No. 01-1107

# In The
# Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

*Petitioner,*

v.

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

*Respondents.*

**On Writ Of Certiorari**
**To The Supreme Court Of Virginia**

## BRIEF OF PETITIONER

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## QUESTION PRESENTED

Does the Virginia statute that bans cross burning with intent to intimidate violate the First Amendment, even though the statute reaches *all* such intimidation and is not limited to any racial, religious or other content-focused category?

## LIST OF PARTIES

The petitioner is the Commonwealth of Virginia. The respondents are Barry Elton Black, Richard J. Elliott and Jonathan O'Mara, each of whom was convicted under Virginia Code § 18.2-423, which prohibits cross burning with intent to intimidate.

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## BRIEF OF PETITIONER

The Commonwealth of Virginia respectfully petitions this Court to reverse the judgment of the Supreme Court of Virginia, which held that the First Amendment is violated by the Virginia statute prohibiting cross burning with "the intent of intimidating any person."

## OPINIONS BELOW

The Supreme Court of Virginia held that Virginia Code § 18.2-423 – which bans cross burning with the intent to intimidate – is unconstitutional and thus reversed the convictions of the three respondents. This decision is published as *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001), and is reprinted in the Joint Appendix at J.A. 269. The opinion of the Court of Appeals of Virginia, affirming the convictions of two respondents, Jonathan O'Mara and Richard J. Elliott, is published as *O'Mara v. Commonwealth*, 535 S.E.2d 175 (Va. App. 2000). It is reprinted at J.A. 258. The unpublished *per curiam* order of the Court of Appeals of Virginia, affirming the conviction of the third respondent, Barry Elton Black, is reprinted at J.A. 201. The letter opinion of the Circuit Court of Carroll County, overruling Black's motion to dismiss the indictment is reprinted at J.A. 7. The ruling whereby the Circuit Court of the City of Virginia Beach overruled Elliott's and O'Mara's motions to dismiss their indictments is reprinted at J.A. 222, 224.

## JURISDICTION

The decision of the Virginia Supreme Court was entered on November 2, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. A writ of certiorari was granted on May 28, 2002.

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Virginia Code § 18.2-423 states:

> 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.

## STATEMENT OF CASE

For a half-century, the Commonwealth of Virginia has banned the fear-inspiring practice of cross burning.

Enacted in 1952, the statute at issue – Virginia Code § 18.2-423 – was a well-advised response to domestic terrorism by the Ku Klux Klan.[1] Yet, the statute is not limited to that group, nor to those whose acts of intimidation spring from similar racial or religious bigotry. Instead, the statute bans cross burning by *anyone* whose intent is to intimidate *anyone* for *any reason*.

The case at bar involves a consolidated appeal arising out of three separate convictions for violations of the cross burning statute. Two co-defendants were convicted for a 1998 act of cross burning in Virginia Beach. The third conviction followed a separate cross burning incident in 1998 in Carroll County, part of rural southwestern Virginia. The facts of each case are as follows:

**Virginia Beach – May 2, 1998:** There is no evidence that these two respondents – Richard J. Elliott and Jonathan O'Mara – are members of the Klan or any similar group. The record does not show that they hold any particular views on politics or race or any other subject. They tried to burn a cross in the yard of Elliott's next door neighbor, James S. Jubilee, simply because they wanted to "get back" at Jubilee by intimidating him and his family.

A native Virginian and African-American, Jubilee had recently moved back to the Commonwealth from California, along with his wife and two sons. J.A. 226. The family

[1] The Virginia Supreme Court took notice of the public history of the times in which the cross burning statute was originally enacted, citing a series of nine newspaper articles appearing between 1949 and 1952. *Black*, 553 S.E.2d at 742 n.2, J.A. 274 n.2. Copies of these articles are reproduced at J.A. 312-26.

had lived in their new neighborhood for about four months when, on May 2, 1998, Jubilee asked Elliott's mother about "some shooting" that was going on behind the Elliott home. She explained that her son had a firing range where he shot firearms as a hobby. *Id*. at 228. The conversation was cordial. *Id*. at 228. Even so, Jubilee's inquiry so angered Elliott and O'Mara that – after drinking a lot of beer – they hatched a plan to burn a cross that night in Jubilee's yard. They were joined in this endeavor by a seventeen year-old friend, David Targee.

Late that night, the three of them rode onto Jubilee's land in a pick-up truck, planted their makeshift cross, set it afire and fled. Jubilee awoke the next morning – a Sunday – to find the partially burned cross stuck in the ground less than 20 feet from his house. *Id*. at 229-30. Initially furious, Jubilee soon became worried and very nervous. He was concerned about what might come next, and saw the burnt cross as "just the first round." *Id*. at 231. Jubilee called the police.

After an investigation, Elliott and O'Mara were identified as perpetrators. They were both indicted for attempting to burn a cross with intent to intimidate, in violation of Va. Code § 18.2-423.[2] Before trial, both defendants moved to dismiss the indictments claiming that the cross burning statute is unconstitutional. The trial court denied both motions. J.A. 222, 224.

[2] The third perpetrator, David Targee, was also charged and became the key witness for the prosecution. *See* J.A. 239-45. His case was handled in juvenile and domestic relations district court and is not addressed in the decision that is the subject of this writ of certiorari.

Tried by a jury on February 22-23, 1999, Elliott was convicted of attempted cross burning. J.A. 252**.** The circuit court sentenced Elliott to 90 days in jail and fined him $2,500. J.A. 254. Elliott appealed.

Meanwhile, after losing his motion to dismiss, O'Mara entered a conditional guilty plea under Va. Code § 19.2-254, thereby preserving his constitutional objection. The circuit court sentenced O'Mara to 90 days in jail and fined him $2,500. Half of the jail time and $1,000 of the fine were suspended. J.A. 257. O'Mara appealed.

With their cases consolidated on appeal, both O'Mara and Elliott maintained that § 18.2-423 is "unconstitutional as violative of the free speech and expression protections guaranteed by both the United States and Virginia Constitutions." *O'Mara*, 535 S.E.2d at 177, J.A. 259 (internal quotation marks omitted). The Virginia Court of Appeals disagreed:

> Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets *only* expressive conduct undertaken with the *intent to intimidate* another, conduct clearly proscribable both as *fighting words* and a *threat of violence*. The statute *does not discriminate* in its prohibition and is neither overbroad nor underinclusive.

*O'Mara*, 535 S.E.2d at 181, J.A. 268 (emphasis added). Thus, the Court of Appeals affirmed the convictions. *Id*. Elliott and O'Mara then appealed to the Virginia Supreme Court, which consolidated their cases with the appeal of the third cross burning defendant, whose case will now be discussed.

**Carroll County – August 22, 1998:** Unlike the other two respondents, Barry Elton Black is a Klansman. A leader in the Klan, Black led a rally and cross burning in Carroll County, Virginia, on the evening of August 22, 1998. J.A. 58-59. This incident took place on private property with the permission of the owner – but in public view, a fact the decision below does not note. While a part of the property could not be seen from the roadside, this was not the spot chosen for erecting the cross. Instead, it was erected and burned where passers-by could clearly see it. Standing 25 to 30 feet tall, the burning cross was visible along a three-quarter mile stretch of state roadway, where cars passed at the rate of about 40 to 50 miles per hour. *Id.* at 112-13.[3] The reaction of one black family driving along the road was noted by a deputy sheriff. They "stopped and looked across the field" toward the burning cross, then "took off at a higher than normal rate of speed." *Id.* at 112.

The burning cross was also clearly visible from 8 to 10 nearby houses, including the home of Rebecca Sechrist. *Id.* at 124. Her home was close enough that she could hear Klan speakers "talk real bad about the blacks and the Mexicans." *Id.* at 176. "One guy got up and said he would love to take a .30/.30 and just random[ly] shoot the blacks . . . ." *Id.* at 130. So intimidating was the scene that Mrs. Sechrist – who is neither black nor Hispanic – "sat there

[3] The very public nature of the display is confirmed by a photograph of the scene, showing the open field where the cross was burned and the long stretch of adjacent highway. J.A. 65-66, 192. Another photograph shows a secluded area on the same property where the Klan could have held its rally out of public view, without the intimidating effect on passers-by. J.A. 65-66, 193. *See also* J.A. 104-05 (describing alternative location behind trees on same property).

and . . . cried," terrified that the Klan might burn her home or harm her children. *Id. at* 131.

Admitting his responsibility for the cross burning, Black was arrested by the county sheriff and a deputy for violating Va. Code § 18.2-423. En route to jail, Black volunteered his complaint about "blacks and Mexicans . . . walking up and down the sidewalk with white women holding hands and taking all the jobs." He also asked "When is the white man going to stand up to the blacks and Mexicans in this area?" *Id.* at 155.

Black defended against the charge by challenging the constitutionality of the statute, moving to dismiss his indictment on the theory that the statute violates the First Amendment of the United States Constitution and comparable provisions of the Virginia Constitution. In a letter opinion, the trial court rejected Black's arguments, saying:

> This Court accepts the Commonwealth's position that the Code Section 18.2-423 reaches only the crime of intimidation when an accused *actually intended to intimidate others* by his actions, such limitation saves the statute from being a proscription of speech in violation of the First Amendment and . . . the Virginia Constitution.

J.A. 10.

Black was tried before a jury, who convicted him of the offense charged. Fined $2,500, he appealed. J.A. 200. Like the trial court, the Virginia Court of Appeals rejected Black's arguments. Having decided the Virginia Beach case just a few weeks earlier, the Court of Appeals issued a one sentence opinion, affirming the judgment of the trial court "for the reasons stated in *O'Mara v. Commonwealth*." J.A. 201. Black again appealed.

The Virginia Supreme Court consolidated Black's appeal with the Elliott and O'Mara appeals. Taking up the free speech issues raised by the three defendants, the Court concluded that:

> [D]espite the laudable intentions of the General Assembly to combat bigotry and racism, 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*.

*Black*, 553 S.E.2d at 740, J.A. 270 (emphasis added).

By a vote of 4 to 3, the Virginia Supreme Court struck down the Commonwealth's ban on cross burning, believing it to be "analytically indistinguishable" from the St. Paul ordinance declared unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *Black*, 553 S.E.2d at 742, J.A. 275.[4] The Virginia Supreme Court also found fault with that part of the statute that makes the burning of a cross prima facie evidence of an intent to intimidate, striking down the inference under a flawed application of the overbreadth doctrine. *Black*, 553 S.E.2d at 743-46, J.A. 276-285.

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[4] Having resolved the case based on the federal constitutional issues, the Court found it unnecessary to address the respondents' state constitutional claims. *Black*, 553 S.E.2d at 746 n.9, J.A. 285 n.9. Moreover, as the Virginia Court of Appeals observed in rejecting their state claim: "Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *O'Mara*, 535 S.E.2d at 178, J.A. 262 (quoting *Bennefield v. Commonwealth*, 467 S.E.2d 306, 311 (Va. App. 1996)).

## SUMMARY OF ARGUMENT

***"Few things can chill free expression and association to the bone like night-riders outside the door and a fiery cross in the yard."***

*State v. T.B.D.*, 656 So. 2d 479, 482 (Fla. 1995).

This case involves two important freedoms: freedom of speech and freedom from fear. In an attempt to leave the first freedom intact, while securing the second, the Virginia General Assembly long ago enacted a ban on cross burning, but *only* when accompanied by an intent to intimidate someone. The Virginia law does not limit its protection to those of a particular race, religion or background. It protects everyone. Even so, the Virginia Supreme Court read this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), to mean that such a law constitutes unconstitutional content discrimination. This was error for several reasons.

First, unlike the local ordinance at issue in *R.A.V.*, the Virginia statute is content-neutral. It is not limited to disfavored subjects or particular victims. Rather, it applies to *anyone* who burns a cross with the intent to intimidate *anyone* for *any reason*. In this sense, it is similar to the cross burning statute upheld in Florida and fundamentally different from the cross burning statutes struck down in Maryland, New Jersey, and South Carolina.

Second, contrary to the reasoning of the lower court, the legislature's purpose in enacting the Virginia statute does not alter its content-neutrality. Quite simply, the motivations of the Virginia General Assembly in enacting the statute are irrelevant. All that matters is the text and, as the lower court conceded, the law is content-neutral. Moreover, if the legislative purpose were relevant, the

Virginia legislature was motivated by the legitimate purpose of promoting law and order. Furthermore, even if there were mixed motives for the statute – some legitimate and some illegitimate – the statute is still constitutional. An illegitimate motive can doom a content-neutral statute, if at all, only when there is clearly no evidence of any legitimate motive whatsoever.

Third, a historical matter, the Virginia statute was passed in response to cross burnings by the Ku Klux Klan and similar groups bent upon intimidation of black Virginians. J.A. 281. Even today, many acts of intimidation by cross burning may be intertwined with expressions of racial or religious bigotry. And, as the decision below points out, the statute does not ban the burning of other geometric configurations, such as a circle or a square. Yet, such matters are constitutionally irrelevant. The statute only reaches speech that can be constitutionally proscribed and does so with language that is content-neutral. Thus, it is constitutional.

Fourth, even if this Court were to include that the Virginia statute is not content-neutral, the statute is fully consistent with *R.A.V.* Specifically, the Virginia statute fits all three of the *R.A.V.* exceptions. Cross burning is an especially virulent form of intimidation. Since it is constitutionally permissible to ban all forms of intimidation, it is constitutional to ban its most virulent forms. Moreover, cross burning has an array of secondary effects that justify its proscription. Furthermore, because the statute applies to anyone who burns a cross with the intent to intimidate anyone for any reason, and because of the other factors surrounding this statute, there is no possibility of official suppression of ideas.

Finally, the Virginia statute is not overbroad. The decision below misapplied the overbreadth doctrine as recognized by this Court. The lower court did not find the law to be vague, or to prohibit speech that is constitutionally protected. What troubled the court was the statutory inference, which allows – but does not require – a jury to infer an intent to intimidate from an act of cross burning alone. The inference leaves the burden of proof squarely on the prosecution, and it otherwise meets familiar constitutional criteria for statutory inferences. Even so, the court was concerned that somewhere, somehow an innocent cross burner might be charged. Yet, as this Court's decisions, make clear, a statute is fatally overbroad only if there is both "real" overbreadth, by *prohibiting* constitutionally protected expression, and "substantial" overbreadth, by prohibiting a *significant amount* of such expression. Because the statute, by its terms, is limited to acts of intimidation, it does not prohibit any protected expression. Moreover, respondents have not and cannot point to a single instance, much less numerous instances, of anyone being prosecuted under the statute for an innocent cross burning. For these reasons, too, the decision below is in error.

## ARGUMENT

### I. THE VIRGINIA STATUTE IS CONTENT-NEUTRAL.

#### A. Unlike the Ordinance in *R.A.V.*, the Virginia Statute Is Not Limited to Disfavored Subjects.

The Virginia Supreme Court struck down the Virginia cross burning statute because it believed the law was

"analytically indistinguishable" from the ordinance declared unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *Black*, 553 S.E.2d at 742, J.A. 275. This was error. The two laws are substantially different.

Confined to certain disfavored topics, the St. Paul ordinance said:

> 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 (quoting Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)) (emphasis added).

Before *R.A.V.* reached this Court, the ordinance had been limited by the Minnesota Supreme Court to reach only "fighting words," a form of speech that can be constitutionally proscribed. *Id*. at 381 (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)).[5] Even so, this

[5] The concept of "fighting words" – and their exclusion from the right of free expression – was recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). "Fighting words" are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The focus is not on any likely follow-up by the speaker, but on the likely response by the person to whom the words are said. *See, e.g., id.* at 573 ("[F]ighting words" have the "characteristic of plainly tending to excite the *addressee* to a breach of the peace.") (emphasis added).

Court found the ordinance to be facially unconstitutional because, it applied only to those particular "fighting words" that insult or provoke violence "on the basis of race, color, creed, religion or gender." *R.A.V.*, 505 U.S. at 391. As the Court explained:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

*Id*. In other words, the St. Paul ordinance was invalid not because it banned fighting words, but because it banned *only* those fighting words which were addressed to *specific disfavored subjects*.

The Virginia statute is markedly different. First, the focus of the Virginia statute is intimidation.[6] Fighting words and intimidation are alike in that they can both be constitutionally proscribed. *R.A.V.*, 505 U.S. at 388

[6] In Virginia criminal law, "intimidation" means acts that put the victim "in fear of bodily harm." *Black*, 553 S.E.2d at 751, J.A. 297-98 (Hassell, J., joined by Carrico, C.J., Koontz, J., dissenting) (quoting *Sutton v. Commonwealth*, 324 S.E.2d 665, 669 (Va. 1989)). "Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic or hysteria." *Id*.

("[T]hreats of violence are outside the First Amendment.").[7] But intimidation is a far more insidious evil. Hurling an epithet may sometimes provoke a breach of the peace in the heat of the moment, but the danger is likely soon to pass. It is different with intimidation. A threat to do bodily harm to an individual or his family is likely to sink deep into the psyche of its victim, acquiring more force over time. So it was, for example, with James Jubilee, whose initial reaction of anger soon gave way to fear about what might come next. J.A. 231. "The value of a sword of Damocles is that it hangs – not that it drops." *Rafeedie v. INS*, 880 F.2d 506, 530 n.8 (D.C. Cir. 1989) (Ginsburg, J., concurring).

Second, and more importantly, unlike the St. Paul ordinance, the Virginia law is not limited to any set of disfavored subjects. It applies whenever *anyone* burns a cross to intimidate *anyone* for *any* reason. Political affiliation, union membership *vel non*, sexual orientation, age, gender, personal grievance: it makes no difference what may prompt the intimidation. So long as there is an intent to intimidate, *all* acts of cross burning are banned. All are

[7] While there is some overlap between fighting words and intimidation, the two concepts are different. In some circumstances, words that are intended to intimidate another may trigger an instinct for self-preservation and/or provoke such anger as to lead to an immediate breach of the peace. *See, e.g., Chaplinsky*, 315 U.S. at 573 ("[T]hreatening" words are "likely to cause a fight."). In other circumstances, where the threat is conveyed anonymously, or where it is made to the very weak or the very powerful, it is unlikely to provoke a violent reaction. Even so, such threats may be constitutionally proscribed. *See, e.g., Watts v. United States*, 394 U.S. 705, 707 (1969) (explaining that statute criminalizing threats against the President is facially constitutional).

subject to the same punishment. Thus, the statute is content-neutral.

### 1. Similarly Worded Laws Have Been Deemed Content-Neutral.

This conclusion is supported by the post-*R.A.V.* decision of the Florida Supreme Court, which upheld that State's cross burning law[8] using the same rationale now urged by the Commonwealth in defense of the Virginia statute:

> The present statute comports with R.A.V. because the Florida prohibition is "not limited to [any] favored topics," but rather cuts across the board evenly. No mention is made of any special topic such as race, color, creed, religion or gender.
>
> * * *
>
> The statute is a legitimate legislative attempt to protect Floridians of every stripe from a particularly reprehensible form of tyranny. The

[8] Section 876.18, Fla. Stat. (1993) provides:

> **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. . . .

The Florida Supreme Court found this statute to be content-neutral within the meaning of *R.A.V.* even though it lacks the "intent to intimidate" element so prominent in the Virginia law.

> statute plays no favorites – it protects equally the Baptist, Catholic, Jew, Muslim; the Communist, Bircher, Democrat, Nazi, Republican, Socialist; the African-American, Caucasian, Haitian, Hispanic, native American, Vietnamese; the heterosexual, the male homosexual, the lesbian; the established politician, the neophyte, the activist; the author, the editor, the publisher; the artist, the curator; the teacher, the school administrator; the union organizer, the plant owner.

*State v. T.B.D.*, 656 So. 2d 479, 481-82 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996). Like the Florida law, the Virginia statute "plays no favorites." It, too, is content-neutral – and constitutional.

### 2. Statutes Invalidated under the Reasoning of *R.A.V.* Are Distinguishable Because They Lacked an Intimidation Element Or Contained Content Distinctions.

These two features of the Virginia law – the intimidation element and the absence of any content-based categories – distinguish this case from the three state supreme court decisions striking down cross burning statutes in the wake of *R.A.V.* The South Carolina statute invalidated in *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), contained no intimidation element. *See* S.C. Code Ann. § 16-7-120 (1985). Neither did the Maryland law overturned in *State v. Sheldon*, 629 A.2d 753 (Md. 1993). *See* Md. Code Ann. art. 27, § 10A (1957). The New Jersey statute had an intimidation element, but also contained problematic content-based restriction, limiting its sweep to "the basis of race, color, creed or religion." N.J. Stat. Ann. § 2C:33-10

(1995). Thus, the law was declared unconstitutional. *State v. Vawter*, 642 A.2d 349 (N.J. 1994). Given these important distinctions, none of these three cases presents a persuasive basis for striking down the Virginia law.

## II. THE LEGISLATURE'S PURPOSE DOES NOT ALTER THE CONTENT-NEUTRALITY OF THE VIRGINIA STATUTE.

Although the lower court conceded that the Virginia statute contains no content-based categories, it was not satisfied with this level of inquiry. Instead, it looked to what it thought was the legislature's "motivating purpose" and found it problematic. *Black*, 553 S.E.2d at 744, J.A. 279. There are three errors in this assessment. First, legislative motivation is irrelevant here. Second, even if legislative purpose were relevant, there would be no basis for concluding that the legislature had any purpose in mind other than to prevent intimidation. Third, even if legislative purposes were mixed – some legitimate and some not – the statute still must be upheld based on the legitimate purpose of preventing intimidation.

### A. Legislative Purpose Is Irrelevant.

The motivations of the Virginia legislature are irrelevant. The Virginia Supreme Court based its inquiry into legislative purpose on a misreading of *United States v. Eichman*, 496 U.S. 310 (1990), where this Court struck down a federal law that prohibited burning or physically desecrating the United States flag. *Black*, 553 S.E.2d at 743-44, J.A. 279-80. The cases are very different. This Court has made it clear that the act of desecrating the flag

enjoys the full protection of the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Eichman*, 496 U.S. at 315. By contrast, the act of burning a cross is typically not intended to heap calumny upon the Christian religion, but to intimidate a victim. Intimidation can be constitutionally proscribed. *R.A.V.*, 505 U.S. at 388. Where there is no intent to intimidate, the Virginia statute does not apply.

Moreover, the government interest asserted in *Eichman* was preserving the flag as the "unique and unalloyed symbol of the Nation." *Eichman*, 496 U.S. at 315. Thus, while there was "no *express* content-based limitation on the scope of the prohibited conduct, it [was] nevertheless clear that the Government's asserted interest [was] *related* to the suppression of free expression." *Id*. at 315 (emphasis added). Indeed, the content-based limitation was *implicit*. While cast in positive language, the asserted government interest was simply the "flip-side" of an unconstitutional objective. Here, the interest asserted by Virginia is preventing an egregious form of intimidation. Such an interest is not related to the suppression of free expression. Admittedly, intimidation by cross burning is a tactic introduced into our society by a radical group notorious for its bigoted views on race and religion, but this is not the sort of "relationship" at issue in *Eichman*.

Instead, the relevant precedents are found in *Frisby v. Schultz*, 487 U.S. 474, 482 (1988), and *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000). In both cases, this Court upheld laws as facially neutral even though the Court acknowledged that they were enacted in response to partisans on one side of an issue. In *Frisby*, the Court

upheld an ordinance that prohibited picketing in front of an individual residence.[9] The ordinance was adopted in response to activities by one group – anti-abortion demonstrators – who had been picketing in front of a doctor's home. *Frisby*, 487 U.S. at 476. Even so, this Court determined that the statute was content-neutral because it prohibited *all* picketing in front of a residence, regardless of the message being conveyed. *Id*. at 482.

Similarly, in *Hill*, this Court upheld an ordinance that imposed significant restrictions on speech within 100 feet of an entrance to any health care facility. Within this restricted zone, the ordinance made it unlawful to knowingly approach within 8 feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with [that] person." *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)). The motivation for the law was to restrict abortion protestors in venues where abortions are performed, a point confirmed by the statutory preamble.[10] Yet, despite the causal connection and statement of purpose, this Court found the statute to be content-neutral because its prohibitions appeared even-handed:

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[9] The ordinance read: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Frisby*, 487 U.S. at 477.

[10] The statute declared that "the exercise of a person's right to *protest or counsel against certain medical procedures* must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner." *Hill*, 530 U.S. at 708 n.1 (quoting Colo. Rev. Stat. § 18-9-122(1) (1999)) (emphasis added). No one on the Court doubted that this was a euphemistic reference to abortion.

> The statute is not limited to those who oppose abortion. . . . It applies to all "protest," to all "counseling," and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands.

*Id.* at 725.[11]

The activities restricted in *Frisby* and *Hill* were fully protected by the First Amendment. *Frisby*, 487 U.S. at 479 (noting that "antipicketing ordinance operat[ed] at the core of the First Amendment"); *Hill*, 530 U.S. at 714 ("The First Amendment interests of petitioners are clear and undisputed."). By contrast, the acts of intimidation at issue here can be constitutionally proscribed. *R.A.V.*, 505 U.S. at 388. Surely, the requirement for content-neutrality cannot be more stringent in the case at bar than it was in *Frisby* or *Hill*. While the Virginia statute was enacted in

[11] In *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), this Court upheld as content-neutral a state court injunction that limited expressive activity by abortion protestors without imposing similar restrictions on abortion proponents. In so ruling, the Court "look[ed] to the government's purpose as the threshold consideration." *Id.* at 763. Such an inquiry into purpose was necessary there in order to determine whether the injunction – which was content-based on its face – was truly content-based for constitutional purposes. Explaining that abortion opponents and abortion supporters had dissimilar records of activity – and that abortion opponents had repeatedly violated the state court's original order – this Court concluded that the order was content-neutral. *Id.* at 762, 763. "[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content- or viewpoint-based." *Id.* at 763. Because the Virginia statute is neutral on its face, the Court need go no further.

response to intimidation by the Klan, it is not limited to the Klan, nor to those who share the Klan's racial and religious bigotry. Rather, it applies to all acts of cross burning with intent to intimidate, regardless of the views of the perpetrator. Thus, it satisfies the level of neutrality required by this Court's precedents.[12]

### B. If Legislative Purpose Is Relevant, the Statute Is Still Constitutional Because Virginia's Purposes Are Legitimate.

If this Court were now to decide that legislative motivation is relevant, it should nevertheless defer to Virginia's articulation of a legitimate purpose. "Inquiries into congressional motives or purposes are a hazardous matter . . . and the stakes are sufficiently high for us to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (upholding statute banning burning of draft

[12] Dissenting in *Hill*, Justice Kennedy viewed the Colorado statute as an impermissible, content-based restriction on speech, believing it had the potential for treating speakers differently depending on their viewpoint. *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting). He noted, for example, that a speaker in the protected zone would not be breaking the law if she praised Supreme Court abortion decisions or congratulated politicians who favored abortion rights. *Id*. at 769. On the other hand, if another speaker in the zone criticized those same decisions or sought to shame that same politician, she would be engaged in a "protest" in violation of the same statute. *Id*. Justice Kennedy's concern does not apply here because the Virginia statue lacks any potential for such uneven application. It bans *all* cross burning with intent to intimidate. For example, while it *prohibits* the bigot from using the tactic, it likewise *protects* the bigot against others in the community who might wish to give him a taste of his own medicine; and it applies with equal force against anyone wishing to intimidate anyone for any reason whatsoever.

cards). In another First Amendment context – the Establishment Clause – this Court typically defers to the State's proffered explanation, at least where it is "sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987). Moreover, "a court has no license to psychoanalyze the legislators." *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring). By analogy, any inquiry into legislative purpose here must also be "deferential and limited." *Id*.

There is nothing here to show any purpose other than a wholly legitimate one. Indeed, there is very little to show legislative purpose at all. There is no legislative preamble, no committee report and no official record of floor debates. Instead, there are several old newspaper articles, cited by the Virginia Supreme Court, showing a rash of cross burnings in the years leading up to passage of the original statute in 1952. *See Black*, 553 S.E.2d at 742 n.2, J.A. 274 n.2. These incidents were, in the words of the time, "un-American act[s], designed to intimidate Negroes from seeking their rights as citizens." *Police Aid Requested By Teacher, Cross is Burned on Negro's Yard*, Richmond News-Leader, Jan. 21, 1949, at 19, J.A. 312. The articles also report the stated purpose of the measure. The bill was presented to the House of Delegates by a former FBI agent, Delegate Mills E. Godwin, Jr., who later became twice Governor of Virginia. According to the article: "Godwin said law and order in the State were impossible if organized groups could create fear by intimidation." *Bill to Curb KKK Passed By the House, Action is Taken Without Debate*, Richmond Times Dispatch, Mar. 8, 1952, at 5, J.A.

325.[13] This is the best available statement of the motivating purpose, and it is wholly legitimate.

The decision below seems to imply that the statute may have been enacted as a gesture of modern day political correctness. History belies the suggestion. In 1952, when the statute was enacted, racial segregation was still the prevailing practice – and often the law – in Virginia.[14] Indeed, the General Assembly that originally banned cross burning in 1952 was substantially the same legislature as the one that soon initiated a campaign of "massive

[13] In 1952, Virginia already had in place a statute banning intimidation by written communications. Va. Code § 18-134 (1950) (recodified in 1952 as § 18.1-257). The penalty for a violation included up to five years in prison. The same maximum incarceration penalty was adopted for violation of the cross burning ban. Va. Code § 18-349.4 (1952). The same statutory parallelism was in place in 1998, when these two acts of cross burning were committed. Both were class six felonies. *Compare* Va. Code § 18.2-60(A) (1998) *with* § 18.2-423 (1998). They still are.

[14] *See, e.g.*, Va. Code § 18-327 (1952) (repealed 1960) (required separation of "white" and "colored" at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code § 20-54 (1950) (repealed 1968) (prohibited racial intermarriage); Va. Code § 22-221 (1952) (repealed 1972) ("White and colored persons shall not be taught in the same school . . . "); Va. Code § 24-120 (1952) (repealed 1970) **(**required separate listings for "white and colored persons" who failed to pay poll tax); Va. Code § 38-281 (1950) (repealed 1952) (prohibited fraternal associations from having "both white and colored members"); Va. Code § 53-42 (1950) (amended to remove "race" 1968) (required racial separation in prison); Va. Code § 56-114 (1950) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code § 56-326 (1950) (repealed 1970) (required motor carries to "separate" their "white and colored passengers," violation was misdemeanor); Va. Code § 56-390 and 396 (1950) (repealed 1970) (same for railroads); Va. Code § 58-880 (1950) (repealed 1970) (required separate personal property tax books for "whites" and "colored").

resistance" in response to this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See generally, Griffin v. County School Board*, 377 U.S. 218, 221 (1964); *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959) (describing "massive resistance" as legislatively mandated attempt to close public schools rather than desegregate). Clearly, the legislature's purpose was *not* to usher in a new era of racial equality, or to disfavor ideas of white supremacy. The purpose was to prevent a particularly virulent form of intimidation and thus to preserve law and order. It is a purpose still legitimate today.

### C. Even If There Was Also an Illegitimate Purpose, the Legitimate Purposes Control.

Even if this Court were to decide that the legitimate purpose of preventing intimidation was combined with some illegitimate motive, the statute would still be constitutional. This Court has rejected the idea that an illegitimate motive will make a law invalid "no matter how small a part [the] motivating factor may have played" in the legislature's decision. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (citing *O'Brien*, 391 U.S. at 382-86). Instead, where the "predominate intent" is unrelated to the suppression of free expression, that legitimate motive is "more than adequate" to uphold the statute. *Renton*, 475 U.S. at 48. Here the predominant intent – indeed, the exclusive intent – was to prevent intimidation. Thus, the statute is constitutional.

Given the obviously legitimate purpose, there is no need to decide how large some hypothetical, illegitimate motive must be before the resulting statute would be invalid. Even so, it may be helpful to note again the approach followed in Establishment Clause cases. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court

requires statutes to have "***a*** secular legislative purpose." *Id*. at 612 (emphasis added). Statutes arising from *mixed* motives – some legitimate and some illegitimate – will not be struck down based on a purpose test. "The Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added).[15] If this Court were to consider legislative purpose, the same approach should be followed here. An illegitimate purpose should not doom an otherwise constitutional enactment unless there is *no* evidence of a legitimate purpose. Because the statute is facially neutral, and because it was motivated – in whole or in part – by the legitimate purpose of preventing intimidation, it survives constitutional scrutiny.

## III. CROSS BURNING CAN BE USED TO INTIMIDATE ANYONE; ANY NUMERICAL CORRELATION BETWEEN CROSS BURNING AND BIGOTRY DOES NOT UNDERMINE CONTENT-NEUTRALITY.

The court below did not find that cross burning is limited to the Klan, or that the tactic can only be used by

[15] Justice O'Connor's concurring opinion in *Lynch* takes a somewhat different tack, warning against reliance on secular purposes that are *de minimus*. *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) (expressing view that first prong is not satisfied by "mere existence of some secular purpose, however dominated by religious purposes"). Yet, this cautionary note would not help respondents here, where the legitimate purposes are obviously substantial.

persons espousing ideas of racial or religious bigotry. Nor have respondents made such a suggestion. *See generally*, Br. in Opp. to Cert. Indeed, this case would refute any such claim. Two respondents – Elliott and O'Mara – burned a cross to frighten a neighbor in Virginia Beach. Yet, they are not Klansmen, nor do they have any discernible ideas on race, religion or any other topic. They burned a cross on the neighbor's lawn because he asked questions about gunfire in Elliott's backyard. Elliott and O'Mara did not have a political agenda, they had a personal grievance. People of *any* race can be frightened by cross burnings. So intimidating was the incident in Carroll County that one witness – who is Caucasian – was brought to tears, fearing for the safety of her children and home. J.A. 111.

A burning cross – standing alone and without explanation – is understood in our society as a message of intimidation. "[T]he pernicious message of such conduct [is] a clear and direct expression of an intention to do one harm, [and] constitutes a true threat envisioned by *Watts [v. United States]* irrespective of racial, religious, ethnic or like characteristics peculiar to the victim." *O'Mara*, 535 S.E.2d at 179, J.A. 264. A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police.

Undoubtedly, many acts of intimidation by cross burning are intertwined with expressions of racial or

religious bigotry. Yet, arguments based upon such numerical correlation cannot prevail. To begin, the record is devoid of any quantitative evidence that might provide a basis for statistical analysis. Moreover, even if the correlation were assumed to be high, this Court has rejected a statistical approach to constitutional questions arising under the First Amendment. Decided last term, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002), was an Establishment Clause challenge to a school voucher plan enacted by the Ohio legislature. Although the challenged statute was facially neutral, a higher percentage of participating students were enrolled in religiously affiliated schools. In one city, the number was ninety-six percent. *Id.* at 2464. Opponents of the statute argued that this high correlation undermined the religious neutrality appearing on the statute's face. The Court disagreed, saying that "such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." *Id.* at 2470 (quoting *Mueller v. Allen*, 463 U.S. 388, 401 (1983)). The Court also noted that a statistical approach would lead to inconsistent results, striking down statutes where the correlation seems too high but leaving the same or similar statutes in place where the correlation is deemed low enough to be acceptable. *Id.* at 2470-71.

The same principle is at work here. The Virginia statute is facially neutral. It bans cross burning by *anyone* whose intent is to intimidate *anyone* for *any reason*. This facial neutrality is not undermined by the supposedly high correlation between such acts of intimidation and intertwined expressions of racial or religious bigotry. A numerical approach is precluded by the lack of principled

standards for evaluating what statistical evidence might show. There is no way to draw a line based on statistics other than to do so arbitrarily. A numerical approach is also precluded by the need to avoid inconsistent results. It would be a perverse outcome, indeed, if cross burning bans were invalid in States where the tactic is aimed primarily against minorities, but valid where the tactic is more racially neutral in its application.

*Zelman* and *Mueller* are not the only cases where members of this Court have rejected numerical correlation as a tool for examining facially neutral statutes challenged under the First Amendment. In *Hill*, there was a high correlation between the prohibited activity – protests outside health facilities – and opposition to abortions. Yet, the statute was upheld as facially neutral. In their concurring opinion, four Justices said:

> It is important to recognize that the validity of punishing some expressive conduct . . . does not depend on showing that the particular behavior or mode of delivery has no association with a particular subject or opinion.
>
> * * *
>
> *There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy*. But that does not mean that every regulation of such distinctive behavior is content-based as First Amendment doctrine employs that term. The correct rule, rather, is captured in the formulation that a restriction is content-based only if it is imposed because of the content of the speech.

*Hill*, 530 U.S. at 737 (Souter, J., joined by O'Connor, Ginsberg and Breyer, JJ., concurring) (emphasis added).

Whether drawn from the *Zelman* majority or the *Hill* concurrence, the same principles should apply here. Any numerical correlation between intimidation by cross burning and the expression of racial or religious bigotry is irrelevant. Unlike the ordinance struck down in *R.A.V.*, the Virginia statute is neutral on its face. Thus, it is constitutional.

The Virginia Supreme Court also suggested that the Virginia statute is impermissibly content-based because, while it bans the burning of *crosses* with intent to intimidate, it does not ban the burning of "other geometric shapes," such as "circles and squares." *Black*, 553 S.E.2d at 745, J.A. 281. Yet there is a good reason for focusing on crosses. There is a history and practice of intimidation by cross burning that has no counterpart with other geometric shapes. The record contains no evidence of anyone ever burning a circle or square for any expressive purpose, much less a purpose of intimidation. Indeed, the Commonwealth is unaware of a single reported American case concerning a burning circle or a burning square used to intimidate. In our society, a burning cross *means* intimidation. By contrast, burning a circle or a square expresses nothing.[16] As the Virginia Supreme Court recognized, "no animating message is contained in such an act." *Black*, 553 S.E.2d. at 745, J.A. 281. Given this concession, it is difficult to understand why the Virginia Supreme Court thought content discrimination was afoot. Indeed, it is not.

[16] While there may be occasions in our society when other religious symbols are burned, such acts of destruction – like the burning of the United States flag – are typically understood as dissent from the ideas and institutions such symbols represent, not as attempts to intimidate.

Perhaps someday, somewhere, somebody in Virginia may intimidate someone – and simultaneously express an idea – by burning some geometric shape other than a cross. But such speculation does not make the current law invalid. "States adopt laws to address the problems that confront them. The First Amendment does not require states to regulate for problems that do not exist." *Burson v. Freeman*, 504 U.S. 191, 207 (1992).[17] The Virginia statute seeks to deal with a tactic of intimidation that has been a source of trouble in the past, without speculating about future developments, and without trivializing cross burning by equating it, say, with a burning Jack O'Lantern impishly left on a neighbor's porch at Halloween.

Finally, the principle of content-neutrality is designed to avoid the evil of a statute "lend[ing] itself" to "invidious thought-control purposes." *Madsen*, 512 U.S. at 794 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and dissenting in part). However, "a statute that restricts certain categories of speech only lends itself to invidious use if there is a *significant* number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." *Hill*, 530 U.S. at 723 (emphasis added).

[17] In *R.A.V.*, the majority expressed concern about this passage from *Burson* being converted into "the revolutionary proposition that the suppression of particular *ideas* can be justified when only those *ideas* have been a source of trouble in the past." 505 U.S. at 396 n.8 (emphasis added) (citing 505 U.S. at 405 (White, J., concurring in judgment) and 505 U.S. at 434 (Stevens, J., concurring in judgment)). Here it is not the suppression of *ideas* that is afoot, but the prevention of intimidation.

There are *no* communications raising the same problem that the cross burning ban was enacted to solve – and certainly not a "significant number" of them. Nor did the court below purport to identify any. The statute does not lend itself to invidious use. It is content-neutral – and constitutional.

## IV. ALTERNATIVELY, IF THE VIRGINIA STATUTE IS DEEMED CONTENT-BASED, IT IS JUSTIFIED BY THE THREE EXCEPTIONS IN *R.A.V.*

It is a familiar principle of First Amendment law that content discrimination is generally prohibited. The Virginia statute complies with this principle. Even so, the principle is "not absolute." *R.A.V.*, 505 U.S. at 387. Moreover, the principle "applies *differently* in the context of proscribable speech than in the area of fully protected speech." *Id.* (emphasis added). This is so because the reason for the general prohibition has only limited relevance in dealing with speech that can be constitutionally proscribed:

> The rationale of the general prohibition, after all, is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace. But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

*Id.* at 387-88 (internal quotation marks and citations omitted). The Court then recognized three broad exceptions to the general rule against content-based distinctions. Assuming *arguendo* that the Virginia cross burning

statute constitutes "content discrimination," it nevertheless qualifies as constitutional under all three exceptions.[18]

### A. Cross Burning Is an Especially Virulent Form of Intimidation.

In laying out its first exception, *R.A.V.* said that a subclass of proscribable speech may be singled out when it manifests, in some extreme form, the concerns that allow the whole class to be proscribed:

> When the basis for the content discrimination consists entirely of the *very reason* the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

*R.A.V.*, 515 U.S. at 388 (emphasis in original). The Court then explained its rationale with an example:

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[18] In *State v. Talley*, 858 P.2d 217 (Wash. 1993), the Washington Supreme Court rejected a *R.A.V.*-based challenge to a statute that prohibited various acts, including cross burning with "intent to intimidate another person." Unlike the Virginia statute, the Washington law added certain content-based qualifications. The intent to intimate had to be related to "that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap." Washington Code § 9A.36.080(1). While the Washington statute was obviously not content-neutral, the Court nevertheless found the law to be justified by each of the three *R.A.V.* exceptions. If these exceptions save the Washington statute, *a fortiori* they should also save the Virginia law.

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience – i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.

*Id.* (emphasis in original). Just as a State may choose to prohibit only that obscenity which is *most lascivious*, it may also choose to enact a statute focusing on acts of intimidation that are *most virulent* – that is to say, acts that demonstrate with "special force" the reasons why "threats of violence are outside the First Amendment." *Id.* The Court has given three such reasons: "protecting individuals [1] from the fear of violence, [2] from the disruption that fear engenders, and [3] from the possibility that the threatened violence will occur." *Id.* Cross burning operates with "special force" with respect to all three. *See In re Steven S.*, 31 Cal. Rptr. 2d 644, 650 (Cal. App. 1994) ("[U]nauthorized cross burning on another person's private property . . . invokes all three of the exceptions set forth in *R.A.V.*").[19]

Although cross burning is sometimes called "hate speech," that label is not quite right. It is something far worse. "Hate speech" need only make a statement about

[19] While the California statute applies only when the cross burning occurs without permission on the property of another, it is difficult to see any practical distinction between burning a cross in someone's front lawn and burning the same cross in the public right-of-way just outside the victim's property. Moreover, while cross burning at a *secluded* Klan rally may intimidate no one, there is intimidation when the cross is burned – as it was in Carroll County – in a place visible to neighbors and passers-by.

the attitudes of the speaker. Cross burning is a form of intimidation – a threat of harm. It makes a statement about harm one or more listeners may expect to suffer. It is a tactic for putting someone in fear for his life or safety, and it is an especially virulent method for doing so. *See In re Steven S.*, 31 Cal. Rptr. 2d at 649, ("[M]alicious cross burning *is* directed at individuals . . . and it goes far beyond hurt feelings, offense, or resentment. It causes terror in specific victims.")

It is no accident that the Ku Klux Klan – grand masters of intimidation – chose a burning cross to do their work. Such a structure instills fear in a way that mere words can rarely equal.[20] As this Court has recognized, use of a symbol bypasses the need for the victim to read and decipher the message, so as to make the effect penetrating and immediate. It is a "short cut from mind to mind." *Johnson*, 491 U.S. at 417. The symbol of a burning cross is especially powerful. It takes fire – an archetype of destruction – and marries it with a deeply evocative icon of Christianity, transmogrifying a sign of heavenly assurance into a hellish threat. The impact is underscored when the cross is burned at night – as is usually the case – when the cover of darkness hides the identity of the perpetrators and taps into the basic human fear of the unknown.

Moreover, the business of constructing, transporting, erecting and igniting a cross suggests more than the effort of a single individual. It suggests the presence of a group, whose size and membership are unknown, but whose

[20] Even so, written threats to kill or do bodily harm are also prohibited by Virginia law. Va. Code § 18.2-60(A).

malevolence – and whose resolve to *act* on that malevolence – is plain enough. The flames are not only a *metaphor* for destruction, they demonstrate a *means* of destruction. By burning a cross in public view, the perpetrators step beyond words, even beyond conventional symbolism, and provide a physical example of what may come. By an act of destruction, they assert their ability – and their will – to engage in further acts of destruction. This is especially so when the victim's own property has been invaded.

The message of a cross burning is this:

> ***We may kill you, or hurt you badly. Believe it. We have already come to your home, and we have done this hateful and dangerous thing in front of you. So, we don't just talk. We act. Next time we may torch your home. Or bomb your car. Or shoot into your windows. No one stopped us when we burned the cross. No one will stop us next time either. Fear us.***

These considerations make cross burning an especially fearsome weapon, thus implicating with "special force" the first reason why threats are constitutionally proscribable – *i.e.* "fear of violence." *R.A.V.*, 505 U.S. at 388.

Another reason why threats are proscribable is to guard against the "disruption that fear engenders." *Id.* This is why it is constitutional to prohibit people from yelling "Fire!" in a crowded theater, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.), or to prohibit threatening the life of the President, *R.A.V.*, 505 U.S. at 388. If this Court were to decide that the historical usage of cross burning somehow imparted content not found in the neutrally worded text, an examination of the same

historical usage would reveal the special sort of disruption that this intimidating tactic engenders. As one legislature expressly found, "cross burnings historically and traditionally have been used to threaten, terrorize, intimidate, and harass African Americans and their families."[21] Washington Code § 9A.36.078. In other words, it has been a tactic to keep African-Americans in the status of second class citizens, thereby disrupting the basic principles espoused by the Declaration of Independence ("all men are created equal") and sought to be accomplished by the Thirteenth and Fourteenth Amendments. Although cast in universal terms, these amendments were prompted by the harshness to which persons of African descent were historically subjected. *See Nixon v. Condon*, 286 U.S. 73, 89 (1932). Surely to disrupt the operation of such fundamental principles is an example of the "special force" contemplated by *R.A.V.* as a justification for content-based distinctions.

Yet another reason why threats are proscribable is to avoid "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. The reason likewise applies with "special force" to cross burnings. As the Florida Supreme Court observed:

> [U]nauthorized cross-burning . . . has been *inextricably linked* in this state's history to *sudden*

[21] The result is no different when the cross is burned, not at a targeted home, but at a Klan rally visible to all passers-by. In such a case, the incident is understood to be a threat against those minorities whom the Klan has historically sought to cower. This is illustrated by the talk about "random[ly] shoot[ing] the blacks" that accompanied the cross burning in Carroll County. J.A. 109.

> *and precipitous violence* – lynchings, shootings, whippings, mutilations, and home-burnings. The connection between a flaming cross in the yard and forthcoming violence is clear and direct. A more terrifying symbolic threat for many Floridians would be difficult to imagine.

*T.B.D.*, 656 So. 2d at 481 (emphasis added). If Virginia's own history has been less sanguinary than some States, its General Assembly is no less aware of the "clear and direct" connection between cross burning and forthcoming violence.

In sum, cross burning presents a special case of intimidation. It is especially terrifying, especially disruptive, and a special harbinger of violence. There is simply no counterpart in our society. This was the judgment of the Virginia General Assembly when, a half century ago, it passed the cross burning statute, even though the Commonwealth's public policy was then one of segregation. There is no reason to overturn its judgment now. This Court should find that the statute qualifies for the first *R.A.V.* exception and uphold the law as constitutional.

### B. As a Subclass of Intimidation, Cross Burning Has an Array of Secondary Effects.

For the second *R.A.V.* exception, this Court turned to the "secondary effects" doctrine. It said:

> Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "*justified* without reference to the content of the . . . speech."

*Id.* at 389 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). St. Paul sought to invoke this doctrine, arguing that the impact of fighting words on historically disfavored minorities was a "secondary effect" that the ordinance was justified in trying to prevent. The Court disagreed, noting that "[l]istener's reactions" do not qualify as "secondary effects." *Id.* at 394 (quoting *Boos v. Barry*, 485 U.S. 312 (1988)). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.*

By contrast, the Virginia statute – which deals not with mere fighting words, but with virulent intimidation – presents genuine examples of secondary effects akin to those identified by the Court in *Renton*. In *Renton*, the Court approved the challenged ordinance because it was designed to "prevent crime, protect the city's retail trade, maintain property values, and generally '[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" *Id.* at 48. Similarly, the Virginia cross burning statute is intended not just to prevent intimidation of the victim (which, under *Boos*, may or may not be a secondary effect[22]), but to preserve law and order in the surrounding community. J.A. 326. Cross burnings are historically associated not with threatened fisticuffs or other minor assault, but with

[22] While emotive reaction is not a secondary effect, one court has held that "the fear and intimidation of a victim of a malicious cross burning crosses the line between emotive reaction and tangible injury." *In re Steven S.*, 31 Cal. Rptr. 2d at 651. *See also Talley*, 858 P.2d at 226.

threats to burn, lynch, behead or otherwise murder innocent victims. It is not hard to imagine how unchecked spates of intimidation by cross burning could spark retaliation, retard commerce, depress property values and generally transform our society into one reminiscent of Northern Ireland or the Balkans. It was to preserve law and order – and thereby "insure domestic tranquility" – that the General Assembly saw fit to ban cross burning fifty years ago. U.S. Const., Preamble. There is no reason to question its judgment now.

The applicability of the secondary effects doctrine is underscored by the similarity between this case and other aspects of *Renton*. There the adult theater argued that the town's ordinance was constitutionally defective because it "fail[ed] to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters." 475 U.S. at 52. Such other businesses presumably included other forms of expressive activity, such as adult bookstores and adult video stores. Yet, the Court rejected the argument, explaining its position with a logic that applies equally to the case at bar:

> There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton . . . . We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.

*Id*. at 52-53 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)). Similarly, there is no evidence that, at the time the Virginia statute was enacted, any

other practice of intimidation was abroad in the land with the same capacity to undermine law and order. Nor is there evidence of any such practice today, nor is there any reason to believe that, if some new and comparably intimidating practice were to raise its head in the future, that the General Assembly would not amend Virginia law accordingly.

### C. No Official Suppression of Ideas Is Afoot.

For its third exception, *R.A.V.* describes a broad "catch-all" category of content-based distinctions, saying "it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." 505 U.S. at 390. Here, no such possibility exists.

Assuming *arguendo* that the Virginia statute contains some form of content-based distinction, it nevertheless qualifies for this third exception as shown by an array of pertinent facts. First, the statute contains no content-based categories. It bans *all* cross burning with intent to intimidate not just cross burning that conveys racial and religious bigotry. *See T.B.D.*, 656 So. 2d at 481. Second, the law was originally enacted by a legislature that embraced a policy of racial inequality. Suppressing such ideas could not have been its purpose. Third, while the Commonwealth no longer adheres to a policy of segregation, Virginia law still leaves ample opportunity for such ideas to be expressed – as the First Amendment requires – so long as they are not intertwined with intimidation. Simply causing "resentment" or "ill-feeling" is not enough to run afoul the Virginia statute. Fourth, the plausibility of the asserted purpose – to preserve law and order – is

confirmed by the spate of cross burnings that preceded the law. Fifth, no comparable form of intimidation was being practiced – not in 1952, and not now. Sixth, other provisions of Virginia law ban intimidation using the written word. Va. Code § 18.2-60(A). To treat cross burning as intimidation is simply to recognize the "shorthand" already in use and already understood by perpetrator and victim alike. Seventh, while the statute does not ban the burning of other geometric shapes, "no animating message is contained in such acts." *Black*, 553 S.E.2d at 745, J.A. 281. In sum, there is no "realistic possibility" that official suppression of ideas is afoot. Cross burning with the intent to intimidate "[a]t its core, is an act of terrorism that inflicts pain on its victim, not the expression of an idea." *In re Steven S.*, 34 Cal. Rptr. 2d at 651. Indeed, this combination of facts "refute[s] the proposition that the selectivity of the restriction is 'even arguably conditioned upon the sovereign's disagreement with what a speaker may intend to say.'" *Id.* at 390 (quoting *Metromedia, Inc. v. San Diego,* 453 U.S. 490 (1981) (Stevens, J., dissenting in part) (internal marks and citation omitted). For this reason, too, the Virginia statute is constitutional.

## V. THE VIRGINIA STATUTE IS NOT OVERBROAD.

### A. The Lower Court Misunderstood This Court's Overbreadth Jurisprudence.

The Virginia Supreme Court also ruled that the cross burning statute is void under the overbreadth doctrine. In so ruling, it relied – mistakenly – on Justice White's concurrence in *R.A.V. Black,* 553 S.E.2d at 745-46, J.A. 283-84. Despite the narrowing construction by the Minnesota Supreme Court, Justice White said the law still "criminalize[d] a substantial amount of expression that –

however repugnant – is shielded by the First Amendment." *R.A.V.*, 505 U.S. at 413 (White, J., joined by Blackmun, Stevens, and O'Connor, JJ., concurring). The court below misread Justice White and misunderstood this Court's overbreadth jurisprudence. Indeed, what the court below called "overbreadth" bears little resemblance to the overbreadth doctrine explained by this Court.

Unlike the concurrence in *R.A.V.*, the Virginia Supreme Court did not focus on the statute's prohibitory terms. Instead, it looked at the statutory inference, which allows – but does not require – a jury to infer an intent to intimidate based on the act of cross burning alone.[23] The court did not doubt that the prosecutor still must prove every element of the offense – including intent – beyond a reasonable doubt. Nor did the court otherwise suggest that the statute fails to meet the constitutional requirements that ordinarily govern statutory presumptions. *See Barnes v. United States*, 412 U.S. 837, 842 (1973).[24] Instead, the court focused on the mere *possibility* of arrest and prosecution. Where a cross is burned in a place described by the statute, the court said,

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[23] Added in 1968, the last paragraph of the statute provides: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code § 18.2-423. *See also* 1968 Va. Acts ch. 350.

[24] A statutory inference is constitutional if (i) the state retains the burden of proof on the fact to be presumed, and (ii) "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Barnes*, 412 U.S. at 842-43 (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)) (internal quotation marks omitted). The inference in the Virginia statute clearly meets this test.

> the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression. [The Virginia statute] sweeps within its ambit for arrest and prosecution, both protected and unprotected speech. As such it is overbroad.

553 S.E.2d at 746, J.A. 284-85 (citations and footnotes omitted). In other words, what concerned the court was the possibility that an *innocent* cross-burner – *i.e.*, one who burns a cross *without* an intent to intimidate – might still be arrested and prosecuted. The conduct of such a person is not barred by the statute; yet, the court thought the prospect of a trial might chill innocent expression, and that the mere possibility of such an occurrence was sufficient to make the Virginia statute overbroad. This is error.

The court erred in its understanding of both the statutory presumption and the overbreadth doctrine. Contrary to what the court tacitly assumed, the presumption does not purport to direct police officers when to make arrests, nor does it purport to bind prosecutions in the exercise of their discretion. Instead, it comes into play only

at trial, where it may form the basis of one jury instruction among many.[25]

Moreover, the mere possibility that someone might be mistakenly charged does not render a statute overbroad. Indeed, if the lower court were correct in its approach, it would be difficult for *any* regulation of expressive conduct to withstand scrutiny. There will always be cases where conduct that is lawful initially appears culpable and results in charges that are ultimately dismissed. For example, this Court has held that government may constitutionally prohibit possession of child pornography, even where the same images would not be proscribable as obscene if their subjects were adults. *Ferber v. New York*, 458 U.S. 747, 764 (1982). Yet, when confronted with the printed image of a youthful individual engaged in sex, law enforcement officers necessarily must evaluate whether the individual appears to be a minor before deciding whether to make an arrest. Sometimes the evaluation may be difficult. Sometimes the evaluation may be mistaken. Yet, the possibility that law enforcement might err does not make these important statutes "overbroad." Pornographers who prefer "barely legal" models – those who recently turned 18 and who look even younger – may be deterred in some instances, or they may find it advisable to surround their work with assurances of their subjects' adult status. Yet, so long as the statute's *prohibitory terms* do not reach too far, these collateral effects are not the sort of "chill" the overbreadth doctrine is designed to prevent.

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[25] Such an instruction was given in the Black case, J.A. at 146, but not in Elliott's trial. O'Mara, of course, was not tried by a jury.

### B. Under This Court's Overbreadth Jurisprudence, the Virginia Statute Is Not Overbroad.

This Court's overbreadth doctrine contains two components. The first component addresses standing, while the second provides substantive rules for evaluating the constitutionality of a statute. Under the traditional rule of standing, "constitutional rights are personal and may not be asserted vicariously." *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973). Thus, if a person's conduct may be constitutionally prohibited by statute, he is unable to challenge the statute on the grounds that the same statute might be applied unconstitutionally to someone else. *Id.* The overbreadth doctrine alters this traditional rule in certain limited circumstances. In the area of the First Amendment, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612. In other words, where the statute in question might chill speech protected by the First Amendment, those who are before the court have standing to challenge the statute on its face, even if their own conduct is not so protected. While the court below found respondents to have such standing, this is not where its error occurred.

Rather, the lower court erred on the second component – the substantive rules of overbreadth. The overbreadth doctrine is designed to invalidate statutes which, by their very terms, prohibit constitutionally protected expression *and* which do so routinely. Thus, in order for a statute to be so invalidated under this doctrine, "the overbreadth . . . must not only be *real*, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at

615 (emphasis added). This rule applies with particular force where, as here, "conduct and not merely speech is involved." *Id*. On both of these issues – whether overbreadth is real and whether it is substantial – the Virginia Supreme Court erred.

### 1. There Is No Real Overbreadth.

In order for overbreadth to be *real*, the statute's *prohibitory terms* must be so broad – or so vague – as to forbid expression that is constitutionally protected. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (holding that statute is overbroad "if in its reach it prohibits constitutionally protected conduct"); *Ferber*, 458 U.S. at 771 ("On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.") By its terms, the Virginia statute would not apply if someone burned a cross for some wholly innocent purpose. It applies *only* when the cross is burned with the intent to intimidate someone. There are *no* circumstances where such intimidation is constitutionally protected. *See R.A.V.*, 505 U.S. at 388 ("[T]hreats of violence are outside the First Amendment."). Thus, the Virginia statute does not reach *any* protected expression. There is no real overbreadth.

### 2. There Is No Substantial Overbreadth.

Not every case of overbreadth is fatal. As the *Broadrick* Court explained, overbreadth analysis is "strong medicine" and should be applied "sparingly and only as last resort." 413 U.S. at 615. Indeed, before a statute will be invalidated under the overbreadth doctrine, the

overbreadth must be *substantial*. *Id.* at 613.[26] As this Court, speaking through Justice White, observed:

> The premise that a law should not be invalidated for overbreadth unless it reaches a *substantial number* of impermissible applications is hardly novel. On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.
>
> * * *
>
> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to *repeatedly* chill the exercise of expressive activity by *many* individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.

*Ferber*, 458 U.S. at 771-72 (emphasis added). *See id*. at 772 n.27.

Here the Virginia Supreme Court gave no analysis for why it thought any perceived overbreadth was substantial. Indeed, there is no basis for any such conclusion. Even if the possibility of erroneous prosecutions played a role in overbreadth analysis, there is nothing to show that the

[26] In *Broadrick*, Justice Brennan sought to wield the overbreadth doctrine more aggressively than the majority, dissenting there because he thought the Court should strike down the statute that the *Broadrick* majority decided to uphold. Yet, as Justice Brennan observed, the Court has "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." 413 U.S. at 630 (Brennan, J., dissenting).

number of such errors would be substantial under the Virginia statute. As the Florida Supreme Court held in rejecting an overbreadth challenge to that State's cross burning law: "Although one might be able to imagine a hypothetical situation wherein the statute could be impermissibly applied, the threat of overbreadth is speculative at best and is insufficiently substantial to invalidate the statute on its face." *T.B.D.*, 656 So. 2d at 482.[27] Here, too, the possibility that someone might burn a cross for reasons other than intimidation – and *also* be charged under the Virginia statute – is speculative at best. In challenging this statute under the overbreadth doctrine, respondents "bear the *heavy burden* of demonstrating that the [statute] forbids a substantial amount of valuable or harmless speech." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1410 (2002) (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part) (emphasis added); *Reno v. A.C.L.U.*, 512 U.S. 844, 896 (1997) (O'Connor, J., joined by Rehnquist, C.J., concurring in part and dissenting in part). Assuming *arguendo* that such possibilities might arise, it cannot be seriously suggested that "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ferber,* 458 U.S. at 773. Thus, to say that the Virginia statute is substantially overbroad is wholly without merit.

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[27] *See also In re Steven S.*, 31 Cal. Rptr. 2d at 651, where the California Court of Appeals reached a similar result.

### C. If the Presumption about Intent to Intimidate Renders the Statute Overbroad, Then This Court Should Sever the Presumption from the Remainder of the Statute.

If the Court agrees that the statute's prohibitory terms are constitutional – but concludes that the statutory presumption is not – the statute should not be stricken on its face. Instead, the presumption should be severed and the rest of the statute allowed to stand.[28] Severability is a question of state law. *See United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 509-10 (1993). The Virginia law in this area was recently explained by the Fourth Circuit:

> Virginia's General Assembly has enacted a statutory provision dealing with severability of sections of the Virginia Code. Section 1-17.1 of the Code provides that "the provisions of *all* statutes are severable unless . . . it is apparent that two or more statutes or provisions *must* operate in accord with one another." In other words, the Virginia legislature has stated clearly that courts are now to apply a presumption of severability unless two provisions of a statutory section *must* operate together.

*Sons of Confederate Veterans, Inc. v. Comm'r*, 288 F.3d 610, 627 (4th Cir. 2002) (emphasis in original). Thus, this Court

[28] In terms of relief for these respondents, this would mean, at most, that Black, who pled "not guilty," would be retried without the Commonwealth's having the benefit of the jury instruction regarding an inference of intent. J.A. 146. The conviction of O'Mara, who pled "guilty," would stand. So would the conviction of Elliott, who pled "not guilty" but whose jury did not receive an instruction based on the statutory presumption.

must apply a presumption of severability to the cross-burning statute's presumption of intent. There is no reason why such presumption of intent *must* operate in accord with the remaining prohibitory terms, especially since the presumption of intent was not added until sixteen years after the original enactment. 1968 Va. Acts ch. 350. Thus, if this Court finds the statutory presumption to be invalid under the overbreadth doctrine, it can be – and must be – severed from the rest of the statute. More importantly, however, there is no overbreadth. The statute is constitutional as written.

## CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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