No. 01-1107

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

BARRY ELTON BLACK, ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

John W. Whitehead
Steven H. Aden (Counsel of Record)
THE RUTHERFORD INSTITUTE
112 Whitewood Road
Charlottesville, VA 22901
Tel.: (434) 978-3888

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Rutherford Institute litigates and educates on behalf of constitutional rights, civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writs of certiorari and *amicus curiae* briefs in many cases in the Supreme Court, and have represented parties on the merits in several significant First Amendment cases.

The Court's *amicus* will address two issues raised by the Question Presented in the Petition. First, *amicus* will address the Commonwealth's contention that the cross-burning statute is not content-based, *i.e.*, that it is not targeted at the expressive aspect of cross-burning but at its effects. Second, *amicus* will discuss whether, assuming *arguendo* that racial intimidation is a social harm that can and ought to be proscribed by the Commonwealth (a prospect with which the Court's *amicus* certainly agrees), the cross-burning statute is narrowly tailored to achieve this proscription, or if other less restrictive alternatives can be (and are in fact) employed to achieve this end. The Court's *amicus* will also briefly address, with the forbearance of the Court, one important issue not included within the Question: whether the burden-shifting provision of VA. CODE ANN. § 18.2-423, which states that the burning of a cross under the circumstances proscribed by the statute "shall be *prima facie* evidence of an intent to intimidate a person or

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent are on file with the clerk of the Court. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

group of persons," denied Respondents their Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

SUMMARY OF ARGUMENT

Amicus respectfully submits that the Commonwealth of Virginia' contention that Va. Code Ann. § 18.2-423 is not viewpoint discriminatory is constitutionally untenable. It is a well-established maxim of First Amendment jurisprudence that a law targeting expression because of its anticipated offensive impact is viewpoint discriminatory, and cannot be upheld unless a compelling interest exists for it and no less restrictive means to further that interest exist. The Commonwealth can and does employ less restrictive means to proscribe the secondary effects of the speech at issue in this case.

Amicus also submits that the statute's burden-shifting provision, stating that the burning of a cross "shall be *prima facie* evidence of an intent to intimidate," contravenes the rights of trial by jury and due process protected by the Sixth and Fourteenth Amendments, respectively. The Supreme Court has repeatedly struck down burden-shifting statutes and jury instructions that place the burden of negating criminal intent upon the defendant as fundamentally opposed to traditional notions of fair play and justice in the adversary system.

ARGUMENT

I. VIRGINIA CODE ANN. § 18.2-423 IS A PROHIBITED CONTENT-BASED CRIMINAL STATUTE.

"[A] law imposing criminal penalties on protected speech

is a stark example of speech suppression." *Ashcroft v. Free Speech Coalition*, ___ U.S. ___, 122 S.Ct. 1389, 1398 (2002). "[E]ven minor punishments can chill protected speech...." *Id.* Specifically targeting cross burning, as opposed to other forms of hateful conduct, implicates legislative bias against the symbol itself. A broad range of constitutionally protected expressive conduct may cause substantial offense, intimidation and psychological harm (*e.g.*, flag burning, racist rhetoric, etc.). Yet the Commonwealth subjects to legislative sanction only two forms of expression, both symbolic: the burning cross and the Nazi swastika, as the Virginia Code also proscribes posting a swastika on another's property with the intent to intimidate.[2] Other than the symbol targeted, the language of both statutes is effectively identical. The enactment of these parallel statutes, which carve out for criminal sanction the two most hated symbols in America, leads inexorably to the conclusion that the Virginia legislature aimed to target and proscribe specific hateful speech and not simply to prevent intimidating conduct.

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[2] VA. CODE ANN. § 18.2-423.1 provides:

> Placing swastika on certain property with intent to intimidate; penalty; prima facie evidence of intent
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> It shall be unlawful for any person or persons, with the intent of intimidating another person or group of persons, to place or cause to be placed a swastika on any church, synagogue or other building or place used for religious worship, or on any school, educational facility or community center owned or operated by a church or religious body.
>
> A violation of this section shall be punishable as a Class 6 felony.
>
> For the purposes of this section, any such placing of a swastika shall be prima facie evidence of an intent to intimidate another person or group of persons.

The Supreme Court has squarely and repeatedly rejected the proposition that government may restrict display of a symbol in order to avoid an adverse public reaction to its message. *Good News Club v. Milford Central School Dist.*, 533 U.S. 98, 119 (2001); *Cohen v. California*, 403 U.S. 15, 23 (1971). Mere "[u]ndifferentiated fear... of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School Dist*., 393 U.S. 503, 508 (1969). The Virginia cross-burning statute cannot be meaningfully distinguished from the municipal hate crime ordinance struck down by the Court on this basis in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). The petitioner in *R.A.V.* was charged with violating the St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990), for burning a cross in the yard of an African-American family. Finding the ban an unconstitutional content regulation on symbolic speech, *id.* at 386, the Court rejected St. Paul's argument that the ordinance was constitutional because it targeted criminal conduct – racial intimidation – stating, "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. "The point of the First Amendment is that majority preferences must be expressed in some fashion other then silencing speech on the basis of its content." *Id.* at 392. While St. Paul was entitled to express that hostility, it could not do so "through the means of imposing unique limitations upon speakers who (however benightedly) disagree." *Id.* at 396.

Like St. Paul, the Commonwealth's justifications for its cross-burning statute boil down to the notion that government may prohibit "controversial" speech because of its impact. That is the very essence of prohibited viewpoint discrimination, however – controlling speech because of the content of the message. *City of Erie, et al v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. 277 (2000); *Boos v. Barry*, 485 U.S.

312 (1988). States may control speech based on the "secondary effects" that ensue from it, but such secondary effects may not include the impact of the speech upon the audience. *City of Erie, supra* at 291 (approving nudity ban that reached nude dancing because "the ordinance d[id] not attempt to regulate the primary effects of the expression, *i.e*. the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health").

Thus, "to determine what level of scrutiny applies to the ordinance at issue here, we must decide 'whether the State's regulation is related to the suppression of expression.'" *Id.* at 289, quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Any prohibition on the secondary effects of controversial speech must be content and viewpoint-neutral. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 811 (1985); *Arkansas Educ. Tel. v. Forbes*, 523 U.S. 666, 676 (1998). "[P]ublic expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), quoting *Street v. New York*, 394 U.S. 576, 592 (1969).[3] *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). The Commonwealth criminally prosecuted Respondents for displaying the burning cross specifically because it was a burning cross, *i.e.*, an expression

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[3] *See also Hess v. Indiana*, 414 U.S. 105, 107 (1973)(statement "We'll take the f—ing street later" not punishable as "fighting words," since not directed to any person or group in particular); *Cohen v. California*, 403 U.S. 15, 16 (1971) (appearance in municipal court wearing a jacket bearing the words "F— the draft" not punishable as "fighting words."); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (viciously critical statements about various political and racial groups protected).

of a certain viewpoint. "[T]he specific motivating ideology or the opinion or perspective of the speaker [was] the rationale for the restriction." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). The burning cross is, perhaps alone among expressive symbols save the Nazi swastika, a virtually unequivocal communication: "a distinctive idea, conveyed by a distinctive message," *R.A.V. v. City of St. Paul*, 505 U.S. at 391-392. It is for this very reason that criminalizing its display cannot be regarded as content or viewpoint-neutral. One cannot conceive of a rhetorically ambiguous cross-burning.

No Supreme Court case holds that expressive conduct may be proscribed based upon its offensive impact.[4] The only narrow exceptions to the protections of the First Amendment under the Supreme Court's "limited categorical approach" are

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[4] This rule holds even where government legislative or executive officials have established fora in the context of governmental programs that further legitimate interests of the state, such as broadcast debates, *Arkansas Educ. Tel.* v. Forbes, *supra* (public broadcaster would be prohibited from excluding third-party candidate from public debate if based on viewpoint); funding of the arts; *NEA v. Finley*, 524 U.S. 569 (1998) (funding decisions for government arts program based on "aesthetic merit" could not discriminate on political viewpoint); funding for university student publications, activities and speech, *Rosenberger v. Rector & Visitors of Univ. of Va.*, *supra* (prohibiting viewpoint based exclusion of publication from university forum for funding); *Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (student association fees permitted provided neutrally allocated among student organizations); and programs for legal representation for indigents in civil matters, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking down Congressional prohibition on constitutional challenges to welfare law by organizations receiving federal legal services funding).

for obscenity, defamation and "fighting words." *R.A.V. v. St. Paul*, 505 U.S. at 383. As reprehensible as Respondents' views are, "The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane." *Iota Xi Chapter of Sigma Chi v. George Mason Univ.*, 773 F.Supp. 792, 795 (E. Dist. Va. 1991), *aff'd*, 993 F.2d 386 (4th Cir. 1993); *Dambrot v. Central Michigan University*, 839 F.Supp. 477, 484 (E. Dist. Mich. 1993). In fact, the Court has recognized that the First Amendment regards dialogue and disputation as a desired end of protected expression, not just its unfortunate by-product:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Terminiello v. Chicago, 337 U.S. at 4.[5] The right to freely speak vile ideas, and the immediate harsh reaction they should generate from a healthy body politic, are tonic to a free society. An unspoken idea goes unchallenged, and its adherents may be emboldened by the false belief that their views are widely accepted, or would be embraced if allowed to be broadcast uncensored. It is only the scorching heat of public debate that withers a despicable idea.

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[5] *See Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) ("In the realm...of political belief, sharp differences arise. In both fields [politics and religion] the tenets of one man may seem the rankest error to his neighbor."); *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

II. THE STATUTE IS NOT NARROWLY TAILORED TO ACHIEVE THE VALID LEGISLATIVE END OF PREVENTING INTIMIDATING CONDUCT DIRECTED TOWARD MINORITIES BECAUSE VIRGINIA ALREADY EMPLOYS STATUTORY MEANS TOWARD THAT END THAT ARE NOT CONTENT-BASED.

VIRGINIA CODE ANN. § 18.2-423 cannot be regarded as narrowly tailored to achieve the end of preventing intimidating and threatening actions against racial minorities because less restrictive means are available and are already in fact employed by the Commonwealth. Apart from their expressive content, the actions of Respondents Elliott and O'Mara were in fact criminal under existing Virginia law.[6] It is a Class 6 felony to maliciously set fire to wood, fencing, grass or other flammable material that is capable of spreading fire to land, the very act committed by Elliott and O'Mara in burning an object on the victim's property. *See* VA. CODE ANN. § 18.2-86 (2001). As the Court observed in *Wisconsin v. Mitchell*, "The First Amendment does not protect violence." 508 U.S. 476, 484 (1993).

Moreover, the Commonwealth has already passed a lesser restrictive version of the cross-burning statute (although the statue at issue remains on the books). After the decision of the Virginia Supreme Court, the Virginia General Assembly enacted VA. CODE ANN. § 18.2-423.01, which was intended to redress the constitutional infirmities of the cross-burning statute. It provides:

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[6] The Court's *amicus* does not believe that the actions of Respondent Black could be prosecuted by the Commonwealth under any properly drawn criminal statute.

> 18.2-423.01. Burning object on property of another or a highway or other public place with intent to intimidate; penalty
>
> A. Any person who, with the intent of intimidating any person or group of persons, burns an object on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury is guilty of a Class 6 felony.

History: 2002, cc 589, 600. This statute eliminates the reference to a "cross," replacing it with the content-neutral term "object." *Id*. The statute also eliminates the burden-shifting presumption of intent to intimidate present in § 18.2-423, the constitutional effect of which will be discussed below. Although the present case is not the proper forum to address the constitutionality of this new provision, it is clearly a less objectionable means to the end sought by the Virginia General Assembly.

III. THE BURDEN-SHIFTING PROVISION OF THE STATUTE VIOLATES RESPONDENTS' RIGHT TO DUE PROCESS.

Ordinarily, the Court will confine its review to federal questions raised by or fairly included within the questions presented to the Court. However, a respondent "may support the judgment [of the state court] in his favor upon grounds different from those upon which the court below rested its judgment," *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940), provided it is done only in "exceptional cases." *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983). The Court has stated, "consideration of issues not presented in the jurisdictional statement or petition for certiorari and not

presented in the [lower court] is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980). The Court has utilized the plain error doctrine to address constitutional infirmities of state criminal statutes targeted at speech in several important First Amendment cases, notably *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949) and *Stromberg v. California*, 283 U.S. 359 (1931).

The present case presents such an "exceptional circumstance." *Heckler, supra*. The issue of whether a statutory provision that shifts the burden of proof of an element of a criminal charge to the defendant comports with the due process provisions of the Fifth and Fourteenth Amendments has recently been characterized by the Court as "of surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

Although it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," *Patterson v. New York*, 432 U.S. 197, 201-205 (1997), "[t]he Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v. California*, 491 U.S. 263, 265 (1989); *Apprendi*, 530 U.S. at 477*; In re Winship*, 397 U.S. 358, 364 (1970). Jury instructions relieving States of this burden violate a defendant's due process rights:

> Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.

Carella v. California, 491 U.S. at 263 (jury instructions allowing presumption against defendant of intent to steal rented vehicle after specific number of days have elapsed from the end of the lease term violated due process); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The Court's *amicus* respectfully submits that the Commonwealth's cross burning statute contravenes due process by depriving Respondents of the benefit of a jury of peers and proof beyond a reasonable doubt of criminal intent that is subject to the severest possible societal stigma and disapprobation. Where the state requires a criminal defendant to negate the existence of culpable *mens rea*, the determination that the defendant committed a reprehensible "hate crime" becomes almost equibly poised between establishing hate and absolving the defendant of animus. The Supreme Court has found sentencing schemes violative of due process where they impose an undue burden upon a defendant to negate a state of mind to avoid culpability. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684 (1975) (state could not impose burden on murder defendant to establish that he acted in the "heat of passion on sudden provocation" to reduce homicide to manslaughter); *Leary v. United States*, 395 U.S. 6 (1969) (due process prohibited penal provision authorizing jury to infer from defendant's possession of marijuana that he knew of the illegal importation). Further, "although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him." *Mullaney*, 421 U.S. at 702; *cf. Davis v. United States*, 160 U.S. 469 (1895) (reversing murder conviction because trial judge instructed jury it was their duty to convict if the evidence was equally balanced regarding the sanity of the accused). "[D]ue process demands more exacting standards." *Mullaney*, 421 U.S. at 702, n. 31. The higher the degree of

stigmatization resulting to the defendant from conviction, the clearer the jury's adjudication of culpability must be. *Mullaney*, 421 U.S. at 699-700; *Winship*, 397 U.S. at 363, 364. Because "the penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,'" *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968), quoting *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937), that societal judgment should be subjected to the highest evidentiary standard of protection for an accused perpetrator of a hate crime, such as cross burning, not only to protect the innocent accused, but to preclude a "rush to judgment" in circumstances which have the potential to inflame community sensibilities. For this reason, even apart from the question whether VA. CODE ANN. § 18.2-423 survives the stringent demands of strict scrutiny as a content-based restriction on speech, the statutory presumption of culpable state of mind contained in the statute violates the right of due process, and the statute cannot therefore pass constitutional muster.

CONCLUSION

As the Court noted in *Texas v. Johnson*:

> The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the market-place of ideas. We decline, therefore to create for the flag an exception to the joust of principles protected by the First Amendment.

491 U.S. at 418. Just as the First Amendment constrained the State of Texas from consecrating the meaning of the American flag by force of criminal law, it constrains the Commonwealth of Virginia from employing the force of law to sanction the

burning cross – and the meaning it stands for – as a desecration of the ideal of racial equality Americans hold dear.

Respectfully submitted,

John W. Whitehead
Steven H. Aden (Counsel of Record)
THE RUTHERFORD INSTITUTE
112 Whitewood Rd.
Charlottesville, VA 22901
Tel.: (434) 978-3888

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