No. 01-1107

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

BARRY ELTON BLACK; RICHARD J. ELLIOTT; JONATHAN O'MARA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case presents a First Amendment challenge to Virginia's cross-burning statute, which reads:

> 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 Ann. § 18.2-423 (Michie 1996).

The prosecutions under this statute of Respondents Richard J. Elliott and Jonathan O'Mara arose from the same incident in the City of Virginia Beach on May 2, 1998. James Jubilee, an African-American, was a neighbor of Elliott's. Jubilee complained to Elliot's father about the discharge of firearms in Elliott's backyard. After discussing Jubilee's complaint with O'Mara and a third person, David Targee, at a party at Targee's home, Elliott, O'Mara, and Targee hastily constructed a crude wooden cross in Targee's garage. They went to Jubillee's home, planted the cross in his back yard, and attempted to light the cross. Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to

commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross-burning law. Elliott was also charged with attempted cross-burning and conspiracy to commit cross-burning. Upon his plea of not guilty, a jury found him guilty of attempted cross-burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500. O'Mara and Elliott appealed. A panel of the Virginia Court of Appeals affirmed the convictions, holding that the cross-burning statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence." *O'Mara v. Commonwealth*, 33 Va.App. 525, 536, 535 S.E.2d 175, 181 (2000). O'Mara's and Elliott's petition for rehearing en banc was refused.

Respondent Barry Elton Black organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County, Virginia. The Klan rally was conducted on rural property with the permission of the landowner, who also participated in the rally. No one other than the participants in the rally was present on the property. The County Sheriff and Deputy monitored the rally from an adjacent highway, to be sure that it would not get out of hand. A neighbor watched the rally from her porch. Several vehicles passed by the rally on the highway, and the occupants of one vehicle, an African-American family briefly slowed to see what was going on, and then sped away. Following Ku Klux Klan traditions, the rally was largely comprised of hate-filled racial, ethnic, and religious bigotry. At the

height of the rally a cross a cross approximately 25 to 30 feet tall was ignited, while the hymn *Amazing Grace* was played. The sight of the burning cross was visible from the highway.

Black was indicted for violating Virginia's cross-burning statute. He moved for dismissal of the indictment on the grounds that the statute was unconstitutional. The trial court denied Black's motion and, upon conviction by a jury, Black was sentenced to pay a fine of $2500. Black's conviction was affirmed by the another panel of the Virginia Court of Appeals in a one-sentence order, relying on the reasons the prior panel of the Court of Appeals had articulated in the Elliott and O'Mara cases.

The Supreme Court of Virginia heard oral argument in all three cases on the same day, and in a consolidated opinion, reversed all three convictions in a 4-3 decision, holding that the Virginia cross-burning statute was unconstitutional on its face.[1] *Black v. Commonwealth of Virginia*, 262 Va. 764, 553 S.E.2d 738 (2001), App.1.[2] The Supreme Court of Virginia held that the statute engaged in content-based discrimination impermissible under the First Amendment, relying principally on this Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

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[1]Elliott and O'Mara brought only a facial challenge to the cross-burning statute. Black challenged the cross-burning statute both on its face and as applied.

[2]Pinpoint page citations to the opinion of the *Black* opinion throughout this Brief are made to the Appendix appropriate Appendix page in the Petition for *Certiorari*.

REASONS FOR DENYING THE PETITION

A. The Competing Lower Court Interpretations of *R.A.V.*

In *R.A.V.* this Court struck down an ordinance of St. Paul Minnesota that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380. This Court held that "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 391.

Two different understandings of the meaning of *R.A.V. v. City of St. Paul* have surfaced among lower court jurists since this Court's decision in the case. The "strong" version of *R.A.V.* treats the decision as essentially an absolute bar against any statute that singles out any symbol or group of symbols for special proscription or penalty. Under the strong reading of *R.A.V.*, no cross-burning law will ever survive constitutional attack, precisely and simply because it is a cross-burning law. The strong version of *R.A.V.* will

permit the *act* of cross-burning to be prosecuted if the law is content-neutral. So too, the strong version will permit laws that punish bias-motivated crimes by singling out for special proscription or penalty acts motivated by biased intent, such as racism or religious bigotry. Correspondingly, the strong version of *R.A.V.* will permit symbolic expression such as cross-burning to be introduced as *evidence* to establish invidious intent. What the strong reading of *R.A.V.* will never permit, however, is the penalizing of symbolic expression, such as cross-burning, *as such*. *See, e.g.*,, *Black v. Commonwealth*, App. 18 ("A statute selectively addressed to the content of symbolic speech is not permitted under the First Amendment."); *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993) (applying *R.A.V.* to strike down a cross-burning law, stating: "Like the Minnesota statute, section 16-7-120 does not completely prohibit the use of fighting words; rather, it prevents only the use of those fighting words symbolically conveyed by burning a cross. The government may not selectively limit speech that communicates, as does a burning cross, messages of racial or religious intolerance.").

In contrast, the "weak" interpretation of *R.A.V.* treats that decision as a far more permeable holding. The weak version will permit a cross-burning law in which the prohibition of cross-burning is tied to some other constitutionally unprotected conduct, such as a "threat" or act of "intimidation" or use of "fighting words" as long as that proscription is itself content-neutral. The weak version treats this Court's condemnation of content-based and viewpoint-based discrimination is *R.A.V.* as residing in the language of

the St. Paul ordinance requiring that the symbolic speech (such as burning a cross) be of the type "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *See State v. T.B.D.*, 656 So.2d 479, 481-82 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996). A law that does not include any such list of forbidden messages is content-neutral, under the weak version, even though it may be limited to symbolic acts such as burning crosses. The weak version, however, posits that a properly drawn cross-burning statute can be defended under one or more of the "exceptions" for content-based regulation recognized in *R.A.V.* Cases adopting the weak version of *R.A.V.* frequently claim, as does the Commonwealth in its Petition for *Certiorari*, that *R.A.V.* contained exactly three such stylized doctrinal "exemptions." *See In re Steven S.*, 31 Cal. Rptr.2d 644 (Cal. App. 1994), *review denied* 1994 Cal. LEXIS 5185 (Cal. 1994). Relying on various passages within the *R.A.V.* opinion, these three exceptions are typically articulated as: (1) forms of content discrimination in which "the basis for the content discrimination consists of the very reason the entire class of speech at issue is proscribable," *R.A.V.* 505 U.S. at 387; (2) content-based discrimination against a subclass associated with particular "secondary effects" of the speech, *id.* at 387; and (3) situations where "the nature of the content discrimination is such that there is no realistic

possibility that suppression of ideas is afoot." *Id.* at 390.[1]

These two differing views of the meaning of *R.A.V.* are vividly represented by the divisions between the majority and dissenting opinions in the Supreme Court of Virginia below. More significantly, the differences are observable in the conflicts posed by some--though not all--of the cases cited by the Commonwealth in its Petition for *Certiorari.*

B. The Supreme Court of Virginia Correctly Interpreted and Applied *R.A.V.*

In their constitutional challenge to the Virginia cross-burning statute, Elliott, O'Mara, and Black maintained that the principal constitutional defect in the law was not content-discrimination or viewpoint-discrimination resting in either the identity of the speaker, the identity of the alleged victims, or in any specific message of bigotry, but rather rested blatantly and, for First Amendment purposes, sufficiently, in the fact that the law was limited to expression arising from one symbol, and one symbol only: the burning cross.

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[1]Respondents do not accept this understanding of *R.A.V.* as sound. This Court's ruling in *R.A.V.* cannot be reduced to a mechanical outline, with a general rule against content discrimination qualified by three well-defined exceptions. Moreover, as set forth in Respondent's argument later in this Brief, the "exceptions" identified by the Commonwealth and those judicial decisions sympathetic to its position interpret these would-be exceptions in a manner that cannot be squared with the larger holding or rationale of *R.A.V.* Suffice it to say at this juncture, however, that decisions from other jurisdictions that squarely conflict with the ruling of the Supreme Court of Virginia below tend to rely on one or more of these perceived exceptions.

Out of all the objects in the world that might be set on fire, the law selected only a burning cross for unique treatment. At the highest level of abstraction a cross is an object or symbol of a particular shape: a vertical bar traversed by a horizontal bar. There certainly is nothing in this geometric configuration of the vertical and horizontal that carries any peculiarly dangerous potency. It is not the fire that burns hotter when flaming sticks are crossed, but the passions that the fire inflames.

In holding the Virginia cross-burning statute void, the Supreme Court of Virginia rejected every argument advanced by the Commonwealth in defense of the law. The Supreme Court of Virginia rebuffed the Commonwealth's claim that the statute was content-neutral because it applied to any person who burned a cross for the purpose of intimidation, and was not limited to any particular group (such as the Ku Klux Klan) or to any specific message (such as racism or anti-Semitism.). In rejecting the Commonwealth's claim, the Court noted that the law had its origins in concern over the activity of the Klan, including a series of cross-burning incidents by the Klan in the early 1950s. *Black v. Commonwealth*, App. 11-12 ("While not specifically stating that 'race, color, creed, religion or gender' is the subject of the proscription, the absence of such language in the Virginia statute does not mask the motivating purpose behind the statutory prohibition of cross-burning.") The Commonwealth, the Court noted, had relied on this history of cross-burning, and the relationship between these cross-burnings and racial intimidation and violence, as a justification for the legislative judgment that cross-burning is an especially potent and dangerous mode of intimidation. *Id.*, App.

14. The Commonwealth's submission that society's historical experience with cross-burning justified singling the practice out for special treatment, however, was in tension with its claim that the law was content-neutral. This tension was picked up by the Supreme Court of Virginia, which succinctly observed that "[t]he Commonwealth cannot have it both ways." *Id.*, App. 14.

The Court held that Virginia's cross-burning law could not be sustained merely because it was limited to acts of intentional intimidation. While the Commonwealth could certainly attack bigotry and violence through neutral laws dealing with threats, intimidation, or fighting words, it could not resort to the short cut of attacking only the content of symbolic expression. *Id.*, App. 11-14. *See also Watts v. United States*, 394 U.S. 705 (1969) (interpreting the "true threat" First Amendment doctrine.) The Court held that the "secondary effects" doctrine could not be invoked to sustain the law, because the law was not a neutral statute targeting harms unrelated to the content of the message conveyed by cross-burning, but rather was a statute in which the targeted harm--intimidation--arose entirely from the communicative impact of burning a cross. *Id.* App. 16.

Lastly, the Court properly held, the constitutional infirmities of the law were exacerbated by the statute's prima facie evidence provision. The mere burning of a cross, with no other extrinsic evidence of an intent to intimidate, is enough to subject a speaker to arrest, prosecution, and conviction under the statute. Although the state bears the ultimate burden of proving an intent to intimidate, the fact remains that the burning of a cross by itself creates a

statutory presumption, albeit rebuttable, of such intent. This regime chills expression, the Court correctly held, sweeping within its ambit both protected and unprotected speech, and as such was unconstitutionally overbroad. *Id.* App. 16-17.

C. Not All the Lower Court Decisions Cited by the Commonwealth to Support Its Claim of Conflict Are in Fact in Direct Conflict with the Opinion of the Supreme Court of Virginia Below

The Respondents do not dispute the claim advanced by the Commonwealth of Virginia or its supporting *amici,* the states of Arizona, California, Georgia, Kansas, Massachusetts, Missouri, Oklahoma, Utah, and Washington, that conflict exists in the decisional law of various lower courts in prosecutions involving defendants who engaged in cross-burning. Nor do respondents dispute the philosophical intensity or social significance of the conflict. The line that separates violent and hateful rhetoric from violent and hateful criminal conduct is central to our constitutional democracy, especially in times permeated with racial and religious tension and a heightened national sensitivity to the horrors of terrorism. Respondents do, however, dispute the claimed breadth of the conflict in the decisional law.

The Commonwealth maintains that decisions in three sister states, South Carolina, Maryland, and New Jersey, are consistent with the ruling of Supreme Court of Virginia below in *Black v. Commonwealth*.[2] Respondents agree.

The Commonwealth maintains that decisions in three other sister states, Florida, California, and Washington, as well as decisions in two federal circuits, the Seventh Circuit and the Eighth Circuit, are in conflict with the ruling of Supreme Court of Virginia. Respondents disagree.

Decisions in two states, Florida and California, are indeed in irreconcilable conflict with the decision in Virginia. The decision of the Supreme Court of Washington, however, does not pose a bona fide conflict. The decisions of the United States Court of Appeals for the Seventh and Eighth Circuits can arguably be reconciled with at least the holding of the Supreme Court of Virginia below. Respondents do concede that some of the more far-reaching language and rationales of those federal decisions are at least in tension with the rationales advanced by the Supreme Court of Virginia.

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[2] *See State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993) (overturning cross-burning conviction on the authority of *R.A.V.*); *State v. Sheldon*, 629 A.2d 753 (1993) (same); *State v. Vawter*, 642 A.2d 349 (N.J. 1994) (same). Respondents agree with the Commonwealth that these decisions are consistent with the decision of the Supreme Court of Virginia below.

1. Florida

The conflict between the decision below and the decision of the Florida Supreme Court in *State v. T.B.D.*, 656 So.2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996), is direct and irreconcilable. In *T.B.D.*, a minor was charged with erecting a flaming cross on the property of Atef Abdul-Nour in violation of Florida's anti-cross-burning law, part of a Florida criminal code Chapter entitled "Criminal Anarchy, Treason, and Other Crimes Against Public Order." Chapter 876, Fla. Stat. (1993).[3] The Florida statute singled out for punishment one particular communicative mode and message, the burning of a cross, but was not otherwise tied to the identity of either speakers or recipients, or the motivation of the cross-burner. The defendant in *T.B.D.* argued that this Court's decision in *R.A.V.* rendered the Florida statute unconstitutional on its face, because it was tainted by content-discrimination in the same sense as the ordinance struck down by this Court in *R.A.V.* The Florida Supreme Court disagreed,

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[3] The statute at issue in *T.B.D.*, section 876.18, Fla. Stat. (1993) read in pertinent part:

> Placing burning or flaming cross on property of another. -- It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree . . . .

distinguishing *R.A.V.* The core of the Florida Supreme Court's analysis was that the content and viewpoint discrimination found unconstitutional in *R.A.V.* inured not in the fact that the ordinance mentioned specific symbols, such as swastikas or crosses, but rather in the fact that the ordinance "played favorites," by treating certain viewpoints within the marketplace of ideas less favorably than others:

> The United States Supreme Court held the ordinance invalid because it played favorites: Rather than proscribing certain types of "fighting words" across the board, the ordinance prohibited such words only in special cases, *i.e.*, only where the words may offend due to "race, color, creed, religion or gender." "Such a restriction would open the door to government favoritism and protectionism of certain topics and viewpoints and implicit censorship of disfavored ones. . . ."

State v. T.B.D., 656 So.2d at 481, *quoting* St. Paul, Minn.Legis.Code §§ 292.02 (1990), and *State v. Stalder*, 630 So.2d 1072, 1075 (Fla.1994). The Florida Supreme Court reasoned that the Florida statute was consistent with *R.A.V.* "because the Florida prohibition is 'not limited to [any] favored topics,' but rather cuts across the board evenly." 656 So.2d at 481. In the view of the Florida Supreme Court, it was enough to satisfy First Amendment requirements that no mention was made in the Florida law of "any special topic such as race, color, creed, religion or gender." *Id.* While the law did

single out cross-burning, the Florida Supreme Court, like the dissenters in the Virginia Supreme Court below, appeared to see this not as content or viewpoint discrimination, but rather as a "targeted activity" that was "proscribed because it is one of the most virulent forms of 'threats of violence' and 'fighting words' and has a tremendous propensity to produce terror and violence." *Id.* *See also* Black v. Commonwealth, Hassell, J., dissenting ("[T]he purpose of the Virginia statute . . .is not to suppress repugnant ideas, but rather to proscribe physical acts intended to inflict bodily harm upon the victims of such acts.").

Justice Overton, the lone dissenter in the Florida Supreme Court, saw the matter differently, writing that "[w]hile I would personally prefer to uphold the constitutionality of this statute and to prohibit through this statute the type of conduct at issue, I find that the United States Supreme Court's decision in *R.A.V. v. City of St. Paul* eliminates any choice that I have in this matter. *State v. T.B.D.*, 656 So.2d at 482 (Overton, J., dissenting)(internal citation omitted).

2. California

In *In re Steven S.*, 31 Cal.Rptr.2d 644 (Cal. App. 1994), *review denied*, 1994 Cal. LEXIS 5185 (Cal. 1994) a California intermediate appellate court sustained the constitutionality of California's cross-burning law.[1] *See*

[1]The California statute, § 11411 of the California Penal Code, read in pertinent part:

> (a) Any person who places or displays a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property shall be punished by imprisonment in the county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction and by imprisonment in the county jail not to exceed one year, by a fine not to exceed fifteen thousand dollars ($15,000), or by both the fine and imprisonment for any subsequent conviction.
>
> (b) Any person who engages in a pattern of conduct for the purpose of terrorizing the owner or occupant of private property or in reckless disregard of terrorizing the owner or occupant of that private property, by placing or displaying a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika, on the private property of another on two or more occasions, shall be punished by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine not to exceed ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment. A violation of this subdivision shall not constitute felonious conduct for purposes of Section 186.22.
>
> (c) Any person who burns or desecrates a cross or other

also People v. Carr, 97 Cal.Rptr.2d 143 (Cal. App. 2000) (applying California's cross-burning law to sustain a conviction for cross-burning).

The ruling of the California intermediate appellate court in *In re Steven S.* does conflict, at least in substantial part, with the decision below of the Supreme Court of Virginia. Unlike the Virginia statute, the California statute required that the act of cross-burning take place, unauthorized, on the property of

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> religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who burns, desecrates, or destroys a cross or other religious symbol, knowing it to be a religious symbol, on the property of a primary school, junior high school, or high school for the purpose of terrorizing any person who attends or works at the school or who is otherwise associated with the school, shall be punished by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction and by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed fifteen thousand dollars ($15,000), or by both the fine and imprisonment for any subsequent conviction.
>
> (d) As used in this section, "terrorize" means to cause a person of ordinary emotions and sensibilities to fear for personal safety.

another.[2] Nevertheless, at its heart the California ruling embraced a view later advanced by the Commonwealth of Virginia but rejected by the Court below, that an intimidation statute that singles out cross-burning for special prohibition is not content or viewpoint discrimination within the meaning of *R.A.V.* The California court took the position that burning a cross on the property of another inherently causes terror and intimidation, and thus constitutes unprotected conduct under both the "true threat" and "fighting words" doctrines. *In re Steven S.*, 31 Cal.Rptr.2d at 647. ("But an *unauthorized* cross burning *on another person's property*, which we shall call 'malicious' cross burning for shorthand purposes . . .does more than convey a message. It inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm."). The California court reasoned that the "true threat" doctrine removes from First Amendment protection threats of violence in which a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm. *Id. citing Watts v. United States* 394 U.S. 705, 707-708 (1969); *United States v. Orozco-Santillan* 903 F.2d 1262, 1265-1266 (9th Cir. 1990). Similarly, the California court understood the "fighting words" doctrine as permitting punishment for statements "'which by their very utterance inflict injury or tend to

[2]Thus the California statute would have reached the conduct of Respondents Elliott and O'Mara in the case at bar, who burned a cross without authorization on the property of another, but not the conduct of Respondent Black, who burned a cross on the property of another with the permission of that property owner.

incite an immediate breach of the peace.'" *In re Steven S.*, 31 Cal.Rptr.2d at 647, *quoting Chaplinsky v. New Hampshire* 315 U.S. 568, 572 (1942).

The California court conceded that both the true threat and fighting words doctrines were limited by the rule announced by this Court in *R.A.V.* Nevertheless, the California court interpreted *R.A.V.* as not barring content discrimination if a law falls within one or more of the "exceptions" noted in *R.A.V.* As previously noted in this Brief these three purported exceptions involve (1) forms of content discrimination in which the basis for the content discrimination consists of the very reason the entire class of speech at issue is proscribable; (2) content-based discrimination against a subclass associated with particular "secondary effects" of the speech, and (3) situations where the nature of the content discrimination is such that there is no realistic possibility that suppression of ideas is afoot. *In re Steven S.*, 31 Cal.Rptr.2d at 651. Applying these exceptions, the California court ruled that although the California statute singled out cross-burning for singular proscription, it was still constitutional, because it fell within all three *R.A.V.* exceptions. The California statute did not reach mere obnoxious speech, but speech that was actually "threatening," which was enough, in the court's view, to satisfy the first *R.A.V.* exception. Because the law was targeted at intimidation and threats, the court further reasoned, it was also justifiable under the "secondary effects" concept. Finally, the court held, there was no realistic possibility that suppression of unpopular ideas was implicated by the California statute. Rather, the court reasoned, the purpose of the law was to penalize "an act of terrorism that inflicts pain on its victim." *Id.*

California, consistent with the arguments advanced by the Commonwealth of Virginia, thus appears to embrace the position that cross-burning laws do not offend the Constitution when enacted from the altruistic motive of attacking terror and racial bigotry. As a more recent California intermediate appellate decision would candidly state, relying on *In re Steven S.*, the "the statue was designed to curtail expressive conduct which conveys the message of racial hatred." *People v. Carr*, 97 Cal.Rptr.2d at 147.

This reasoning is entirely at odds with the holding and rationale of the Supreme Court of Virginia in *Black v. Commonwealth.* Respondents submit that it is also at odds with this Court's ruling in *R.A.V.* It trivializes the import of this Court's ruling in *R.A.V.* to reduce it to a sterile rule with three loopholes so elastic that they utterly undermine the integrity of the rule. The stern ban on content and viewpoint discrimination announced in *R.A.V.* cannot be avoided by the simple expedient of tying that discrimination to some other independently proscribable form of expression, such as threats, intimidation, incitement, or fighting words. In *R.A.V.* itself, the Minnesota Supreme Court attempted to save the hate speech law at issue through a narrowing construction that purported to limit application of the law to situations in which the speech was directed to the incitement of imminent lawless action and likely to produce such action – the incitement standard, in short, of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Yet this Court held that even if the law were otherwise valid as an incitement or a fighting words law, it would still be unconstitutional, because it was infected with viewpoint discrimination. *R.A.V.*,

505 U.S. at 390-96. As this Court emphasized in *R.A.V.*, a state has ample viewpoint-neutral methods of vindicating the governmental interests at stake. *See id.* at 395-96. There is no valid governmental interest underlying cross-burning statutes that cannot be vindicated through content-neutral criminal statutes. Laws of general applicability, proscribing palpable conduct that incites or threatens physical harm, do not violate the First Amendment. Beyond that, under this Court's ruling in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), hate *crime* laws, singling out for special punishment conduct undertaken out of biased motivation, are also constitutional. The legislative objectives that animate the enactment of cross-burning statutes may be achieved without throwing the First Amendment into the fire. *See Texas v. Johnson*, 491 U.S. 397, 418 (1989).

3. Washington

Contrary to the argument advanced in Virginia's Petition for *Certiorari*, the decision of the Supreme Court of Washington in *State v. Talley*, 858 P.2d 817 (Wash. 1993) is not in genuine conflict with the decision of the Supreme Court of Virginia. In *Talley* the Supreme Court of Washington interpreted and applied a relatively complex Washington statute that contained elements of classic "hate crimes" legislation, such as provisions enhancing the penalty for otherwise punishable crimes committed out of biased motivations, as well as elements of classic hate speech laws, such as proscriptions on the certain symbolic

expression, such as cross-burning.[3] Much like the case at bar, *Talley* was a consolidated appeal arising from two different cross-burning incidents. One involved a

[3]The Washington statute, RCW 9A.36.080, read:

> (1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:
>
> > (a) Causes physical injury to another person; or (b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap. However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or (c) Causes physical damage to or destruction of the property of another person.
>
> (2) The following constitute per se violations of this section:
>
> > (a) Cross burning; or
> > (b) Defacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim.
>
> (3) Malicious harassment is a class C felony.

white person's burning of a cross in his own front yard to intimidate and discourage a mixed-race family from moving in next door. A second involved a cross burned by a group of teenagers in the yard of an African American family, apparently motivated by racial ill will toward a member of that family, who was a fellow student at their high school.

The Washington statute at issue in *Talley* was principally a content-neutral law targeting "malicious harassment" in which the victim was selected on the basis of the victim's "race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap." RCW 9A.36.080 (1). To violate the statute the perpetrator had to either inflict physical injury on the victim, damage another's property, or (by words or conduct) place the victim in reasonable fear of harm to his person or property or harm to the person or property of a third person. RCW 9A.36.080(1)(a)-(c). The statute described as examples words or conduct that included, but were not limited to:

> (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap.

RCW 9A.36.080(1)(b).

Two other provisions of the Washington statute seemed to cut in somewhat different directions. The statute contained a caveat plainly aimed at protecting freedom of expression, stating that "it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person." *Id.* On the other hand, the statue also contained two *per se* violations, one of which was "[c]ross burning," and the other of which was "[d]efacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim." RCW 9A.36.080(1)(2).

The Supreme Court of Washington viewed the state statute as divisible into two conceptually distinct components. Section (1) of the law, in the court's view, was a content-neutral hate crimes law. Section (1) dealt with victim selection and with the perpetrator's biased motivation. While the law did use as examples of prohibited conduct the use of cross-burning and other traditional hate symbols, the perpetrator's use of these forms of expression did not *per se* constitute violations of the law, but instead were merely *evidence* of the perpetrator's biased victim selection or biased intent. The Supreme Court of Washington thus upheld Section (1) of the Washington statute, and in doing so anticipated this Court's own subsequent ruling in *Wisconsin v. Mitchell*, in which this Court made clear that pure hate-crime laws, which are calibrated to the

motivation of the actor, and which use hate speech merely in an evidentiary sense to establish that biased motivation, are constitutional. *Wisconsin v. Mitchell*, 508 U.S. at 488.

This aspect of the *Talley* decision does not conflict with the ruling below of the Supreme Court of Virginia, for nothing in the opinion below would preclude Virginia from enacting or enforcing a content-neutral "hate crime" law similar to that of Washington's, in which specific expressive symbols *as such* are not targeted for proscription.

The second aspect of the *Talley* decision dealt with Section (2) of the Washington statute, which made certain expressive conduct, such as cross-burning or symbols historically used to connote hatred, *per se* violations of the law. The Supreme Court of Washington did *not* uphold this element of the law, but instead struck down this part of the Washington statute, holding that it was a violation of the First Amendment principles established in *R.A.V.* Virginia in is Petition for *Certiorari* seeks to distinguish the Virginia statute from the Washington statute on the grounds that the presumption contained in the Virginia law making cross-burning prima facie evidence of an intent to intimidate is merely permissive, whereas cross-burning was rendered a *per se* violation of the Washington statute. This does articulate a difference between the two laws, but it does not place these two decisions in conflict. The most that can be said is that the Supreme Court of Virginia went beyond what the Supreme Court of Washington held in extending its understanding of the First Amendment prohibition to include even a permissive inference drawn from cross-

burning. A ruling extending a principle adopted in another jurisdiction does not create a conflict with the law of that jurisdiction. The Supreme Court of Washington did, of course, sustain Section (1) of the Washington statute, which did list cross-burning as among the examples of conduct that could be deemed "malicious harassment" undertaken out of a biased motivation. In doing so, however, the state of Washington was not sustaining a "permissive inference" similar to that contained in the Virginia statute, and the *Talley* ruling on this point does not conflict with the decision of the Supreme Court of Virginia in *Black v. Commonwealth* holding the prima facie evidence provision of the Virginia statute unconstitutional. The Washington Supreme Court made it clear that the non-exhaustive examples listed in the Washington statute, which included cross-burning, merely involved the evidentiary use of speech to establish biased intent. There is a fundamental difference between the evidentiary use of hate speech to establish the bias motivation requirement for a hate crime, and the creation of a statutory presumption–rebuttable or non-rebuttable–that certain symbols are *inherently* criminal. *See Wisconsin v. Mitchell*, 508 U.S. at 488 ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

4. The Federal Courts of Appeal

Neither federal circuit decision relied upon by the Commonwealth poses a direct conflict with the holding below. The language and rationales of those decisions, however, are at least somewhat in tension with the underlying rationales advanced by the Supreme Court of Virginia. The United States Court of Appeals for the Eighth Circuit, in *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994), sustained a prosecution under federal laws arising from the same cross-burning incident that was the subject of this Court's holding in *R.A.V.* The Eighth Circuit distinguished *R.A.V.* because the federal statutes under which the prosecutions were brought, 18 U.S.C. § 241,[4] and 42 U.S.C. § 3631,[5] were both content-neutral laws

[4] 18 U.S.C. § 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, ... [they shall be guilty of an offense against the United States].

[5] 42 U.S.C. § 3631 provides:

> Whoever . . . by force or threat of force willfully injuries [sic], intimidates or interferes with, or attempts to injure, intimidate or interfere with--
>
> (a) any person because of his race, color, religion, sex, handicap ... familial status ... or national origin and because he is ... occupying ... any dwelling . . .
>
> [shall be guilty of an offense against the United States].

that made no mention of cross-burning or any other form of expressive activity. Cross-burning was the method used by the defendants to engage in intimidation, but the statute under which the defendants were charged was neutral:

> The government points out that 18 U.S.C. §§ 241 and 42 U.S.C. §§ 3631 are not directed toward protected speech, but are directed only at intentional threats, intimidation, and interference with federally guaranteed rights. The government further emphasizes that the statutes punish *any* threat or intimidation, or conspiracy to threaten or to intimidate, violating the statutes regardless of the viewpoint guiding the action. This, the government contends, distinguishes prosecution under these statutes from prosecution pursuant to the St. Paul ordinance invalidated in *R.A.V.* We agree.

J.H.H., 22 F.3d at 825.

So too, in *United States v. Hayward*, 6 F.33d 1241 (7th Cir. 1993), the United State Court of Appeals for the Seventh Circuit upheld a cross-burning conviction under 42 U.S.C. § 3631, again on the ground that the statute (which is part of the Fair Housing Act, 42 U.S. C. §§ 3601-3631), was content-neutral. The Seventh Circuit in *Hayward* did discuss the indisputable reality that cross-burning is conduct imbued with well-recognized symbolic meaning in the United States. Thus the Seventh Circuit explained:

> In this case, the evidence showed that the defendants burned the crosses to tell those in the Jones household (and no doubt to anyone else who saw the burning crosses) that black people were unwelcome in Keeneyville and that association with blacks was not approved. Anyone who saw the burning crosses, especially those in the Jones household, was highly likely to understand their meaning. Indeed, a burning cross may provide different connotations to different people. . . . No doubt, the defendants wanted to *express* their dislike, even hatred, of blacks through the cross burnings. But the act of cross burning also promotes fear, intimidation, and psychological injury. Therein lies the reason cross burning, as done in this case, lacks First Amendment protection.

Hayward, 6 F.3d at 1249-1250. In this quoted passage from *Hayward*, as well as in other passing observations contained in that opinion, there are suggestions that symbolic expression resulting in "oppression" or "psychological injury" (vaguely defined) might suffice, in the judgment of the Seventh Circuit, to remove that symbolic expression from the protections of the First Amendment. Moreover, it is not clear that the federal statute interpreted in *Hayward*, or the Seventh Circuit's interpretation of that statute, would comport with a sound interpretation of *Brandenburg v. Ohio*, 395 U.S.

444 (1969). Because the Supreme Court of Virginia held the Virginia cross-burning law void on its face under the rationale of *R.A.V.*, the Court did not reach the various *Brandenberg* claims advanced by Elliott, O'Mara, and Black below. It should be emphasized, however, that nothing in the opinion of the Supreme Court of Virginia prevents the state from adopting and enforcing a *content-neutral* prohibition against hate crime, provided it meets the requirements of *Brandenburg*, and to the extend the decisions of the Eighth Circuit and Seventh Circuit understood the federal statutes before them to be content-neutral, there is no direct conflict between those decisions and the decision of the Supreme Court of Virginia below.

CONCLUSION

Under our First Amendment, it is not the action of a defendant who burns a cross that most matters, but the wording of the act under which the defendant is charged. A person who burns a cross to threaten or intimidate another may be convicted under a properly drawn statute, a statute that does not target expression. When cross-burning is used as a vehicle to express threats or intimidation, it is not constitutionally protected, *provided* that the law under which it is prosecuted is not unconstitutionally infected.

The decision of the Supreme Court of Virginia below was sound. The court conscientiously applied core First Amendment principles in unpalatable circumstances. The conflicting decisions of other jurisdictions, candidly discussed in this Brief, fail to give full resonance to the First Amendment's sweeping command forbidding the abridgement of freedom of

speech. To the extent that the Supreme Court of Virginia's interpretation of that ringing command differs from some (though not all) of the decisions of other jurisdictions, those courts, and not the Supreme Court of Virginia, are the tribunals in error.

Respectfully submitted,

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