IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA	**)**	
	)	**DOCKET NUMBER: 01-1107**
PETITIONER,	**)**	
VS.	**)**	
	)	
BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,	**)**	
	)	
DEFENDANTS.	**)**	

BRIEF OF AMICUS CURIAE
COUNCIL OF CONSERVATIVE CITIZENS
FILED IN SUPPORT OF RESPONDENTS

I. STATEMENT OF INTEREST OF AMICUS CURIAE.

The Council of Conservative Citizens is interested in this case because it ardently supports the right of freedom of expression of all of the citizens of the United States and of all persons who lawfully reside or sojourn within the boundaries of this nation. The particular emphasis of the Council is the protection of the expressive rights of the millions of Americans of British and European descent who hold to conservative views on matters of racial and ethnic relations and who further believe that the United States should remain a substantially British and European derived nation in terms of its demography and its culture. For this reason its submits this brief in support of the position of the Respondents Barry Elton Black, Richard J. Elliot and Jonathan O'Mara.[1]

II. SUMMARY OF ARGUMENT.

While the burning cross has undoubtedly been utilized in numerous acts of ethnic, racial and

[1] Pursuant to Rule 37 (6) of the Court no party to this action has written any portion of this brief. The Council of Conservative Citizens is the group solely responsible financially for the preparation of the document and not any party to this action.

religious violence over the last 130 years, it also has significance as a means of communication of political thoughts and sentiments. This is so because it is a potent symbol of White resistance to what many Whites believe to be the accelerating non-white political and cultural ascendancy in the United States . Because it is a symbolic expression of political speech, government cannot criminalize cross burning on account of the fact that various persons and groups who may have the occasion to view such conduct may become angry or fearful.

The statute at issue, Va. Code § 18.2-423, is overbroad for the reason that it punishes someone who lights a cross solely with the intent of intimidating a person or persons. It is expansive because the term "intimidation" can simply connote symbolic expression which causes certain persons and groups to feel a sense of fear and anger merely on account of having viewed such a spectacle. Furthermore, it purports to punish someone who burns a cross on the basis that the defendant intended to intimidate another person or persons without requiring proof that such conduct did in fact intimidate someone.

Finally the statute allows the trier of fact in any prosecution under this enactment to infer an intent to intimidate merely from the fact of burning a cross. For that reason it empowers the Commonwealth of Virginia to arrest and prosecute anyone who burns a cross in any circumstances regardless of the context in which such conduct took place.

The overbroad nature of this statute required it to be struck down regardless of the conduct of the Respondents on account of the danger that this law poses to the exercise of First Amendments rights.

The Court must affirm the decision of the Supreme Court of Virginia if the Court is to continue to adhere to the "incitement to eminent lawless action test" for determining the legality of

speech, particularly political speech, explicated in **Brandenburg v. Ohio, 395 U.S. 444 (1969)** and most recently reiterated and reaffirmed in **Ashcroft v. Free Speech Coalition, 535 U.S. _____, 122 S. Ct. 1385, 152 L Ed 2d 403 (2002)**.

The burning of a cross cannot be punished as so-called "hate speech" because of what many persons believe to be the tendency of such expression to either cause or facilitate the commission of violent and terroristic acts against racial and religious minorities and other vulnerable groups. Speech and expression cannot be prohibited on the grounds that it may encourage violent conduct at some indefinite and undetermined future time. This precept must be as applicable to the putative consequences of provocative and unpopular political speech and expression as it is to the alleged deleterious social effects of depictions and portrayals of explicit sexual conduct, even those supposedly involving minors.

III. ARGUMENT.

In 1996 the Bureau of the Census announced its projection that by the middle of the twenty-first century Americans of British and European extraction, the group that brought this nation into existence in the first instance, would barely constitute over half of its population.[2] The most cursory review of demographic statistics concerning the population of the United States shows that that portion of the population has been steadily falling since the middle of the twentieth century.

The results of the 2000 census confirmed the accuracy of this projection in that it revealed that nearly half of the United States 100 largest cities are home to more Blacks, Hispanics, Asians and other minorities than they are to Whites and that seventy- one of these cities lost White residents

[2] Steven A. Holmes, "Census See Profound Ethnic Shift in U. S.," N. Y. Times, March 14, 1996 at A16.

over the last decade.[3] Since the large cities of any nation are its principal centers of commerce and culture the only inference that can be drawn from this data is that Americans of British and European extraction (hereafter referred to as Euro-Americans or, more generally, Whites) are inexorably losing hegemony and control over the homeland that their ancestors fought so hard to bring into being for at least two hundred arduous and blood soaked years.

While the majority of Euro-Americans are now indifferent to this process, there is a growing minority of this population group that seriously questions the universalist ethical and philosophical assumptions that underlie the majority's pacific attitude toward this trend and which strongly posits the absolute right and the moral imperative of Euro-Americans to oppose their dispossession by every legitimate means allowed in a free and democratic society. In the face of demographic and social changes unprecedented in the history of any nation, changes which Euro-American activists believe can only lead to the eventual marginalization if not the obliteration of their culture in the United States, such activists defend the right of themselves and like- minded individuals to explicate and expound upon the "gathering storm" of their people's plight in the bluntest and most forceful means possible.

Thus the Council defends the right of certain Euro-American militants to utilize the burning cross, the traditional symbol of the Ku Klux Klan, as an expression of unyielding opposition on their part to what they plausibly believe to be a minority-liberal agenda that threatens to diminish and to eventually eliminate traditional Euro-American influence in this country. The Council supports this right notwithstanding the fact that the burning cross has frequently been associated with terrorist acts

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[3] Eric Schmitt, "The Census: The Nation; Whites in Minority in Largest Cities, the Census Shows," N. Y. Times, April 30, 2001 at A1.

and violence. Needless to say, The Council in no way endorses the use of this symbol as an expression of White solidarity, but it must empathically defend the right of other activists to utilize it in that manner. The Council does so because it knows that if governments and minority-liberal organizations can proscribe and impede its use as a means of symbolic speech, then such bodies or groups can effectively chill and perhaps ultimately eliminate other forms of expression which articulate the Euro-American defense of its legitimate interests.

When the Virginia statute in question is examined, the overbroad and inexact nature of this enactment becomes self- evident. It declares 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, or highway or other public place." Virginia Code § 18.2-423. The statute does not further define what manner of conduct, other than the burning of the cross itself, shall constitute the act of "intimidating" nor have the Virginia courts adopted a narrowing construction of this term which explicitly states the proposition that the expression of political opinions is not embraced within the concept of intimidation insofar of the construal of this statute is concerned.

The lighting of a cross in an area where it is plainly visible to large numbers of minority group members is surely in one sense "intimidating". The person or persons who have undertaken such a mode of expression are thereby stating in the most unequivocal means possible their unyielding opposition to what they believe is a minority-liberal program of affirmative action in education and employment, "set asides" in the granting of government contracts, less restrictive immigration laws and other forms of government-sponsored empowerment of non-white ethnic and racial groups. A large number of non-whites - in all probability a decided majority of them - who view such a demonstration would for that reason be likely to feel a sense of fear and anger upon

observing such a spectacle and consequently they would undoubtedly describe themselves as having been "intimidated" because it transpired within their range of perception.

The principle of First Amendment jurisprudence is nevertheless axiomatic that speech and equivalent forms of expression can be neither prohibited nor punished because those persons who hear it or see it may be offended or otherwise detrimentally effected emotionally by it. **Texas v. Johnson, 491 U.S. 397, 407-409 (1989); Boos v. Barry, 485 U.S. 312 (1988).** Consequently, the fact that a manner of speech or expression may have a tendency to coerce or intimidate some listeners is not a basis for holding that it falls outside the ambit of First Amendment protection. In **Thornhill v. Alabama, 310 U.S. 88 (1940)** this Court held that peaceful picketing was entitled to constitutional protection even though the purpose of the picketing was to advise customers and prospective customers of an adversarial relationship existing between the employer and its employees and to thereby induce such customers not to patronize the employer. The constitutional protection afforded to such ostensibly coercive and intimidating speech was reaffirmed in **NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908-910 (1982)** when this Court held that the NAACP's publication of the names of Black people who violated that organization's boycott of Port Gibson, Mississippi merchants could not subject that group to a successful civil lawsuit. The Court so ruled despite the fact that there was no doubt that this particular speech had had a substantial intimidating effect on those Blacks who did not desire to adhere to the NAACP strategy in the Port Gibson controversy.

The proscription contained in §18.2-423 must therefore be said to sweep within its circumference a great deal of conduct that would otherwise be fully protected expression. The statute in its entirety for that reason must be held to be overbroad and therefore unconstitutional.

Broadrick v. Oklahoma, 413 U.S. 601 (1973).

This conclusion is buttressed by consideration of the second paragraph of the statute which states that "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." In Virginia "prima facie evidence" means evidence sufficient to raise a presumption of fact or establish the fact in question unless rebutted. **Nicely v. Commonwealth, 25 Va. App. 579, 490 S. E. 2d 281, 282 (1997).**

Allowing the state to establish a prima facie case against a defendant charged with a violation of the statute, sufficient to get the case to a jury, merely on the basis of that person's conduct in burning a cross in a public place or on the property of another without the introduction of any actual evidence of his or her intent in doing so directly contravenes this Court's holding in **Watts v. United States, 394 U. S. 705 (1969).** While at a political gathering assembled to protest the Vietnam War the defendant Watts said that "If they (referring to the United States Army) ever make me carry a rifle the first man I want to get in my sights is L.B.J. (speaking of then President Lyndon Johnson)". **394 U.S. at 706.** On the basis of that statement Watts was prosecuted and convicted of violating **18 U.S.C. § 871 (a)**, the federal law that makes it a crime for any person to threaten the life of the President of the United States.

In reviewing Mr. Watt's conviction this Court upheld the constitutionality of **18 U.S.C. § 871 (a)** but it further ruled that Mr. Watts could not be prosecuted for that crime in the circumstances in which he made the offending utterance.

> **. . . the statute initially requires the Government to prove a true threat. We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose**

"against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Company v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964). The language of the political arena, like the language used in labor disputes, see Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966) is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the president." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

394 U.S. 708.

In contrast, the Virginia statute would allow law enforcement authorities to arrest anyone charged with burning a cross in a public area, which could include such a defendant's own property. Such an unfortunate person could further be indicted and tried on such meager evidence. And according to this statutory scheme, the felonious intent can be implied from the singular act of the defendant in burning the cross.

Thus under the terms of this statute a defendant can be arrested, indicted and tried solely for lighting a cross regardless of the circumstances and context within which this expressive conduct took place. The mere possibility that a person could even be threatened with prosecution pursuant to this seriously flawed enactment mandated that it be struck down. Such judicial action was required

notwithstanding the fact that not a few persons charged with violating the statute had, in fact, been engaged in morally culpable conduct. For that reason alone the Virginia Supreme Court was amply justified in declaring this statute unconstitutional, particularly in light of its all-encompassing presumption of intent to intimidate arising merely from the exercise of this form of symbolic expression.

> **A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e. g., Smith v. People the State of California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205. When the statutes also have an overbroad sweep, as here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that the defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.**
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> **. . . we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of the First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of its success or failure.**

Dombrowski v. Pfister, 380 US 479, 486, 487 (1965).

Despite the palpable unconstitutionality of this statute, the Council does not dispute the proposition that Virginia or any other jurisdiction in the United States may properly pass an act

which makes it illegal for anyone to burn a cross on the property of another without that person's permission or to do so in close proximity to another person's home with the further intention of intimidating or terrorizing that person. The Council concedes the validity of such legislation because of its high regard for property rights and on account of the obvious duty of government to protect the tranquility and the sanctity of the homes of all of its citizens. See **Frisby v. Schultz, 487 U.S. 474 (1988)** (government can prohibit continuous picketing in front of a person's home).

In its decision striking down a statute of the state of Texas prohibiting the burning of the flag of the United States, the Court held that it was impelled to do so because a contrary opinion would effectively overrule much of its modern jurisprudence delineating the scope and protection of the First Amendment, particularly that concerning political speech and expression.

> **Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite such action." Brandenburg v. Ohio, 395 U. S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d. 430 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' argument that it need only demonstrate "the potential for a breach of the peace", Brief for Petitioner 37, and that every flag burning necessarily possesses that potential would be to eviscerate our holding in Brandenburg. This we decline to do.**

Texas v. Johnson, supra at 409 (1989).

Any careful weighing of the arguments both for and against the constitutionally of this Virginia statute must inexorably lead to the conclusion that this Court cannot reverse the decision of the Supreme Court of Virginia and still adhere to the Brandenburg formula, as upheld and reaffirmed in **Texas v. Johnson.** Intellectual integrity and the institutional necessity of maintaining a coherent body of First Amendment jurisprudence demands affirmance of the opinion of the lower court.

The Council anticipates that the most powerful arguments in support of the position of the petitioner in urging reversal will be the emotive ones. If they are not expressly set forth by the Commonwealth and the various amici who have submitted briefs in support of its position, they will certainly be a discernible undercurrent which will run through virtually all of the arguments advanced by that side of this controversy. The essence of that argument is this :

> **In an increasely diverse and pluralistic America we can neither tolerate nor indulge the kind of hate- laden rhetoric and expression represented by the burning of a cross and other such symbols. The corrosive and destructive ideas represented by these symbols do have palpable, real - life consequences. These consequences are the perpetration of hate crimes such as took place in Jasper, Texas several years ago- the James Byrd truck dragging case - and more generally the oppression and persecution of racial and ethnic minorities and other vulnerable groups such as gay people. Indeed, the most traumatic and horrific event of modern times - the Holocaust - was the end result of allowing in the name of "free speech" such pernicious discourse to permeat the infected societies out of which that terrible event arose.**

The Council will not respond to this argument because this Court, speaking through Justice Kennedy, has already done so in terms that are directly applicable to this case and which should clearly dictate its outcome. In **Ashcroft v. Free Speech Coalition, 535 U.S. ___,122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)**, the Court grappled with the constitutionality of certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 et seq., which, among other things, in § 2256 (8) (B) banned any visual depiction that "is, or appears to be, of a minor engaged in sexually explicit conduct". The target of that provision is what has come to be known as "virtual child pornography" - images that appear to depict minors which are produced by means other than the use of real children, as, for example, the production of computer- generated images and images of adults that have been electronically altered to appear to be minors.

One of the most powerful and forcefully advanced arguments of the proponents of the constitutionality of this provision, among whom were numbered the United States government speaking through its Solicitor- General, was that such images had to be placed beyond the pale of First Amendment protection because the widespread dissemination of such materials to persons who have sexual inclinations and attractions toward children would invariably encourage them to act on those impulses and to consequently molest and victimize children as a means of satiating their desires. The proponents of censorship in this very sensitive area of human sexuality understandably and plausibly argued that the fantasies of such persons would necessarily be fed by the widespread proliferation of such depictions if they were not criminalized and suppressed.

In speaking for the majority of this Court which held this and similar provisions of the act to be unconstitutional as violative of the First Amendment, Justice Kennedy expressly and emphatically rejected this "future harm" argument.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. Stanley v. Georgia, 394 U. S. 557, 566, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See Kingsley International Pictures Corp., 360 U. S., at 689, 79 S. Ct. 1362; see also Bartnicki v. Vopper, 532 U. S. 514, 529, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."). The government may not prohibit speech because it increases the chance an unlawful act will be committed " at some indefinite future time". Hess v. Indiana, 414 U. S. 105, 108, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (per curiam). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing

imminent lawless action and is likely to incite or produce such action". Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam). There is here no attempt, incitement, solicitation or conspiracy. The government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significant stronger, more direct connection, the government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

122 S. Ct. 1403.

The necessity of maintaining a coherent corpus of First Amendment law dictates that this Court cannot have varying standards for determining whether or not so-called hate speech can be banned because of its putatively harmful affects on society in contradistinction to those utilized in deciding whether or not sexually explicit materials can be proscribed because of their possible use in victimizing children. Elementary fairness dictates that all of the perveyors of speech and expression which is widely believed to be socially harmful in some respects must be " fed out of the same spoon" insofar as the judicial determination of the purview and contours of First Amendment protection of their views is concerned.

IV. CONCLUSION.

Clearly, the Supreme Court of Virginia made the correct decision in holding § 18.2-423 to be unconstitutional and therefore unenforceable. A contrary decision would have been wholly inconsistent with the entire body of this Court's First Amendment jurisprudence as explicated up to April 16, 2002 when **Ashcroft v. Free Speech Coalition** was handed down. The decision of the

Supreme Court of Virginia in **Black v. Commonwealth, 262 Va. 764, 553 S. E. 2d 738 (2001)** should therefore be affirmed by this Court.

This ___ day of _____ 2002.

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Edgar Steele