NO. 88-155

IN THE

Supreme Court of the United States

October Term, 1988

THE STATE OF TEXAS,

Petitioner,

v.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION, VETERANS OF FOREIGN WARS OF THE U.S., NATIONAL FLAG FOUNDATION, AMVETS, AIR FORCE ASSOCIATION, AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER.

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Date: December 1, 1988

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Amici curiae the Washington Legal Foundation, *et al.*, hereby move this Court pursuant to Supreme Court Rules 36.1 and 42.2(b) for leave to file the annexed Brief *Amici Curiae* in support of the petitioner in this case. Counsel for petitioner has expressed his written consent to the filing of this brief. However, counsel for respondent, who is listed as counsel of record in this case, has indicated that he no longer represents respondent and that the respondent should be contacted directly. Despite written requests and other efforts to contact respondent, no response has been received, and therefore, this motion is necessary.

INTERESTS OF *AMICI CURIAE*

Amicus the Washington Legal Foundation (WLF) is a non-profit public interest law and policy center organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 120,000 members and supporters throughout the United States and Texas whose interests the Foundation represents.

WLF has devoted a substantial amount of its resources to cases relating to governmental regulations and constitutional law. WLF has participated in numerous cases before this Court as *amicus*, party, or counsel to party, including cases pertinent to the case at bar relating to the First Amendment. *See, e.g, Boos v. Barry*, 108 S.Ct. 1157 (1988). WLF seeks to present to this Court a broader perspective of the issues raised in this case than the parties directly involved in the case in order to assist this Court is the disposition of this matter.

Amicus Veterans of Foreign Wars of the U.S. is a federally chartered corporation whose nearly two million men and women members worldwide, including many in Texas, served their country honorably in overseas engagements for which a campaign badge or medal has been authorized. As expressed in its federal charter, its purposes are "fraternal, patriotic, historical, and educational...[and] to maintain true allegiance to the government of the United States of America and fidelity toits constitution and laws; to foster true partiotism...and to preserve and defend the United States from all her enemies whomsoever." As part of its mission, the VFW, throught its 10,000 Posts around the world, promotes respect and love for the Flag that their members have defended in battle.

Amici National Flag Foundation (NFF) is a non-profit patriotic and educational organization with its headquarters at Flag Plaza in Pittsburgh, Pennsylvania. NFF devotes its resour-

ces to producing literature, programs, and activities which stimulate enhanced appreciation for America's heritage, liberty and Flag. It is widely recognized as this country's leading organization devoted to promoting respect for the Flag among millions of citizens, especially the nation's youth.

Amicus AMVETS, originally formed in 1943, was federally chartered by Congress in 1947 and represents American Veterans who fought in World War II. Since then, AMVETS, headquartered in Lanham, Maryland, has become to represent also those men and women who fought in Korean and Vietnam. On May 31, 1984, President Reagan signed the law amending AMVETS charter to allow as members all those who served honorably and actively after May 7, 1975. AMVETS also promotes respect and honor for the Flag among its members and society at large.

Amicus Air Force Association is a non-profit membership and professional organization consisting of over 240,000 men and women, both military and civilian, active duty and retired, Reserve and Guard, devoted to promoting the national security and strength of this country, especially through a strengthened air force. Based in Arlington, Virginia, and founded by General Jimmy Doolittle, the Air Force Association also strongly supports and encourages respect and love for the Flag and the country it represents.

Amicus Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education, study, and research in such diverse areas as history, law, economics, and the arts. AEF has participated as *amicus* in this Court on numerous occasions along with WLF, and supports the laws of the state and federal government prohibiting the desecration of the Flag.

Accordingly, *amici* respectfully request this Court that they be permitted to file the annexed brief which we believe will assist this Court in the disposition of this case.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the foregoing motion and are incorporated herein by reference.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case as set forth in the petitioner's brief. Nevertheless, *amici* wish to emphasize certain facts relevant to the issues discussed in this case.

The defendant, Gregory Lee Johnson, led a demonstration of protestors through downtown Dallas, Texas on August 22, 1984 during the time of the Republican National Convention in that city. The "protest" was short on speech or debate, and looked more like a roving band of vandals. The protestors marched from one office building complex to the next, banging on office windows, spray-painting walls, floors, and windows of buildings that were open, and tearing up potted plants. In front of one of the buildings, they bent a flagpole and tore from it the American flag. Johnson took the flag along with him as he led the march to the front of Dallas City Hall, shouting along the way, "Fuck you, America" while "shooting the finger," according to one police officer.

In front of City Hall, Johnson doused the flag with lighter fluid and set it ablaze with a lighter, while he and his fellow protestors chanted "America, the red, white and blue, we spit on you." The charred remains of the flag were gathered up by an observer, an employee of the United States Army Corps of Engineers, who buried them in his backyard.

After a contingent of police arrived on the scene, the demonstrators were arrested on a variety of disorderly conduct charges. Apparently, those charges against Johnson were dropped and he was instead prosecuted for violating Tex. Penal Code Ann. 42.09 which forbids the physical desecration of the flag. He was convicted of the crime and sentenced by a jury to one year in jail and asssessed a fine of $2,000. [1] His conviction was affirmed by the Court of Appeals for the Fifth District. *Johnson v. State,* 706 S.W.2d 120 (Tex. App.--Dallas 1986). With the assistance of the American Civil Liberties Union as his counsel, Johnson petitioned for review with the Texas Court of Criminal Appeals, which reversed his conviction in a 5-4 decision. *Johnson v. State,* No. 372-86 (Tex. Crim. App. Apr. 20, 1988). The court held that section 42.09(a)(3) was unconstitutionally applied to Johnson since his desecration of the flag was "symbolic speech," and that his First Amendment rights outweighed the state's asserted interests in preserving the flag as a symbol of national unity and preserving the peace. The court also held that the statute was overbroad.

SUMMARY OF THE ARGUMENT

The Texas anti-desecration statute does not regulate speech, but rather certain kinds of destructive conduct. Accordingly, such conduct is not protected by the First Amendment by merely labelling it "symbolic speech." Even if the flag desecrator's conduct is a form of speech, the state has a valid and overriding interest in preserving the integrity of the American flag as a symbol of national unity, as well as an interest in preserving

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1 Johnson was not arrested for violating a similar federal law prohibiting public burning of the flag, although he certainly can be since the five-year statute of limitations has not expired. 18 U.S.C. 3282. Nor are there any double jeopardy problems since Johnson violated the law of two jurisdictions, *i.e,* Texas and the United States. *See Abbate v. United States,* 359 U.S. 187 (1959); *United States v. Patterson,* 809 F.2d 244 (5th Cir. 1987).

the peace, a breach of which is likely to be occasioned by the public burning and mutilation of our nation's flag.

The lower court failed to give sufficient weight to these important state interests, and in doing so, misapplied this Court's teachings in *United States v. O'Brien,* 391 U.S. 367 (1965) and *Spence v. Washington,* 418 U.S. 405 (1974). Accordingly, the lower court should be reversed.

ARGUMENT

I. THE TEXAS ANTI-DESECRATION STATUTE REGULATES SPECIFIC DESTRUCTIVE CONDUCT, NOT SPEECH.

Tex. Penal Code Ann. 42.09 regulates or proscribes certain kinds of destructive conduct, not speech. The law prohibits the desecration of certain specified objects, including our national flag, as well as certain places, such as graveyards and places of worship. That statute does not regulate or prohibit speech, either the written or spoken word, about those particular objects or places. *See Street v. New York,* 394 U.S. 576 (1969) (First Amendment protects contemptuous words spoken about the flag; issue as to burning of the flag not addressed). Rather, the Texas law forbids a person to perform certain physical acts, *viz.*, to "*deface, damage,* or otherwise *physically mistreat* in a way that the actor knows will seriously offend one or more persons likely to observe or discover his *action.*" Section 42.09(b) (emphasis added).

There is no question that Johnson was found guilty in this case for the act of burning the flag and not for words uttered. There is also no question that witnesses to this public desecration of the flag were seriously offended, and the lower court so found. Pet. for Cert. App. 13. Accordingly, the First Amendment is not implicated at all since the statute merely proscribes certain destructive and damaging conduct, regardless of whether the desecrator intended thereby to convey any mes-

sage, political or otherwise.

The statute is thus content and viewpoint neutral with respect to any message which the actor seeks to convey. The statute would prohibit desecrating or burning the flag regardless of whether the actor intended to protest government policies, which Johnson claims he intended to do in this case, or whether it was burned by vandals who had no particular political message to convey but who merely intended to get publicity for its own sake. The statute would even prohibit a person from burning the flag for what he thought were patriotic reasons. For example, a person who thinks that Americans take their country and freedoms too much for granted might decide that by burning the flag publicly, he will be able to shock observers and stimulate feelings of patriotism and love for their flag. However, the arguably patriotic motives of the flag burner do not immunize him from prosecution under the statute.

Motive is also irrelevant with respect to other conduct prohibited by the Texas law. Thus, in addition to banning the desecration of state and national flags, the law prohibits the desecration of a "public monument" and a "place of worship or burial." Sections 42.09(1), (2). The statute makes it an offense, for example, for someone to break or topple grave markers in a cemetery at midnight when he knows that visitors to the gravesites the next day will discover the damage and be seriously offended. This conduct is prohibited whether it was a mindless act of vandalism, or whether it was intended as some kind of Satanic ritual, or a statement that the dead should be cremated instead of buried, or should not be honored at all. The same would be true in the case of a place of worship. Spraypainting one's initials on a synagogue may be mere vandalism, but spraypainting the initials "KKK" and a swastika would be prohibited by this law since such damage is done in a way likely to seriously offend those who see or discover it.

The fact that the statute defines "desecration" in terms of whether others will be "seriously offended" does not mean that the state is regulating speech rather than conduct, or is permitting a "heckler's veto," even if the conduct is considered symbolic speech. Rather, this definition reflects the common-sense notion of what "desecration" means. [2] Thus, burning a flag privately in one's own home, whether politically motivated or not, does not violate this statute. Nor does burning a worn or tattered flag in a dignified manner violate this law, because no one be would offended by such conduct, and because burning is the preferred method of disposing of worn flags. 36 U.S.C. 176(k). Similarly, no one would find it offensive if a construction worker who is remodeling a church knocked out a wall of the church to build an addition, even though the wall, and hence the place of worship, has been technically "damaged."

Accordingly, the Texas statute does not regulate speech, but rather certain destructive conduct which the state may prohibit under its well recognized police powers. But even if the actor intended not only to give serious offense by his destructive conduct, but also to convey some type of political or social message, the Texas law would not violate the desecrator's First Amendment rights because the state has a valid interest in preserving the integrity of the flag as a symbol of national unity as well as an interest in preventing breaches of the peace as will be discussed below. *Amici* will further demonstrate that the Texas law passes Constitutional muster under the Court's decisions in *United States v. O'Brien,* 391 U.S. 367 (1965) and *Spence v. Washington,* 418 U.S. 405 (1974).

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2 *See* Webster's New Collegiate Dictionary 304 (1979) which defines "desecrate" as "to treat...in a way that provokes outrage on the part of others."

II. THE STATE HAS A COMPELLING INTEREST IN PREVENTING THE DESECRATION OF OUR FLAG IN ORDER TO PRESERVE ITS PHYSICAL INTEGRITY AS A SYMBOL OF NATIONAL UNITY.

The history of the flag of the United States and its use as a symbol of national unity by its government and its people is a rich and varied one that mirrors the growth and development of our nation. [3].

Although America declared its independence on July 4, 1776, it was not until almost a year later when the Continental Congress, on June 14, 1777, formally adopted the following resolution:

> Resolved, that the flag of the United States be 13 stripes alternate red and white; that the Union be 13 stars white in a blue field, representing a new constellation.

8 Journal of the Continental Congress 464. The 13 stars and 13 stripes of the flag make up the whole flag and thus represent the unity of 13 states formed in a "new constellation." This design was undoubtedly patterned after the Grand Union Flag, first raised at Cambridge, Massachusetts on January 2, 1776, which served as our "national" flag. The Grand Union Flag consisted of the 13 red and white stripes, but the first canton of the flag contained the "Union Jack," the crosses of St. Andrew and St. George symbolizing loyalty to the Crown. While the design change from the Grand Union Flag to the Stars and Stripes may have appeared slight, "it expressed symbolically a tremendous

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3 For an excellent historical description of the flag and its uses, see G. Preble, *History of the Flag of the United States of America* (1880); M. Quaife, *The Flag of the United States* (1942); J. Moss, *The Flag of the United States: Its History and Symbolism* (1933); D. Eggenberger, *Flags of the U.S.A.* (1959); W. Smith, *Flags Through the Ages and Around the World* (1975); W. Furlong, *So Proudly We Hail: The History of the United States Flag* (1981).

fact, for it advertised to the world, however belatedly, the resolve introduced in Congress by Richard Henry Lee on June 7, 1776, and formally voted by that body on July 2, 'that these United Colonies are, and of right ought to be, free and independent States.'" Quaife, *supra*, at 65.

The first legislation relating to the flag after the adoption of the constitution was the Act of January 13, 1794, 1 Stat. 341(c)1, which was similar to the original resolution of the Continental Congress except that two stars and two stripes was added to represent the addition of Vermont and Kentucky to the union. Since then, as new States were admitted to the Union, additional stars were added, although the number of stripes were reduced to the original 13 since the distinctive character of the stripes would be diluted as the stripes became thinner.

While the flag of the United States flew proudly from our ships and in wars in those early years, the citizenry did not display the flag in the ubiquitous manner familiar to us today. Nevertheless, the love for the flag as our country's symbol was strong and was best captured by Francis Scott Key, who witnessed the bombardment of Fort McHenry in Baltimore by the British during the night of September 13-14, 1814. As the "dawn's early light" appeared, it was unclear whether the fort had survived the shelling. When Key eventually saw that the flag, although damaged, was flying above the fort, he was moved to write the poem, which was put to song, entitled "The Star Spangled Banner." See Quaife, *supra,* at 112-113.

It was not until the Civil War, however, that the popularity of the flag and the national songs about the flag became widespread, for it was at that tragic point in our nation's history that the symbol of unity represented by the flag was put to its most grueling test.

"If any one attempts to haul down the American flag, shoot him on the spot," telegraphed President Buchanan's Secretary

of the Treasury John Adams Dix on January 21, 1861. Eggenberger at 136. Throughout the South, seceding states overtook federal forts, ships, arsenals, and other government property. *Id.* The States from the lower south called a convention to organize a provisional government called the Confederate States of America. One of the chief orders of business was to adopt a Flag and Seal of the Confederacy, and the famous Stars and Bars, later modified, was adopted on March 4, 1861. The Confederate Battle Flag contained 13 stars representing the Confederate States. The fall of Fort Sumter in April and the lowering of our flag was viewed as rebellion by President Lincoln and the rest of the country.

> When the stars and stripes went down at Sumter, they went up in every town and county in the loyal States. Every city, town, and village suddenly blossomed with banners. On forts and ships, from church-spires and flagstaffs, from colleges, hotels, store-fronts, and private balconies, from public edifices, everywhere the old flag was flung out, and everywhere it was hailed with enthusiasm; for its prose became poetry, and there was seen in it a sacred value which it had never before possessed.

Preble at 453. Although there were 34 stars in the flag on July 4, 1861, many proposals were made to remove the stars representing the seceded states. Lincoln rejected them all, viewing the war not as one between two nations but as an insurrection of eleven states against the national government. *Id.* at 141.

Thus, the concept of unity and nationhood became firmly associated with the flag and imbedded in the American culture. Since the Civil War, Congress and the States, and private civic, veterans, and patriotic organizations, such as *amici,* have promoted national respect and honor for the flag. On May 30, 1916, President Woodrow Wilson issued a Proclamation declaring June 14th to be Flag Day, in commemoration of the first flag resolution establishing the Stars and Stripes.

In 1949, Congress declared June 14th to be Flag Day. 36 U.S.C. 157. In 1966, the week of June 14th was declared National Flag Week. 36 U.S.C. 157a. In 1931, Congress declared The Star Spangled Banner to be our national anthem, which is universally sung at public gatherings and events. 36 U.S.C. 170. On December 11, 1987, Congress designated John Philip Sousa's "The Stars and Stripes Forever" to be the national march. Pub. Law 101-186, 101 Stat. 1286. Congress has also established The Pledge of Allegiance to the Flag and the manner of its deliverance. 36 U.S.C. 172. [4]

The flag is used to honor those who gave their lives in battle to protect it, and to mark our national achievements. As the court in *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971) properly noted:

> Throughout our history as a nation the flag has been our symbol in many wars, foreign and domestic. It has proud-

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4 During the recent Presidential election, the issue of the Pledge of Allegiance and respect for the flag received considerable attention, although the significance of the Pledge may have been overlooked. While Americans pledge allegiance to the flag, the British subject's allegiance is to the Queen. The Queen as the Sovereign, rather than the Union Jack, is the symbol of unity in the United Kingdom. The Union Jack and the Royal Standard are the Queen's own devices, and it is through her that the flag represents the nation. This notion traces back to the monarchies before the rise of nation states when flags did not represent a political entity, but were symbols for the monarch, lord, or ruler. Thus, while the Union Jack is generally regarded as the national flag of the United Kingdom, legally it is not so. Private citizens are forbidden to fly the Union Jack at sea and their right to so do on land is doubtful. Nevertheless, it is the *pattern* of the Union Jack that is used by the majority of private citizens. *See* D. Lister, *Some Aspects of the Law and Usage of Flags in Britain*, The Flag Bulletin (Jan.-Feb. 1978). As this commentator noted, "In contrast to the secondary status of the Union Jack, the American flag has unusual importance as the primary symbol of sovereignty and of unity....To an outsider the American attitude towards the national flag...ha[s] the appearance of being exaggerated and indeed, emotional. But so must seem the British adulation of the Queen and royal family.... Prima facie, because the United States had adopted the flag as its symbol of national sovereignty, she is fully justified in protecting that symbol from desecration by law, just as the British protect their Queen." *Id.*

> ly led our troops in battle and reverently draped the caskets of those who fell. It has signified our national presence on battleships, airplanes, school houses and army forts, and has been raised triumphantly in battle on far distant mountain peaks [the raising of the flag by the United States Marines on top of Mount Suribachi on the Island of Iwo Jima is commemorated at the Iwo Jima Memorial adjoining Arlington National Cemetery]. It was planted on the moon by the Apollo 15 astronauts....It flies over the Nation's Capitol, the Supreme Court, at all our national cemeteries throughout the world and at our Tomb of the Unknown Soldier in Arlington National Cemetery. Wherever it flies it signifies the presence of the United States of America...[and] is a shining beacon of hope.

454 F.2d at 975-76.

It cannot be disputed that the flag is a symbol of national unity whose physical integrity can be protected by the state. In 1897, South Dakota became the first state to pass a law protecting the flag from misuse by commercial or political advertising. The Supreme Court in *Halter v. Nebraska,* 205 U.S. 34 (1907) upheld Nebraska's law prohibiting a brewer from using the flag design on bottles of beer. Later in 1917, the National Conference of Commissioners of Uniform State Laws drafted a Uniform Flag Act which many states have enacted, while others, like Texas, have their own laws on the subject.

Federal legislation regulating the use of the flag was first enacted in 1905 prohibiting the registration of trademarks using the flag. 33 Stat. 725. In 1917, Congress passed a law prohibiting the flag's desecration or mutilation in the District of Columbia. 39 Stat. 900. And in 1918, Congress passed a law providing for the dismissal of government employees who, during times of war, criticize the flag in an abusive manner. 40 Stat. 554. In was not until 1968 that Congress expanded the

law prohibiting the physical mistreatment of the flag to apply outside the District of Columbia. 18 U.S.C. 700. As then Attorney General Ramsey Clark put it during Congress' consideration of this law:

> The American people are deeply devoted to their flag. It is in the hearts and minds of our citizens, the symbol of our national ideal: "liberty and justice for all." We are deeply hurt when our flag is dishonored for it represents not only a noble history and the sacrifice and spirit of our fathers, but our aspirations for our children and their fulfillment.
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> * * * *
>
> If the Congress determines that State or local enforcement is for any reason inadequate, or that there are overriding reasons why burning the flag should be a Federal offense, the Department of Justice can, and of course will, vigorously prosecute violators.

1968-2 U.S. Code Cong. & Admin. News 2510. *See* note 1, *supra.*

Accordingly, there can be no doubt that the state of Texas has an interest in preserving the flag as a symbol of national unity by preventing its public desecration. Both the Congress and the states have enacted numerous laws promoting the display of and respect for the flag, and laws protecting the physical integrity of the flag. The American people revere and respect the flag. There are no comparable laws or reservoirs of public feeling for other national symbols, such as the national emblem, seal, or Presidential flag, as there is for the Stars and Stripes. Consequently, the flag can be considered sui generis. *See Parker v. Morgan,* 322 F. Supp. 585 (D.N.C. 1971)(three-judge court)("flags of the United States of America and the State of North Carolina [are] sui generis").

The interest in preserving the integrity of the flag as a symbol of unity not only is sufficient in and of itself to support the Texas statute, it also provides the rationale for the breach of the peace interest which the state can protect. Thus, if there is any doubt that the first interest alone can justify the Texas law, the two in combination certainly provide more than adequate support for the law.

III. THE TEXAS ANTI-DESECRATION STATUTE SERVES THE VALID PURPOSE OF PREVENTING THE BREACH OF THE PEACE.

The State of Texas has an interest in preventing any breach of the peace that might result from a violation of the anti-desecration statute. This interest outweighs any claimed First Amendment right to publicly burn the flag. *Amici* contend that it is not unreasonable for the government to anticipate that a breach of the peace might occur when the American flag is publicly destroyed. Precisely because the flag is our nation's symbol and because respect for it is widely promoted by the federal and state governments as well as by countless civic and patriotic groups such as those represented by *amici*, a breach of the peace would not be an unlikely consequence of the public desecration of the flag.

The fact that the flag burning in this case did not, fortunately, result in any particular fight or struggle in no way vitiates the State's interest in preventing one from starting. Considering the facts in this case, the protestors' conduct was, literally and figuratively, inflammatory.

The lower court and respondent improperly construed the law on the validity of "breach of the peace" statutes by seemingly requiring that an actual breach of the peace take place before the state can prevent it. This Court has never required such a Catch-22 standard in sustaining breach of the peace laws.

In the first place, the respondent was wrong when he stated that "the Texas court correctly applied the standard of *Brandenberg v. Ohio*, 395 U.S. 444 (1969), when it concluded that 'there was no breach of the peace, nor does the record reflect that the situation was potentially explosive.'" Respondent's Opp. to Pet. for Cert. at 9. The Texas court never even referred to the *Brandenberg* case, which *amici* believe is irrelevant in any event to this case. *Brandenberg* dealt solely with the constitutionality of an Ohio law that prohibited mere verbal advocacy of violent or lawless conduct. In that case, members of the Ku Klux Klan had made derogatory statements about blacks and Jews and advocated revenge during a television interview. This Court canvassed its prior opinions in this area and concluded that:

> [T]he 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 or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447. The respondent is not being charged here with advocating the use of force or encouraging others to violate the law. The breach of the peace likely to be occasioned by his desecration of the flag is not that passersby will join in and desecrate the flag as well, or that they will use force as advocated and suggested by the speaker. Rather, the breach of the peace likely to be occasioned by desecrating the flag is that which may result by those who, seriously offended by the conduct, step in to protect the flag and who may likely be resisted by the protestors.

In other words, if the respondent intends his burning of the flag to be "symbolic speech," so be it. In that case, since the state can prevent the utterance of "fighting words," it can certainly prevent "fighting symbolic speech." Just as fighting

words find no protection in the First Amendment, so fighting *symbolic* speech enjoys no constitutional protection. Accordingly, the line of cases that are applicable here stems not from *Brandenberg,* but from *Chaplinsky v. City of New Hampshire,* 315 U.S. 568 (1942).

In *Chaplinsky,* a unanimous Supreme Court upheld a New Hampshire law that prohibited the utterance of "any offensive, derisive or annoying word to any other person...nor make any noise or exclamation in his presence with intent to deride, offend or annoy him...." Chaplinsky was engaged in protected First Amendment speech when he publicly criticized organized religion. However, as the crowd became unruly, a traffic officer led Mr. Chaplinsky away from the crowd, and upon approaching the City Marshal, Chaplinsky called him a "damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." While there was no evidence that the marshal or Chaplinsky had engaged in any physical violence or that the marshal had even been offended, the Court upheld the conviction on the grounds that the words uttered were not protected by the First Amendment. The Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--words which *by their very utterance inflict injury* or *tend* to incite an immediate *breach of the peace.* It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

315 U.S. 571-72 (footnotes cited omitted)(emphasis added). The *Chaplinsky* Court relied on these principles and concluded that the law was not unconstitutional as applied to Chaplinsky, stating that

> Argument is unnecessary to demonstrate that the appellations "damn racketeer" and "damn Fascist" are epithets *likely* to provoke the average person to retaliation, and thereby cause a breach of the peace.

Id. at 574 (emphasis added). Accordingly, this Court does not require an actual breach of the peace to have occurred before the state can pass laws to prevent conduct likely to produce a breach of the peace.

By desecrating the flag, by burning it in a public place, as well as by shouting "Fuck you, America," the demonstrators were in effect cursing passersby and destroying an object that most Americans hold dear and revere, a symbol that in fact represents them individually and collectively. A veteran who fought in combat to preserve the flag, a person whose father or husband gave his life for that flag in service to the country, or any patriotic citizen who loves his country and cherishes the freedoms the flag stands for, would likely intervene to protect the flag against destruction. To most people, an assault on the flag constitutes an assault on them as well. The fact that the crowd was restrained in this case does not deprive Texas of authority to prohibit conduct likely to undermine that restraint.

Numerous courts have held that the act of flag burning is so inherently inflammatory that the state may act to *prevent* such breaches of the peace. *See, e.g, State v, Royal,* 113 N.H. 224, 305 A.2d 676, 680 (1973); *State v. Waterman,* 190 N.W. 2d 809 (Iowa 1971); *Deeds v. State,* 474 S.W. 2d 718 (Tex. Crim. App. 1971). The court in *Monroe v. State Court of Fulton County,* 739 F.2d 568 (11th Cir. 1984) stated that "Clearly, the state has a valid interest in preventing breaches of the peace that *might*

arise from certain acts of flag desecration. *Id.* at 575 (emphasis added). That court, however, wrongly discounted that state interest in that case, even though there was an actual physical scuffle which broke out during an attempt by an onlooker to stop the desecration. The *Monroe* court incredibly dismissed the disturbance as nothing more than a "minor breach" of the peace and insufficient to overcome the flag burner's alleged First Amendment rights. *Id.* at 575.

If actual and serious violence must necessarily occur before a state has an interest in preventing it, the petitioner is correct in noting that such a standard may very well encourage a breach of the peace by those spectators who wish to stop this and future acts of flag desecration. Surely the Court can take judicial notice of past breaches of the peace occasioned by flag desecration and sustain the policy judgments made by the state to prevent such inflammatory conduct in public, without requiring that proof of ensuing violence accompany each prosecution for flag desecration. [5] If that were the standard, then the other provisions of Texas's anti-desecration statute would fall as well, since desecration of public monuments, graveyards, and churches are usually done at night without the public witnessing the act.

The lower court erroneously applied this Court's decision in *Boos v. Barry*, 108 S.Ct. 1157 (1988), in ruling that the statute was overbroad as a breach of the peace statute. In *Boos*, the Court noted the existence of a more narrowly drawn law designed to protect foreign embassy personnel than the broadly worded law under challenge. The fact that Texas has a general breach of the peace statute does not prohibit it from

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5 In May 1844, a rioting mob in Kensington near Philadelphia fired upon a public gathering of citizens and a young man was killed defending the flag from desecration, an event memorialized by song and in art. *See* B. Mastai, *The Stars and the Stripes* 27 (1973); *The North American and Daily Advertiser*, May 8, 1844, at 1, col.1.

enacting other laws that define more precisely the proscribed conduct that may likely cause a breach of the peace. Texas' disorderly conduct statute relied upon by the defendant not only includes a general prohibition on offensive displays likely to incite an imminent breach of the peace, but also prohibits more specifically defined conduct such as Section 42.01(a)(10) ("display[ing] a firearm ...in a manner calculated to alarm") or Section 42.01(11) ("exposing genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act.") Surely the state can proscribe this type of conduct. Otherwise, people who appear naked in public or engage in sex acts, and pass out literature extolling their views as to why such conduct should be allowed in public, could claim the protection of the First Amendment on the grounds that an actual breach of the peace has not occurred, or that persons offended by such conduct can simply "avert their eyes." *Cf. Cohen v. California,* 403 U.S. 15 (171). (Person wearing jacket with "Fuck the Draft" written on it in the presence of women and children inside the courthouse, is protected by First Amendment since those offended by the obscenity can "avert their eyes.")

Thus, the Texas anti-desecration statute could just as easily have been listed as an additional subsection to the disorderly conduct statute. The fact that it exists as a separate statute does not render it overbroad.

IV. THE TEXAS STATUTE COMPORTS WITH THIS COURT'S RULINGS IN *UNITED STATES v. O'BRIEN* AND *SPENCE v. WASHINGTON,* AND THEREFORE WAS NOT UNCONSTITUTIONALLY APPLIED TO JOHNSON.

The respondent claims that his desecration of the flag is protected by the First Amendment because he intended to convey his opposition to unspecified government policies, and hence, his conduct is "symbolic speech." This same argument

could be used by those who spray paint "KKK" and the swastika on synagogues in order to convey their hatred of Jews, conduct also prohibited by the Texas statute and by statute in many other states. This argument is similar to the one made by the draft card burner and rejected by this Court in *United States v. O'Brien,* 391 U.S. 367 (1968).

In *O'Brien,* a student who publicly burned his draft registration card in protest of the Vietnam war and was convicted under a law prohibiting the destruction or mutilation of draft cards. In analyzing his "symbolic speech" claim, this Court first noted that:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

391 U.S. at 376. *Amici* contend that even assuming that burning the flag is "symbolic speech," the government has a sufficiently important interest in protection the physical integrity of our nation's symbol as discussed previously. That interest necessarily implicates the related interest of preserving the peace, which was also advanced by the State of Texas and discussed *supra.*

A. *United States v. O'Brien*

In *O'Brien,* this Court articulated its now oft-quoted four-part test to determine whether the regulation of conduct amounting to "symbolic speech" is constitutional:

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 376-77 (footnotes cited omitted).

In the first place, it should be noted that the *O'Brien* test is not a rigid one, since the Court articulated it merely in order to clarify its previous decisions in this area. The test is one that the Court itself characterized as a "clear" test, suggesting that other regulations not fully meeting this "clear" test could nevertheless pass muster. *See Smith v. Goguen,* 415 U.S. 566, 599 (1974) ("While I have some doubt that the first enunciation of a group of tests such as those established in *O'Brien* sets them in concrete for all time, it does seem to me that the Massachusetts statute [regulating flag misuse] substantially complies with those tests") (Rehnquist, J., dissenting). In any event, *amici* submit that the Texas law clearly satisfies the four-part test of *O'Brien.*

As for the first criterion, there is no question that the State of Texas has the constitutional power to promulgate the anti-desecration statute in question. While the United States flag is

a national flag, the states also have a valid interest in preventing the desecration of both the national and state flags as discussed earlier. The very nature of the United States flag at once reveals the state as well as federal interest in its preservation. The U.S. flag appears to be unique among national flags in that it is composed of symbols representing the various states: fifty stars of equal size represent the fifty states (including Texas) of the Union, and thirteen stripes--seven red, six white-- represent the original thirteen colonies and subsequent states. The flag's design and symbolism mirrors the name of the country it represents, the United States. Thus, the concept of federalism and dual federal and state sovereignty is captured in the flag's very design. The federal anti-desecration law does not preempt the states from regulating in this area; indeed, the law expressly says that the states are *not* deprived of any jurisdiction. 18 U.S.C. 700(c).

The Texas statute also satisfies the second prong of the *O'Brien* test, in that it "furthers an important or substantial government interest." The asserted interest is the need to preserve the physical integrity of the flag because it is a symbol of nationhood and national unity that is revered and respected by most citizens. Congress and the states have enacted numerous laws promoting the display of and respect for the flag. Because the flag is such a widely revered symbol, a related governmental interest is the prevention of breaches of the peace that are likely to be occasioned by public desecrations of the flag. Both of these interests have been advanced by Texas in this case and have been discussed by *amici*.

The third criterion of the *O'Brien* test, that the governmental interest be "unrelated to the suppression of free expression," is also satisfied in this case. As previously noted, the state's interest in preserving the integrity of the flag is wholly independent of the message, if any, that the desecrator intends to

convey. Whether the actor burns the flag out of hatred or love of his country is beside the point. Admittedly, the term "desecration" includes the notion that the observer would be "seriously offended," but the statute is indifferent to the type of message conveyed by the desecration. Thus, the statute applies equally to vandals, whose sole purpose is to be offensive and destructive when toppling grave stones in a cemetery, spraypainting public monuments and places of worship, or burning American flags, as well as to respondent. Respondent's message that he opposes the government--in contrast to the *manner* in which he conveyed it--might or might not have seriously offended passersby, or occasioned a breach of the peace. The statute in no way suppresses free speech. For example, Johnson was free to burn the President in effigy, or a replica of the President's flag. He could also have burned the caricature of "Uncle Sam" in effigy. He was free to verbalize his hatred for the country and its leaders as well as his disdain for the flag. The governmental interest advanced by the statute is not the suppression of a message, but the preservation of the physical integrity of the U.S. flag as a symbol of national unity.

The respondent argues, however, that this Court in *Spence v. Washington*, 418 U.S. 403 (1974) rejected the applicability of this prong to a flag misuse statute. Opposition to Pet. for Cert. at 8. In *Spence*, this Court reversed the conviction of a student who had displayed the American flag upside down from his window with a peace symbol taped over the flag. The defendant was convicted for violating Washington's "improper use" statute rather than its flag desecration statute, and this Court specifically noted that the defendant did not "physically disfigure the flag or destroy it." *Id.* at 415. It was in this context that the Court assessed the State of Washington's interest in preserving the flag as a symbol of national unity under the third-prong of the *O'Brien* test, *i.e.*, that the governmental interest be unrelated to the suppression of free expression:

> If this interest is valid, we note that it is directly related to expression *in the context of activity like that undertaken by appellant.* For that reason and *because no other governmental interest unrelated to expression has been advanced* or supported on this record, the four-step analysis of *United States v. O'Brien* ... is inapplicable.

418 U.S. at 414, n.8 (citation omitted) (emphasis added).

Thus, this Court did not foreclose the applicability of *O'Brien* to cases such as the one at bar. In the first place, both the conduct and the statute in this case are, as noted above, different from the conduct and the statute involved in *Spence*. In addition, the *Spence* Court may have mistakenly characterized the third-prong of the *O'Brien,* test by stating that Washington's improper use statute was "directly related to expression." The Court in *O'Brien,* however, formulated the test in terms of whether the state interest is "unrelated to the *suppression* of free expression." *O'Brien, supra* at 377. (emphasis added). The Texas statute does not suppress speech, but merely proscribes certain conduct regardless of the views of the actor. If the test in *O'Brien* was merely whether the proscribed conduct involved "expression" or speech, then even the statute in *O'Brien* prohibiting the burning of draft registration cards would not pass the test since the government asserted that certain information or messages contained on the draft card must not be destroyed. O'Brien objected to these messages and wanted to destroy the card to symbolize or express his political opposition to the message the card conveyed. In the same way, the flag contains messages, although in symbols rather than in words. In both this case and *O'Brien,* the government had an interest in preserving the physical integrity of the document or symbol, and had no desire to suppress speech *about* those documents or symbols. Otherwise, O'Brien could easily have avoided prosecution by simply producing from his wallet a photocopy of his draft card containing the identical information from the original that he

burned.

In any event, the Court in *Spence* further noted that there was "no other interest unrelated to expression" that was advanced in that case. 418 U.S. at 414, n.8. In the instant case, however, Texas has argued that it also has an interest in preserving the peace. That interest also is a valid one, and therefore the statute satisfies the third prong of the *O'Brien* test.

The Texas statute satisfies the fourth and last prong of the *O'Brien* test, namely, that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest at stake. The state interest is the preservation of the physical integrity of the flag, and the Texas statute is narrowly drawn to satisfy that interest. As previously noted, there is no restriction on any verbal or written expression about the flag. The protestors are free to carry the flag and use it as a backdrop for their rally; what they cannot do is to use it as a canvas upon which to spraypaint epithets, as a target upon which to throw eggs or mud, or as an object to be burned and destroyed by fire. They are free to assault and destroy any symbol of government or of our leaders except the flag. They can even burn and mutilate the flag in private and invite like-minded friends to their house to witness the spectacle.

Accordingly, *amici* submit that the Texas statute satisfies the *O'Brien* criteria and is therefore not an unconstitutional abridgement of a flag burner's First Amendment rights. [6]

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6 *Amici* note that the *O'Brien* argument was advanced by the United States in its Opposition to the Petition for a Writ of Certiorari in *Kime v. United States*, 673 F.2d 1318 (4th Cir. 1982), *cert. denied*, 459 U.S. 949 (1982) in defending the validity of a conviction of a politically-motivated flag burner under the federal statute. That statute, unlike the Texas statute, forbids "casting contempt" on the flag by mutilating or burning it. 18 U.S.C. 700. Thus, if the *O'Brien* test is applicable to the federal statute, *a fortiori* it is applicable to the Texas statute.

B. *Spence v. Washington*

Johnson's attempt to liken his case to *Spence v. Washington*, 418 U.S. 403 (1974) is unavailing. In *Spence*, the Court ruled that the Washington "improper use" statute was unconstitutionally applied to a protestor who was convicted of placing on the flag a peace symbol fashioned from black removable tape and then displaying it from his apartment window. In so ruling, the Court noted that a "number of factors [had been] *important*" to the disposition of the case. 418 U.S. 405, 409 (1974) (emphasis added). *Amici* will discuss and analyze each of these factors to demonstrate their inapplicability to this case.

The *Spence* Court initially considered the ownership of the flag in question:

> First, this was a privately owned flag. In a technical sense it was not the property of the government. We have no doubt that the State or National Government may forbid anyone from mishandling in any manner a flag that is public property.

Id. In the instant case, the flag was apparently not owned by the government, but neither was it owned by Johnson. He and his fellow demonstrators had stolen it from the flagpole in front of the Mercantile National Bank building. *See* Petition for Cert. at 7-8. Presumably, it belonged to the bank and was put there by its owner to be displayed in a dignified manner and to convey its message of national unity. Accordingly, by taking the flag away from its owner and interrupting the message sought to be conveyed by its display, Johnson and his demonstrators exercised a "heckler's veto" of the message being conveyed, and can be punished for doing so. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 Harv. L. Rev. 1482, 1504-05 (1975).

Even if the flag had been owned by Johnson, *amici* submit that the state can nevertheless regulate its use by prohibiting its desecration. The flag exists as an entity only because Congress has authorized its creation. It is a symbol of nationhood and national unity, and the state has an interest in preserving the physical integrity of that symbol. In effect, one buys the flag with the understanding that one will comply with the laws prohibiting its desecration. This situation is analogous to that in *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981) where this Court ruled that although mailboxes are purchased and owned privately, the government can regulate its use and prohibit unstamped letters, albeit communication protected by the First Amendment, from being deposited therein. Another example is Congress' assignment of the exclusive use of the word "Olympics" to the United States Olympic Committee, and the authority to prohibit other groups from appropriating that symbol. See *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971 (1987). If Congress or the State can declare that certain private property is historic and must be preserved, it can punish the owner for destroying that property. So too can the state declare that the flag, even if technically private property, cannot be publicly destroyed. Certainly, this is not a "taking" of private property under the Fifth Amendment entitling the flag desecrator to compensation.

As Justice Fortas noted in *Street v. New York*, 394 U.S. 576 (1974), "the flag is a special kind of personalty," a form of property "burdened with peculiar obligations and restrictions." *Id.* at 616, 617 (dissenting opinion). And as Justice White noted, "the flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it." *Smith v. Goguen*, 415 U.S. 566, 587 (concurring in judgment). Justice Rehnquist agreed with these observations in his dissent in *Spence*, 418 U.S. at 422.

Thus, the fact that the flag may be owned by the desecrator does not give him unlimited power to destroy it, anymore than the fact that a person who has purchased the tombstone for a departed but despised relative allows him to desecrate the marker and violate section 42.09(2) with impunity.

The next factor considered by the Court in *Spence* was the place of the display:

> Second, [Spence] displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area.

418 U.S. at 409. In the case at bar, Johnson did not merely "display" an altered flag, but stole the flag, burned it on public property, trespassed upon and destroyed other private property, shouted obscenities, spat on the flag, and otherwise engaged in disorderly conduct. In this respect, *amici* submit that the Texas statute can also be viewed as a reasonable time, place, or manner restraint on access to a public area. The statute allows a person to demonstrate in any way he pleases on public property so long as he does not physically desecrate the flag. As noted earlier, there are ample alternatives for the expression of one's hostility or hatred for his country or leaders. Such a rule leaves plenty of breathing room for the exercise of First Amendment rights.

The third factor discussed in *Spence* was the risk of the breach of the peace:

> Third, the record is devoid of proof of any risk of breach of the peace. It was not [Spence's] purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that [Spence] made any effort to attract attention beyond hanging the flag out of his own window.

Id. In the instant case, the context in which Johnson burned the flag clearly indicates that there was evidence of risk of breach of peace. Besides going on a rampage of vandalism, Spence intended to draw public attention to his conduct, especially for the benefit of the television cameras on the scene. The burning of the flag seriously offended certain onlookers, and an initially passive observer might well have been moved to physically defend the flag from its wanton destruction. Accordingly, Johnson's conduct was totally unlike that of Spence who merely displayed an altered flag and neither drew the public's attention to it nor even appeared next to it.

> Finally, the *Spence* Court found it significant that: the State conceded, as did the Washington Supreme Court, that [Spence] engaged in a form of communication.
>
> * * * *
>
> [T]his was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by [Spence] about the then-current domestic and foreign affairs of his government.

Id. at 410-11. In the instant case, the State of Texas explicitly denies that Johnson engaged in a form of communication. *Amici* submit that the acts of vandalism, breaking windows, spraypainting buildings, shouting obscenities, spitting, and burning of the flag by Johnson and his cohorts, was precisely the type of "mindless nihilism" that this Court found lacking in *Spence*. There is absolutely nothing in the record to show that Johnson intended to engage in debate or discuss anything; his sole intent was to exhibit outrageous conduct.

In addition, the *Spence* Court noted that the attorney for the State of Washington disclaimed any legitimate state interest in promoting respect for the flag. 418 U.S. at 412. *Amici* submit that such an interest is indeed a valid one and one which has been amply advanced at the state and national levels as pre-

viously noted in this brief. In this case, Texas has always maintained a state interest in the preservation of the nation's flag as a symbol of unity.

Nevertheless, the *Spence* Court assumed, for purposes of its decision, that the state has an interest in preserving the physical integrity of the flag. Yet the Court, in a per curiam opinion (with Justices White, Rehnquist, and Chief Justice Burger dissenting), found the "improper use" statute unconstitutional as applied in this case only, noting that Spence had not been charged with violating the separate flag desecration statute, and that he did not "permanently disfigure the flag or destroy it." *Id.*

There can be no doubt that the Texas statute has not been unconstitutionally applied to the flag burner in this case under the test set forth in *O'Brien v. United States* or in light of the factors considered "important" by the Court in *Spence v. Washington.*

In striking down the Texas anti-desecration statute, the lower court and other courts have misapplied other decisions of this Court in erroneously concluding that the state's interest in preserving the flag as a symbol of national unity does not sufficiently outweigh whatever First Amendment rights are possessed by a flag desecrator. In *West Virginia State Board of Ed. v. Barnette,* 319 U.S. 624 (1943), the Court held that the flag salute was symbolic speech and that the state could not compel an individual to salute the flag to promote national unity. [7] However, there is a qualitative and significant difference between compelling someone to affirmatively salute the flag and show outward signs of respect, and prohibiting someone from

7 However, while a state cannot expel a student for refusing to recite the pledge, it should be noted that the state can compel a teacher to lead her class in the pledge as part of the state's interest in promoting civic pride and respect. *See Palmer v. Board of Education of the City of Chicago,* 603 F.2d 1271 (4th Cir. 1979), *cert. denied,* 444 U.S. 1026 (1980).

mutilating or destroying it. The respondent and others of his ilk are free to refuse to show any affirmative or outward sign of respect for the flag. The lower court failed to appreciate this difference, as did the court in *Monroe v. State Court of Fulton County*, 739 F.2d at 574 (11th Cir. 1984).

References to other decisions dealing with flag or symbolic display are also inapposite. In *Stromberg v. California,* 283 U.S. 359 (1931), for example, the defendant was convicted for displaying a plain red flag symbolizing anarchy. This Court overturned the conviction for violating a California law prohibiting displaying such symbols, declaring the law unconstitutional on its face. *Id.* at 369. The Court in *Stromberg* was not faced with a case such as this one, involving the destruction or mutilation of the American flag. The red flag was a symbol chosen by the "speaker" to be displayed to represent his views, just as the black armbands worn by the students in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969) were symbols chosen to represent their views. Neither of these symbols represent national unity or can be said to be revered or honored by the American people.

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to reverse the decision below and to uphold the defendant's conviction.

Respectfully submitted,

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