multi-factor balance. Balancing is implicit in the traditional strict scrutiny analysis. *See City of Los Angeles v. Alameda Books, Inc.*, __ U.S. __, __, 122 S.Ct. 1728, 1737 (2002) (the Court must balance competing interests); *Ferber*, *supra*, 458 U.S. at 764 ("the balance of competing interests is clearly struck"); *Spence v. Washington*, 418 U.S. 405, 417 (1974) ("even protected speech may be subject to reasonable limitation when important countervailing interests are involved") (Rehnquist, J., dissenting). Another factor is the nature of the speech.

Not all speech is entitled to the same level of protection. "Fighting words" and threats are accorded protection commensurate with their position in the First Amendment spectrum. *Chaplinsky v. New Hampshire*, *supra*, 315 U.S. at 572; *Watts v. United States*, *supra*, 394 U.S. 705 ("true threats" are unprotected). Society's interest in protecting non-obscene, sexually-explicit materials (portraying adults) is "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," and so this speech has lesser value. *Young v. American Mini Theaters*, 427 U.S. 50, 70, *reh. den.* 429 U.S. 873 (1976). Commercial speech has "a

measure of First Amendment protection 'commensurate' with its position in relation to other constitutionally guaranteed expression." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001).

The value of the speech affects the required weight of the justification for restricting it. The State may not regulate, on the basis of content, any speech, even speech of lesser value, without demonstrating a compelling interest in doing so. But the governmental interest is most compelling when the State seeks to protect children from significant harm. *Ferber, supra,* 458 U.S. at 756-57. It is least compelling when the State merely seeks to protect citizens from discomfort. *Ashcroft v. The Free Speech Coalition,* __ U.S. __, 122 S.Ct. 1389, 1399 (2002).

Another factor in the balance is the type of speech at issue. As this Court acknowledged in *The Free Speech Coalition, supra,* __ U.S. at __, 122 S.Ct. at 1403, "First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct." "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989). The speech at issue here, cross-burning, is not speech but communicative conduct or expressive activity. It is a deed, not words; conduct, not ideas.

The context of the expressive activity should be considered. Cross-burning is not an invitation to discuss or debate ideas but, rather, it is extremely confrontational and potentially violent conduct. A burning cross is a symbol that, in the context of American history, carries a clear message of racial supremacy and hatred towards certain other groups. *See Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 770-71 (1995) (Thomas, J., concurring); M.

Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich.L.Rev. 2320, 2365 (1989).

The harm intimidating expressive activity causes is an important factor to consider. Cross-burning inflicts unique and significant harm on members of certain groups that have historically been subject to discrimination. The deep physiological and emotional distress caused by such activity is well-documented. *See* Matsuda, *Public Response to Racist Speech*, *supra*, 87 Mich.L.Rev. at 2336-38.

Indeed, the unique harm caused by the activity insulates the restriction from viewpoint discrimination charges, since only the one viewpoint causes such harm. In contrast, the unlawful viewpoint discrimination of, for example, a school that permitted community groups to use the school after hours to teach morals and character development, but prohibited a religious group to teach that subject from the religious or Christian perspective, does not raise the same specter of harm. *See Good News Club v. Milford Central School*, 533 U.S. 98, 109-110 (2001). There was no showing that the teachings from either a secular or nonsecular angle presented any unique danger of harm. However, conduct that communicates racial hatred directed toward a member of a group that has historically been subject to prejudice and discrimination presents a significant danger of harm, while conduct communicating tolerance does not.

Scholars have argued that the failure of government to address racist propaganda "elevates liberty interests of racists over liberty interests of targets." *See* Matsuda, *Public Response to Racist Speech*, *supra*, 87 Mich.L.Rev. at 2378; 2375-81. Virginia seeks to condemn confrontational conduct expressing racial hatred by burning a cross in another's yard. Cross-burning cannot be considered outside of its historical context, a context

of violence and, more important, implicit official sanction. Racial discrimination was, for too long, enforced by law. *See* A. Lewis, *Make No Law: The Sullivan Case and the First Amendment* 15-16 (1991). Efforts to alleviate the lingering effects should be viewed in a special light.

When it is clear to a legislature that bias-motivated threats that tend to intimidate and incite violence are predominantly addressed to certain groups, the legislature should be permitted to address the problem that confronts it. Recognizing that a special harm is caused by one viewpoint but not another, the legislature should be permitted to narrowly tailor its statute to restrict only speech that causes that harm. Those legislative judgments should be accorded respect; cross-burning statutes may be "sustainable by deferring to the legislative judgment concerning which of several causes of a problem government elects to regulate." *State v. Vawter*, 642 A.2d 349, 367 (N.J. 1994) (Stein, J., concurring).

It is appropriate to apply traditional strict scrutiny here. Rather than strike down the statute because a broader statute would suffice, the Court should assess the nature and type of the regulated speech -- intimidation rather than political speech, expressive conduct rather than written or spoken words. It should evaluate the context of the speech, confrontational and potentially violent rather than a debate or discussion. Most importantly, it should consider the unique and significant harm the speech causes.

Accordingly, while Virginia's cross-burning statute is content-based, it may survive strict scrutiny review if Virginia is permitted to justify its statute and all relevant factors are duly considered. This Court quickly accepted the contention that the ordinance in *R.A.V.* served a

compelling interest of helping to "ensure the basic human rights of members of groups that have historically been subjected to discrimination." *Id.* at 395. Virginia may be able to demonstrate that its statute furthers this compelling interest in a manner fully in accord with First Amendment principles.

In sum, the First Amendment requires due consideration of the factors relating to the right to speech or expressive conduct and the reason government seeks to restrict such expression. Some speech is central to the core purposes of the First Amendment, such as political debate, while other speech contributes very little to the exposition of ideas, like fighting words, sexually-explicit language, or threats. Expressive activity tends not to be an invitation to discussion and so should be recognized as less important, especially in a confrontational context. Some speech causes unique and devastating harm, while other speech simply causes discomfort; the level or degree of harm should be considered when evaluating the justification for a restriction on expressive conduct. When all these factors are considered and balanced in the traditional strict scrutiny review, and Virginia's justification for the restriction is adequately demonstrated, the Court will find that this statute accords with the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the Virginia Supreme Court should be reversed and Virginia Code § 18.2-423 should be upheld as fully in accord with First Amendment principles.

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