No. 88-155

In The
Supreme Court of the United States
October Term, 1988

THE STATE OF TEXAS,

Petitioner,

vs.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR PETITIONER

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QUESTION PRESENTED

DOES THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION CONSTITUTE FREE SPEECH SUBJECT TO THE PROTECTION OF THE FIRST AMENDMENT?

LIST OF PARTIES

GREGORY LEE JOHNSON,

Appellant below and Respondent herein

THE STATE OF TEXAS,[1]

Appellee below and Petitioner herein

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[1] Texas is represented before this Court by the Dallas County District Attorney's Office. The Texas Attorney General, by letter dated June 13, 1988, authorized the Dallas County District Attorney to prepare the petition in this cause. See Appendix to Brief 1. Reference to Petitioner is by either "Texas" or "the State."

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (Pet. App. 1-27) is reported at 755 S.W.2d 92. The opinion of the intermediate court of appeals (J.A. 18-27) is reported at 706 S.W.2d 120.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals (Pet. App. 1-27) was entered on April 20, 1988. A motion for rehearing was denied on June 8, 1988. (Pet. App. 28, 29). The petition for a writ of certiorari was filed on

July 27, 1988. That petition was granted on October 17, 1988.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .

U.S. CONST. amend. XIV, § 1, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

TEX. PENAL CODE ANN. § 42.09, in relevant part:

> Desecration of a Venerated Object
>
> (a) A person commits an offense if he intentionally or knowingly desecrates:
>
> * * *
>
> (3) a state or national flag.
>
> (b) For purposes of this section, "desecrate" means 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.
>
> (c) An offense under this section is a Class A misdemeanor.

STATEMENT OF THE CASE

Facts Surrounding the Commission of the Offense

On August 22, 1984, during the Republican National Convention in Dallas, Texas, Dallas Police Officer Terry

Stover was assigned to observe a planned demonstration to be held in downtown Dallas. (R.II-57, 58-59). As part of her assignment, Officer Stover, dressed in plain clothes and acting undercover, joined a march called a "War Chest Tour"[2] at Dealey Plaza in downtown Dallas[3] at approximately noon on that day; she moved with the 75 to 100 protesters as they marched through downtown Dallas. (R. II-58-60, 64). During this march, Officer Stover noticed that Respondent Johnson and a woman, Denise Williams, appeared to be the leaders of this group as both encouraged the crowd by use of a megaphone. (R.II-80).

The protesters initially stopped at LTV Tower, entered the building, and conducted a "die-in," an event in which the protesters would count down from ten to one and then fall to the floor, moaning and yelling for approximately three to four minutes. (R.II-71-72). Apparently, this demonstration was designed to represent an atomic attack or explosion. (R.II-161; R.III-258). After conducting this "die-in," the marchers walked through Thanksgiving Square and entered the Republic Bank building where they seized and tore up deposit slips "like confetti," pulled up potted plants, and dumped the soil on the floor. (R.II-73, 74-75, 157).

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[2] The alleged purpose of this tour was to demonstrate against corporations that had some sort of role "in either discriminatory or other sorts of policies that adversely affected other countries: South Africa, Nicaragua, different parts of Central America." (R.III-309). See also Defendant's Exhibit 1. (R.V-833).

[3] A schematic diagram of the area in downtown Dallas where the march occurred was utilized at trial; a photograph of the diagram is contained in the record as State's Exhibit 4. (R.V-822).

The march then moved toward the Diamond Shamrock building. (R.II-76). Evidently knowing in advance of the march, the management locked the doors of this building. (R.II-76). Upon learning this, the protesters beat on the windows and spray-painted the walls and windows of the building. (R.II-76). The group then traveled to the Plaza of the Americas complex. (R.II-79). Here, the marchers again overturned potted plants and spray-painted the floor and walls of the businesses in the complex. (R.II-79). The group then went by way of a skywalk to the Southland Life building; various protesters spray-painted the carpet and walls of the skywalk. (R.II-81). The group proceeded through the Southland Life building to a "little park" where another die-in was conducted. (R.II-81, 82). The march then moved toward the Mercantile National Bank building. (R.II-82).

Officer Stover testified there were three flag poles in front of this building; one bore the American flag. (R.II-83). Protesters bent all three poles. (R.II-83). One protester took down the American flag and gave it to Johnson who "wadded it up and stuck it under his tee shirt." (R. II-83-84).

The protest march next moved through the Neiman Marcus store, where no damage was done, to the Dallas Power & Light Company building, where the doors were locked. (R.II-85). As they had done before, protesters spray-painted on the windows and beat against them with their fists. (R.II-85-86). A short time later, the marchers conducted another "die-in" at the Southwestern Bell Plaza. (R.II-86). During this "die-in," Officer Stover saw Johnson "shooting the finger" with both hands, say-

ing, "Fuck you, America."[4] (R.II-86-87). The march proceeded to the Federal Reserve building, where protesters again spray-painted and beat against the windows of the building with their fists. (R.II-87).

The protesters ended the march in front of Dallas City Hall. (R.II-87-88). There, Officer Stover saw the United States flag being burned while protesters chanted, "America, the red, white and blue, we spit on you." (R.II-91). Officer Stover testified that she was seriously offended by seeing the burning of the flag though she was not able to see who had burned the flag. (R.II-92).

Officer Roland Tucker, an investigator with the Dallas Police Department, was also assigned to observe the march. (R.III-203-205). In his estimation, there were 100-150 protesters at the time he joined the march in progress. (R.III-206-2007). Officer Tucker witnessed an American flag being taken from a flagpole at the Mercantile Bank building by two individuals who then passed the flag to Johnson. (R.III-209). Johnson "rolled it up" and "stuck it up under his shirt." (R.III-210). He testified that he again saw this flag "in front of the city hall being burned on the ground." (R.III-210).

During the portion of the march that Officer Tucker observed, Johnson kept "the crowd moving along" by "chanting with the rest of the group, yelling, cursing" and by moving "from person to person kind of encouraging them to yell with him." (R.III-210). Most of what John-

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[4] Indeed, during the course of the march, Officer Stover heard Johnson shout such slogans as "Fuck you," "Fuck you, America," and "Fuck the Republicans." (R-II-77-78, 91). Officer Stover did not, however, see Johnson personally engage in acts of destruction during the march. (R.II-79, 87, 155-156, 157, 160).

son yelled were profanities—"Fuck you, fuck America, screw everybody"—and he made the gesture "commonly known as shooting the finger" on several occasions. (R. III-211). Officer Tucker saw Johnson in possession of a spray-paint can, but did not actually see him paint on a building or on any of the pillars around the Dallas City Hall. (R.III-213, 214, 238).

When the protesters arrived at City Hall Plaza, Denise Williams spoke to the crowd with the aid of a megaphone. (R.III-239-240). Officer Tucker did not recall exactly what was said. (R.III-244). While Ms. Williams spoke and the crowd chanted, Johnson "pulled out the flag from underneath his shirt." (R.III-243).

Officer Tucker actually witnessed the burning of the flag in front of City Hall. (R.III-217). According to Officer Tucker, a group of about 40 to 50 people encircled the flag. (R.III-216-217). Officer Tucker saw Denise Williams holding one end of the flag and Johnson holding the other end. (R.III-218). Johnson attempted to light the flag with a cigarette lighter but was unable to do so. (R. III-218). Someone in the crowd then handed Johnson a container of lighter fluid. (R.III-219). Johnson "soaked the flag with lighter fluid" and set it on fire with the aid of the cigarette lighter. (R.III-219). Johnson then jumped back into the crowd. (R.III-220).

Officer Tucker was seriously offended by Johnson's actions. (R.III-222). He testified that he pointed out Johnson to "the sergeant over the arrest team" and told him to have Johnson arrested. (R.III-223). Johnson was subsequently arrested. (R.III-249-250).

The charred fragments of the flag were collected by Daniel Walker, an employee of the United States Army

Corps of Engineers. (R.III-268, 270, 271). Members of the press corps, who were covering the march, asked Mr. Walker how he felt when he saw the flag being burned. (R.III-272). Mr. Walker testified that he told these reporters:

> This was the first time that I ever saw the flag burning and I told them I felt what—my feelings, as to I felt that it was—it was an individual and corporate suicide. And they said, "What do you mean by 'corporate?'"
>
> And I said that in every society, those who try to destroy it will usually succeed in destroying themselves . . .

(R.III-273). Mr. Walker buried the remains of the flag in his backyard. (R.III-273-274).

Johnson did not testify in his own behalf in the guilt/innocence stage of the trial. Defense evidence was presented by three witnesses who had been observers of the march for the American Civil Liberties Union. (R.III-295, 377; R.VI-461-462). One witness testified that he did not see the flag being burned, while two witnesses testified that Johnson was not the person who burned the flag. (R. III-324, 394; R.VI-422, 477, 478).

Procedural History of the Case

Johnson was convicted of violating TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1974), sentenced by a jury to one year's confinement in the Dallas County jail and assessed a fine of $2000. (R.I. 2, 3, 52, 59). He appealed to the Court of Appeals for the Fifth District of Texas at Dallas which, on January 23, 1986, affirmed his conviction in a published opinion. *Johnson v. State,* 706 S.W.2d 120 (Tex. App.—Dallas 1986). (J.A. 18-27).

Johnson filed a petition for discretionary review to the Texas Court of Criminal Appeals. That court granted review and, in a 5-4 opinion, reversed the judgment of the intermediate appellate court and remanded the case to the trial court with instructions that the information be dismissed. *Johnson v. State*, 755 S.W.2d 92 (Tex. Crim. App. 1988) (Pet. App. 1-27). That court concluded that § 42.09 (a)(3) was unconstitutional as applied to Johnson and overbroad. (Pet. App. 13, 21). That court's holding was based strictly on the First Amendment.[5] (Pet. App. 2, 7 n. 6).

The Federal Question

The federal question presented by this case was initially raised in a pre-trial motion to quash the information and was reiterated at the conclusion of the State's case-in-chief and again at the close of all the evidence in motions for an instructed verdict. (J.A. 5, 6, 14, 15, 16, 17). This ground was reurged in Johnson's amended motion for new trial, (J.A. 11, 12, 13), in his original appeal to the intermediate court of appeals, and in his petition for discretionary review to the Texas Court of Criminal Ap-

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[5] The Texas Court of Criminal Appeals had granted review to determine whether § 42.09(a)(3) violates TEX. CONST. Art. I § 8. (Pet. App. 2). The court stated that it did not address the state law issues because the court of appeals relied on cases which applied only the United States Constitution (Pet. App. 7 n. 6) in "purportedly" addressing both the state and federal constitutional claims. In its opinion, the court of appeals stated that it was addressing the Texas constitutional questions. (J.A. 19). The court overruled the points of error raising those issues. (J.A. 24). While that court relied primarily on federal cases and on *Deeds v. State*, 474 S.W.2d 718 (Tex. Crim. App. 1971), a flag desecration case in which the Texas Court of Criminal Appeals relied solely on federal cases in resolving the constitutional issues, none of the language contained in TEX. CONST. Art. I § 8, see Appendix to Brief 2, requires a different result from what is proper under the First Amendment.

peals. Following rendition of the opinion of the Texas Court of Criminal Appeals, the State filed a motion for rehearing urging error in the court's treatment of this issue. When that motion was overruled, the State petitioned this Court for a writ of certiorari, which was granted on October 17, 1988.

SUMMARY OF ARGUMENT

This case presents for determination the question of whether an act of flagburning which occurs during the course of a political demonstration is protected under the First Amendment. This important issue of federal law has not been decided by this Court but was reserved in both *Spence v. Washington,* 418 U.S. 405 (1974), and *Street v. New York,* 394 U.S. 576 (1969).

The Constitution does not prevent Texas from defining with substantial specificity what constitutes forbidden treatment of a United States flag. *See Smith v. Goguen,* 415 U.S. 566, 581-582 (1974). The Texas Legislature has enacted § 42.09(a)(3) of the Texas Penal Code to prohibit desecration of the flag in a way that the actor knows will seriously offend persons likely to observe his act. The statute is specifically designed to reach only flagrant acts of flag desecration carried out in a public context.

The State maintains that an act of flagburning does not constitute "speech" entitled to First Amendment protection because the conduct involved is essential neither to the exposition of any idea nor to the peaceful expression of an opinion. The Texas statute is aimed at reaching only the non-communicative aspects of that conduct. The

public burning of a United States flag is exactly the type of conduct prohibited by § 42.09(a)(3).

Texas recognizes that certain forms of non-verbal expression have, in the past, been characterized as "symbolic speech" within the ambit of the First Amendment. A determination that burning an American flag constitutes "symbolic speech" does not automatically render the statute inapplicable. The First Amendment is not absolute and expressive conduct demands less constitutional protection than does "pure speech." A state may forbid or regulate expressive conduct if a sufficiently important governmental interest justifies the incidental limitation on the First Amendment. *See United States v. O'Brien,* 391 U.S. 367, 376 (1968). Throughout the history of this case, Texas has asserted two substantial interests that justify the prohibition against flagrant acts of flag desecration carried out in a public context: 1) protection of the flag as an important symbol of nationhood and unity and 2) prevention of a breach of the peace.

As to the first interest, it is fundamental that the flag of the United States is a unique, important symbol of nationhood and unity. An act of flag desecration which occurs in a public context degrades the symbolic value of the flag and weakens its efficacy to serve as a symbol. Texas has a compelling interest in protecting the physical integrity of the flag so that it may serve as the paramount symbol of nationhood and unity. Protection of the flag may extend to regulating conduct which destroys that symbol, even if an incidental limitation on an individual's First Amendment rights occurs in the furtherance of that interest.

Texas has also enacted § 42.09(a)(3) as a legitimate means of preventing a breach of the peace. Traditionally,

acts of flag desecration, standing alone, are viewed as so inherently inflammatory as to constitute a danger to the public peace. Pursuant to its police power, Texas, by enacting a flag desecration statute, has proscribed a form of conduct which threatens the peace of its citizens. While some courts have looked to the context in which an act of flag desecration occurred for evidence of imminence of public unrest, the facts surrounding the flagburning in this case reveal that it is merely fortuitous that no actual breach of the peace occurred. The absence of an actual breach of the peace is not dispositive because the goal of the statute is *prevention,* not *punishment,* of a breach of the peace.

Moreover, an act of flagburning should not be cloaked with immunity simply because the act occurred at the culmination of a demonstration with political overtones. Section 42.09 does not provide for, nor should the First Amendment countenance, such a "content-based" exception. Since the act may be prohibited, exceptions should not be made for an act performed as part of a political protest.

Section 42.09 may also be considered valid as a "time, place and manner" restriction since it regulates the manner in which an individual may demonstrate. The statute, which prohibits acts of flag desecration regardless of the message sought to be conveyed, if any, is content neutral. The statute is narrowly tailored to prohibit only flagrant acts of flag desecration, *i.e.,* those involving the most serious form of physical abuse, carried out in a public context. The statute does no more than prohibit one form of conduct by which a demonstrator may express himself; there remain abundant alternative avenues of communication by which the same message, if any, may be conveyed.

Contrary to the holding of the Texas Court of Criminal Appeals, the language of § 42.09(b) is not unconstitutionally overbroad. That court reached this conclusion primarily on the basis of that portion of § 42.09(b) which requires that the actor know his act is likely to seriously offend those who observe it. This "serious offense" language is, in fact, a narrowing rather than a broadening of its reach. Section 42.09 is narrowly tailored because it targets and eliminates no more than the exact source of the evil it seeks to remedy. By inclusion of the "serious offense" language, the State criminalizes only those acts which are done in a public context and which are more likely than not to create a breach of the peace. Section 42.09 avoids the problems which were dispositive in *Spence v. Washington* by regulating only the medium by which a message is communicated. There are no alternative means whereby the State can protect the physical integrity of the flag.

ARGUMENT

THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION DOES NOT CONSTITUTE FREE SPEECH ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT.

I.

THE FIRST AMENDMENT IS NOT ABSOLUTE; LIMITATIONS MAY BE PLACED ON THE EXERCISE OF FREE SPEECH.

A.

Even If Expressive Conduct Is Denominated As Speech For Purposes Of The First Amendment, This Classification Does Not Prevent Limitations On Such Expressive Conduct.

At the heart of the First Amendment guarantee of freedom of speech is the "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell,* 485 U.S. —, 108 S.Ct. 876,879 (1988). Even though the free flow of ideas and opinions is important, it is not absolute "at all times and under all circumstances." *Chaplinsky v. New Hampshire,* 315 U.S. 568,571 (1942). This Court has long accepted the principle that some forms of expression are not entitled to any protection under the First Amendment, even though they might appear to be protected under its literal language. *See Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 54 (1973); *Roth v. California,* 354 U.S. 476, 485 (1957).

In the past, this Court has acknowledged that some forms of non-verbal expression may constitute speech entitled to First Amendment protection. *Spence v. Washington,* 418 U.S. 405 (1974) (attaching peace sign to flag); *Tinker v. Des Moines Ind. Comm. School District,* 393 U.S. 503 (1969) (wearing black armbands in school); *Brown v. Louisiana,* 383 U.S. 131 (1966) (sit-in by blacks in a "whites only" area to protest a government policy of segregation); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943) (compulsory flag salute); *Stromberg v. California,* 283 U.S. 359 (1931) (display of red flag). This Court has not, however, accepted the view that there is a limitless variety of conduct which can be labeled "speech" merely because the individual engaging in the conduct intends to express an idea by that conduct. *United States v. O'Brien,* 391 U.S. 367, 376 (1968). Rather, this Court has endorsed the view that, pursuant to its responsibility to maintain the public peace and to

promote the welfare of society in general, the government may validly prohibit certain forms of conduct even though such prohibitions may incidentally limit First Amendment rights. *O'Brien,* 391 U.S. at 376 (burning a draft card); *Chaplinsky,* 315 U.S. at 571 (fighting words). This is particularly true when the prohibition is "content neutral," *i.e.,* not intended to promote or restrict any particular idea, philosophy or expression. See discussion pp. 39-41.

B.

Expressive Conduct Is Subject To A Balancing Test In Which The Individual's Right To Free Speech Is Weighed Against The Validity Of The Governmental Regulation Sought To Be Imposed.

It is a well-settled principle that even protected speech is not equally permissible in all places and at all times. *Frisby v. Schultz,* 487 U.S. —, 108 S.Ct. 2495, 2499 (1988), citing to and quoting from *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S. 788, 799 (1985). Sometimes expressive conduct must give way to other societal interests. In order to meet this need, some form of a balancing test is usually employed.

1. *The O'Brien Test*

Often looked to by courts for guidance in this area is *United States v. O'Brien,* wherein a defendant was convicted for burning a selective service registration certificate, commonly known as a draft card, during a demonstration against the Vietnam war and the draft.[6] This

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[6] O'Brien admitted to agents of the Federal Bureau of Investigation that he had burned his draft card "because of his beliefs, knowing that he was violating federal law." 391 U.S. at 369.

Court rejected defendant's argument that his conduct constituted "speech" protected by the First Amendment:

> [E]ven 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 (emphasis added). A governmental limitation on otherwise protected speech is justified if it meets the four-part test announced by this Court:

> 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.

Id. at 377. O'Brien has continued vitality and has been cited with approval in recent cases involving First Amendment questions. *See Wayte v. United States,* 470 U.S. 598, 611 (1985); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805 (1984).

2. *The Spence Test*

Another balancing test used on occasion by this Court was set forth in *Spence v. Washington.* *Spence* involved

a conviction under a state statute prohibiting misuse of the United States flag.[7] This Court reaffirmed its statement in *O'Brien* that not all varieties of activity can be labeled as speech simply because the actor intends to convey an idea, but ultimately concluded that defendant's activity constituted a form of symbolic expression subject to First Amendment protection. 418 U.S. at 409-410. It was for this reason that the four-step analysis of *O'Brien* was considered inapplicable.[8] *Id.* at 414 n. 8.

Spence established a two-part analysis which has been utilized in most recent flag desecration cases. Under this analysis, it must be determined 1) whether the conduct is protected under the First Amendment and 2) whether, upon the record of the given case, the interests advanced by the State are so substantial as to justify infringement of an individual's constitutional rights. Both the intermediate court of appeals and the Texas Court of Criminal Appeals applied the *Spence* analysis in deciding this case. (Pet. App. 8-11, J.A. 21-23). If the *Spence* test is utilized in this case, a threshold question for determination is whether Johnson's act of burning a United States flag constitutes unprotected conduct[9] or conduct which may be considered "symbolic speech."

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[7] Spence was not charged under Washington's flag desecration statute. 418 U.S. at 406.

[8] In reaching this conclusion, this Court considered Washington's interest in protecting the United States flag as a symbol of national unity; this Court assumed, without deciding, the validity of this interest. 418 U.S. at 414. In this regard, the *per curiam* opinion noted that, *if* a state has a valid interest in protecting the flag as a symbol, this interest, in the context of activity like that undertaken by Spence, is directly related to expression. *Id.* at 414 n. 8.

[9] For an analysis that Johnson's act constitutes unprotected conduct, see discussion pp. 38-39.

C.

Conduct Which Can Be Characterized As "Symbolic Speech" Demands A Lesser Degree Of Protection Under The First Amendment Than Does Verbal Or Written Communication.

As the State understands the test for "symbolic speech," the conduct in question is considered in combination with the factual context and environment in which the conduct occurred. *See Spence*, 418 U.S. at 409-410. If an individual shows 1) an intent to convey a particularized message and 2) the likelihood was great that the message would be understood by those who viewed it, then the activity may be considered symbolic speech entitled to constitutional protection under the First Amendment. *Id.* at 410-411; *Monroe v. State Court of Fulton County*, 739 F.2d 568,571 (11th Cir. 1984). Both the intermediate court of appeals and the Texas Court of Criminal Appeals found that Johnson's action in burning the flag constituted "symbolic speech."[10] (Pet. App. 8; J. A. 22).

The characterization of Johnson's act as symbolic speech, even if valid, does not bar all governmental regulation. If a compelling societal interest which outweighs an individual's First Amendment rights can be demon-

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[10] The intermediate court of appeals found that Johnson's act of flagburning constituted "symbolic speech" in that it was "intended to convey a particularized message . . . and that this message was very likely to be understood by those who viewed it." (J.A. 22). The Court of Criminal Appeals, in its opinion, adopted this holding, noting that "[g]iven the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed Appellant's act would have understood the message that Appellant intended to convey." (Pet. App. 8-10).

strated, regulation is permitted. As Chief Justice Rehnquist wrote in his dissenting opinion to *Spence:*

> This Court has long recognized . . . that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. *The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.*
>
> Since a State concededly may impose some limitations on speech directly, it would seem to follow *a fortiori* that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

418 U.S. at 417 (emphasis added; citation omitted).

In keeping with these principles, Texas has asserted, throughout the appellate history of this case, two compelling state interests: 1) protecting the United States flag as a symbol of nationhood and national unity and 2) preventing a breach of the peace that could arise from flag-

rant acts of flag desecration carried out in a public context. Each interest will be discussed separately.

II.

THE RIGHT OF THE STATE OF TEXAS TO PRESERVE THE FLAG AS A SYMBOL OF NATIONHOOD AND NATIONAL UNITY IS A COMPELLING STATE INTEREST WHICH SUPERCEDES ANY FIRST AMENDMENT RIGHTS AN INDIVIDUAL MAY HAVE IN EXPRESSIVE CONDUCT.

A.

This Court Has Yet To Answer, In The Context Of A Flag Desecration Case, The Issue of Whether A State Has A Valid Interest In Protecting The Flag As A Symbol Of Nationhood And National Unity.

As previously noted, this Court did not, in *Spence*, specifically address the validity of a state's[11] interest in protecting the United States flag as a symbol of nationhood and national unity. Two factors unique to *Spence* made it unnecessary to address this issue.

First, Washington neither asserted an interest in protecting the flag as a symbol of national unity in the

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[11] Whether Congress has the power to protect the flag as a symbol of nationhood and national unity is not an issue in this case. Congress has enacted both a flag desecration statute, 18 U.S.C. § 700, and a set of rules, the Flag Code, 36 U.S.C. § 173, *et seq.*, setting forth proper etiquette in dealing with the flag. The State acknowledges Congress' authority to legislate in this area. *See United States v. Crosson*, 462 F.2d 96, 99, 101 (9th Cir. 1972), *cert. denied*, 409 U.S. 1064 (1973); *Hoffman v. United States*, 445 F.2d 226, 228 (D.C. Cir. 1971). Congress has not, however, preempted the state's power to legislate in this area. *See* 18 U.S.C. § 700(c).

lower courts nor pursued the matter in argument before this Court. 418 U.S. at 411-412. In contrast, Texas has always asserted that protection of the flag as a symbol of national unity is a legitimate and compelling state interest justifying infringement of any First Amendment rights Johnson may have had. This was specifically recognized by the Texas Court of Criminal Appeals. (Pet. App. 7-8).

Second, Spence was not charged under a flag desecration statute; rather, he was charged under Washington's misuse of a flag statute. *Id.* at 405, 406. The interests underlying these types of statutes are different. In a misuse statute, the apparent interest in protecting the flag as a symbol of nationhood is, as *Spence* acknowledges, concerned primarily with prohibiting use of the flag in a commercial or political context in such a way that it would appear that the government endorsed the message conveyed by the actor. *Id.* at 414. A different interest underlies flag desecration statutes in general and the Texas statute in particular. Through this statute, Texas seeks to prevent dilution of the flag as a symbol capable "of mirroring the sentiments of all who view it," *id.* at 413, by prohibiting its wanton destruction in a public context.

B.

The Notion That A State Has A Valid And Substantial Interest In Protecting The Flag As A Symbol Of Nationhood And National Unity Is Neither New Nor Unusual; Rather, It Is A View Which Has Found Favor With A Variety Of Jurists.

The uniqueness of the United States flag as a symbol was first noted by this Court in *Halter v. Nebraska,* 205 U.S. 34,41 (1907):

> From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not, then, remarkable that the American people, acting through the legislative branch of the government, early in their history, prescribed a flag *as symbolic of the existence and sovereignty of the nation.* Indeed, it would have been extraordinary if the government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government.

(Emphasis added). Likewise, in *Smith v. Goguen,* a prosecution for improper use of a flag, Justice White characterized the flag as a "monument" entitled to protection:

> It is a fact of history that flags have been associated with nations and with government at all levels . . . It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case *to concede that the flag is an important symbol of nationhood and unity,* created by the Nation and endowed with certain attributes . . .
>
> I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, *without regard to whether such conduct might provoke violence* . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. *The flag is itself a monument, subject to similar protection.*

415 U.S. 566, 586-587 (1974) (White, J., concurring) (emphasis added).

Also in *Smith v. Goguen,* the current Chief Justice, in discussing a state's right to prohibit acts which impair the physical integrity of the flag, detailed in a separate opinion the roles that the flag has played in our history and continues to play in our daily lives:

> From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States.
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> * * *
>
> No one who lived through the Second World War in this country can forget the impact of the photographs of the members of the United States Marine Corps raising the United States flag on the top of Mount Suribachi on the Island of Iwo Jima, which is now commemorated in a statute at the Iwo Jima Memorial adjoining Arlington National Cemetery.
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> * * *
>
> The United States flag flies over every federal courthouse in our Nation, and is prominently displayed in almost every federal, state, or local public building throughout the land. It is the one visible embodiment of the authority of the National Government, through which the laws of the Nation and the guarantees of the Constitution are enforced.
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> * * *
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> The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion . . . the Government may . . . prohibit[ing] even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood—a history compiled by generations of our

> forebears and contributed to by streams of imigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen . . . by the most gifted of its begetters."

Id. at 601-603. A few months later, in his dissenting opinion to *Spence,* the current Chief Justice, in discussing the interests of a state in prohibiting misuse of a flag, summarized his judicial views and those of other Supreme Court Jurists:

> The true nature of the State's interest in this case is not only one of preserving "the physical integrity of the flag," but also one of *preserving the flag as "an important symbol of nationhood and unity."* . . . It is the character, not the cloth, of the flag which the State seeks to protect.
>
> The value of this interest has been emphasized in recent as well as distant times. Mr. Justice Fortas, for example, noted in *Street v. New York,* that "the flag is a special kind of personalty," a form of property "burdened with peculiar obligations and restrictions." Mr. Justice White has observed that "[t]he flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it." I agree. *What appellant here seeks is simply license to use the flag however he pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.*

418 U.S. at 421-422 (citations omitted; emphasis added). *See also Street v. New York,* 394 U.S. at 605 (Warren, C.J., dissenting); *id.* at 615-617 (Fortas, J., dissenting); *Bowles v. Jones,* 758 F.2d 1479, 1482 (11th Cir. 1985) (Kravitch, J., concurring); *United States v. Crosson,* 462 F.2d 96, 101 (9th Cir. 1972), *cert. denied,* 409 U.S. 1064

(1973); *Monroe v. State Court of Fulton County,* 571 F. Supp. 1023, 1026 (N.D. Ga. 1983), *rev'd,* 739 F.2d 568 (11th Cir. 1984); *Sutherland v. DeWulf,* 323 F.Supp. 740, 745 (S.D. Ill. 1971); *Monroe v. State,* 250 Ga. 30, 295 S.E.2d 512, 514 (1982).

What is readily apparent from a reading of these opinions is that the people of Texas, acting through their elected state representatives, have a unique and compelling interest in protecting the flag as a symbol of our nation. This interest may be furthered by regulating conduct which seeks to destroy, or which actually does destroy, that symbol.

The State of Texas understands the significance of the holding it seeks from this Court. Texas is not asking this Court to recognize the flag as a symbol of "some system, idea, institution, or personality." *Barnette,* 319 U.S. at 632. Rather, the State is asking this Court to recognize the flag as "an important symbol of nationhood and unity,"[12] and to acknowledge that the flag, as the emblem of the United States of America, is worthy of physical protection.

C.

Prohibitions Against Flag Desecration Neither Compel An Individual's Respect For The Flag Nor Prohibit All Forms Of An Individual's Expression Of Disrespect For The Flag.

In *Street v. New York,* Justice Harlan, writing for a bare majority of this Court, held that the rights of the

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[12] *See Spence v. Washington,* 418 U.S. at 421 (Rehnquist, J., dissenting); *Smith v. Goguen,* 415 U.S. at 587 (White, J., concurring).

individual "encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." 394 U.S. at 593. Relying on this statement, Ninth Circuit Judge Browning, in his dissenting opinion in *United States v. Crosson,* a federal prosecution for flag desecration under 18 U.S.C. § 700,[13] wrote that "in *Barnette* the government sought to *compel* the expression of *respect* toward the flag; in this case the government seeks to *prevent* the expression of *disrespect.*" 462 F.2d at 105. This view was countenanced in *Monroe v. State Court of Fulton County,* 739 F. 2d at 573 (Georgia's interest in protecting the integrity of the national flag is related to suppression of free speech), and apparently has found favor with Justice Brennan. *See Kime v. United States,* 459 U.S. 949 (1982) (Brennan, J., dissenting from denial of certiorari) (a state's interest in protecting the integrity of the flag as a national patriotic symbol cannot be divorced from political expression).

In considering Texas' interest in preserving the flag as a symbol of nationhood in the context of its flag desecration statute, any comparison to the principles announced in *Barnette* is misplaced. *Barnette* held that a state could not compel the expression of respect for the flag by forcing school children to recite the pledge of allegiance. Section 42.09(a)(3) does not compel expressions of respect for the flag.

An excellent distinction between prohibiting flag desecration and compelling the pledge of allegiance was set forth by Circuit Justice Kravitch in her separate opinion in *Bowles v. Jones*:

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[13] The constitutionality of this statute has never been addressed by this Court.

> First, I cannot agree . . . that "there is no significant difference between *West Virginia State Board of Education v. Barnette,* in which the government sought to *compel* the expression of *respect* toward the flag and this case, in which the government seeks to *prevent* the expression of *disrespect.*" In my opinion, there is a significant difference. The fact that the state may not force school-children to salute the American flag does not compel the conclusion that the state may not prohibit mutilation or destruction of the flag. The flag-salute law at issue in *Barnette* raised the spectre of totalitarianism, and the Supreme Court's opinion emphasized the law's affirmatively coercive effect:
>
> > Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.
> >
> > It is also to be noted that the compulsory flag salute and pledge *requires affirmation of a belief and an attitude of mind.*
>
> *Barnette,* 319 U.S. at 633 (emphasis added; footnote omitted).
>
> The Georgia Flag Misuse Statute, on the other hand, requires no affirmation of any kind with respect to the flag or the values it represents. In my view, therefore, *Barnette* simply does not apply.

758 F.2d at 1480-1481 (Kravitch, J., concurring) (some citations omitted; emphasis in original).

The terms of § 42.09 are not affirmatively coercive; nothing in the statute mandates that Johnson salute the flag, take a pledge or oath to the flag, or make any other expression of respect or belief. Nor does § 42.09 prohibit expressions of disrespect. An individual is free to express

any thoughts he may have concerning the flag, no matter how contemptuous. In fact, Johnson did express his disrespect for the flag and at no time was his expression prohibited. Texas exercised its authority only to punish Johnson for wantonly, intentionally and totally destroying the flag in a public context.

D.

Preservation Of The Flag As A Symbol Of Nationhood And National Unity Can Be Accomplished Only By Prohibiting Severe Physical Abuse Of The Flag, Most Importantly Its Wanton Destruction In A Public Context.

The United States flag is a unique symbol,[14] qualitatively different from any other symbol that this nation uses to express its existence. At half-mast, it reminds us of the death of a president; on the coffins of our soldiers and dignitaries, it reminds us of the sacrifices made to establish and keep this nation; in the hands of a victorious Olympian, it evokes pride in the accomplishments of our citizens; its abuse at the hands of a middle-eastern terrorist kindles our anger and frustration; on the surface of the moon, it drives our hope for the future. It is symbolic of the contractual agreement between the government and every citizen. It stands for the republic,[15] for the principles upon which this country was founded and upon which it continues to exist.

The flag symbolizes the nation for every citizen or would-be citizen. It does not symbolize any one philosophy

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[14] Indeed, Congress has sanctified the flag with a national day of honor. 36 U.S.C. § 157.

[15] *See* 36 U.S.C. § 172.

or viewpoint. Rather, it symbolizes the unity of one nation composed of people with many differing philosophies and viewpoints. As such, the flag is elevated above any particular political philosophy. Both the federal government and the states have an interest in preserving the flag's physical integrity so that it may survive to represent and symbolize this country and its uniqueness as a governmental entity.

This interest is consistent with the views expressed in *Parker v. Morgan,* 322 F.Supp. 585, 588 (W.D. N.C. 1971):

> We reject plaintiff's argument that because the national flag is a symbol it is always "saying" something, and because it says something control of its display and usage is outlawed by the freedom of speech clause of the First Amendment. The argument is based on a false premise: that what the flag stands for can be authoritatively stated, *i.e.,* that it represents government and/or official policy. If the flag says anything at all, and we agree it often may in a given context, we think it says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland. *With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.*
>
> *The flag has never been a trademark of government.* It is not "official" in the sense that its display is limited to the Army or the Navy or to public buildings or for state occasions. It no more belongs to the President than it does to the most private citizen. It may be flown, and often is, over the YMCA and the Jewish synagogue, the Peace Corps and the Army post, the American Federation of Labor and General Motors. *It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag repre-*

> *sents government. Sometimes it may represent opposition to government. Always it represents America—in all its marvelous diversity.*

(Emphasis added). By prohibiting the destruction of the nation's symbol, Texas is not, as its Court of Criminal Appeals suggests, "mandating by fiat a feeling of unity." (Pet. App. 19-20). Texas is not attempting to "prescribe a set of approved messages" to be associated with the flag. (Pet. App. 20). Nor is Texas prohibiting defiant or contemptuous opinions about the flag. Preventing physical destruction of the flag is an interest wholly removed from the prevention of an expression of disrespect. By preserving the flag's physical integrity, so that it may serve as a symbol of nationhood and unity, Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy; rather, Texas is protecting the flag against destruction regardless of the philosophy, political or otherwise, that would motivate such destruction. It is the medium, not the message, which is controlled by § 42.09(a)(3).

E.

Having Shown A Danger That Threatens The Flag As A Symbol Of Nationhood And National Unity, It Is Unnecessary For The State To Show The Existence Of A Grave And Immediate Danger.

In its opinion, the Texas Court of Criminal Appeals holds that, in order to justify protection of the flag as a symbol of national unity, the State must demonstrate a danger to the flag as a symbol:

> *If* the State has a legitimate interest in promoting a State approved symbol of unity, that interest is not

> so compelling as to essentially license the flag's use for only the promotion of governmental status quo. In its brief, the State does not aver why the American flag is in such "grave and immediate danger" of losing the ability to rouse feelings of unity or patriotism such that section 42.09(a)(3) is "essential" to prevent its devaluation into a meaningless piece of cloth. We do not believe such a danger is present. Because *Barnette, O'Brien,* and *Boos* would require such a threat in order to uphold violations of federal free speech guarantees, we must hold that the interest of providing a symbol of unity is inadequate to support section 42.09(a)(3).

(Pet. App. 20-21). The fallacy in this reasoning is the assumption that the flag, as a symbol, carries with it one prescribed feeling. The philosophy underlying the preservation of the flag as a symbol of nationhood and national unity is one of tolerance and impartiality. The flag does not represent just one ideology, but rather is above competing ideologies. See discussion pp. 27-29.

If, however, there is some necessity for showing danger, the State maintains that the act of burning a flag is not, in and of itself, inconsequential. Rather, the very nature of the act of destruction is sufficient indicia of potential danger to the flag as a symbol. The flag is no mere piece of cloth; it is not just an aggregation of stars and stripes. It is nothing less than the paramount symbol of our nation. Its wanton destruction in a public context endangers the flag's symbolic value.

III.

TEXAS HAS A LEGITIMATE INTEREST IN PREVENTING BREACHES OF THE PEACE WHICH CAN RESULT FROM FLAGRANT ACTS OF FLAG DESECRATION CARRIED OUT IN A PUBLIC CONTEXT.

A.

One Legislative Purpose Underlying Flag Desecration Statutes Is To Prevent A Breach Of The Peace.

1. *Prevention of breaches of the peace has been recognized as an important and substantial governmental interest unrelated to suppression of expression in the context of flag desecration cases.*

Traditionally, acts of flag desecration are viewed as so inherently inflammatory that a state may regulate the act to prevent a danger to the public peace. *Sutherland v. DeWulf,* 323 F.Supp. 740 (S.D. Ill. 1971) is illustrative of this philosophy. In that case, individuals were charged with publicly mutilating a flag of the United States by burning it. *Id.* at 743. The federal district court recognized that the state has a valid interest in the preservation of the public peace:

> Indeed, the desecration and mutilation of the flag by burning it in a public place *is an act having a high likelihood to cause a breach of the peace.* Taking into account the deeply held and emotional zeal with which so many of our fellow countrymen understandably revere the flag itself, *its public desecration by disrespectful burning is an act of incitment and as fraught with danger to the public peace* as if a person would stand on the street corner shouting derogatory remarks at passing pedestrians. . . . *the public mutilation of the flag is an act which is likely to elicit a violent response from many who observe such acts.*

Id. at 745 (citation omitted; emphasis added). In *People v. Street,* 20 N.Y.2d 231, 229 N.E.2d 187,191, 282 N.Y.S.2d 491 (1967), *rev'd, Street v. New York,* 394 U.S. 576 (1969), Chief Justice Fuld of the New York Court of Appeals expressed a similar view:

> It (the flagburning) was an act of incitement, literally and figuratively "incendiary" and as fraught with danger to the public peace as if he (the flagburner) had stood on the street corner shouting epithets at passing pedestrians. The State may legitimately curb such activities in the interest of preventing violence and maintaining public order.

(Citation omitted). Indeed, as early as 1907, this Court recognized the inciteful impact of flag desecration in *Halter v. Nebraska,*[16] wherein Justice Harlan said as follows: "It has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." 205 U.S. at 41.

The State's interest in preventing a breach of the peace by prohibiting certain acts of flag desecration has been recognized as being unrelated to the suppression of free expression. *See People v. Sutherland,* 9 Ill. App. 3d 824, 292 N.E.2d 746,748 (1973), *appeal vacated and remanded sub nom, Sutherland v. Illinois,* 418 U.S. 907 (1974).[17] That

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[16] Admittedly, *Halter v. Nebraska* is not a flagburning case. Rather, *Halter* involved a prosecution for using representations of the flag on beer bottles for advertising purposes. 205 U.S. at 38.

[17] Four justices dissented from the order of remand and "without further briefing and oral argument would affirm judgment." 418 U.S. at 907. On remand, the Illinois Court reached the same conclusion. *People v. Sutherland,* 29 Ill. App.3d 199, 329 N.E.2d 820 (1975), *appeal dism'd sub nom, Sutherland v.*

(Continued on following page)

court stated that "desecration of the flag by burning it in a public place is highly likely to cause a breach of the peace." 292 N.E.2d at 749. *See also People v. Radich,* 26 N.Y.2d 114, 257 N.E.2d 30,35-36, 308 N.Y.S.2d 846, (1970), *aff'd*[18] *per curiam sub nom, Radich v. New York,* 401 U.S. 531 (1971), wherein the New York Court held that flag desecration statutes are "aimed at keeping the public peace" even though the court also stated that "violations of the flag desecration statute will probably not occur apart from the expression of an idea." 257 N.E.2d at 36.[19] In the case at bar, the intermediate court of appeals chose to adhere to this view, holding that § 42.09 (a)(3) is a "legitimate and constitutional means of protecting the public peace." (J.A. 23).

2. *The facts of this case support Texas' interest in preventing a breach of the peace even if Texas must demonstrate "imminence" or a "clear and present danger" of public unrest.*

Some courts have concluded that an act of flag desecration, in and of itself, is insufficient to justify abridgement of an individual's First Amendment rights; these courts require evidence that demonstrates the imminence of public unrest or evinces a clear and present danger of a breach of the peace. *Monroe v. State Court of Fulton*

(Continued from previous page)

Illinois, 425 U.S. 947 (1976). The appeal was dismissed for want of a substantial federal question; three justices indicated a willingness to note probable jurisdiction and set the case for oral argument. *Id.*

[18] The case was affirmed on appeal by an "equally divided court" with one justice not participating.

[19] *But see United States ex rel. Radich v. Criminal Court of New York,* 385 F.Supp. 165, 183-184 (S.D.N.Y. 1974) (a subsequent habeas corpus proceeding in the same case).

County, 739 F.2d at 575 (flagburning during a political demonstration);[20] *Cline v. Rockingham County Superior Court,* 367 F.Supp. 1146,1151-1153 (D. N.H. 1973), *aff'd,* 502 F.2d 789 (1st Cir. 1974) (peace symbol penned in ink on a flag sewn on a blanket draped over defendant's shoulders); *People v. Vaughan,* 183 Colo. 40, 514 P.2d 1318,1323 (1973) (display of a flag on the seat of defendant's jeans); *State v. Kool,* 212 N.W.2d 518,521 (Iowa 1973) (display of a flag in a window behind a peace symbol); *People v. Von Rosen,* 13 Ill.2d 68, 147 N.E.2d 327, 329 (1958) (magazine illustration depicting young woman nude except for large hat, sunglasses and a piece of cloth which looked exactly like the U.S. flag covering pubic area). To the State's knowledge, no case has clearly enunciated what must be shown to prove that breaches of the peace are either likely or imminent as a result of flag desecration.

The Texas Court of Criminal Appeals held that no actual breach of the peace occurred and that the situation in which Johnson burned the flag was not "potentially explosive." (Pet. App. 13). Contrary to that holding, the facts of this case demonstrate a potential for a breach of the peace which clearly justifies the application of § 42.09 (a)(3) to Johnson's actions. While it is true that no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning, Johnson did not "peacefully" burn the flag. Rather, the flag was burned at the climax of a turbulent, destructive and potentially

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[20] Even *Monroe* recognized that the State clearly has a valid interest in preventing a breach of the peace that *might arise* from certain acts of flag desecration. 739 F.2d at 575. *See also Crosson v. Silver,* 319 F.Supp. 1084, 1088 (D. Ariz. 1970).

violent demonstration, which had attracted a sizeable crowd. See Statement of the Case. The act took place in front of Dallas City Hall, undoubtedly a public place "over which the state by necessity must have certain supervisory powers unrelated to expression." *Spence*, 418 U.S. at 411.[21] Violations of the law had already occurred. Charges of criminal mischief under TEX. PENAL CODE ANN. § 28.03 (Vernon 1974), theft under TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1988), and disorderly conduct under TEX. PENAL CODE ANN. § 42.01 (Vernon 1974 and Vernon Supp. 1988), for example, could doubtless have been brought against those protesters identified as the perpetrators of those offenses.

The situation in this case is totally distinguishable from the minimum risk of a breach of the peace present in *Spence*,[22] where defendant briefly displayed an altered flag from his window. There was no evidence in *Spence* that anyone other than the arresting officers had even seen the display. 418 U.S. at 409. Crucial to the decision in *Spence* was this Court's finding that no state interest had been *sufficiently impaired* by defendant's activity to support the conviction. *Id.* at 412-415. Indeed, when all separate opinions in *Spence* have been read, one senses that a majority of this Court was of the opinion that Wash-

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[21] The State's interest in preventing a breach of the peace for an action occurring on public property is clearly different from the state's interest in *Spence* since *Spence* considered misuse of a flag which was displayed on private property.

[22] The factual situation presented in this case is closer to the act of flagburning in *Street v. New York*. This Court chose to reverse Street's conviction on grounds other than his act of flagburning; indeed, this Court expressed no opinion on the constitutionality of Street's conviction for the act of flagburning, but rather reserved the question. 394 U.S. at 594.

ington had unwisely applied the misuse of a flag statute to defendant Spence. *Id.* at 416 (Burger, C.J., dissenting).

The record in the case at bar, unlike *Spence,* sufficiently reflects imminence of public unrest so as to justify the application of the statute. Johnson's actions, which were not merely peaceful expressions of an opinion, could well have been rewarded by an immediate physical reaction from others opposed to his act[23] or could have led to further, possibly more violent demonstrations by his fellow protestors. It is merely fortuitous that no undue public disorder or unrest actually occurred.

B.

The Texas Court Of Criminal Appeals, By Mandating Evidence Of Actual Violence Before Permitting State Regulation, Has Adopted A Standard Which Has Not Been Previously Applied And Which Is Stricter Than Is Warranted By First Amendment Considerations.

The purpose of flag desecration statutes in general, and § 42.09 in particular, is the *prevention* of a breach of the peace as opposed to a *punishment* for a breach of the peace. By requiring *actual*[24] as opposed to potential violence before a prosecution for desecration of the flag may be initiated, the Texas Court of Criminal Appeals has

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[23] Indeed, James Harrington, an observer for the Texas ACLU, testified that he "stayed there to watch the fellow (Daniel Walker) that was picking it (the flag) up that moved into the crowd because I thought that that *might be a source of conflict.*" (R.III-323).

[24] Indeed, at least one court has held that an actual breach of the peace is not essential to a conviction since the "physical act of burning a United States flag is conduct which could reasonably be expected to provoke a breach of peace." *State v. Farrell,* 209 N.W.2d 103, 107 (Iowa 1973), *vacated and remanded,* 418 U.S. 907 (1974) (for further consideration in light of *Spence*).

adopted a standard stricter than that warranted by First Amendment considerations. As a practical matter, the Texas Court of Criminal Appeals criminalization of an act of flag desecration becomes dependent on the reaction of those witnesses to the desecration. If those observers exercise self-control, no crime is committed; on the other hand, if "tempers flare and fists fly," the flag desecration is punishable.

The court's ruling mandates a heavier burden of proof than the First Amendment requires and obviates the need for a flag desecration statute. The maximum that should be required under the "imminence" or "clear and present danger" standard is for the prosecution to introduce objective evidence that demonstrates the potential for a breach of the peace. The trial prosecutor adequately met this burden of proof since the record clearly reflects that a breach of the peace was more likely than not. See Statement of the Case.

IV.

THE FACT THAT JOHNSON'S ACT OF FLAG-BURNING OCCURRED AT THE CLIMAX OF A POLITICAL DEMONSTRATION DOES NOT CLOAK HIS ACT WITH GREATER PROTECTION SINCE NO EXCEPTION APPLIES TO § 42.09 FOR AN ACT OF POLITICAL PROTEST.

A.

An Act Of Political Protest, Even If Expressive, Is Entitled To No Greater Protection Than Any Other Act Which Violates A Valid State Statute.

As Justice Fortas wrote in his dissenting opinion to *Street v. New York*: "Protest does not exonerate lawless-

ness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." 394 U.S. at 617. In *City Council of Los Angeles v. Taxpayers for Vincent,* Justice Stevens recognized that: "To create an exception for . . . political speech and not . . . other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." 466 U.S. at 816. The Constitution does not require that an exception be made for prohibited activities to which an individual might ascribe some political significance. To extend the same protection afforded to the spoken and written word to all "actions which happen to be conducted for the purpose of 'making a point' is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate." *Community for Creative Non-Violence v. Watt,* 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting). Action, even if clearly for political protest purposes, is not entitled to the same protection given speech alone; action may be subjected to reasonable regulation that takes into account the competing interests involved. *Street v. New York,* 394 U.S. at 616 (Fortas, J., dissenting).

B.

Johnson's Act Of Publicly Burning A United States Flag, Even If Politically Motivated, Clearly Constituted Conduct Which Texas May Proscribe.

It is the prerogative of the Texas legislature to prohibit overt physical acts that it deems offensive and/or

harmful to society; this is true even if some speech aspects are involved. The appropriate line of demarcation comes between "ideas and overt acts." *See Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring). Indeed, § 42.09(a)(3) does not, on its face, prohibit speech at all; rather, the prohibitions are directed solely to overt physical acts and are designed to prohibit only those acts involving severe physical abuse of flags carried out in a public context.

If the act of burning a United States flag has communicative aspects, it is clearly speech "brigaded with conduct." Texas has a right to regulate the non-speech aspects involved in burning a United States flag. The public destruction by fire of a United States flag is exactly the type of conduct which is prohibited under any construction which could be given § 42.09.

1. *Section 42.09(a)(3) is "content neutral."*

The Texas statute is clearly "content neutral."[25] A "content neutral" speech regulation is justified because it is without reference to the content of the regulated speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Under a flag desecration statute, the act of flagburning is

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[25] A "content-based" speech regulation would be one wherein government grants the use of a forum to people whose views it finds acceptable but denies the same forum to those who wish to express less favored or more controversial views. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986), citing *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). The fact that the statute is "content neutral" should further distinguish this case from *Boos v. Barry*, 485 U.S. —, 108 S.Ct. 1157 (1988); see discussion pp. 46-48.

prohibited regardless of the message, if any, that the actor seeks to convey.

This premise was recognized in *Joyce v. United States*, 454 F.2d 971, 989 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972), a case involving the constitutionality of the federal flag desecration statute, 18 U.S.C. § 700: "The statute proscribes *certain distinctive acts* whether they are associated with any particular expression of views which may be popular or unpopular with any group or individual." The Texas statute does not prohibit the "casting of contempt" on the flag; one can heap abuse on the flag either verbally or in writing. It is only the most severe acts of physical mistreatment which § 42.09(a)(3) proscribes.

Application of § 42.09(a)(3) does not depend on whether the flag is burned for communicative or for non-communicative purposes, nor does it depend upon whether a particular message, political or otherwise, is sought to be conveyed. It does not depend on whether the flag desecration is respectful or contemptuous. Thus, whether the flag is burned out of an act of treason or patriotism, love or hate, satisfaction or dissatisfaction with any particular governmental personnel or policy, the physical act of burning the flag remains prohibited.

This Court has held that "content neutral" time, place and manner regulations are acceptable so long as they 1) are designed to serve a substantial governmental interest and 2) do not unreasonably limit alternative avenues of communication. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (a municipal zoning ordinance prohibiting adult movie theaters from locating their business within 1,000 feet of residential property,

church, park or school was upheld to be a proper "time, place and manner" regulation which did not violate the First Amendment); *Clark v. Community for Creative Non-Violence,* 468 U.S. at 293 (a National Park Service regulation prohibiting camping in Lafayette Park was not violative of the First Amendment even though it worked a hardship on individuals participating in a demonstration which was intended to call attention to the plight of the homeless); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647-648 (1981) (a Minnesota State Fair rule which restricted the sale or distribution of any merchandise, including written or printed material, to a fixed location did not violate the First Amendment). The First Amendment does not guarantee to any individual the right to communicate his views in any manner that may be desired. *Heffron,* 452 U.S. at 647. The prohibition against destruction of a flag removes merely one manner of possible expression from the otherwise limitless arsenal available to any protester. The statute in no way prohibits legitimate protest activities. Abundant alternative avenues of communication utilizing the flag remain.

2. *There remain alternative avenues of communication.*

This premise was recognized in *United States v. Crosson,* a prosecution under 18 U.S.C. § 700, where the Ninth Circuit said as follows:

> Clearly, the restriction on appellant's First Amendment freedoms is no greater than is essential to the furtherance of the national interest. She has not been deprived of a forum for expressing her dissent, but rather denied the use of the flag for contemptuous physical destruction.

462 F.2d at 102. Likewise, Johnson was not banned from expressing his dissent in a variety of other ways. He was afforded not only an opportunity but a forum in which to express his views. He was able to participate and did, in fact, participate in a lengthy demonstration. He was able to verbally express, by slogans, chants and obscenities, his opinions. Nor was Johnson prohibited from using the flag for protest purposes; he could, for example, have carried the flag during the demonstration or used it as a prop or backdrop while making a speech.

3. *To allow an act of flagburning to go unpunished because it occurred in the context of a political protest creates a "content based" exception to the statute.*

The Texas Court of Criminal Appeals found that Johnson's act of flagburning constituted "symbolic speech" *when considered in the context in which it arose.* (Pet. App. 8-10). Indeed, the court concluded that Johnson's act was political and therefore could not be punished since it fell "within the protections of the First Amendment;" the court expressed no view "as to whether the State may prosecute acts of flag desecration which do not constitute speech under the First Amendment." (Pet. App. 21). The court's conclusion that Johnson's act was protected has the effect of creating an exception under § 42.09(a)(3) for acts that occur as part of a political protest or for acts with an incidental political message. Even assuming that there is some way to clearly define what is "political" and what is not, by allowing § 42.09 to be avoided where "political" speech is involved, the court has itself re-drafted the statute and removed its content-neutrality.

V.

THAT PORTION OF SECTION 42.09(b) WHICH REQUIRES THAT THE ACTOR KNOW HIS ACTIONS WILL SERIOUSLY OFFEND IS NOT UNCONSTITUTIONALLY OVERBROAD.

A.

The Language Of § 42.09(b) Narrowly Tailors The Statute To Punish Only Flagrant Acts Of Flag Desecration Carried Out In A Public Context.

The Texas Court of Criminal Appeals reviewed the language found in the definition of "desecrate," § 42.09(b), which includes the provision that the desecration be done "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." The court noted that this provision is a step toward "narrowly tailoring"[26] the statute to serve a significant governmental interest (Pet. App. 12), but went on to find that this language was "so broad" that it could be used to "punish protected conduct which has no propensity to result in breaches of the peace" because "serious offense" will not always result in a breach of the peace. (Pet. App. 13). The court concluded that since "serious offense" could not be equated with incitement to breach of the peace the statute was overbroad. (Pet. App. 13).

There are a number of fallacies with this reasoning. First, the court assumes the act of flagburning is protected conduct and, second, the court's reasoning tends to

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[26] As the State understands this principle, a statute is considered to be "narrowly tailored" if it targets and eliminates no more than the exact source of the evil it seeks to remedy. *Frisby v. Schultz*, 108 S.Ct. at 2502, citing to *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 808-810.

mandate an actual breach of the peace before Texas may proscribe the act of desecration. Both of these fallacies have already been discussed in greater detail. Third, the court erred when it attempted to equate "serious offense" with an actual breach of the peace or with incitement to a breach of the peace. The error lies in the assumption that serious offense must necessarily occur for § 42.09(a)(3) to be violated. This is not the case. While it is undisputed that the record in this cause established that serious offense did, in fact, result from Johnson's act of flagburning, the absence of such evidence would not necessarily have acquitted Johnson.

The "serious offense" language of the statute refers to an individual's intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd. Enforcement of the statute does not depend on an assessment of the sensibilities, or on the unfettered discretion, of those who observe a flagburner's conduct. Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals. As such, this is a legitimate effort to "narrowly tailor" the statute to pass constitutional muster.

Additionally, the "serious offense" clause is specifically designed to avoid *Spence*-type applications. Section 42.09(b) does not regulate the content of the message, if any, sought to be conveyed but rather goes to the manner in which the conduct is effectuated. Through § 42.09(b), the statute is designed to regulate flag desecrations that

occur in a public context and have, inherently, the potential for creating unrest.

Comparison to *Spence* may be useful in underscoring this distinction since it is clear that Spence could not have been prosecuted under the Texas statute at issue. Spence displayed his privately owned flag on private property, 418 U.S. at 408-409; Johnson burned a flag, which in all probability was taken from the Mercantile Bank building's flagpole, on public property. Spence testified that he utilized removable tape to form the peace symbol on the flag because he did not wish to damage the flag, *id.* at 409; Johnson soaked the flag with lighter fluid and ignited it with the aid of a cigarette lighter. There was no evidence in *Spence* that anyone other than the arresting officers saw the flag display, *id.;* Johnson burned the flag in the midst of a crowd of protesters, police and other observers.

By focusing on the offensive nature of the mistreatment of the flag, § 42.09(b) is also designed to distinguish between acts done in private and those done in public and thus avoid "the confusion of the public-private distinction." *See Renn v. State,* 495 S.W.2d 922, 923 (Tex. Crim. App. 1973). Moreover, § 42.09(b) is clearly not intended to apply to a situation where a worn flag is discarded. Rather, the statute permits latitude for the honorable retirement of a flag from service that is no longer fit for public display. *See* 36 U.S.C. § 176(k). Nor does the statute, by its very terms, criminalize accidental or unintentional damage to a flag.

There is no question under the facts of this case that Johnson's act of publicly burning a United States flag was done in a manner intended to cause serious offense. His actions were unquestionably within the prohibited

zone of conduct proscribed by § 42.09(a)(3) and (b). The statute targeted and eliminated exactly the evil intended by the legislature, *i.e.*, the desecration of a flag in a public context carried out in a manner having a high potential for creating unrest.

B.

There Is No Legislative Alternative To Section 42.09 Which Justifies The Conclusion That It Is Unconstitutionally Overbroad.

As support for its conclusion that § 42.09 is overbroad, the Court of Criminal Appeals stated that "the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad." (Pet. App. 14). This "standard" was set forth without citation to authority, though the court claims to be guided by *Boos v. Barry,* 485 U.S. —, 108 S.Ct. 1157 (1988). The Texas court found the statute overbroad because it related to "a breach of the peace" which is generally prohibited by TEX. PENAL CODE ANN. § 42.01 (Vernon 1974 and Vernon Supp. 1988). Section 42.01 proscribes disorderly conduct and essentially covers the "fighting words" exception to the First Amendment. *See Houston v. Hill,* 482 U.S. —, 107 S.Ct. 2502,2510 n. 10 (1987).

Sections 42.01 and 42.09 are neither interchangeable nor duplicative. Section 42.01 does not proscribe the destruction of specific property designated by the legislature as a venerated object and § 42.09, in turn, does not proscribe "fighting words" or any other form of pure speech. Indeed, had Johnson been prosecuted for disorderly con-

duct[27] under § 42.01, he would have had a legitimate argument that his conduct did not constitute a crime under that statute and that he should have been prosecuted under § 42.09 which covers his conduct specifically. *See* TEX. GOV'T CODE ANN. § 311.026 (Vernon 1988).

Additionally, the Texas court's reliance on *Boos* for the proposition that the existence of a "less restrictive alternative" constitutes constitutional overbreadth *per se* is inappropriate. *Boos* involved a prosecution under a District of Columbia ordinance prohibiting, in part, the display of any sign that tended to bring a foreign government into "public odium" or "public disrepute" within 500 feet of a foreign embassy located within the District. The D.C. ordinance was compared with an analogous federal statute—18 U.S.C. § 112(b)(2)—which applied to diplomatic personnel outside of the District of Columbia. This Court noted that § 112 originally contained anti-picketing provisions which were deleted in 1976, leaving only a prohibition against intimidating, coercing, threatening or harassing a foreign official, and that "the District of Columbia government has responded to the congressional request . . . by repealing" the municipal ordinance contingent upon congressional action to extend 18 U.S.C. § 112 (b)(2) to the District of Columbia. "Relying on congressional judgment in this delicate area," this Court then concluded that the availability of alternatives such as § 112 demonstrated that the display clause was not crafted with sufficient precision to withstand First Amendment scrutiny. The fact that an alternative was in the process

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[27] The record does reflect that Johnson was initially charged with disorderly conduct; within hours of his arrest, this charge was dropped. (R.IV-564-565).

of adoption appears to have been central to this Court's decision.

This, however, is not the situation with respect to the Texas statute at issue. Section 42.01 covers a broad range of disorderly conduct, including fighting words, which tend to incite a breach of the peace while § 42.09(a)(3) deals with overt physical acts of flag desecration. Desecration is defined in detail and is limited to certain enumerated conduct. Thus, § 42.09 is narrowly tailored to fit specific conduct—in this case, the prevention of the desecration of a flag by publicly burning it in a manner likely to seriously offend. Because § 42.01 does not address the same basic interest as § 42.09, § 42.01 cannot be deemed to be a "less restrictive alternative."

C.

The "Serious Offense" Language Of § 42.09(b) Can Be Excluded And The Remainder Of The Statute Given Effect Under A Savings Construction.

Even though the Texas Court of Criminal Appeals found the language of the "serious offense" clause overbroad, the remainder of the statute could have properly remained in effect if the court had applied a savings construction, placing a period after the word "mistreat" and deleting the remaining portion of § 42.09(b). This would have been consistent with TEX. GOV'T CODE ANN. § 311.032(c) (Vernon 1988), which states, in pertinent part:

> If any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that *can be given effect without*

> *the invalid provision* or application, and to this end the provisions of the statute are severable.

(Emphasis added). Section 42.09 can be given effect without the "serious offense" language. Because § 42.09 contains no provision that declares it to be non-severable, deletion of the serious offense language would not affect the enforceability of the remainder of the statute. An individual still would be criminally liable for the act of defacing, damaging or physically mistreating a flag or other venerated object. The statute still would be narrowly tailored to serve the legitimate governmental interests of Texas in protecting the physical integrity of the flag.[28]

The Texas Court of Criminal Appeals, however, did not consider this option. Instead, it ignored the requirement that the overbreadth doctrine be applied only as a "last resort" and only where there is no room for a savings construction. *See Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. —, 107 S.Ct. 2568, 2572 (1987). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Because the Texas court did not address the possibility of a savings construction, this Court could remand this

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[28] A "blanket prohibition" of the manner of speech may still be "narrowly tailored" if in each case the manner of speech forbidden necessarily produces the evil the government seeks to eradicate. *Frisby v. Schultz*, 108 S.Ct. at 2502-2504; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 808-810. The "blanket prohibition" on flag desecrations is still narrowly tailored to a government interest, *i.e.*, either the prevention of a breach of the peace inherently likely to occur as a result of flagrant acts of flag desecration or the preservation of the physical integrity of our national symbol.

case for determination of that issue. The Texas Court of Criminal Appeals is empowered to answer questions of state law certified from a federal appellate court. TEX. CONST. Art. V § 3-c; TEX. R. APP. P. 214. *See Houston v. Hill,* 107 S.Ct. at 2517. (Powell, J., concurring in part and dissenting in part). It is doubtful that this procedure would be helpful to this Court because the Texas court has given its answer to the overbreadth challenge. It merely has not considered the viability of a savings construction. *Cf. Houston v. Hill.* This Court is in as good a position to determine the savings construction issue as is the Texas court, and the State of Texas would urge this Court to proceed to a determination of this issue in favor of the statute.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the Texas Court of Criminal Appeals be, in all respects, reversed.

Respectfully submitted,

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