No. 01-1107

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

BARBARA MCDOWELL
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a state statute that prohibits the burning of a cross with the intent to intimidate violates the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulation and rule:

In the Supreme Court of the United States

No. 01-1107

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States, like the Commonwealth of Virginia, prosecutes persons who burn crosses, or conspire to do so, in order to intimidate others. See, *e.g.*, *United States* v. *Magleby*, 241 F.3d 1306 (10th Cir. 2001); *United States* v. *Stewart*, 65 F.3d 918 (11th Cir. 1995), cert. denied, 516 U.S. 1134 (1996); *United States* v. *Hayward*, 6 F.3d 1241 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994). The United States does so under statutes that, in contrast to the Virginia statute here, do not focus exclusively on intimidation by cross burning, but instead generally prohibit the use of force or threats of force to intimidate a person because of his race (or other protected status) and his exercise of federal housing rights, see 42 U.S.C. 3631, or generally prohibit conspiracy to intimidate a person in the exercise of federal

rights, see 18 U.S.C. 241. The federal statutes and the Virginia statute share the common purpose of preventing conduct that instills fear in its victims, disrupts the life of the community, and increases the potential for violence. Such statutes are constitutional under the First Amendment even though, in some instances, they reach conduct that may be intended not only to intimidate, but also to express an idea or viewpoint.

The United States has a significant interest not only in prosecuting acts of cross burning that come within the scope of its own statutes, but also in assuring that the States retain wide discretion to address the continuing national problem of cross burning as an instrument of intimidation. Some States, following the United States' approach, may choose to adopt statutes that encompass a wide array of coercive conduct intended to prevent or deter their citizens from engaging in protected activities. Other States, following Virginia's approach, may choose to adopt statutes focused on the particular conduct that has been employed to intimidate their citizens. Both approaches should be permissible under the First Amendment so long as the gravamen of the offense is intimidation, not expression.[1]

STATEMENT

For much of the past century, a burning cross has served as both "a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and * * * other groups." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). This case concerns whether

---

[1] The federal statutes that have been applied to prosecute cross burning do not contain any provisions comparable to Virginia's provision that the burning of a cross is "prima facie evidence of an intent to intimidate," Va. Code Ann. § 18.2-423 (Michie 1996), and the United States expresses no view on the constitutionality of that provision. See p. 24 note 10, *infra*.

a State is constrained, because of the symbolic component of cross burning, from specifically regulating the intimidation component.

1. Cross burning, which originated in the Scottish Highlands as a means of signaling from one clan to another, was unknown in the United States until the early 20th Century. The first reported cross burning in this country occurred in October 1915 at Stone Mountain, Georgia, when a group calling itself the Knights of Mary Phagan burned a giant cross that could be seen miles away in Atlanta. The Stone Mountain cross burning has been attributed to the same vigilantes who two months earlier abducted Leo Frank, a Jewish merchant whose sentence for Phagan's murder had been commuted, from a Georgia prison farm and hanged him. See Wyn C. Wade, *The Fiery Cross: The Ku Klux Klan in America* 144, 146 (1987); Michael Newton & Judy Newton, *The Ku Klux Klan: An Encyclopedia* 145-145, 325-326 (1991).

Cross burning soon became a part of the prescribed ritual at Ku Klux Klan gatherings. But cross burning also came to have a more sinister use as one of the means, along with arson, assault, bombing, and even murder, used by the Klan and others to "terrify people out of engaging in particular kinds of behavior." Nancy MacLean, *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan* 150 (1994). Indeed, on occasions when cross burning alone "failed to intimidate," Klan members "resorted to beatings and murder," among other tactics. Juan Williams, *Eyes on the Prize: America's Civil Rights Years 1954-1965*, at 39 (1987); see Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. Crim. L. & Criminology 335, 342 (Fall 2001-Winter 2002) (noting that an "escalating campaign to eject a [minority] family" from a white neighborhood could begin with "cross burnings, window breaking, or threatening

telephone calls," and culminate with bombings). The association between acts of intimidating cross burning and acts of violence is well documented in recent American history.[2]

---

[2] See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 747-748 n.1 (1966) (quoting indictment charging conspiracy under 18 U.S.C. 241 to interfere with federally secured rights by, *inter alia*, "burning crosses at night in public view," "shooting Negroes," "beating Negroes," "killing Negroes," "damaging and destroying property of Negroes," and "pursuing Negroes in automobiles and threatening them with guns"); *United States* v. *Pospisil*, 186 F.3d 1023, 1027 (8th Cir. 1999) (defendants burned a cross in victims' yard, slashed their tires, and fired guns), cert. denied, 529 U.S. 1089 (2000); *United States* v. *Stewart*, 65 F.3d 918, 922 (11th Cir. 1995) (cross burning precipitated an exchange of gunfire between victim and perpetrators), cert. denied, 516 U.S. 1134 (1996); *United States* v. *McDermott*, 29 F.3d 404, 405 (8th Cir. 1994) (defendants sought to discourage African-Americans from using public park by burning a cross in the park, as well as by "waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars towards black persons; and physically chasing black persons out of the park"); *Cox* v. *State*, 585 So. 2d 182, 202 (Ala. Crim. App. 1991) (defendant participated in evening of cross burning and murder), cert. denied, 503 U.S. 987 (1992); Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* 847 (2002) (referring to a wave of "southern bombings, beatings, sniper fire, and cross-burnings" in late 1956 in response to efforts to desegregate schools, buses, and parks); Michael Newton & Judy Newton, *supra*, at 21 (observing that "Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence" by the Klan and its sympathizers); *id.* at 361-362 (describing cross burning and beatings directed at an African-American family that refused demands to sell its home); *id.* at 382 (describing incident of cross burning and brick throwing at home of Jewish officeholder); *id.* at 583 (describing campaign of cross burning and property damage directed at Vietnamese immigrant fishermen); Wyn C. Wade, *supra*, at 262-263 (describing incidents of cross burning, beatings, kidnapping, and other "terrorism" directed against union organizers in the South); *id.* at 376 (cross burnings associated with shooting into cars); *id.* at 377 (cross burnings associated with assaults on African-Americans); 1 Richard Kluger, *Simple Justice* 378 (1975) (describing cross burning at, and subsequent shooting into, home of federal judge who issued

2. In 1952, the Virginia General Assembly adopted the predecessor to the statute at issue here, "in direct response to Ku Klux Klan activities in Virginia, including incidents of cross burning." Pet. App. 6 (footnote omitted); see *id.* at 86-95 (newspaper articles describing such incidents). The statute, in its original form, made it unlawful "to place or cause to be placed on the property of another * * * a burning or a flaming cross * * * without first obtaining written permission of the owner or occupier of the premises." *Id.* at 6 n.3 (quoting 1952 Va. Acts ch. 483 § 2, at 477). In subsequent years, the General Assembly made the statute broader in some respects (*e.g.*, to include cross burning on "a highway or other public place"), and narrower in other respects (*e.g.*, to apply only to cross burning "with the intent of intimidating any person or group of persons"). In its present form, the statute provides:

> 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.

Va. Code Ann. § 18.2-423 (Michie 1996).

3. This case arises out of the prosecutions of three individuals, respondents here, for violations of the Virginia statute. Two of those individuals, Richard Elliott and

---

desegregation decisions); Leonard S. Rubinowitz & Imani Perry, *supra*, 92 J. Crim. L. & Criminology at 354-355, 388, 408-410, 419, 420, 421, 423 (describing incidents of cross burning accompanied by violence); Pet. App. 92-93 (describing 1951 Virginia cross burning accompanied by gunfire).

Jonathan O'Mara, were prosecuted for an attempted cross burning in Virginia Beach, Virginia, in May 1998. The third individual, Barry Elton Black, was prosecuted for a cross burning in Carroll County, Virginia, in August 1998.

a. Respondents Elliott and O'Mara, together with a third individual, attempted to burn a cross on the property of James Jubilee, an African-American who lived next door to Elliott and who had recently complained about the shooting of firearms in Elliott's backyard. Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. Pet. App. 2-3, 48-49.

At Elliott's trial, the court instructed the jury on the elements of attempted cross burning: "[t]hat the defendant intended to commit cross burning"; "[t]hat the defendant did a direct act toward the commission of the cross burning"; and "[t]hat the defendant had the intent of intimidating any person or group of persons." Pet. App. 75. The jury found Elliott guilty of attempted cross burning, but not of conspiracy. *Id.* at 3.

The court of appeals sustained the cross-burning statute against respondents' First Amendment challenge. The court concluded that the statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and as a threat of violence." Pet. App. 57; see *id.* at 3.

b. Respondent Black was charged with cross burning at a Ku Klux Klan rally. Pet. App. 4. At his trial, the court instructed the jury that the Commonwealth was required to prove beyond a reasonable doubt that Black "burned or caused to be burned a cross in a public place" and "did so with the intent to intimidate any person or group of persons." *Id.* at 66. The court further instructed the jury that an "intent to intimidate" means "a motivation to intention-

ally put a person or group of persons in fear of bodily harm." *Id.* at 66-67. The court added that "[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." *Id.* at 67. The jury found Black guilty. *Id.* at 4.

The court of appeals affirmed Black's conviction, rejecting his constitutional challenge to the statute "[f]or the reasons stated in *O'Mara*." Pet. App. 46; see *id.* at 4.

4. The Virginia Supreme Court, after consolidating respondents' appeals, reversed their convictions. The court held that the cross-burning statute, on its face, violates the First Amendment for two reasons.

First, the court held that the cross-burning statute "prohibits otherwise permitted speech solely on the basis of its content." Pet. App. 2. The court did not dispute that the Commonwealth could proscribe all "expressive conduct that is intimidating in nature." *Id.* at 11. The court reasoned, however, that the Commonwealth could not single out some such conduct "based upon hostility—or favoritism—towards the underlying message expressed." *Ibid.* (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 386 (1992)). The court concluded that the Commonwealth violated that principle by "selectively choos[ing] only cross burning because of its distinctive message." *Ibid.*

Second, the court held that the cross-burning statute is "overbroad," because of its provision that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate." Pet. App. 16-17. The court concluded that the provision could chill free expression, because "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution," even if "the trier of fact ultimately finds the actor not guilty of the offense." *Id.* at 17.

SUMMARY OF ARGUMENT

The United States and the Commonwealth of Virginia have taken divergent approaches in their regulation of cross burning intended to threaten or intimidate. The United States prosecutes certain acts of cross burning under federal civil-rights statutes that generally proscribe the use of force or the threat of force to intimidate an individual because of, *inter alia*, his race and his exercise of federal housing rights, see 42 U.S.C. 3631, or that generally proscribe conspiracy to interfere with the exercise of federally protected rights, see 18 U.S.C. 241. Virginia, in contrast, prosecutes similar acts under a statute that specifically proscribes cross burning "with the intent of intimidating any person or group of persons." The federal statutes are constitutional under the First Amendment for reasons articulated in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), and *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993). The Virginia statute's exclusive focus on cross burning with the intent to intimidate is constitutional as well.

The statutes under which the United States prosecutes cross burning—principally, 42 U.S.C. 3631 and 18 U.S.C. 241—are directed at conduct, without regard to its expressive content, if any. Those statutes are analytically indistinguishable from 18 U.S.C. 242, which prohibits "willfully subjecting any person * * * to the deprivation of any [federal] rights," and which *R.A.V.* and *Mitchell* identify as "a permissible content-neutral regulation of conduct." *Mitchell*, 508 U.S. at 487. As *R.A.V.* explains, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a [particular] idea or philosophy." 505 U.S. at 390. Thus, the United States may prosecute a cross burning intended to intimidate an individual because of his race and his exercise of his federal right to "occupy[] * * * any dwelling," 42

U.S.C. 3631(a), even if the cross burning is also intended to express an idea or philosophy.

The Virginia statute's focus on cross burning is constitutional for the same reason. The statute applies to *only* those cross burnings intended to intimidate, and to *all* such cross burnings regardless of any idea or viewpoint that they may be intended to express. As such, the statute is properly viewed as a regulation directed at conduct—the intentional use of a burning cross as a tool of intimidation—and not as a regulation directed at speech. To the extent that the First Amendment may require additional scrutiny because the statute focuses on an activity that may often be intended not only to intimidate but also to express an idea or viewpoint, the statute satisfies the applicable standard, which is that set forth in *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968). The statute serves the Commonwealth's important interest in protecting its citizens from coercive activity intended to put them in fear of harm. That interest is unrelated to the suppression of free expression. The statute is narrowly tailored to reach only cross burning intended to intimidate, leaving ample opportunity for the expression of any view, including by burning a cross on one's own property or otherwise in circumstances not intended to intimidate. A regulation of conduct, or a "nonspeech" element of expressive conduct, is not subject to the content-neutrality principle of *R.A.V.*; thus, a State is not required by the First Amendment to regulate all such conduct in the same manner or to the same extent, but instead may, for example, regulate intimidation by burning a cross without similarly regulating other modes of intimidation.

Alternatively, even if the Virginia statute is viewed (as the Virginia Supreme Court viewed it) as a selective regulation of intimidating expression, the statute does not violate the First Amendment. As the Court explained in *R.A.V.*, "[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 discrimination exists," because "[s]uch a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." 505 U.S. at 388. The government could constitutionally proscribe all sufficiently threatening or intimidating expression in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Ibid.* Those reasons apply with "special force," *ibid.*, to intimidating cross burning. Cross burning, because of its historical association with vigilantism and violence, has a unique potential for instilling fear in its victims, disrupting the life of the community, and precipitating other unlawful conduct. A regulation that focuses exclusively on intimidation by cross burning is justified for those content-neutral reasons.

ARGUMENT

A person has no First Amendment right to burn a cross in order to intimidate others, whether or not he also intends to express an idea or philosophy. Such conduct "produce[s] special harms distinct from [its] communicative impact," and thus is "entitled to no constitutional protection." *Mitchell*, 508 U.S. at 484. In *R.A.V.*, which arose out of the burning of a cross in the yard of an African-American family, the Court acknowledged that the government "has sufficient means at its disposal to prevent such behavior," 505 U.S. at 396, apart from an ordinance that prohibits "fighting words that contain * * * messages of 'bias-motivated' hatred," *id.* at 392. See *id.* at 380 n.1 (suggesting that such conduct may be prosecuted under, *inter alia*, a statute prohibiting threats). Indeed, the United States subsequently prosecuted the same cross burning at issue in *R.A.V.* under its statutes pro-

hibiting, *inter alia*, the use of threats of force to intimidate a person because of his race and his exercise of federal housing rights, 42 U.S.C. 3631, and conspiracy to intimidate a person in the exercise of federal rights, 18 U.S.C. 241. See *United States* v. *J.H.H.*, 22 F.3d 821 (8th Cir. 1994) (rejecting First Amendment challenge to that prosecution).

Intimidation is not protected speech. It is conduct, physical or verbal, intended to coerce its victims by putting them in fear, typically of bodily harm. See, *e.g.*, *Black's Law Dictionary* 827 (7th ed. 1999) (defining "intimidation" as "[u]nlawful coercion, extortion"); *Anderson* v. *Boston Sch. Comm.*, 105 F.3d 762, 766 (1st Cir. 1997) (defining "intimidation" under Massachusetts Civil Rights Act as "putting in fear for the purpose of compelling or deterring conduct"); *United States* v. *Woodrup*, 86 F.3d 359, 363-364 (4th Cir.) (defining "intimidation" under federal bank robbery statute as conduct from which "an ordinary person * * * reasonably could infer a threat of bodily harm"), cert. denied, 519 U.S. 944 (1996); *United States* v. *McDermott*, 29 F.3d 404, 408 (8th Cir. 1994) (approving instruction defining "threaten" and "intimidate" under 18 U.S.C. 241 as "cover-[ing] a variety of conduct intended to harm, frighten, punish or prevent the free action of other persons"); *Sutton* v. *Commonwealth*, 324 S.E.2d 665, 670 (Va. 1985) ("[i]ntimidation * * * means putting a victim in fear of bodily harm"); 11th Cir. Pattern Jury Instructions—Criminal Cases, Instr. No. 87 (1997) (defining use of "threat of force" to "intimidate" under 42 U.S.C. 3631 as "to say or do something which, under the same circumstances, would cause another person of ordinary sensibilities to be fearful of bodily harm if he or she did not comply") (available on Westlaw). Intimidation is not necessarily, or even usually, associated

with the expression of ideas or viewpoints.[3] Thus, when a statute proscribes certain conduct (whether or not expressive) only when undertaken with the intent to intimidate, the statute is "insulate[d] * * * from unconstitutional application to protected speech." *United States* v. *Gilbert*, 813 F.2d 1523, 1529 (9th Cir.) (addressing intent to intimidate element of 42 U.S.C. 3631), cert. denied, 484 U.S. 860 (1987).[4]

Such a statute, if confined to a single type of conduct that often is intended not only to intimidate but also to express an idea or viewpoint, may nonetheless implicate the First Amendment by virtue of its impact on proscribable speech. The Virginia statute, unlike the federal statutes, may come within that category because of its focus on intimidation by cross burning. Such a statute still may satisfy the First

---

[3] Intimidation is an element of many federal offenses—ranging from bank robbery to witness tampering to obtaining nuclear material—that ordinarily are not associated with the expression of ideas or viewpoints. See, *e.g.*, 18 U.S.C. 831(a)(4) (obtaining nuclear material by intimidation); 18 U.S.C. 844(d) (transportation of explosives to be used to intimidate); 18 U.S.C. 1503 (intimidation of juror or judicial officer); 18 U.S.C. 1512(b) (intimidation with intent to influence official proceedings); 18 U.S.C. 1860 (intimidation in purchase or sale of public lands); 18 U.S.C. 2113(a) (intimidation to obtain money or property from financial institution); 18 U.S.C. 2231(a) (intimidation of person serving or executing search warrant).

[4] When the defendant's intent to intimidate is an element of a criminal offense, as it is under the federal and Virginia statutes used to prosecute intimidating cross burning, the evidence, taken as a whole, must be sufficient to establish that element beyond a reasonable doubt. The First Amendment provides additional protection by requiring "an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted); cf. *United States* v. *Hanna*, 293 F.3d 1080, 1087-1088 (9th Cir. 2002) (conducting independent review to determine whether record established a "true threat").

Amendment, either under the *O'Brien* framework for a regulation of expressive conduct or under one of *R.A.V.*'s exceptions for a selective regulation of proscribable expression that poses no threat of suppressing ideas or viewpoints.

I. THE UNITED STATES PERMISSIBLY REGULATES CROSS BURNING, WHEN INTENDED TO THREATEN OR INTIMIDATE, UNDER STATUTES THAT ARE DIRECTED AT CONDUCT WITHOUT REGARD TO ITS EXPRESSIVE CONTENT

The United States prosecutes cross burning under Acts of Congress that prohibit the use of force or threats of force to intimidate an individual because of his race (or other status) and his exercise of federal housing rights, see 42 U.S.C. 3631, and conspiracy to interfere with the exercise of federal rights, see 18 U.S.C. 241. See Appendix, *infra*, 1a, 6a-7a. Those statutes, on their face and as applied to cross burning, are constitutional under the First Amendment, because they are directed at conduct, without regard to its expressive content, if any.[5]

---

[5] An act of cross burning is not necessarily designed both to express a message, such as racial animus, and to intimidate. Some cross burnings, such as those that occur at a Ku Klux Klan rally from which the public is excluded, may be intended only to express a common ideology and to foster group solidarity. Other cross burnings, perhaps including the cross burning involving respondents Elliott and O'Mara, may be intended to intimidate for a purely personal reason, and not to express any idea or viewpoint. See Pet. 3 (noting the absence of any record evidence that respondents Elliott and O'Mara "are members of the Klan" or "hold any particular views on politics or race or any other subject"); Pet. App. 36 (Hassell, J., dissenting) (noting that Elliott and O'Mara "burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliotts' yard, not because of any racial animus"); see also, *e.g.*, *People* v. *Carr*, 97 Cal. Rptr. 2d 143, 146 (Ct. App. 2000) (Jewish teenager asked his friends to burn a cross in his family's yard because "he was mad at his parents; he didn't like his curfew

1. Most often, the United States prosecutes cross burning under 42 U.S.C. 3631, a provision of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.* Section 3631 prohibits, among other things, using "force or threat of force" to "willfully injure[], intimidate[] or interfere[] with" any person because of his "race" and his "occupying * * * any dwelling." 42 U.S.C. 3631(a).

If more than one person is involved in planning or carrying out a cross burning, the United States may also charge those persons under 18 U.S.C. 241, which prohibits conspiracy to "injure, oppress, threaten, or intimidate any person" in the exercise of a federally secured right. Typically, in such a conspiracy prosecution, the underlying right is the right under 42 U.S.C. 1982 to purchase, lease, or hold real property free from racial discrimination.[6]

Those statutes may, consistent with the First Amendment, be applied to prosecute acts of cross burning intended to intimidate a victim, notwithstanding that those acts may

---

and other rules"); *State* v. *Miller*, 629 P.2d 748 (Kan. Ct. App. 1981) (defendant burned a cross in the yard of a lawyer who had previously represented him and who was prosecuting him on traffic charges); *Williams* v. *Commonwealth*, 72 S.W.2d 31 (Ky. 1934) (defendant murdered his brother-in-law, while preparing to burn a cross on his property, apparently in response to an earlier disagreement). Some cross burnings may be intended for other purposes. See, *e.g.*, *People* v. *Steven S.*, 31 Cal. Rptr. 2d 644, 646 653 (Ct. App. 1994) (cross burning was purportedly "a practical joke"); Wyn C. Wade, *supra*, at 227 (describing an instance in which young Roman Catholics, whose religion was opposed by the local Klan, "lit crosses all over town and let the Klan take the blame").

[6] Defendants in a cross-burning case may also be prosecuted under 18 U.S.C. 245(b), which criminalizes interference "by force or threat of force" with other federally guaranteed rights, including voting, employment, and use of public facilities and public accommodations. See *United States* v. *McDermott*, 29 F.3d at 405 (prosecution under 18 U.S.C. 241 and 245(b)(2)(B) for conduct, including cross burning, intended to interfere with African-Americans' use of public park).

also be intended to express an idea or viewpoint. That is because the statutes are directed at conduct, not speech, although they may sometimes be violated by acts that have an expressive component.

2. In *R.A.V.*, the Court distinguished laws directed at speech, such as the ordinance in that case, from laws directed at conduct, distinct from its expressive content. 505 U.S. at 389. The Court explained that, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a [particular] idea or philosophy." *Id.* at 390. Thus, "nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *Id.* at 385; cf. *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements.") (citations omitted). A statute directed at conduct may even be violated by words alone without raising First Amendment concerns. See *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

The Court noted that a law directed at conduct, without regard to its expressive content, may "incidentally" encompass "a particular content-based subcategory of a proscribable class of speech." *R.A.V.*, 505 U.S. at 389. The Court made clear that such laws, in contrast to the one in *R.A.V.*, do not involve unconstitutional content discrimination. The Court identified several federal civil-rights laws as examples of such permissible regulations. Thus, "Title VII's general prohibition against sexual discrimination in

employment practices"—a regulation of conduct—may be violated by, among other things, "sexually derogatory 'fighting words.'" *Id.* at 389-390 (citing 42 U.S.C. 2000e-2; 29 C.F.R. 1604.11 (1991)). The Court also cited 18 U.S.C. 242, 42 U.S.C. 1981, and 42 U.S.C. 1982 as examples of constitutionally permissible regulations. 505 U.S. at 389-390.

In *Mitchell*, the Court upheld a statute that provided an enhanced criminal penalty if the defendant targeted his victim on the basis of race. In rejecting a First Amendment challenge to the statute, the Court reiterated the distinction between laws directed at speech and laws directed at conduct, explaining that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression * * *, the statute in this case is aimed at conduct unprotected by the First Amendment." 508 U.S. at 487. It was of no constitutional significance that the statute reached conduct, such as the assault in that case, that could be viewed as an expression of the perpetrator's views toward a particular race, because "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact * * * are entitled to no constiutional protection." *Id.* at 484. The Court also noted that *R.A.V.* had "cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct." *Id.* at 487.

3. The civil-rights statutes under which the United States prosecutes cross burning, like the federal civil-rights statutes that the Court identified in *R.A.V.* and *Mitchell*, are directed at conduct, distinct from any idea or viewpoint that it might express. 508 U.S. at 487. As the Court recognized in those cases, such statutes may reach words or expressive acts without violating the First Amendment. See *R.A.V.*, 505 U.S. at 389-390.

As noted, 42 U.S.C. 3631, the principal statute used by the United States to prosecute cross burning, prohibits *any* use

of "force or threat of force" to "willfully injure[], intimidate[] or interfere[] with" a person because of, *inter alia*, his "race" and his "occupying * * * any dwelling." 42 U.S.C. 3631(a). It makes no difference whether such conduct is intended to express an idea or viewpoint as well as to "injure[], intimidate[] or interfere[] with" a victim. Section 3631 applies equally to an assault committed in secrecy, see, *e.g.*, *United States* v. *Wood*, 780 F.2d 955 (11th Cir.) (forcible entry into home, beatings, death threats), cert. denied, 476 U.S. 1184 (1986); *United States* v. *Johns*, 615 F.2d 672 (5th Cir.) (firing guns into home), cert. denied, 449 U.S. 829 (1980), and to a cross burning committed in public view, provided that the defendant acted with the requisite intent. Thus, Section 3631 "is aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech." *United States* v. *Hayward*, 6 F.3d 1241, 1250 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994); accord *United States* v. *Stewart*, 65 F.3d 918, 928-929 (11th Cir. 1995) (describing Section 3631 as "target[ing] unprotected conduct—willful interference with housing rights" —that "the government may regulate without violating the First Amendment"), cert. denied, 516 U.S. 1134 (1996).

Similarly, 18 U.S.C. 241 and 42 U.S.C. 1982, which are used together to prosecute cross-burning conspiracies, are regulations directed at conduct. Section 241 "punish[es] *any* * * * conspiracy to threaten or to intimidate, violating the statute[] regardless of the viewpoint guiding the action." *J.H.H.*, 22 F.3d at 825. Section 1982, which secures certain rights with respect to real and personal property against discrimination based on race, is specifically mentioned in *Mitchell*, 508 U.S. at 487, and *R.A.V.*, 505 U.S. at 389-390, as a constitutional regulation of conduct, without regard to its expressive content.

Both 42 U.S.C. 3631 and 18 U.S.C. 241 are analytically indistinguishable from statutes that this Court has described

as regulations directed at conduct. One statute so described by the Court is 18 U.S.C. 242, which was an example given in *R.A.V.*, 505 U.S. at 389-390, and *Mitchell*, 508 U.S. at 487. Section 242, which applies to those acting under color of law, prohibits "willfully subject[ing] any person * * * to the deprivation of any [federal] rights, privileges or immunities." Similarly, Section 3631 and Section 241 are directed at conduct intended to interfere with the exercise of federal rights, not at the message that the conduct may be intended to convey.

Section 3631 and Section 241 also resemble 18 U.S.C. 112(b), a statute that the Court viewed as constitutional in *Boos* v. *Barry*, 485 U.S. 312, 326 (1988). Section 112(b) prohibits "willfully * * * intimidat[ing], coerc[ing], threaten-[ing], or harass[ing] a foreign official or an official guest or obstruct[ing] a foreign official in the performance of his duties," or attempting to do so. 18 U.S.C. 112(b)(1) and (2). In *Boos*, the Court noted the "constitutionally significant" differences between 18 U.S.C. 112(b) and the statute at issue in that case, which prohibited displays designed, *inter alia*, to bring a foreign government, its officials, its policies, or its views into "public odium" or "public disrepute." 485 U.S. at 316, 326. The Court explained that Section 112(b), in contrast to the statute at issue, "is not narrowly directed at the content of speech but at any activity, including speech, that has the prohibited effects" of "intimidat[ing], coerc[ing], threaten[ing], or harass[ing]" a foreign official or guest. *Id.* at 326. *Boos* thus reinforces the conclusion that a statute that prohibits acts of intimidation, threats, harassment, and other such interference, without regard to their expressive content, is a constitutionally permissible regulation of conduct, "including speech." *Ibid.*

4. It is thus clear that the federal statutes that have been used to prosecute cross burning are aimed at conduct, not expressive content. The scope of conduct prohibited by

Section 3631, for example, includes both "force" and "threats," and "threats of violence are outside the First Amendment," *R.A.V.*, 505 U.S. at 388, insofar as they are "true threats." See *Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam). *R.A.V.* indicated that, even though threats are unprotected, a statute that singled out certain threats based on the ideas or viewpoints that they sought to express would raise a distinct First Amendment issue. See 505 U.S. at 388 ("the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities"). But the federal statutes that have been used to prosecute cross burning do not make such content distinctions. Section 3631 punishes all "threats of force" that are used to injure, intimidate, or interfere with a person "because of" his race, color, religion, etc., and "because of" his exercise of federal housing rights. 42 U.S.C. 3631(a). The statute therefore singles out threats made because of the defendant's motives or reasons for acting, not because of the content of the threat. A threat using any language or any means of expression is covered, if made for the prohibited reasons. That approach raises no First Amendment issue. See *Mitchell*, 508 U.S. at 487 (upholding enhanced penalty for bias-motivated crime because "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge").[7]

---

[7] The Virginia Supreme Court stated that "a statute punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment." Pet. App. 9. That statement has no application to the federal statutes under which cross burning has been prosecuted (which do not focus on the content of speech), and it is overbroad even if intended simply as a description of *R.A.V.*, which did not pronounce an absolute rule forbidding content discrimination. But to the extent that the statement suggests that a statute cannot proscribe intimidation or threats

In sum, 42 U.S.C. 3631 and 18 U.S.C. 241 are properly understood as regulations directed at conduct, which may constitutionally encompass acts, such as cross burning, that may also express an idea or viewpoint. Accordingly, whether or not a State may prosecute intimidation by cross burning under a statute that exclusively applies to that activity, a State may do so under a statute of more general application that is modeled on the federal statutes discussed above.

II. A STATE MAY PERMISSIBLY REGULATE CROSS BURNING, WHEN INTENDED TO THREATEN OR INTIMIDATE, UNDER A STATUTE THAT APPLIES EXCLUSIVELY TO THAT CONDUCT

The Virginia statute does not prohibit *all* cross burning, or a content-based subcategory of cross burning. Rather, the statute prohibits cross burning "with the intent of intimidating any person or group of persons," when conducted "on the property of another, a highway or other public place." Va. Code Ann. § 18.2-423 (Michie 1996). The statute reaches all such incidents of cross burning regardless of the ideas, if any, that they may be intended to communicate. Those features of the statute are constitutionally significant for two reasons. First, the statute may be viewed as a regulation directed at conduct—intimidation—as distinguished from a regulation directed at expression.

---

directed at a person because of his race, religion, or another such characteristic or because of the defendant's reasons for acting, the statement is inconsistent with this Court's understanding that "a prohibition of fighting words that are directed at certain persons or groups * * * would be *facially* valid if it met the requirements of the Equal Protection Clause." *R.A.V.*, 505 U.S. at 392, and with this Court's conclusion in *Mitchell*, 508 U.S. at 486-487, that imposition of an enhanced penalty when the defendant selects his victim based on race or another protected characteristic does not violate the First Amendment.

Alternatively, even if the statute is viewed as a selective regulation of proscribable expression, the statute does not violate the First Amendment, because it presents no danger of impermissible content or viewpoint discrimination. The same content-neutral reasons that would justify a prohibition of all intimidating expression also justify a selective prohibition of intimidation by cross burning.

A. The Virginia Statute Is A Regulation Of Conduct—The Intentional Use Of Cross Burning As A Tool Of Intimidation—Not A Regulation Of Expression

1. The Virginia statute, like the federal statutes discussed above, is appropriately viewed as a regulation of conduct—specifically, the intentional use of a burning cross as "an instrument of intimidation." *Capitol Square*, 515 U.S. at 770-771 (Thomas, J. concurring). It applies only to cross burning that is undertaken "with the intent of intimidating any person or group of persons," and to all such cross burning whether or not it is also intended to express an idea or philosophy. Such a statute cannot reasonably be viewed as being directed at the suppression of free expression.

As explained above (at 11-12), intimidation is not protected speech. It is conduct intended to "put a person or group of persons in fear of bodily harm." Pet. App. 66-67 (jury instruction in respondent Black's case); see *Sutton* v. *Commonwealth*, 324 S.E.2d at 670 ("[i]ntimidation * * * means putting a victim in fear of bodily harm"). A law against intimidation is thus similar to a law against treason, or fraud, or blackmail—a law that may be violated by words, but that is "directed not against speech but against conduct." *R.A.V.*, 505 U.S. at 389 (discussing law against treason).[8]

---

[8] The state cross-burning statutes invalidated in two cases cited by the Virginia Supreme Court (Pet. App. 13-14)—*State* v. *Ramsey*, 430 S.E.2d 511 (S.C. 1993), and *State* v. *Sheldon*, 629 A.2d 753 (Md. 1993)—did

The Virginia statute thus differs in critical respects from the ordinance in *R.A.V.* The Commonwealth has not sought to regulate speech that arouses "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender," as did the provision at issue in *R.A.V.* 505 U.S. at 393. The distinctive harms in that case, the Court concluded, were the product of the expression of "a distinctive idea, conveyed by a distinctive message." *Ibid.* Here, Virginia has selected for prohibition, not a "distinctive idea" or "a distinctive message," but a distinctive form of conduct —intentional intimidation through cross burning— that has historically served as a precursor to violent action. See pp. 2-5 & note 2, *supra.* It does not matter whether the defendant selected that mode of intimidation to express racial hatred or simply to take advantage of the intense fear that it induces. In either case, cross burning has a unique potential to cause fear, disruption, and the potential for violence, and it is for that reason that Virginia has singled out cross burning with the intent to intimidate for special proscription. In regulating that specific act, Virginia protects against a form of conduct that has a particularized capacity to instill in its victims a well-grounded fear that physical violence will follow.

2. The Virginia statute, in contrast to the federal statutes discussed above, applies to a single mode of intimidating conduct, intimidation by cross burning. Cross burning is not in all instances an expressive activity. See pp. 13-14 note 5, *supra.* But by focusing on a particular type of activity that often is expressive of an idea or viewpoint, the Virginia statute, although directed at conduct, may require scrutiny under the First Amendment in a way that the federal statutes do not.

---

not contain an "intent to intimidate" element, and for that reason are unlike the statute at issue here.

To that extent, the Virginia statute is appropriately analyzed under the intermediate scrutiny standard of *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968), as a regulation of a "nonspeech" element (*i.e.*, intentional intimidation) of conduct that may contain both "speech" and "nonspeech" elements. See *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 703 (1986) (noting that the Court has applied the *O'Brien* analysis to "cases involving government regulation of conduct that has an expressive element"); see also, *e.g.*, *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (applying *O'Brien* standard to regulation of public nudity); accord *id.* at 310 (Souter, J., concurring in part and dissenting in part); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298-299 (1984) (applying *O'Brien* standard to regulation prohibiting sleeping in public parks).[9]

The Virginia statute withstands First Amendment scrutiny under the *O'Brien* standard. See *O'Brien*, 391 U.S. at 377 (statute must promote an "important or substantial government interest," which is "unrelated to the suppression of free expression," and restrict such expression only to the extent "essential to the furtherance of that interest"). The statute serves the government's important, indeed compelling, interest in preventing activity that creates fear, disruption, and the potential for violence. See pp. 28-29, *infra*. Such an interest is unrelated to the suppression of any idea

---

[9] See also *Hernandez* v. *Commonwealth*, 406 S.E.2d 398, 400-401 (Va. Ct. App. 1991) (sustaining under *O'Brien* standard Virginia statute prohibiting wearing of masks to conceal identity as applied to Ku Klux Klan member), habeas corpus denied *sub nom. Hernandez* v. *Superintendent*, 800 F. Supp. 1344 (E.D. Va. 1992), appeal dismissed, 8 F.3d 818 (4th Cir. 1993) (Table), cert. denied, 510 U.S. 1119 (1994); Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* 80-109 (1999) (suggesting mode of analysis similar to *O'Brien*'s for distinguishing "prosecutable bias crimes," including cross burning intended to threaten or intimidate, from "protected racist speech").

or viewpoint that a particular act of cross burning may be intended to express. Cf. *People* v. *Steven S.*, 31 Cal. Rptr. 2d 644, 651 (Ct. App. 1994) ("the expressive element of an unauthorized cross burning on another person's property is incidental at best"). The statute does not suppress any more expression than is necessary to prevent intimidation, as reflected in its application only to cross burning for the purpose of intimidation, and not to cross burning for other purposes or cross burning for any purpose on one's own property.[10]

3. The First Amendment requires content neutrality only when the government regulates expression, as such, or when the government regulates expressive conduct *because* of its expressive element. Otherwise, a statute may focus, subject only to equal protection constraints, on "the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955), rather than on all phases of the problem at the same time and to the same extent. Cf. *Friedman* v. *Rogers*, 440 U.S. 1, 15 n.14 (1979) (observing that, in regulating commercial speech to prevent misleading or deceptive practices, "[t]here is no requirement that the State legislate

---

[10] The final sentence of the statute—which provides that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons"—raises distinct issues concerning whether the statute is sufficiently narrowly tailored. There is no constitutional vice in permitting a jury to infer an intent to intimidate from speech or expressive conduct considered in light of all the circumstances of the case. See *Mitchell*, 508 U.S. at 489 ("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). If, however, the provision allows a jury to find, merely from the fact that the defendant burned a cross, that he acted with the intent to intimidate, the statute could reach cross burning that was intended only to express an idea or viewpoint. No analogous provision appears in any federal statute that is used to prosecute cross burning. See p. 2 note 1, *supra*.

more broadly than required by the problem it seeks to remedy") (citing *Williamson*); *O'Brien*, 392 U.S. at 375 (sustaining statute that prohibited the destruction of draft cards but not other government-issued documents, the destruction of which could produce comparable harms).

Thus, when regulating the conduct of intentional intimidation, in furtherance of an interest unrelated to the suppression of expression, a State may focus on intimidation in one context. Virginia may, for example, prohibit intimidation by burning a cross without, as the Virginia Supreme Court suggested (Pet. App. 14), also prohibiting intimidation by burning a circle or a square. That is because Virginia's valid concerns with the unique evils of intimidating cross burning respond to a genuine threat to social order, a threat not found in other contexts. The Commonwealth's focus on the actual problem that it has encountered raises no concern that it is actually seeking to suppress disfavored ideas or views.

4. The Virginia statute is unlike the Texas flag-burning statute that was invalidated in *Texas* v. *Johnson*. There, the Court held that the *O'Brien* standard was inapplicable because the State offered no valid interest unrelated to the suppression of free expression to justify the statute. 491 U.S. at 407. The Court concluded that Texas's asserted interest in preventing breaches of the peace was unsupported by any evidence that flag burning would provoke a violent response. *Id.* at 407-410. And the Court concluded that Texas's interest in preserving the symbolic value of the flag was related to the suppression of free expression. *Id.* at 410. Here, in contrast, the Commonwealth's interest in preventing coercive conduct that instills fear in its citizens is inherent in the statute's limitation to cross burning with the intent to intimidate. The historical accuracy of Virginia's premise that such cross burning warrants proscription is beyond question. See pp. 2-5 & note 2, *supra*.

The Virginia statute is also unlike the federal Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, which the Court declined to review under the *O'Brien* standard in *United States* v. *Eichman*, 496 U.S. 310, 315 (1990). In that case, the Court held that the government's asserted interest, to protect the physical integrity of the American flag, was "related to the suppression of free expression," because it "rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals." *Id.* at 315-316. Again, the Virginia statute is justified by the Commonwealth's interest in protecting its citizens from intimidation, which is distinct from any interest in preventing the use of cross burning as a symbol of an idea or philosophy.[11]

B. The Virginia Statute Poses No Danger Of Idea Or Viewpoint Discrimination Because The Same Reasons That Justify A Ban Of All Intimidating Expression Justify A Ban Of Intimidation By Cross Burning

The Virginia statute, even if viewed as a selective regulation of proscribable expression, does not violate the First Amendment under *R.A.V.* The government may constitutionally proscribe all threatening and intimidating expression. See *Watts* v. *United States*, 394 U.S. at 707. It also may distinguish within that category, provided that it does so for a reason that is sufficiently content-neutral. See

---

[11] The federal civil-rights statutes discussed above, if viewed as regulations of a "nonspeech" element of expressive conduct in their application to cross burning, would also satisfy the *O'Brien* standard. Those statutes serve the government's important interest in protecting citizens against interference in the exercise of federal rights. That interest is unrelated to the suppression of free expression. The statutes are narrowly tailored to reach only those cross burnings that are intended to intimidate, leaving ample alternative means for the expression of views antagonistic to the persons and rights that the statutes protect. See *Hayward*, 6 F.3d at 1250-1251 (holding that Section 3631 satisfies the *O'Brien* test in prosecution involving cross burning).

R.A.V., 505 U.S. at 388. A prohibition of intimidation by cross burning is justified for the same content-neutral reasons that would justify a prohibition of all threatening or intimidating expression.

In *R.A.V.*, the Court explained that the First Amendment's prohibition against content discrimination in the regulation of "fighting words" and other categories of proscribable speech is "not absolute." 505 U.S. at 387. The Court identified various instances in which such discrimination is permissible because it poses no threat of driving certain ideas or viewpoints from the marketplace. One such instance is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech of speech at issue is proscribable." *Id.* at 388. That is because "[s]uch a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Ibid.* Thus, Congress could prohibit only threats of violence made against the President, "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." *Ibid.*

The same analysis applies to a statute that prohibits only intentional intimidation by cross burning. A statute that prohibited *all* intimidating speech (*i.e.*, speech intended to coerce its victims by putting them in fear of bodily harm) would be permissible under the First Amendment. Intimidating speech, like the threatening speech discussed in *R.A.V.*, is "outside the First Amendment," and may be prohibited for the same content-neutral reasons: to "protect[] individuals from the fear of violence, from the disruption

that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

Those reasons have "special force," 505 U.S. at 388, when applied to intentional intimidation by cross burning. A State could properly conclude that cross burning, when engaged in to intimidate, has a unique potential for instilling fear in its victims, disrupting the life of the community, and precipitating violent or other unlawful conduct. As history demonstrates, cross burning, as contrasted with other intimidating expression, has a particularly strong association with acts of vigilantism and violence. See pp. 2-5 & note 2, *supra*; see also, *e.g.*, *Steven S.*, 31 Cal. Rptr. 2d at 653 ("Given the role of the Ku Klux Klan in our nation's history, * * * a malicious cross burning * * * can be uniquely threatening, fearsome, and provocative."). Because cross burning typically targets its victims based on their race (or ethnicity or religion), its intimidating impact is particularly likely to be felt not only by its immediate victims, but also by others in the community who are of the same race (or ethnicity or religion). See *Symposium: Civil Rights Law in Transition*, 27 Fordham Urb. L.J. 1109, 1173 (Apr. 2000) (Professor Frederick M. Lawrence) ("[S]tudies have shown that in the aftermath of cross burnings on the lawn of a black family, other black families in the area * * * respond as if they themselves were attacked, of actual personal victimization. This is evident with other ethnic and other groups as well. Consequently, bias crimes affect the target community in such a way that there is no equivalent with parallel crimes."); S. Rep. No. 721, 90th Cong., 1st Sess. 4 (1967) (observing that violence or the threat of violence "has been used against [some] Negroes * * * in order generally to intimidate and deter all Negroes in the exercise of their rights"). The impact of intimidating cross burning on racial or other groups within the community heightens the injury that such conduct causes and justifies its special prohibition. Cf.

Mitchell, 508 U.S. at 488 (special harms of bias-motivated crimes "provide[] an adequate explanation for [a State's] penalty-enhancement provision over and above mere disagreement with the offender's beliefs or biases").[12]

Intimidation by cross burning, in light of its history, is therefore singularly proscribable for the same reasons that intimidating expression is generally proscribable. A statute such as Virginia's presents "no significant danger of idea or viewpoint discrimination." *R.A.V.*, 505 U.S. at 388.[13]

---

[12] It would be especially inappropriate to presume, in light of the historical context, that Virginia enacted the statute for the impermissible purpose of suppressing expression, rather than for the permissible purpose of protecting its citizens from a particularly virulent form of intimidation. As noted, the statute was originally adopted in 1952, at a time when many of the views that a person may seek to advocate by burning a cross, such as white supremacy and racial separation, were reflected in state law. See, *e.g.*, *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); *Loving* v. *Virginia*, 388 U.S. 1, 7 (1967) (characterizing as "obviously an endorsement of the doctrine of White Supremacy" the justifications offered by Virginia Supreme Court in 1955 to uphold the state anti-miscegenation statute).

[13] The federal civil-rights statutes discussed above are not selective regulations of proscribable expression. Even if they were so viewed, however, they would be permissible for reasons similar to those discussed in the text. Cross burning or other expressive activity intended to intimidate a person for exercising his federal right to occupy a dwelling may cause particularly intense fear and disruption. Cf. *Frisby* v. *Schultz*, 487 U.S. 474, 486-487 (1988) (noting the uniquely disturbing impact of picketing in the residential context). And, because the activity is directed at a victim because of his race (or ethnicity, religion, etc.), it is likely to instill fear not only in that victim, but also in others of the same group.

CONCLUSION

The judgment of the Virginia Supreme Court should be reversed to the extent that it holds that a State cannot exclusively proscribe cross burning with the intent to intimidate.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

BARBARA MCDOWELL
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys

AUGUST 2002

APPENDIX

1. Section 241 of Title 18, U.S.C., provides, in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;

* * * * *

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

2. Section 242 of Title 18, U.S.C., provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one years, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a

dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

3. Section 245(b) of Title 18, U.S.C., provides, in pertinent part:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

> (1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—
>
> > (A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;
> >
> > (B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;
> >
> > (C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any

inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

> (B) affording another person or class of persons opportunity or protection to so participate; or
>
> (5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of

such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

* * * * *

4. Section 1982 of Title 42, U.S.C., provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

5. Section 3631 of Title 42, U.S.C., provides:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

> (a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or
>
> (b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined under title 18 or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under title 18 or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse; or an attempt to kill, shall be fined under title 18 or imprisoned for any term of years or for life, or both.

6. The Virginia cross-burning statute, Va. Code Ann. § 18.2-423 (Michie 1996), provides:

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.