No. 01-1107

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Petitioner,
vs.
BARRY ELTON BLACK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, HUMAN RIGHTS CAMPAIGN, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC., AMERICAN JEWISH COMMITTEE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, COMMISSION OF SOCIAL ACTION OF REFORM JUDAISM, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, NATIONAL GAY AND LESBIAN TASK FORCE, NATIONAL COUNCIL OF JEWISH WOMEN, INC., AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI*

Amici curiae listed in the caption hereof submit this brief in support of neither petitioner nor respondents.[1]

Anti-Defamation League

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. The impetus for ADL's founding was a hate crime—the lynching of a Jewish man, Leo Frank, in Atlanta, after his unjust conviction for murder and the commutation of his death sentence to life imprisonment—and ADL's core commitment is to the eradication of hate. Yet, as a civil rights advocacy organization, ADL is equally committed to the preservation of our democratic freedoms and to the constitutional rights that gird those freedoms. ADL is particularly sensitive to First Amendment rights of speech, belief, and conscience, believing that such

[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amici* have obtained and lodge herewith the written consents of the parties to the submission of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici* and their counsel, made a monetary contribution to its preparation or submission.

freedoms are essential to our other freedoms as Americans, and that they serve as foundation stones of the fight against hate and bigotry. The competing interests at stake here are thus of keen interest to ADL and central to its mission.[2]

People for the American Way Foundation

People For the American Way Foundation ("People For") is a non partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 500,000 members and supporters nationwide. People For has a broad concern for protecting First Amendment rights, and has submitted *amicus* briefs to this Court in support of free expression in a number of recent cases, such as *Ashcroft v. A.C.L.U.*, 122 S. Ct. 1700 (2002), and *United States v. Eichman*, 496 U.S. 310 (1990). At the same time, People For is devoted to promoting religious and racial tolerance and to combating discrimination and prejudice, a goal which can be accomplished consistent with the First Amendment. People For accordingly believes that it is important

[2] ADL has participated in other relevant cases to reach the Court. *See* ADL briefs *amicus curiae* filed in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

that the Court's decision in this case makes clear, consistent with the First Amendment, that a state may proscribe conduct such as cross-burning when it is intended and likely to instill fear and terror in others.

Human Rights Campaign

Human Rights Campaign ("HRC") is the nation's largest gay and lesbian civil rights organization, with over 450,000 members nationwide. HRC is devoted to fighting and ending discrimination on the basis of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC has provided federal and state legislative, regulatory, and judicial advocacy, as well as media and grass roots support on a range of initiatives affecting gay, lesbian, and bisexual individuals who suffer discrimination or hate crimes because of their sexual orientation. HRC has a clear interest in the prevention and punishment of the criminal conduct at issue in this case.

National Asian Pacific American Legal Consortium

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal and public policy advocacy, as well as community education, on

discrimination issues affecting the communities they serve. NAPALC is a leading national voice against anti-Asian violence, and accordingly has a vital interest in the issues presented in this case.

The National Conference for Community and Justice

The National Conference for Community and Justice ("NCCJ"), founded in 1927 as The National Conference of Christians and Jews, is a human relations organization dedicated to fighting bias, bigotry, and racism in America. NCCJ promotes understanding and respect among all races, religions, and cultures through advocacy, conflict resolution, and education. Uniquely positioned to enhance community leadership development programs in its service area with 61 offices in 34 states and the District of Columbia, NCCJ has dedicated itself to empowering leaders to create institutional change directed to the transformation of communities so that they may provide fuller opportunity to their citizens and so that they are more inclusive and more just. NCCJ is vitally interested in this case because of its central mission of fighting bigotry and racism in America, and because of the significant ramifications that this case will have in our communities.

Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans

nationwide through the prosecution of lawsuits, through its legal advocacy, and through the public dissemination, both in the communities it serves and more broadly, of information respecting discrimination against Asian Americans. AALDEF has throughout its history been in the forefront of the campaign to end violence against racial, national origin, and religious groups. Along with its affiliates, AALDEF annually publishes an audit of racial violence against Asian Americans. Criminal laws that punish intentional intimidation and serious threats are an important weapon in the arsenal of a state's responses to racial violence, and AALDEF is accordingly interested in the issues in this case.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc. ("Hadassah"), founded in 1912, is the largest women's and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and of the Jewish community in the United States. Crimes involving symbols of hatred such as burning crosses are an extreme manifestation of bigotry, and historically Jews and women alike have been targets of such crimes. Such crimes threaten the viability of our communities. While Hadassah is strongly committed to the First Amendment's guarantee of freedom of expression, Hadassah equally supports laws that combat crimes of intimidation.

American Jewish Committee

The American Jewish Committee ("AJC"), a national human relations organization with over 115,000 members and supporters and 33 regional chapters nationwide, was founded in 1906 to protect the civil and religious rights of Jews. AJC has historically been a staunch defender of the First Amendment's guarantees of freedom of expression. At the same time, AJC has been sensitive to the constitutional limits of free speech and firmly believes that purposeful intimidation and intentional threats of violence have no place in our society.

Jewish Council for Public Affairs

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of 13 national and 122 local Jewish community relations organizations. JCPA was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just American society. JCPA holds that crimes based on hatred and intimidation are anathema to the fundamental democratic values upon which this nation is founded.

Commission of Social Action of Reform Judaism

The Commission of Social Action of Reform Judaism ("CSA") is a joint instrumentality of the Union of American Hebrew Congregations ("UAHC") and the Central Conference of American Rabbis ("CCAR"). The 900 congregations of UAHC encompass 1.5 million Reform Jews; the membership of CCAR 1,800 Reform rabbis. CSA establishes policy for the Religious Action

Center of Reform Judaism, established to advocate for social and political policy in keeping with Jewish law and theology as understood by Reform Judaism.

Crimes such as those involved here hit particularly close to home for the Jewish people. All of us have watched in horror as acts of violence against Jews and Jewish institutions have, over the past year, again terrorized Europe and nations across the globe, creating an atmosphere of fear and intimidation. Laws which proscribe such crimes underscore, indeed strengthen, our nation's historic promise of liberty and justice. Jewish ethics support the struggle to uphold such laws. Jews are taught that God created humans *b'tselem elohim*, in the Divine Image, and that we are all, therefore, deserving of equal treatment (Genesis 1:27). Jews are commanded that "You may not stand idly by when your neighbor's blood is being shed" (Leviticus 19:16) and that "You shall not hate your kinsfolk in your heart. . . . Love your fellow as yourself" (Leviticus 19:17-18). Because of these precepts, Judaism teaches the importance of tolerance and acceptance of others. And because of the importance of these precepts CSA has a keen interest in this case.

American-Arab Anti-Discrimination Committee

The American-Arab Anti-Discrimination Committee ("ADC") is the national association of Arab Americans that works in every sphere of public life to promote and defend the interests of the Arab-American community. ADC is a grassroots civil rights organization welcoming people of all backgrounds,

faiths, and ethnicity as members. Since its founding in 1980 by former U. S. Senator James Abourezk, it has grown into the largest non-sectarian, non-partisan civil rights organization in America dedicated to protecting the civil rights of Americans of Arab descent. ADC works with other civil rights organizations and coalitions on a multitude of issues that affect constitutional freedoms. With headquarters in Washington, D.C., ADC also has more than 80 membership chapters nationwide. Through its Legal Department, ADC offers counseling, advocacy, and mediation, addressing hate crimes, employment and educational discrimination, public accommodation discrimination, immigration, housing, freedom of speech, and other civil liberties.

ADC is committed to combating crimes of hate while at the same time protecting the constitutional guarantees of expression. As the national voice of the Arab-American community, ADC supports and joins the Anti-Defamation League and other *amici* in submitting this brief, in the belief that freedom of speech and expression are equally as important to the American way of life as freedom from hate, and from racial, ethnic, and religious bigotry in our society.

National Gay and Lesbian Task Force

Founded in 1973, the National Gay and Lesbian Task Force ("NGLTF") works to eliminate prejudice, violence, and injustice against gay, lesbian, bisexual, and transgender people at the local, state, and national level. As part of a broader social justice movement for justice and equality, NGLTF strives to

create a world that respects and celebrates the diversity of human expression and identity, where all may fully participate in society. In its mission, NGLTF works to curtail hate crimes in this country, but simultaneously respects the key right of free speech.

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families, and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members, supporters, and volunteers in over 500 communities nationwide. NCJW joins this brief in light of its National Principle, which states that "Human rights and dignity are fundamental and must be guaranteed to all individuals," and its National Resolution supporting "The enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all."

Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association

The Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association ("Lawyers' Committee") is a non-profit law office that provides free legal services to victims of discrimination based on race or national origin. We have been successful in some of Massachusetts' most important civil rights cases, including school desegregation, housing

discrimination, and voting rights cases. In 1982, the Lawyers' Committee created the Project to Combat Racial Violence to address the crisis of racial violence that was engulfing Boston and surrounding communities. Twenty years later, we continue to represent victims of racially motivated harassment, violence, and intimidation throughout the Boston area, and have participated as *amicus curiae* in numerous cases involving the interpretation of our state hate crimes law. The Lawyers' Committee has an interest in this matter because all victims of racial violence and harassment deserve aggressive enforcement of their state's laws proscribing intimidation. Massachusetts does not have a specific cross burning statute, perhaps because the history of racism in New England has manifested itself differently than that of other states. But we support the vigorous enforcement of such laws in other states, and believe that statutes like Virginia's are consistent with the First Amendment.

* * *

All of the *amici* are uniquely situated to suggest, if not a resolution of the competing interests presented by this case, at least a mode of analysis through which an answer to such questions may ultimately be reached. As civil rights organizations, they each have widely varying missions. Yet all nonetheless recognize the paramount importance of protecting First Amendment privileges, even if the exercise of such privileges results in the expression of hateful ideas. But *amici* also recognize that expressive conduct can constitute a crime when a symbol of hatred such as

the burning cross is used to target others with the intent and likely effect of instilling in them fear and terror.

Amici believe that such crimes of intimidation continue to be a serious problem in our country, that legislatures should have the flexibility to punish expressive conduct which has such an intimidating intent and likely effect, and that in doing so they do not transgress First Amendment limitations. *Amici* thus submit this brief, in support of neither petitioner nor respondents, to advance their conviction that expressive conduct may be proscribed and punished if by its nature as "fighting words" it is outside the realm of protected speech, and if the criminal proscription requires a *mens rea* element of a specific intent to intimidate or to threaten. A statute that meets these requirements passes constitutional muster.

STATEMENT

Virginia Code § 18.2-423 provides, in pertinent part, that:

> 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.

The statute also contains a presumption that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate . . . ." Respondents were

convicted of violating § 18.2-423. Respondent Black burned a cross at a rally of the Ku Klux Klan conducted on private property but within view of the property of others. A jury found him guilty, believing that the evidence was sufficient to support the requirement of the statute that he intended to intimidate. Respondents O'Mara and Elliott burned a cross on the property of a neighbor, an African-American, in the night in retaliation for the neighbor's complaints about Elliott's "shooting guns in the backyard." O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, reserving his constitutional challenge, and his guilty plea constitutes an admission that he intended to intimidate others. A jury found Elliott guilty of attempted cross burning. As with Black, the jury found that the evidence supported the requirement that Elliott intended to intimidate his neighbor by burning a cross.

SUMMARY OF ARGUMENT

1. Government may constitutionally proscribe intimidation and threats, even if accomplished by speech or expressive conduct. The essential First Amendment safeguard for such regulation is found in the *mens rea* requirement of intent to bring about the desired end of instilling fear or terror in targeted individuals. In focusing on this element, the Virginia statute is consistent with the First Amendment.

2. The Virginia statute is neutral in viewpoint. It seeks to accomplish the legitimate state goal of proscription of intimidation without discrimination, by

banning *all* cross-burning, so long as accompanied by the required specific intent. It does not ban only those acts motivated by or which seek to express a particular viewpoint.

3. That the Virginia statute singles out the burning of *crosses* for particular proscription does not invalidate it. It is not generally necessary to prohibit either all acts of intimidation or none in order to guard against government infringement on rights of conscience, speech, and belief. Rather, it is sufficient if a state legislature has made a reasoned judgment that within the universe of threats, some are worse than others.

4. The message of intimidating cross burning is within the class of expressive conduct of such slight social value as to permit of outright ban. This doctrine of "fighting words" outside First Amendment reach appropriately encompasses words that are intended to and have the likely effect of creating fear of injury in the addressee. The burning of a cross with the requisite intent may be banned under this principle.

5. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), does not contradict this conclusion. While that case dealt with cross burning, it did not address a statute that conditions proscription on the actor's intent to intimidate others. Moreover, under the rule enunciated in that case, Virginia had the power to regulate speech involving intimidating cross burning because it had the power to regulate the broader class of intimidating or threatening speech intended to induce serious fear in others.

ARGUMENT

ASSAULTIVE AND UNPROTECTED SPEECH MAY BE CONSTITUTIONALLY PROHIBITED AND PUNISHED UNDER STATUTES SUCH AS THE VIRGINIA STATUTE

The Virginia Supreme Court invalidated Virginia Code § 18.2-423, asserting that "the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content . . . ." *Black v. Commonwealth*, 267 Va. 764, 768 (2001). The majority of that court felt that "[t]he Virginia cross burning statute is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V. (v. City of St. Paul)*." *Id*. at 772. In so holding, the Virginia court ignored the assaultive nature of the expressive conduct at issue and its consequent lack of constitutional protection.

A. The Statute Punishes Assaultive Speech Designed to Induce Fear in Others, Not Any Particular Viewpoint or Message.

It is axiomatic that a state legislature, in the exercise of the state's police power, may proscribe conduct harmful to others. It is equally axiomatic that such proscribable conduct includes intimidation. Thus, expressive conduct or speech both intended and likely to induce serious fear in others has long been held subject to criminal proscription. The Virginia legislature, as have the legislatures of other states with historical legacies of racism, bigotry, and hatred, chose

to punish a particular form of assaultive speech or intimidating conduct—the burning of a cross. It did so, however, without reference to the *content* of that expressive conduct, defining the crime instead by the intent with which it is committed and only by that intent. Cross burning *per se* is not prohibited by the statute. What is prohibited is cross burning "with the intent of intimidating any person . . . ."

Under the scheme of § 18.2-423, it does not matter what substantive message a defendant intended to convey by burning a cross. While choosing a symbol that Americans uniformly view as emblematic of racial and religious hatred, the legislature did *not* choose to punish the mere expression of hatred. It rather chose to punish expression only when it crosses the constitutional line into assaultive speech and is accompanied by the intent to instill serious fear in those exposed to the message.

Section 18.2-423 is accordingly limited. As noted by the dissent below, "by its express terms, [it] does not proscribe every act of burning a cross." *Black v. Commonwealth*, 262 Va. at 787. Rather, it punishes such conduct only when performed with the requisite *mens rea*—a specific intent to intimidate. As defined by the courts of Virginia, "intimidation" refers to "acts which put the victim 'in fear of bodily harm.'" *Id.* Mere offensiveness based on the listener's personal characteristics is insufficient to constitute criminal intimidation. It is defined not by reference to the peculiar susceptibilities of the victim, but by the intent of the actor. "Such fear must arise from the willful

conduct of the accused, rather than from some mere temperamental timidity of the victim. . . ." *Id*. Because it focuses on the actor's intent, and not the addressee's perception, the danger of regulation of otherwise protected viewpoint is virtually non-existent.

Finally, that the Virginia statute punishes harmful conduct and not viewpoint is illustrated by the fact that guilt under the statute is not dependent upon a motivation of racial or religious hatred. It is equally triggered by mere personal animus or other such content. For example, the evidence as to whether O'Mara and Elliott harbored racial hatred was ambiguous. But there was evidence to establish that, whatever their reasons, these respondents intended to instill fear in their targets. In punishing that expressive conduct, the Virginia statute does not violate First Amendment protections.

B. The Virginia Statute is Not Invalid In Proscribing a Particular Form of Assaultive Speech.

While a statute punishing intimidation or threats is constitutionally permissible, it may be argued that the Virginia statute impermissibly focuses upon certain racial or religious categories of intimidation. Because it proscribes *all* threatening uses of a burning cross, § 18.2-423 does no such thing. But even if the statute were understood as applying to particular forms of intimidation, this argument would be flawed. Content neutrality places restrictions upon the state's ability to proscribe intimidation—for example, a state could not criminalize only acts of intimidation that are aimed at

members of a particular political party. To accept content neutrality, however, does not require an all-or-nothing-at-all approach—it is not necessary to prohibit either all acts of intimidation or none. Were that the case, many criminal laws that are unquestionably lawful would raise issues of content neutrality.

A state may properly make a judgment that, within the universe of threats, some are worse than others. For instance, an assault with a deadly weapon is, in most states, some form of aggravated assault. The crime is more serious because the defendant has exposed society to greater risk—even if the weapon is not actually used—and has presumably caused greater fear in the victim. These differences justify an increased penalty. Likewise, a state may determine that acts of bias-motivated intimidation are worse than otherwise comparable acts, because these crimes cause greater societal harm and injury to the victims. That the Virginia legislature chose to proscribe conduct that has a high propensity to intimidate and, in its judgment, that causes greater harm to society, is simply not constitutionally significant.

Similarly, it may be argued that the Virginia legislature chose to proscribe a symbol, and that it therefore intended to suppress a message identified with that symbol. This argument proves too much. While it is "a bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Virginia legislature has not forbidden its citizens to burn

crosses in order to express racial or religious hatred. This they remain free to do. What they may not do is burn crosses with the intent of instilling serious fear, for this invades others' rights. *See* D., *infra* at 24.

Equally, that the burning of a cross has a direct tendency to instill serious fear does not invalidate the prohibition as content-based. The origin of the symbol underscores the power of its message. "The Klan . . . appropriated one of the most sacred of symbols as a symbol of hate." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 771 (1995) (Thomas, J., concurring). But the burning cross not only is linked to racial and religious hatred, but is directly associated with violence, terror, and lawlessness.[3] The

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[3] A late-night cross burning in the yard of a neighbor, with the intent to intimidate, the crime of which respondents O'Mara and Elliott were convicted, is an act of violence and terror.

> After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: "murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person."

United States v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1991).

use of this symbol, charged as it is with historical associations of violence, accompanied by a specific intent to intimidate, inflicts injury through speech. Cross burning, of course, has been specifically recognized as having such an effect. It is "not mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence . . . ." *United States v. Lee*, 935 F.2d 952, 956 (8th Cir. 1991).

The state may not proscribe the *expression* of hate, whether racial, religious, anti-Semitic, or ethnic. But the state may prohibit the use of a particular symbol, one universally identified with violent manifestations of hate, when it is employed to intimidate. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (citation omitted) ("First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control."). The latter objective is all the Virginia statute seeks to accomplish, and it does not invade the precincts of the First Amendment in doing so.[4]

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[4] The Virginia statute states that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate . . . ." To the extent that this presumption eliminates *proof* of the state of mind of a defendant, in *amici's* view the statute may run afoul of First Amendment protections which, under our formulation, require such proof.

C. Cross Burning With the Intent to Intimidate a Targeted Individual is Expressive Conduct Outside the Scope of First Amendment Protection.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court held that "certain well-defined and narrowly limited classes of speech, . . . including the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" are not within the scope of protection of the First Amendment. *Id.* at 571-72. As recognized by the Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), "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 382-83, quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572. For the reasons we have discussed, the proscription here is within the classical definition of "fighting words," and as such outside the scope of protection of the First Amendment.

This doctrine retains substantial force in the context of assaultive hate speech. While *Cohen v. California*, 403 U.S. 15 (1971), and *Lewis v. New Orleans*, 415 U.S. 130 (1974), refined the doctrine, in one case requiring that the state must show that the defendant directed "personally abusive epithets" at a specific individual (*Cohen v. California*, 403 U.S. at 20), and in the other requiring that the words be directed at a person with a predisposition to fight (*Lewis v. New Orleans*, 415 U.S. at 135 (Powell, J., concurring)), the gravamen of the doctrine remains

that words which inflict serious and real injury are both proscribable and punishable. *See*, *e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection").

Viewed as the underpinning to punish expressive conduct specifically intended and likely to intimidate—in this case, cross burning—the doctrine retains special force. As one leading commentator has put it, "[i]f *Chaplinsky* is to maintain any contemporary vitality, it must be understood to place outside the First Amendment's reach those words that are intended to and have the likely effect of creating fear of injury in the addressee." Frederick M. Lawrence, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 102 (1999).[5] Statutes like the Virginia statute do precisely that. In proscribing such "fighting words," these statutes properly regulate an area of expressive conduct that is not protected by the First Amendment.

D. The Court's Holding in *R.A.V.* Does Not Control This Case.

The Court's holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which the Supreme Court of Virginia believed controlling, does not invalidate

[5] Professor Lawrence is co-counsel to *amici* in this case, and a co-author of this brief.

statutes like the Virginia statute. What distinguishes such statutes, and the Virginia statute as well, from the statute invalidated in *R.A.V.*—and what takes the respondents' conduct here outside the realm of protected speech—is the incorporation of the required *mens rea* element of a specific "intent to intimidate."

In *R.A.V.*, St. Paul chose to punish cross burning by reference to an effect on third parties related to the *content* of the speech. While the statute was construed by the Supreme Court of Minnesota to proscribe only "fighting words" otherwise outside First Amendment protections, it nonetheless swept within its prohibition only those "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. In doing so, it selected among different forms of speech, and thus regulated the content or viewpoint of that speech. "Fighting words" or not, this regulation or proscription transgressed the First Amendment line.

But here, the statute does not select among messages or content or viewpoint. Instead, it identifies a particular type of conduct—the burning of a cross—accompanied by a particular kind of *mens rea*—intent to intimidate—and makes it illegal consistent with the First Amendment. The Virginia statute does not select among ideas, choosing to prohibit only particular political or religious (or even hateful) messages. To the contrary, the actor may utter whatever message he wishes, hateful, distasteful, even violent. But when the actor acts—by using fighting words—with the required *mens rea*, with an intent to intimidate, he

passes outside the sphere of protected expression into the sphere of proscribable activity.[6]

In locating its proscription in the actor's intent, the Virginia statute properly focuses on the right of others to be free of assaultive conduct, and proscribes expressive conduct without regard to content or expression. Unlike *R.A.V.*, this is true regardless of the actor's motive, and punishes the conduct whether the motive is based on race, religion, or mere personal animosity. This type of prohibition, focusing as it does on intent and conduct of the actor, and not on content, passes First Amendment muster even under the rigorous test established by *R.A.V.*.

That the speech here is proscribable when accompanied by specific criminal intent to intimidate is clear also from another aspect of *R.A.V.* As Justice Scalia pointed out there, "[w]hen 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

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[6] The *R.A.V.* statute also did not require intentional conduct. Rather, the ordinance challenged there could be violated by negligent conduct if a defendant used a symbol "which one knows or has reasonable ground to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ." *Id.* at 380. A statute which can be violated by negligent conduct poses a more distinct threat to First Amendment freedoms than one requiring the state to prove intentional conduct, such as that here.

discrimination exists." *R.A.V. v. City of St. Paul,* 505 U.S. at 388. The Virginia legislature chose to proscribe the burning of a cross with the intent to intimidate because of the clear harm criminal intimidation poses to targeted individuals. In such a case, the "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." *Id.* Thus, Virginia could constitutionally choose to exclude this one type of expressive conduct—the burning of a cross with the specific intent to intimidate—because it can constitutionally prohibit speech that is intended and likely to intimidate and threaten.

Amici emphatically support laws that proscribe criminal conduct such as that at issue here. Yet *amici* also stand firmly behind the commitment to free expression. They would not and do not urge that belief, conscience, or hateful speech alone may be suppressed. The "bedrock principle" (*Texas v. Johnson*, 491 U.S. 397 at 414) that upholds expression even of distasteful ideas leaves no room for government regulation. But expression for the purpose of intimidation, expressive conduct directed at an individual to instill or inspire fear, is simply not within the expansive realm of freedom of speech as we know it. Society may properly guard against this evil.

As a corollary, of course, the burning of a cross without the accompanying *mens rea* requirement of an intent to intimidate would constitute protected speech. Thus, *amici* concede that the burning of a cross at a

political rally as a general expression of racial or religious hatred is protected expressive conduct.[7] No matter how odious or unpalatable the idea, *amici* recognize the First Amendment protection accorded such expression. While perhaps offensive to others, it is nonetheless protected; that is the price we pay for the First Amendment, and it is not too high a price.

An act intended to intimidate others is different in kind, and forfeits expressive protection, from an act intended to make a political, or racial, or religious, point, even such a point infused or motivated by hate or bias. We tolerate the *expression* of hatred because the First Amendment guarantees freedom of all expression, but we distinguish from true expression words and expressive conduct that are intended and likely to intimidate. In those cases, we may constitutionally proscribe the use of symbols when they are the means through which the vital force of that intimidation is conveyed.

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[7] *Amici* take no position on whether the juries in these cases properly found an "intent to intimidate" or whether the evidence in this regard was sufficient to sustain the convictions of Elliott and Black, the two respondents convicted at trial. The two cases raise different problems of proof, and in one the proof may well have been sufficient, while in the other it may not have been. In particular, proscribing the burning of a cross at a rally, without a specific target of intimidation or threat, may not satisfy constitutional requirements.

* * *

The intimidation of others is a serious crime. It is no less a crime, and no less punishable, when accomplished through the burning of a cross. While that act may have expressive content, a state may validly proscribe it when it does not single out any particular viewpoint, but rather focuses only on the act and the requisite specific intent of the actor.

Amici, leading American civil rights groups each concerned in its own way with, and dedicated in its own mission to, the eradication of hate, bigotry, and bias-related violence, are mindful that we must tread with great caution in regulating speech, conscience, or belief. But there is no social value in the burning of a cross accompanied by the specific intent to intimidate others. It does no violence to the First Amendment to bar such conduct.

CONCLUSION

The judgment of the Supreme Court of Virginia invalidating Virginia Code § 18.2-423 on the First Amendment grounds specified in that court's opinion should be vacated.

Respectfully submitted,

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