No. 01-1107

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

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

Respondents.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

(Intentionally left blank)

QUESTIONS PRESENTED

1) Does Virginia's statute prohibiting burning a cross with intent to intimidate violate the rule of *R.A.V.* v. *St. Paul*, by discriminating between types of threats on the basis of content unrelated to the state's legitimate interest in protecting people from threats?

2) Does the statute prohibit speech other than constitutionally proscribable threats? If so, are those applications severable?

3) After severing any severable, invalid applications, is the statute substantially overbroad?

(Intentionally left blank)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

State Statute

Miscellaneous

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

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

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a statute enacted to protect the people from terrorist threats. The Supreme Court of Virginia held that the First Amendment precludes enforcement of this

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   All parties have given written consent to the filing of this brief.

statute in the present case even though the defendants' act is not protected expression. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On May 2, 1998, defendants Richard Elliott and Jonathan O'Mara, along with David Targee, attempted to burn a cross in the back yard of James S. Jubilee. Mr. Jubilee is a neighbor of Elliott's, and there had been a dispute between them arising from Elliott firing guns in his back yard. *Black* v. *Commonwealth*, 262 Va. 764, 768, 553 S. E. 2d 738, 740 (2001).

O'Mara pleaded guilty to attempted cross burning and conspiracy to commit cross burning, Va. Code § 18.2-423, but reserved the right to appeal on the issue of the constitutionality of that statute. Elliott went to trial on the same charges and was convicted by a jury of attempt but acquitted of conspiracy. 262 Va., at 769, 553 S. E. 2d, at 740-741. The Court of Appeals affirmed. *O'Mara* v. *Commonwealth*, 33 Va. App. 525, 535 S. E. 2d 175 (2000).

Defendant Barry Black burned a cross at a Ku Klux Klan rally, which was held on private property with permission of the owner. *Black*, 262 Va., at 782, 553 S. E. 2d, at 748 (Hassell, J., dissenting). A neighbor testified that she feared arson of her home and harm to her children. *Id*., at 782, 553 S. E. 2d, at 749. The Court of Appeals affirmed in an unpublished opinion, relying on its *O'Mara* opinion. See *id*., at 769, 553 S. E. 2d, at 741 (majority); App. to Pet. for Cert. 46.

The Virginia Supreme Court consolidated the cases and reversed in a 4-3 decision. "We conclude that . . . the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad." 262 Va., at 768, 553 S. E. 2d, at 740.

SUMMARY OF ARGUMENT

When a court invokes the First Amendment "overbreadth" doctrine, it refuses to enforce a statute in the case before it, even though the statute does not conflict with the Constitution as applied to that case. This result is contrary to the basis for judicial review, contrary to the people's right of self-government, and of doubtful legitimacy. If "overbreadth" is not to be abandoned altogether, it should be applied sparingly and as a last resort.

The statute at issue in this case prohibits threats, which are not protected speech. It does distinguish some threats from others on the basis of content, but it does so on a permissible basis. Cross burning is a particularly threatening type of threat. The fact that an otherwise valid statute has a greater impact on one group of speakers than another does not render it invalid.

The Virginia Supreme Court conducted its overbreadth analysis without considering severability. This is an error of federal law under *Brockett* v. *Spokane Arcades*. The determination of whether a statute actually is severable is a question of state law, not reviewable by this Court, but no such determination was made here. *If* this statute has any invalid applications potentially rendering it overbroad, severability must be considered before deciding whether any unseverable, invalid applications are substantial in comparison to the valid applications.

ARGUMENT

I. The overbreadth doctrine should be used sparingly, and only as a last resort.

A. The Overbroad Overbreadth Doctrine.

Defendants Elliott and O'Mara committed the act of which they were convicted. The state *may* constitutionally punish this act. The state *has* passed a statute clearly prohibiting and punishing this act. Yet the Supreme Court of Virginia nonethe-

less held that the Constitution of the United States prohibits the enforcement of that statute in this case. Such a result would surely strike Jane and John Q. Public as odd. The logic of the overbreadth doctrine often leads to extremes. See *Lewis* v. *New Orleans*, 415 U. S. 130, 136-137 (1974) (Blackmun, J., dissenting). When that happens, it is time to reexamine the premises.

The essence of an overbreadth challenge is that even though the party before the court has committed an act which the legislature can and has prohibited, he should nonetheless escape punishment because the same statute may, in other contexts, chill the exercise of First Amendment rights. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980). Generally, such an argument requires the court to deal with hypothetical situations "and pass upon . . . constitutionality . . . as an abstract question." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). Such a course is unwise and possibly illegitimate. In the present case, there is a third defendant whose case is joined for the purpose of appeal who has at least a plausible argument that the statute cannot be constitutionally applied to his conduct. While that fortuity mitigates the abstraction problem, it still leaves the problem of formulating a constitutional rule broader than needed to cover the case before the court.

> "That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to

be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Ibid*.

Liverpool's statement that the Court has "rigidly adhered" to these rules is no longer true. The overbreadth doctrine routinely involves both advance rulings on constitutionality and the formulation of rules broader than necessary for decision. These deviations have not gone unnoticed by the Members of the Court. Individual opinions have questioned both the legitimacy and the wisdom of the overbreadth doctrine. See *Lewis*, 415 U. S., at 136-142 (Blackmun, J., dissenting); *New York* v. *Ferber*, 458 U. S. 747, 780-781 (1982) (Stevens, J., concurring in the judgment); *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 976-978 (1984) (Rehnquist, J., dissenting). Majority opinions have also expressed reservations. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610-611 (1973).

These reservations are well-founded. If the overbreadth doctrine is not to be abandoned altogether, it should at the very least be kept on a tight leash.

B. The Legitimate Scope of Judicial Review.

Although people speak freely of courts "striking down" statutes, nowhere in the Constitution is such a function assigned to the judicial branch. Instead, the Constitution establishes a hierarchy of laws, and the judiciary must necessarily apply the higher law in preference to the lower one when the laws conflict. That preference is explicit in the case of state statutes, U. S. Const., Art. VI, cl. 2, and implicit in the case of federal statutes.

The legitimacy of judicial review is well established in cases where the Constitution and the statute actually command different results in the case before the court. See, *e.g.*, *Bayard* v. *Singleton*, 1 N. C. 15, 18 (1787) (jury trial); *United States* v. *Eichman*, 496 U. S. 310, 319 (1990) (flag burning). In these

situations, the court must decide whether the statute conflicts with the Constitution because and *only* because there is no other way to decide the case.

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> "So if a law be in opposition to the constitution; *if both the law and the constitution apply to a particular case*, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> "If, then, the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern *the case to which they both apply*." *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803) (emphasis added).

Legitimate judicial review is limited to the necessity of deciding cases, as outlined in *Marbury*. *Broadrick*, 413 U. S., at 611. That necessity is limited to cases to which "both the law and the constitution apply." If the Constitution does not apply to a case, then the case is governed solely by the statute, and there is no constitutional issue to decide.

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Citations.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [Citation.] These principles rest on

> more than the fussiness of judges. They reflect the conviction that under our constitutional system *courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws*." *Id*., at 610-611 (emphasis added).

This is not a matter of policy; this is a matter of the boundaries of the judicial function. It is a matter of usurpation of "the prerogative of democratic government." *Lewis*, 415 U. S., at 140 (Blackmun, J., dissenting); see also *Ferber*, 458 U. S., at 767-768, n. 20 (Article III implications of the *Liverpool* principle).

The overbreadth doctrine is sometimes justified by "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). But does the end justify the means?

Surely no one would contend that a court could reach out and "strike down" a statute on its own initiative, with no case before it at all. The patent illegitimacy of such a decree requires that the statute be tolerated until *someone* brings a challenge. Why can it not be further tolerated until a challenge is brought in a case where the constitutional right in question is *genuinely* at issue? Further, once such a challenge is brought, why is it necessary to declare the statute invalid any further than is necessary to avoid conflict with the Constitution in actual application?

With modern procedures, there is no need to await a criminal prosecution. See *Munson*, 467 U. S., at 977-978 (Rehnquist, J., dissenting). While the cost of declaratory and injunctive relief is a concern, there appears to be a more than adequate supply of litigation. The panhandlers of New York's subway obtained representation. See *Young* v. *New York City Transit Auth*., 903 F. 2d 146, 147 (CA2 1990). When the State of Washington passed a "moral nuisance" statute, a complaint was on file within days. *Brockett* v. *Spokane Arcades, Inc.*, 472

U. S. 491, 507 (1985) (O'Connor, J., concurring). Even the Pledge of Allegiance has attracted a willing and able opponent in litigation. See *Newdow* v. *U. S. Congress*, 292 F. 3d 597 (CA9 2002) (stay granted June 27, 2002).

The notion that the First Amendment is suffering from a dearth of litigants seems out of touch with reality. Even if necessity could ever justify an otherwise improper constitutional edict, which is doubtful, a stronger showing of necessity should be required.

C. Collateral Damage.

The invalidation of an entire statute legalizes conduct that the people, through the democratic process, have deemed it necessary to prohibit. Even if the legislature enacts a new statute, it cannot do so retroactively. See U. S. Const., Art. I, § 10. Given that the legislative process is constructed to make blocking legislation easier than enacting legislation, it is not always possible to enact a new statute even if favored by a majority. It may be true that "if some constitutionally unprotected speech [or conduct] must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *Houston* v. *Hill*, 482 U. S. 451, 462, n. 11 (1987). Whether the price is *worth* paying, however, begs the question of whether the price *needs* to be paid.

This Court has been reluctant to apply the overbreadth doctrine where the statute has a substantial number of valid applications. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974). Furthermore, the overbreadth doctrine must be carefully tied to the circumstances warranting its exception to the usual rules of constitutional adjudication. *New York* v. *Ferber*, 458 U. S., at 769. Overbreadth is a "last resort." *Ibid*. (quoting *Broadrick*, 413 U. S., at 613).

When the legislative branch regulates in the area of fundamental rights, the judiciary admonishes that the least drastic means must be employed. See, *e.g.*, *Shelton* v. *Tucker*, 364

U. S. 479, 488 (1960). The judiciary should heed the same advice. The right of self-government is a fundamental right. See U. S. Const., Art. IV, § 4; The Declaration of Independence, para. 2 (1776). The overbreadth doctrine should be invoked, if at all, only when no less drastic interference with democratic government is available.

This is not such a case. The principal scope of the statute is the prohibition of threats, which lie outside the protection of the First Amendment. If the statute does prohibit any protected expression, a court must ask if those applications are severable before applying the overbreadth doctrine. If there is any remaining overbreadth at that point, it is not substantial.

II. The statute validly prohibits unprotected threats.

A. Proscribable Threats.

A statute which prohibits a threat is prohibiting speech or expressive conduct on the basis of its content. This Court's previous cross-burning case, *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), discussed the constitutional limits of such a prohibition.

> "Content-based regulations are presumptively invalid. [Citations.] From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which 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 382-383 (quoting *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)).

Threats are one such limited area. See *id.*, at 388. Threats as such contribute little or nothing to the marketplace of ideas. It is difficult to imagine any idea expressed by a threat, other than the intent to commit a crime, that could not be expressed without a threat. A government which actually wanted to "drive certain ideas or viewpoints from the marketplace,"

Simon & Schuster, Inc. v. *Members of N. Y. State Crime Victims Bd.,* 502 U. S. 105, 116 (1991), would find such a prohibition a particularly ineffective means toward that end.

On the other side, "the social interest in order" weighs particularly heavy in the case of threats. In most free speech cases, the harm caused by the speech is a diffuse one, affecting society in general but not causing specific harm to a particular individual or a small group of people, such as a family. See, *e.g.*, *United States* v. *Eichman*, 496 U. S. 310, 312 (1990) (flag burning); *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. __, 152 L. Ed. 2d 670, 681, 122 S. Ct. 1728, 1734 (2002) (plurality opinion) (secondary effects of "adult" businesses); *Brandenburg* v. *Ohio*, 395 U. S. 444, 446 (1969) (*per curiam*) (vague reference to possibility of "some revengance"). A threat directed to a specific person is quite different. See Reed, The State Is Strong But I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence, 38 Am. Bus. L. J. 177, 197-198 (2000). It causes that person to live in fear. It may cause the person to forego the exercise of his right to vote or to live in the neighborhood of his choice. Few, if any, kinds of speech cause more acute harm merely by their utterance than do threats.

The reduced danger of idea suppression and the direct harm that they cause make threats a distinct analytical category, different from both the abstract advocacy of violent action and "fighting words." Statutes directed at advocacy, such as those at issue in *Brandenburg* and *Dennis* v. *United States*, 341 U. S. 494, 496 (1951), present a far greater danger to the expressions of ideas. Revolutionary ideology cannot be expressed without at least bordering on the violation of such statutes. A prohibition on threatening people, in contrast, is easily avoided by anyone interested only in expressing ideas.

An equally important distinction is that neither advocacy nor fighting words *directly* cause any serious harm, while threats do. Advocacy of violence and fighting words cause

harm only indirectly, by inciting another person to violence. The "substantive evil[]," see *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), which justifies the prohibition is only the act, not the advocacy of it. A time interval between advocacy and act attenuates the connection and weakens the state's interest in prohibiting the advocacy. See *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925) (Holmes, J., dissenting). Thus, only incitement to *imminent* violence may be prohibited. See *Brandenburg*, 395 U. S., at 447. A threat causes harm to its target by itself, immediately upon receipt, regardless of whether it is ever carried out and regardless of whether it is conditional. See *United States* v. *Gilbert*, 884 F. 2d 454, 458 (CA9 1989); Reed, 38 Am. Bus. L. J., at 197-198. The harm threatened need not be immediate or unconditional before the state may prohibit the threat, because the threat itself causes substantial harm immediately and unconditionally.

This Court has repeatedly recognized that "threats of violence are outside the First Amendment . . . ." *R. A. V.*, 505 U. S., at 388; *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 773 (1994). However, this Court has not yet defined what is a proscribable threat. We know from *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*), that a statement which, in its context, was only "political hyperbole" is not a "true 'threat,' " but that case provides very little guidance beyond its specific facts. *Rankin* v. *McPherson*, 483 U. S. 378, 386-387 (1978) similarly acknowledges that threats may be proscribed, holds that the statement in question was not a threat, citing *Watts*, and sheds little additional light.

United States v. *Orozco-Santillan*, 903 F. 2d 1262, 1265 (CA9 1990) stated a test for a "true threat." "Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." Other circuits and state courts have adopted similar tests. See, *e.g.*, *United*

States v. *Fulmer*, 108 F. 3d 1486, 1491 (CA1 1997); *United States* v. *Khorrami*, 895 F. 2d 1186, 1192 (CA7 1990); *United States* v. *J. H. H.*, 22 F. 3d 821, 827-828 (CA8 1994); *In re Steven S.*, 25 Cal. App. 4th 598, 608, 31 Cal. Rptr. 2d 644, 648 (1994).

The only requirement is that a reasonable person in the position of the target would take the threat as a serious one. There is no requirement that the threat be immediate or unconditional, that the maker subjectively intend to carry it out, or even that he have the ability to do so. See *United States* v. *Mitchell*, 812 F. 2d 1250, 1256 (CA9 1987). Proscribable threats are not limited to bodily injury, notwithstanding some loose language in some cases. Serious threats to property may also be prohibited. See *McCalden* v. *California Library Ass'n*, 955 F. 2d 1214, 1217, 1222 (CA9 1992) (threat to property, First Amendment defense rejected). A threat to burn down a person's house if he does not move out of the neighborhood is surely within the power of the state to prohibit.

There can be no doubt that a reasonable person in Mr. Jubilee's position would take a burning cross on his property as an expression of a serious intent to do harm. Russell Jones, the target of the cross-burning in *R. A. V.* and *J. H. H.*[2] testified, "a cross burning represents 'a threat of death' to an African-American, a 'warning that you have to get out of this neighborhood . . . [or] you will be sorry.' " *J. H. H.*, 22 F. 3d, at 827. The Supreme Court of Florida noted that cross-burning "is one of the most virulent forms of 'threats of violence' . . . ." *State* v. *T. B. D.*, 656 So. 2d 479, 481 (1995). A cross burning directed at a specific target is an unprotected threat, well within the power of the state to prohibit.

---

2. After this Court's decision in *R. A. V.*, the United States Attorney charged R. A. V. and his cohorts J. H. H. and L. M. J. under the federal civil rights laws. See *J. H. H.*, 22 F. 3d, at 824.

B. Content Discrimination.

The Virginia Supreme Court held that Virginia's cross-burning statute ran afoul of the rule of *R. A. V.* because it is "selective regulation of speech based upon content." *Black* v. *Commonwealth*, 262 Va. 764, 771, 553 S. E. 2d 738, 742 (2001) (capitalization omitted). This is an overly broad interpretation of *R. A. V.*

R. A. V. held that areas of speech that can be "regulated because of their constitutionally proscribable content" may not "be made the vehicle for content discrimination unrelated to their distinctively proscribable content." 505 U. S., at 383-384 (emphasis omitted). On the other hand, "content discrimination" is permitted "[w]hen the basis for [it] consists entirely of the very reason the entire class of speech at issue is proscribable . . . ." *Id*., at 388. For example, the state may discriminate among obscene materials by the degree of obscenity. *Ibid*. Of particular relevance to this case, *R. A. V.* noted that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *Id*., at 388-389. Analogously, a state may prohibit cross burning selectively if the degree of terror caused by this particular form of threat "is in its view greater there."

The distinction between valid content discrimination along the same dimension that makes the category proscribable in the first place and invalid discrimination based on some other aspect of the content is similar to the so-called "content-neutral" requirement for "time, place, or manner" restrictions. *Id*., at 386.

> "And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements." *Ibid*. (emphasis in original).

The test for "time, place, or manner restrictions" is, in turn, substantially equivalent to the test for "expressive conduct" regulation. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). The corresponding prong of that test is that "the governmental interest is unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). Adapted to the present case, the test is whether the governmental interest in prohibiting cross-burning threats is related to the reason that threats in general are not protected speech.

Assessment of governmental interests and the purposes of legislation is a "hazardous matter." *Id*., at 383. Laws have multiple effects. If one effect of a law is permissible and another is not, application of the test requires a court to identify which is the "purpose." This issue was confronted by the plurality in *Erie* v. *Pap's A.M*., 529 U. S. 277, 289-292 (2000), a nude dancing case.[3]

In *Erie*, the state court had found two purposes—the legitimate purpose "to combat the negative secondary effects" of nude dancing and the illegitimate purpose of "suppressing the erotic message of the dance." *Id*., at 291-292. That second purpose, the state court held, invalidated the statute. *Id*., at 292. "A majority of the Court rejected that view in *Barnes*, and [the plurality did] so again" in *Erie*. *Ibid*. "[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Ibid*.; *O'Brien*, 391 U. S., at 383.

Given the burning cross's history as the symbol of the Ku Klux Klan, there are two obvious reasons for distinguishing a cross burning from other forms of threats—the greater terror it

---

3. Justices Scalia and Thomas concurred in the result on the broader grounds that regulation of nude dancing " 'is not subject to First Amendment scrutiny at all.' " *Id*., at 307-308 (quoting *Barnes* v. *Glen Theatre, Inc*., 501 U. S. 560, 572 (1991) (Scalia, J., concurring in the judgment)). Hence, the plurality opinion is the holding of the court under the rule of *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

strikes into the hearts of its targets and its association with racist ideology. See *In re Steven S.*, 25 Cal. App. 4th 598, 606-607, 31 Cal. Rptr. 2d 644, 647 (1994). The first reason is plainly legitimate. Congress can legitimately distinguish threats to the President from other threats "since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." *R. A. V.*, 505 U. S., at 388 (citing *Watts*, 394 U. S., at 707). Beyond dispute, "protecting individuals from the fear of violence," *ibid.*, has "special force" when applied to a form of threat used by a large, notorious terrorist organization.

The "alleged illicit motive" in this case, cf. *Erie*, 529 U. S., at 292, is to suppress " 'the controversial racial and religious messages which [cross burnings] impart.' " *Black*, 262 Va., at 776, 553 S. E. 2d, at 745 (quoting *State* v. *Sheldon*, 332 Md. 45, 629 A. 2d 753, 757 (1993)). As an initial matter, the notion that the Virginia General Assembly of 1952 sought to suppress the segregationist ideology motivating the Klan's activities borders on absurd to one who lived there during the civil rights struggles of the 1950s and 1960s. This was a jurisdiction that maintained *de jure* segregated schools for a decade in defiance of *Brown* v. *Board of Education*, 347 U. S. 483 (1954).[4] It was the Klan's terrorist means, not its segregationist ends, that triggered widespread revulsion and motivated the 1952 legislature to enact this statute almost unanimously. See App. to Pet. for Cert. 100. "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R. A. V.*, 505 U. S., at 390.

The First Amendment does not require that an otherwise valid limitation on speech avoid disparate impact on different

4. Counsel for *amicus* attended public schools in Fairfax County, Virginia, from 1960 to 1971. The county maintained separate black and white schools through the 1964-1965 school year, and finally integrated in Fall 1965.

speakers. A restriction on the volume of music has a much greater impact on hard rockers than on string quartets, but the limitation is valid nonetheless. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). The prohibition on draft card burning obviously impacted the expressive conduct of those who opposed the Vietnam War and not those who favored it, but the prohibition was still valid. See *O'Brien*, 391 U. S., at 386; *Erie*, 529 U. S., at 292. The fact that the present statute has a greater impact on the expression of hate-spewing bigots than it does on believers in racial equality does not render it invalid if it otherwise qualifies as permissible regulation of a particularly harmful form of threat.

In *R. A. V.*, the purpose of discrimination on the basis of message was apparent on the face of the ordinance, and no amount of narrowing construction by the state court could save it. By its terms, "the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender.' " 505 U. S., at 391. In *Erie*, the state court found a dual purpose, and this Court held that the legitimate purpose was sufficient. See 529 U. S., at 291-298. In the present case, the Virginia Supreme Court focused only on what it perceived as "hostility" toward an "underlying message" of "expression of bigotry" in the burning cross, 262 Va., at 779, 553 S. E. 2d, at 746, ignoring the entirely legitimate reason for the prohibition. This raises the question of whether any implicit finding of legislative purpose in this discussion is binding on this Court, as a state high court interpretation of a state statute.

Wisconsin v. *Mitchell*, 508 U. S. 476 (1993) comes closest to the present case in this regard. The state high court's conclusion that the "hate crime" statute punished thought rather than conduct was not a binding construction of the statute. See *id*., at 483-484. The state court's construction "in the sense of defining the meaning of a particular statutory word or phrase,"

id., at 484, is binding, but "this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law." *New York* v. *Ferber*, 458 U. S. 747, 767 (1982). A state court should not be able to insulate its decision from this Court's review simply by ignoring an obvious, legitimate purpose of a statute.

This statute prohibits conduct which the state has every right to prohibit. To the extent that it distinguishes a type of threat on the basis of content, it does so on the wholly legitimate basis of the exceptionally threatening effect of that content. The statute is valid as applied to the act of defendants Elliott and O'Mara. The only remaining question in their case is whether the statute is nonetheless invalid as "overbroad."

III. Narrowing construction and severability must be considered before determining if any overbreadth is substantial.

Defendant Black burned a cross at a Ku Klux Klan rally held on private property with the permission of the owner. The requisite intimidation was found from the reaction of a neighbor, who feared arson of her house and harm to her children. See *Black* v. *Commonwealth*, 262 Va. 764, 782, 553 S. E. 2d 738, 748-749 (2001) (Hassell, J., dissenting).

Unlike Elliott and O'Mara, Black has a plausible argument that his conduct falls in the zone of protected expression rather than unprotected threats. The California Court of Appeal distinguished the two types of cross burnings in *In re Steven S.*, 25 Cal. App. 4th 598, 606-607, 31 Cal. Rptr. 2d 644, 647 (1994) (emphasis in original, footnote omitted):

> "Cross burning conveys a message—the Ku Klux Klan's creed of racial hatred. As such, it implicates the First Amendment's guarantee of freedom of speech. [Citations.]
>
> "But an *unauthorized* cross burning *on another person's property*, which we shall call 'malicious' cross burning for

> shorthand purposes, as distinguished from a ritual cross burning at a Klan gathering, 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."

Amicus understands that the Commonwealth will argue that under the circumstances of this case, Black's cross burning comes within the definition of proscribable conduct. We will not repeat that argument here. Instead, we will address the question of whether, if *Steven S.* has drawn the constitutional line correctly, the Virginia statute must be stricken in its entirety as "overbroad."

A. Narrowing Construction.

The first and simplest way to deal with an overbreadth challenge to a statute is to construe the statute not to apply outside the constitutional boundaries. The dissent in the present case interpreted the statute to apply only to "real threats." See 262 Va., at 793, 553 S. E. 2d, at 754. So construed, there is no overbreadth question. Black's case would reduce to routine questions of correctness of jury instructions and sufficiency of the evidence. The case might also qualify for the more exacting review of facts on appeal sometimes afforded "in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 503 (1984); see *United States* v. *Hanna*, 293 F. 3d 1080, part III (CA9, June 20, 2002).

In the present case, the Virginia Supreme Court did not discuss in any detail the correspondence between the boundaries of the statute and the constitutional "threat" limit because of its mistaken view that the statute transgressed the rule of *R. A. V.* See part II, *supra*. This omission puts this Court in the awkward position of considering an overbreadth challenge without a definitive statutory interpretation from the state court.

Cf. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 509 (1985) (O'Connor, J., concurring).

If the *R. A. V.* question is resolved as suggested in part II, *supra*, there are several alternative ways for this Court to deal with the statutory interpretation question. The Court could remand for that determination, certify a question to the Virginia Supreme Court, or assume for the sake of argument that the statute does reach some protected expression and proceed to the question of partial versus full invalidation on that assumption. The latter course was taken in *Brockett*, 472 U. S., at 504.

B. Severability.

Assuming that the statute reaches cross burnings which are not targeted at anyone in particular, and further assuming that such applications of the statute cross the constitutional line, under the principles set forth in *Brockett*, "[f]acial invalidation of the statute [is] nonetheless improvident." *Id.*, at 501. Partial invalidation is not limited to excising particular words or phrases from statutory language. An overbroad statute may also be cured by identifying valid and invalid applications of its language, so long as that can be done in a way that cures the uncertainty of applications and resulting chilling effect on protected expression. In *United States* v. *Grace*, 461 U. S. 171, 175 (1983), a statute regulating speech on the Supreme Court "grounds" was invalidated only as applied to the perimeter sidewalks. See *Brockett*, *supra*, at 503. *Brockett* itself held that an obscenity statute could be valid as applied to some kinds of "lust" and invalid as to others. If "intimidating" under the Virginia statute really does extend further than constitutionally proscribable "threats," the statute is invalid to that extent, but only to that extent, and a simple holding to that effect by this Court or the Virginia Supreme Court is sufficient to cure any overbreadth. Following such a holding, there is no longer a "danger . . . of sweeping and improper application," *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), and the justification for applying the drastic overbreadth rule vanishes.

The Virginia Supreme Court focused its overbreadth analysis on the novel theory that threat of prosecution rather than actual application of the statute was a danger sufficient to warrant invalidation of the entire statute. See *Black*, 262 Va., at 777-778, 553 S. E. 2d, at 746; Pet. for Cert. 28-29. This holding is based on the final sentence of the statute: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Again, we leave to the Commonwealth the argument that this provision is constitutional. Assuming for the sake of argument that it does present a First Amendment problem, it was error as a matter of federal constitutional law to use this sentence to invalidate the entire statute without considering severability.

Severability is a matter of legislative intent. *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999). If the Virginia Supreme Court had actually considered severability and decided that the last sentence was not severable, that interpretation would be binding on this Court. The state court did not consider the question, though, and this appears to be a crystal clear case of severability. We need not speculate whether the legislature *would* have enacted the statute without the last sentence. Cf. *Brockett*, 472 U. S., at 506. We know it actually *did*. The language in question was added as the last amendment to the statute, in 1975. *Black*, 262 Va., at 776, 553 S. E. 2d, at 745.

New York v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982) noted in dictum that federal courts must consider severability and that state courts are "free" to do so. *Ferber* did not consider whether state courts must consider severability, as the issue was not presented. *Ferber* held that the "substantial overbreadth" principles of *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), apply to cases in the state courts as well as the federal courts.

> "While the construction that a state court gives a state statute is not a matter subject to our review, [citations], this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. It is only

> through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state-court decisions giving the Constitution too little shrift. A state court is not free to avoid a proper facial attack on federal constitutional grounds. [Citation.] By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution." *Ferber*, 458 U. S., at 767.

This rationale applies as much to the partial invalidation principle of *Brockett* as it does to the substantiality requirement of *Broadrick*, with one caveat. The principle requires the state court to consider severability, and its failure to do so is federal law error, reversible by this Court. A holding that the offending portion of a statute actually is not severable would be a holding of state law, not reviewable here.

CONCLUSION

To the extent it holds Virginia Code § 18.2-423 unconstitutional as content discrimination under the rule of *R. A. V.* v. *St. Paul*, the decision of the Supreme Court of Virginia should be reversed. The case should be remanded to determine whether the statute applies to any cross burnings which are not constitutionally proscribable threats, and if so, whether such applications are severable.

August, 2002

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation