No. _____

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 Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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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 Va. Code § 18.2-423, which prohibits cross burning with intent to intimidate.

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PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Virginia respectfully petitions this Court for a writ of *certiorari* to review 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 three defendants. This decision is published as *Black, et al. v. Commonwealth of Virginia*, 262 Va. 764, 553 S.E.2d 738 (2001), and is reprinted in the Appendix at App. 1. The opinion of the Court of Appeals of Virginia affirming the convictions of two defendants, Jonathan O'Mara and Richard J. Elliott, is published as *O'Mara, et al. v. Commonwealth of Virginia*, 33 Va. App. 525, 535 S.E.2d 175 (2000). It is reprinted at App. 47. The unpublished *per curiam* order of the Court of Appeals of Virginia affirming the conviction of the third defendant, Barry Elton Black, is reprinted at App. 46. The letter opinion of the Circuit Court of Carroll County overruling Black's motion to dismiss the indictment is reprinted at App. 61. The record of the ruling whereby the Circuit Court of the City of Virginia Beach overruled Elliott's and O'Mara's motions to dismiss the indictments is reprinted at App. 79. *See also* App. 74.

JURISDICTION

The opinion of the Supreme Court of Virginia was entered on November 2, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

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 THE CASE

For nearly a half-century, the Commonwealth of Virginia has banned the fear-inspiring practice of cross burning. Enacted in 1952, the statute at issue – Va. 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 violating the cross burning statute. Two of the convictions involved co-defendants in a 1998 act of cross burning in Virginia Beach. The third conviction involved a separate cross burning incident in 1998 in Carroll County, part of rural Southwest Virginia. The facts of each case are as follows:

Virginia Beach – May 2, 1998: There is no evidence that Richard J. Elliott and Jonathan O'Mara are members of the Klan. 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.

An African-American and native Virginian, Jubilee had recently moved back to the Commonwealth from California, along with his wife and two sons. Elliott J.A. 52, 93.[2] The family 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

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[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. Copies of these articles are reproduced at App. 86-101.

[2] "Elliott J.A." refers to the Joint Appendix filed in the Virginia Supreme Court in the Elliott case.

going on in the rear of the Elliott home. Mrs. Elliott explained that her son had a firing range where he shot firearms as a hobby. *Id.* at 86. The conversation was cordial. *Id.* at 54. 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 on fire 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 55. Initially furious, Jubilee soon became worried and very nervous about the incident. He was concerned about what might come next, and saw the burnt cross as "just the first round." *Id.* at 55, 57-58. Jubilee called the police.

After an investigation, Elliott and O'Mara were identified as perpetrators. The pair were indicted for attempting to burn a cross with intent to intimidate, in violation of Va. Code § 18.2-423.[3] Before trial, both defendants moved to dismiss the indictments based on their claim that the cross burning statute is unconstitutional. Heard in a consolidated hearing, both motions were denied by the trial court:

> The defendants maintain that as a content-based regulation of speech . . . the statute violates the First and Fourteenth Amendments . . . and have moved to dismiss the case . . . [T]he court is going to overrule the defendants' motions. . . .

Transcript of Hearing, Jan. 20, 1999, App. 79-80.

Tried by a jury in February of 1999, Elliott was convicted of attempted cross burning. App. 71-72. On May 6, 1999, the circuit court sentenced Elliott to 90 days in jail and fined him $2,500, in accordance with the jury's verdict. App. 69-70. Elliott then 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. On April 26, 1999, the circuit court imposed on O'Mara a sentence of 90 days in jail and a fine of $2,500. Half of the jail time and $1,000 of the fine were suspended. App. 77-78. O'Mara then appealed.

With their cases consolidated on appeal, "both O'Mara and Elliott . . . maintain[ed] . . . 'that the code section [§ 18.2-423] is unconstitutional as violative of the free speech and expression protections' guaranteed by both the United States and Virginia Constitutions." App. 48. The Virginia Court of Appeals disagreed:

> We, therefore, conclude that 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

[3] The third perpetrator, David Targee, was also charged and became the key witness for the prosecution. *See* Elliott J.A. 67-106. His case was handled in juvenile and domestic relations district court and is not addressed in the decision that is the subject of this petition.

> prohibition and is neither overbroad nor underinclusive.
>
> Accordingly, we affirm the convictions.

App. 57 (emphasis added). 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 defendants, Barry Elton Black is a Klansman. A leader in the Klan, Black headed a rally and cross burning in Carroll County, Virginia, on the evening of August 22, 1998. Black J.A. 128.[4] 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 observe 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 per hour. *Id.* at 124, 125, 156, 157. 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 156, 157.

The burning cross was also in view of 8 to 10 houses, including the home of Rebecca Sechrist. *Id.* at 125. She heard 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

[4] "Black J.A." refers to the Joint Appendix filed in the Virginia Supreme Court in the *Black* case.

the blacks. . . . " *Id.* at 176. So intimidating was the scene that Mrs. Sechrist – who is neither black nor Hispanic – "sat there and . . . cried," scared that the Klan might burn her home. *Id.* at 178, 181.

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 with the deputy, Black volunteered his complaint about "blacks and Mexicans . . . walking up and down the sidewalk with white women holding hands and taking all the jobs," and he 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 Article I, § 12 of the Virginia Constitution.[5] 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.
>
> * * *

[5] Black's motion argued, *inter alia*, that § 18.2-423 discriminates on the basis of content and viewpoint, that its prima facie evidence standard creates an unconstitutional presumption, and that it is vague and overbroad. App. 62.

> Accordingly, the defendant's Motion to Dismiss is denied.

App. 64 (emphasis added).

Black was tried before a jury, who convicted him of the offense charged. He was fined $2,500, and appealed. App. 58-60. The Virginia Court of Appeals also rejected Black's free speech claims. Having already decided the Virginia Beach case 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*." App. 46.[6] Black again appealed.

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[6] The issues raised by Black and rejected by the Virginia Court of Appeals were:

1. Does Virginia's cross burning statute, promulgated by section 18.2-423 of the Code of Virginia, engage in viewpoint discrimination in violation of the First Amendment to the United States Constitution?
2. Does Virginia's cross burning statute, promulgated by section 18.2-423 of the Code of Virginia, violate the First Amendment by failing to incorporate the standard imposed by the Supreme Court of the United States in *Brandenburg v. Ohio*, holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action?"
3. Does the provision in Virginia's cross burning statute, promulgated by section 18.2-423 of the Code of Virginia, stating that the "burning of a cross shall be prima facie evidence of an intent to intimate a person or group of persons" and permitting a jury to draw inferences of an intent to intimidate from the mere fact of cross burning alone, violate the First Amendment?

Black v. Commonwealth, Opening Brief of Appellant, p.1.

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

> [W]e consider whether Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech . . . We conclude that, despite 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*.

App. 1-2 (emphasis added). Having resolved the case based on the federal constitutional issues, the Court found it unnecessary to address the defendants' state constitutional claims. App. 18, n.9.

By a vote of 4 to 3, the Virginia high court struck down the Commonwealth's cross burning law, 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). App. 7. The court reached this result by overlooking two substantial differences between the two laws. First, the Virginia statute includes an "intent to intimidate" element wholly lacking from the St. Paul ordinance, which dealt only with "fighting words." 505 U.S. at 380. Second, the St. Paul ordinance contained a content-based element of "race, color, creed, religion or gender" wholly missing from the Virginia statute, which bans use of a burning cross to intimidate anyone for any reason. It was these differences that led three Justices of the Virginia Supreme Court to dissent. *See* App. 36.

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. This provision is simply a permissible inference. The Commonwealth still bears the burden of proving its case – including the intent element – beyond a reasonable doubt. Yet, the court believed that such a statutory inference could lead to the arrest and prosecution – albeit acquittal – of persons who had no intent to intimidate and whose speech was constitutionally protected. The court believed that such a possibility made the law unconstitutional under the overbreadth doctrine.

REASONS WHY THE WRIT SHOULD BE GRANTED

Summary

"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 has 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. Such a result exacerbates a growing conflict among state courts of last resort about what *R.A.V.* means for state

laws banning the burning of crosses. The Virginia decision is also in conflict with federal courts of appeal that have upheld anti-intimidation statutes in the context of cross burning episodes. This Court should grant *certiorari* in order to resolve these conflicts and provide guidance to the States on how they may constitutionally accommodate their fundamental interest in preserving these two freedoms.

Additionally, the Virginia decision greatly expands the overbreadth doctrine as previously recognized by this Court in its First Amendment jurisprudence. The Virginia law is not vague nor do its terms prohibit any speech that is constitutionally protected. It only prohibits cross burning when there is an intent to intimidate. Consistent with constitutional limits on the use of statutory inferences, the Virginia law also allows – but does not require – a jury to infer an intent to intimidate from an act of cross burning alone, and it leaves the burden of proof squarely on the prosecution. Looking not at the narrow scope of the law's prohibition – but focusing on the statutory inference – the court below concluded that the Virginia law is void for overbreadth. Its concern was that somewhere, somehow an innocent cross burner might be charged. A subsequent acquittal, the court reasoned, was not enough to avoid an unconstitutional chill. In so ruling, the court misunderstood what it means for overbreadth to be *real*, and disregarded the need for overbreadth to be *substantial*. It thus decided an important federal question in a way that conflicts with relevant decisions of this Court, and with relevant decisions by another state court of last resort. For these reasons, too, *certiorari* should be granted.

I. There Is a Conflict Among the States on the Constitutionality of Cross Burning Statutes.

Strictly speaking, symbols have no inherent meaning. Their meaning arises from the way they are employed in the society where they are found. Burning crosses were once used in Scotland as signal fires. *See In re Steven S.*, 31 Cal. Rptr. 2d 644, 646 (Cal. App. 1994). Early in the last century, the Ku Klux Klan adopted the practice of cross burning as a tactic of terrorism. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). Today, the practice is no longer limited to the Klan, as shown by the incident involving Elliott and O'Mara.

Today, a burning cross – standing alone and without explanation – is typically understood in our society as a message of intimidation. This is so regardless of the race, religion or other characteristics of the individual targeted. A white, middle-class Protestant waking up at night to find a burning cross in the street 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.

So harmful -- and so persistent – is the practice of cross burning that, over the years, a number of States have enacted statutes that ban it in one form or another. The question of *how* States may ban cross burning – when the intent is to intimidate – is an important question of federal law that this Court should address. Some guidance was given ten years ago in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where the Court struck down an

ordinance of St. Paul, Minnesota. The ordinance criminalized the placing of a symbol, including a burning cross, "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." *Id.* at 380. The Court described this language as "content-based discrimination," and held the ordinance to be "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 381, 393.

In the wake of *R.A.V.*, laws prohibiting cross burning have been challenged in several States. As detailed below, the results are in conflict. In three States – South Carolina, Maryland and New Jersey – the statutes were struck down in the belief that *R.A.V.* dictated such a result. In other three States – Florida, Washington and California – the statutes were upheld, based on perceived distinctions with *R.A.V.*, including three *R.A.V.* authorized exceptions.

With the decision below, the Virginia Supreme Court has joined the first group of courts, holding the Virginia statute to be "analytically indistinguishable" from the St. Paul ordinance. The court reached this result despite two major differences between the two laws. The Virginia statute includes an "intent to intimidate" element not found in the St. Paul ordinance. Moreover, the Virginia statute bans cross burning to intimidate *anyone* for *any* reason, and thus lacks the content-based element of "race, color, creed, religion or gender" that this Court found problematic in *R.A.V.* These differences between the Virginia law and the one invalidated in *R.A.V.* make this petition a good vehicle for resolving the conflict and providing additional guidance in this important area of constitutional law.

A. States Upholding Cross Burning Laws.

The decision by the Virginia Supreme Court conflicts with decisions in three States upholding cross burning laws.

1. Florida: The Florida Supreme Court upheld that State's cross burning law in *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996). Florida's statute is limited to cross burnings on private property, but does not require an intent to intimidate.[7] The Florida defendant challenged his conviction on grounds similar to those argued by the three Virginia cross burners, claiming the Florida law was content discrimination, and invalid under *R.A.V.* In rejecting this argument, the Florida Supreme Court adopted the same rationale unsuccessfully argued by the Commonwealth in defense of the Virginia law:

> 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.

[7] 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 statute is a legitimate legislative attempt to protect Floridians of every stripe from a particularly reprehensible form of tyranny. The 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.
>
> 656 So. 2d 481, 482.

The conflict between the results in Florida and Virginia could hardly be more dramatic. Indeed, the Virginia requirement that there be an "intent to intimidate" – an element wholly missing from Florida's statute – reinforces the constitutionality of the Virginia law. If the Florida law does not run afoul of *R.A.V.*, then *a fortiori* the Virginia law is not invalid under *R.A.V.* either. This Court should grant the petition in order to resolve the conflict.

2. Washington: In *State v. Talley*, 858 P.2d 217 (Wash. 1993), the Supreme Court of Washington rejected a *R.A.V.*-based challenge to a statute that prohibited various acts, including cross burning, with "intent to intimidate or harass another person" because of that person's "race, color, religion, ancestry, national origin, or mental,

physical or sensory handicap."[8] The court found that the Washington ordinance qualified for all three exceptions to the prohibition against content discrimination, as announced in *R.A.V.* by Justice Scalia. If these exceptions save the Washington statute, they should also save the Virginia law.

a. The first *R.A.V.* exception is where the "basis for the content discrimination consists of the *very reason* the entire class of speech at issue is proscribable." *R.A.V.*, 505 U.S. at 387 (emphasis added). The Washington court found that the law at issue qualified for this exception on

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[8] The Washington statute provided:

> (1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:
>
> (b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning. . . . However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or

RCW 9A.36.080(1).

Subsection (2) of the same statute, which made cross burning a *per se* violation, was struck down by the Washington court as overly broad. 858 P.2d at 230. The Virginia law is not a *per se* statute, but requires an intent to intimidate.

the theory that those who "target a crime victim because of that victim's protected status" cause more harm than those who engage in the same conduct without such "special animus." 858 P.2d at 207. If the first *R.A.V.* exception permits a law to protect persons from intimidation based on *selected categories* – race, color, religion, handicap, etc. – then surely the Virginia law, which protects *everyone* from intimidation, must also be allowed.[9] The textual neutrality of the Virginia law is important. Yet, even if this neutrality were somehow disregarded and the law viewed as guarding against "special animus" toward minorities, the Virginia law would still be constitutional under *Talley*, a result in conflict with the decision below.

b. The second *R.A.V.* exception is where the subclass of proscribable speech "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." *R.A.V.*, 505 U.S. at 389 (citations and internal quotation marks omitted) (emphasis added). The Washington court said that, unlike the St. Paul ordinance, the Washington law is not concerned with "the listener's reactions to speech" but with "the additional harm to the victim of a hate crime and that crime's effect on society as a whole." 858 P.2d at 208. The court reasoned that such consequences qualify as "secondary effects" that bring the Washington law within the scope of the second *R.A.V.* exception.

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[9] In the trial of Black, the Commonwealth conceded that the definition of "with the intent to intimidate," as used in this statute, means "a motivation to intentionally put a person or group of persons in fear of bodily harm." The jury was so instructed. App. 66-67.

If the second *R.A.V.* exception finds a secondary effect in the impact of hate crime on society as a whole, then surely there is also a secondary effect when society sees crosses burned with an intent to intimidate. Such incidents are historically associated not with threatened fisticuffs or other minor assault, but are a form of domestic terrorism associated with threats to burn, lynch, behead, or otherwise murder innocent victims. Indeed, in the old newspaper articles cited by the Virginia Supreme Court, it is clear that cross burning was not banned because the Commonwealth wanted to suppress free expression, as the Virginia court erroneously concluded. App. 12. Instead, it was banned because cross burning was understood to be a terrorist act. *See, e.g.* App. 89, 100. The bill to ban such terrorism was presented to the House of Delegates by a former FBI agent, Delegate Mills E. Godwin, Jr., who later became twice Governor of Virginia. A newspaper reported the purpose of the measure: "Godwin said law and order in the State were impossible if organized groups could create fear by intimidation." App. 100-01. The breakdown of law and order which Virginia sought to avoid should surely qualify as a secondary effect, and a legitimate objective of legislation banning the burning of crosses.

c. The third *R.A.V.* exception applies where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. 390. The Washington court also said the statute there qualified for this exception because it expressly protected "discriminatory ideas and philosophies when they are not combined with criminal acts." 858 P.2d at 209. If the third *R.A.V.* exception is thus met, then it must also be met by the language of the Virginia

law, which cannot be construed as reaching *anything* other than criminal acts of intimidation.

In sum, the Washington decision that the cross burning statute of that State qualifies for these three *R.A.V.* exceptions conflicts with the decision below to strike down the Virginia law under *R.A.V.* This conflict should be resolved through *certiorari*.

3. **California:** The conflict among the States is further illustrated by a California decision rejecting a *R.A.V.*-based challenge to that State's cross burning law. *In re Steven S.*, 31 Cal Rptr. 2d 644 (Cal. App. 1994), *review denied*, 1994 Cal. LEXIS 5185 (Cal. 1994). The California law criminalized the burning of a cross or other known religious symbol, on the property of another, without permission, for the purpose of terrorizing the owner or occupant, or with reckless disregard of the risk of doing so.[10] The court first held that the statute did not prohibit constitutionally protected conduct because it was aimed at threats, and threats are outside the First Amendment. 31 Cal. Rptr. 2d at 647-48. It then rejected a claim that the law was content-discriminatory in violation of *R.A.V.*, finding that the statute in question came within all three

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[10] Section 11411(c) of the California Penal Code provides, in relevant part:

> Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, . . . shall be punished [as a felony or misdemeanor].

Section 11411(d) defines "terrorize" as "to cause a person of ordinary emotions and sensibilities to fear for personal safety."

of the exceptions to the content-discrimination doctrine announced in *R.A.V.*

B. States Striking Down Cross Burning Laws.

The appropriateness of certiorari is enhanced by the fact that Virginia is not the only State in conflict with Florida, Washington and California. As the implementation of *R.A.V.* has percolated through the States, three other state supreme courts – South Carolina, Maryland and New Jersey – have struck down cross burning laws. The issue of how *R.A.V.* should be applied is ripe for consideration by this Court.

1. South Carolina: *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), involved a defendant convicted of burning a cross on the property of another and intimidation by use of an incendiary.[11] The South Carolina Supreme Court

[11] The South Carolina cross burning law provided:

> It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or 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 the whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

S.C. Code Ann. 16-7-120 (1985).

Additionally, S.C. Code Ann. 16-11-550 (1985) provided, in pertinent part: "Whoever willfully and unlawfully communicates a threat . . . concerning an attempt . . . to . . . intimidate any individual . . . by means of an explosive or incendiary . . . shall be guilty of a felony . . . "

upheld his convictions. A few days later, this Court decided *R.A.V.*, and the defendant sought re-hearing. The court then concluded that *R.A.V.* made the cross burning statute unconstitutional. It also concluded that, in order to save the intimidation statute from unconstitutionality, it was necessary to re-interpret the term "incendiary" so as to exclude a burning cross. Both convictions were vacated.

2. Maryland: A Maryland statute outlawed the burning of crosses and other religious symbols without obtaining permission from the owner of the premises and notifying the fire department. The law did not require an intent to intimidate. *See* Md. Code (1957) Art. 27, § 10A.[12] Two convicted cross burners challenged the law as unconstitutional. One had burned a cross on the property of a black family. The other had burned a cross on State-owned property. Neither had obtained permission nor given the required notice. *State v. Sheldon*, 629 A.2d 753, 755-56 (1993). The Maryland Supreme Court rejected the State's argument that it has "a compelling interest in

[12] Maryland Code (1957) Art. 27, § 10A, provided:

> It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place. Any person or persons who violates the provisions of this section shall, upon conviction, be deemed guilty of a felony and shall suffer punishment for a period not to exceed 3 years or shall be fined an amount not to exceed $5,000 or shall suffer both such fine and imprisonment in the discretion of the court.

protecting the community against bias-motivated threats to public safety and order." *Id.* at 759. It also rejected the claim that the law was a fire safety measure. *Id.* at 759. Instead, the court struck the statute down as content-based discrimination, holding that "the cross burning statute does not fall within any of the *R.A.V.* exceptions. . . . " *Id.* at 762.

3. **New Jersey:** In *State v. Vawter*, 642 A.2d 349 (N.J. 1994), the Supreme Court of New Jersey struck down a statute that prohibited "purposefully, knowingly or recklessly" putting another in "fear of bodily violence" through symbols that expose others to "threats of violence, contempt or hatred on the basis of race, color, creed or religion." Specifically listed among such symbols were "a burning cross or Nazi swastika." N.J.S.A. 2C:33-10.[13] Notwithstanding the *mens rea* and "fear of bodily violence" requirements, the court concluded that the law was a "content-based restriction" rendered unconstitutional by the decision in *R.A.V. Id.* at 357, 358.

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[13] The New Jersey statute read in full:

> A person is guilty of a crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to[,] a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

N.J.S.A. 2C:33-10.

In sum, three States have read *R.A.V.* to allow their cross burning statute to survive. Four States – including Virginia – have read *R.A.V.* to invalidate their statutes. The difference in outcome cannot be explained by difference in statutory texts, but reflects fundamentally different understandings of what *R.A.V.* means. The conflict is mature and should now be resolved through *certiorari*.

II. There is a Conflict Between Virginia and Federal Circuits On the Constitutionality of Anti-Intimidation Statutes Applied in the Context of Cross burning.

The conflict in how to apply *R.A.V.* does not just exist among States. There is also a conflict between Virginia and two federal circuits – the Eighth and Seventh. After this Court's decision in *R.A.V.*, the United States Attorney for the District of Minnesota brought federal civil rights charges against the young cross burner who prevailed there, along with two juvenile co-defendants. The basis of the charges was the same cross burning spree that led to the state law prosecutions in *R.A.V.* Of particular note was the new federal charge brought under 42 U.S.C. § 3631, which provides:

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

The defendants were convicted and appealed to the Eighth Circuit, claiming that the convictions could not stand because the expressive act of cross burning is protected speech under the decision in *R.A.V.* The Eighth Circuit rejected the argument and upheld the convictions. *United States v. J.H.H., et al.*, 22 F.3d 821 (8th Cir. 1994). In so doing, the court held that, even if the statutes at issue made content distinctions, they came within the third *R.A.V.* exception, because "they are of a kind that poses 'no significant danger of idea or viewpoint discrimination.' " *Id.*, quoting *R.A.V.*, 505 U.S. at 388. This conclusion echoes the result reached earlier by the Supreme Court of Washington in *Talley*, an opinion whose conflict with the case at bar has already been discussed. *See supra* at 15.

Additionally, the Eighth Circuit expressly drew a distinction between cross burning "done with the specific intent to intimidate" and cross burning "done for the sole purpose of making a political statement." *Id.* at 826. The court held that the former sort of cross burning could be prohibited, but not the latter. By definition, the Virginia statute *only* prohibits cross burning when there is a specific intent to intimidate, and thus meets the post-*R.A.V.* standard in the Eighth Circuit. By striking down the Virginia law, the Virginia Supreme Court has created a conflict with a federal court of appeals on an important issue of constitutional law.

There is also a conflict between Virginia and the Seventh Circuit. In *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993), charges were brought against another pair of cross burners for violating 42 U.S.C. § 3631. The comments of the court are telling:

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

6 F.3d at 1250 (emphasis added). The Seventh Circuit – like the Eighth – found that cross burning for the purpose of *intimidation* can be prosecuted, even under a statute that includes the same sort of content-based categories – race, color, religion, sex, handicap, familial status and national origin – that were problematic in *R.A.V.* The Virginia statute has no such categories. It applies whenever anyone burns a cross to intimidate *anyone* for *any* reason. If Virginia Supreme Court was correct in striking down such a content-neutral statute, then *a fortiori* the Seventh and Eighth Circuits must have erred in upholding content-based prohibitions on intimidation. Conversely, if these federal circuits were correct, then it was the Virginia court that erred. There is a major conflict here, which this Court should resolve.

III. The Decision that the Virginia Law is "Overbroad" is Contrary to the Overbreadth Doctrine of this Court, and Creates a Conflict Among the States.

The Virginia Supreme Court also ruled that the cross burning statute is void under the overbreadth doctrine, citing Justice White's concurrence in *R.A.V.* App. 16. The court misread what Justice White had to say.[14] Indeed, what the opinion below calls "overbreadth" bears little resemblance to the overbreadth doctrine as explained by this Court, or as applied by Justice White in *R.A.V.* As a result, there is a conflict between state high courts on overbreadth challenges to cross burning bans. Certiorari should be granted in order to correct the Virginia Supreme Court's failure to follow the precedents of this Court, and to resolve the resulting conflict among States.

It may be helpful to begin by reviewing what the overbreadth doctrine means. Under traditional rules of standing, "constitutional rights are personal and may not be asserted vicariously." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Similarly, a person whose conduct may be constitutionally prohibited by statute, is unable to challenge the statute on the grounds that the same statute might be applied unconstitutionally to someone else whose conduct is not before the court. *Id.* The overbreadth doctrine alters these traditional rules of standing. 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

[14] Justice White was joined by Justices Blackmun and O'Connor, and was joined in part by Justice Stevens.

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.

There is more. The overbreadth doctrine contains not just a rule of standing, but also a rule of decision-making. 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 a last resort." *Id.* at 13. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be *real*, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 614. On both of these issues – whether overbreadth is real and whether it is substantial – the Virginia Supreme Court made decisions about overbreadth that merit review by this Court.

Under this Court's precedents, in order for there to be real overbreadth, 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 (1972) (holding that statute is overbroad "if in its reach it prohibits constitutionally protected conduct.") But, the Virginia cross burning statute contains no such flaw. By its terms, the law only bans cross burning when there is an intent to intimidate someone. There are *no* circumstances where such intimidation is constitutionally protected, and the court below did not suggest otherwise.

Instead of looking at the prohibitory terms, the court focused on the statutory inference, which allows a jury to infer an intent to intimidate, based on the act of cross

burning alone. The court did not doubt that the prosecutor still must prove every element of the offense – including intent – beyond a reasonable doubt.[15] 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. The possibility that someone who has not violated a statute might be mistakenly charged is inherent in law enforcement and is not what the overbreadth doctrine has heretofore sought to address. Thus, the decision below represents a novel reading of what real overbreadth means.[16] At best, it is an expansion of

[15] The juries in both *Black* and *Elliott* were so instructed. App. 66, 75-76. In *Black*, the jury was also instructed that it might find such intention from the act of burning the cross in public. App. 67. Moreover, the test for the constitutionality of statutory inferences is (i) whether the state retains the burden of proof on the fact to be presumed, and (ii) whether "it can 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 v. United States*, 412 U.S. 837, 843 (1973). The inference in the Virginia cross burning statute clearly meets this test, and the decision below does not suggest otherwise.

[16] In its overbreadth discussion, the Virginia Supreme Court cites the concurring opinion of Justice White in *R.A.V.*, as well as decisions in three other cases: *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999); *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 382 (2nd Cir. 2000). *See* App. 16. Yet, each of these cases involved overbreadth in the conventional sense of a statute which *by its terms* bans protected speech. *None* involved the concern about potentially erroneous arrests that the court wishes to add to the overbreadth doctrine.

the doctrine and, thus, presents an important federal issue on which this Court ought to rule. At worst, it is a failure to abide by the precedents of this Court, which ought to be corrected. In either case, the issue merits *certiorari*.

The Virginia Supreme Court also decided – albeit implicitly – that the number of innocent cross burners chilled is *substantial* in relation to the number who burn crosses with an intent to intimidate. Such a conclusion is implausible and unsupported by any analysis in the opinion below. Moreover, it is in conflict with the decision of the Florida Supreme Court, which rejected an overbreadth challenge to the cross burning law of that State: "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." *State v. T.B.D.*, 656 So.2d at 482.[17] The Virginia statute is even narrower than its Florida counterpart. While the Florida law applies only to cross burnings on the land of another – and not on highways and other public places – it lacks the critical "intent to intimidate" element that confines the reach of the Virginia law. To say the Virginia law is overbroad, but the Florida law is not, constitutes a conflict that should be resolved by *certiorari*.

[17] *See also In re Steven S.*, where the California Court of Appeal reached a similar result, 31 Cal. Rptr. 2d 644 (1994), and the Supreme Court of California denied review. 1994 Cal. LEXIS 5185 (Sept. 22, 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:

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