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

BRIEF OF THE CHRISTIC INSTITUTE, CLERGY AND LAITY CONCERNED, THE COMMITTEE OF INTERNS AND RESIDENTS, THE COMMUNITY FOR CREATIVE NON-VIOLENCE, THE FELLOWSHIP OF RECONCILIATION, LA RAZA LAWYERS' ASSOCIATION OF SAN FRANCISCO, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., THE LAWYERS' COMMITTEE ON NUCLEAR POLICY, THE MASSACHUSETTS CHAPTER OF THE NATIONAL LAWYERS GUILD, THE NATION INSTITUTE OF NEW YORK CITY, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, THE NATIONAL ORGANIZATION FOR WOMEN, INC., THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PEOPLE FOR THE AMERICAN WAY, TOWARD A MORE PERFECT UNION, THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, WABUN-ININI, ANISHINABE (A/K/A VERNON BELLECOURT), AS A REPRESENTATIVE OF THE AMERICAN INDIAN MOVEMENT, THE WAR RESISTERS LEAGUE, AND THE WRITERS GUILD OF AMERICA, EAST, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

JAMES C. GOODALE
(Counsel of Record)
JONATHAN H. HINES
JAMES B. HENLY
MARK P. GOODMAN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000
Attorneys for Amici Curiae

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STATEMENT OF INTEREST

This brief is submitted on behalf of twenty-one *amici curiae* which include religious and anti-war organizations, labor unions and guilds, women's and minority advocacy organizations, progressive political and civil rights groups, political education and public policy associations, lawyers' committees and public interest law groups, a community-based activist center and an individual representative of the American Indian Movement. They have a combined membership of over half a million Americans.

Amici have a special interest in the subject matter and outcome of this case. Each is dedicated to achieving progressive social ends through organized political, legal and/or educational activity. In pursuing such ends, each relies upon the constitutional guarantee of free expression to ensure that its voice be heard and each is committed to the principle that dissenting political views must be permitted expression.

Many of the *amici* regularly engage in political expression that is symbolic in form, or in which conduct and speech are intertwined. All believe that symbolic speech is an important and proper medium for expressing messages of political and social significance. The American flag, as the leading symbol of our government, is a particularly potent medium for communicating opposition to government policies.

This case raises significant issues of law concerning the scope of constitutional protection of all symbolic protest. Were the decision below to be reversed, *amici* believe their efforts to effect progressive social changes through the exercise of free speech would be seriously impaired.

This brief is filed pursuant to Rule 36.2 of the Rules of the Court. The parties have consented to its submission in letters on file with the Clerk of the Court. Descriptions of the individual *amici* are set forth in Appendix A of this brief.

SUMMARY OF ARGUMENT

This case requires the Court to decide whether the State of Texas may punish Gregory Lee Johnson for expressing his political views by publicly burning an American flag. The Texas Court of Criminal Appeals held that the State could not do so consistent with the First Amendment. This Court should affirm.

Desecration of our nation's cherished symbol has profound emotional resonance. Most Americans recoil at the message communicated by an act of flag desecration. That understandable reaction must not obscure a clear constitutional analysis of this case. The Texas statute simply ignores this Court's historic protection of the flag's use as an important symbol of political protest, *see Spence v. Washington*, 418 U.S. 405 (1974) (per curiam); *Street v. New York*, 394 U.S. 576 (1969); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931), and deprives dissenters of a highly effective means of communication.

The burning of an American flag during a political demonstration plainly is symbolic speech entitled to First Amendment protection. Furthermore, the regulation at issue here focuses, both implicitly and by its very terms, on the communicative content and effect of a flag desecration on observers. By prohibiting abuse of a symbol that carries strong patriotic connotations, Texas protects "acceptable" uses of the flag's symbolism while restricting its contrary use to express disaffection with our government. Moreover, this statute forbids only those desecrations that would "seriously offend" third parties. The regulation is thus directly rather than incidentally speech-suppressive, and so cannot satisfy the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

Because it is speech-suppressive, the Texas statute must be subjected to this Court's most exacting scrutiny. Such a law is invalidated unless the government makes the exceptional showing that it is the most narrowly tailored means of furthering a compelling state interest, or that it proscribes a category of speech that is unprotected by the First Amendment.

Texas has made no such showing. Neither of the justifications advanced by the State—protecting the flag as a symbol of "national unity" and preventing breaches of the peace that might occur as a result of a flag desecration—warrants withdrawal of the First Amendment's protection of political expression. These interests are merely a subterfuge to effect the sort of state-enforced obeisance to the flag that this Court has, on a number of occasions during the past fifty years, held to violate the First Amendment.

To reinstate Gregory Johnson's conviction and sentence of imprisonment would signal a dangerous reorientation in the relationship of state and citizen. If Johnson's communicative conduct may be suppressed in the name of privileged symbolism and public order, what principle would limit even wider suppression justified by similar governmental interests? May Texas punish the next dissenter who shreds a paper flag or profanes our national anthem to express dismay at U.S. inaction against apartheid? Or prosecute another who, in opposition to a new U.S.-Soviet missile treaty, hangs our President in effigy? Such attempts to enforce a love of country by outlawing symbolic expressions of protest are as unproductive as they are unconstitutional. Under settled First Amendment principles, *amici* submit that the decision below should be upheld.

ARGUMENT

I. JOHNSON'S POLITICALLY INSPIRED BURNING OF AN AMERICAN FLAG AT A PUBLIC DEMONSTRATION CONSTITUTES SYMBOLIC SPEECH ENTITLED TO FIRST AMENDMENT PROTECTION.

Gregory Johnson was prosecuted and convicted for burning an American flag at a public assembly convened to protest policies of the United States Government.[1] This activity was sym-

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1 *Amici* note that there remains some question as to whether Johnson himself set fire to the flag during the Dallas protest, or was simply present when the desecration occurred. References to Johnson's burning of the flag are made with this ambiguity in mind.

bolic speech within the ambit of the First Amendment. Analysis of the case must proceed on this basis.

A. Johnson's Activity Readily Conveyed a Particularized Message That Was Likely to Be Understood by Onlookers.

Johnson and others attending the Dallas rally spoke through words as well as actions. Even taking Johnson's actions alone, however, it is settled law that the freedom of speech is "not confined to verbal expression." *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (plurality) (silent sit-in). This Court has long recognized that First Amendment protection must be accorded to non-verbal activity when it is "sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam) (display of peace symbol affixed to American flag). *See also Stromberg v. California*, 283 U.S. 359, 368-69 (1931) (display of red flag); *Tinker v. Des Moines School District*, 393 U.S. 503, 505-06 (1969) (wearing of black armband in protest is "closely akin" to "pure speech" and so "is entitled to comprehensive protection under the First Amendment").

Johnson's conduct easily satisfies this constitutional standard. Johnson burned the flag at a public assembly held in front of the Dallas City Hall (R.III-355, II-162), a standard forum for communications of a political nature. The demonstration, entitled the "Republican War Chest Tour", was convened while the Republican National Convention was taking place in Dallas and was preceded by a march in which the participants, including Johnson, distributed political leaflets and chanted political slogans critical of the United States and its conduct of foreign policy. (R.II-71-72, V-833-34). At the culmination of the rally, Johnson participated in burning the flag while the assembled continued to chant messages of political protest. (R.III-355; II-162). Observers of the demonstration and the flagburning testified at trial that they understood that

Johnson was conveying a political message by his action. (R.III-380-90, II-160).[2]

Here, no less than in *Spence*, "it would have been difficult for the great majority of citizens to miss the drift of [Johnson's] point at the time that he made it." 418 U.S. at 410. As both the majority and the dissent in the Texas Court of Criminal Appeals found below, Johnson's action met the Court's symbolic speech test: in burning the flag, he "intended to convey a particularized message . . . and . . . this message was very likely to be understood by those who viewed it." Pet. App. 8-10 (majority opinion) (quoting *Johnson v. State*, 706 S.W.2d 120, 123 (Tex. App. 1988) (Vance, J.)); *see also* Pet. App. 25 (dissenting opinion). These events permit no other conclusion than that Johnson was, in burning the flag, engaged in an act of protected symbolic speech and was prosecuted by the State of Texas because of his "expression of an idea through activity." *Spence v. Washington*, 418 U.S. at 411.

B. Flag Destruction Is a Form of Expression of Political Dissent Falling Squarely Within the First Amendment Guarantee of Freedom of Speech.

No doubt, the message conveyed by Johnson's act of flagburning was both powerful and unpopular. Most Americans, believing in the greatness of this nation and the democratic foundations which sustain it, find Johnson's message as well as his medium deplorable. But the theory of our democracy requires that we tolerate dissent. Those who founded this nation "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

For that reason, the guarantee of freedom of expression protects messages no matter how controversial in content or radical in point of view. The First Amendment's sweep is not "limited

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2 At his trial, Johnson explained that "[t]he American Flag was burned as Ronald Reagan was being renominated as President . . . . [A] more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time." (R.V-656).

to things that do not matter much . . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Nor does the First Amendment shrink from protecting communications of a political nature on grounds that they are cast in form offensive to many. *See Cohen v. California*, 403 U.S. 15, 22-23 (1971); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (freedom of speech embraces communication that "stirs the public to anger," because a "function of free speech under our system of government is to invite dispute"). As the Court most recently stated in *Boos v. Barry*, 485 U.S. ____, 108 S. Ct. 1157 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. ____, 108 S. Ct. 876, 882 (1988)), "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.' " *Id.*, at 1164.

Applying these basic principles, the Court has accorded First Amendment protection to unpopular and highly emotive expressions of political dissent, whether conveyed by symbol or spoken word. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (reversing convictions of speaker who aroused anger by race baiting); *Tinker v. Des Moines School District*, 393 U.S. 503 (protecting symbolic opposition to the war in Vietnam expressed by the wearing of a black armband); *Brandenberg v. Ohio*, 395 U.S. 444 (1969) (striking down on its face, and as applied to virulent racist verbal and symbolic speech, statute prohibiting advocacy of use of force and violations of law); *Cohen v. California*, 403 U.S. 15 (shielding vulgar anti-draft epithet emblazoned on back of jacket).

First Amendment protection is no less applicable to expressions of dissent conveyed by, or about, a flag, even in the charged setting when "the flag involved is our own." *Board of Educ. v. Barnette*, 319 U.S. at 641. This Court "for decades has recognized the communicative connotations of the use of flags," *Spence*, 418 U.S. at 410, and at least one Justice has observed the place of the American flag as "an integral part of public protests." *Street v. New York*, 394 U.S. 576, 604 (1969) (Warren, C.J., dissenting). The fact that a flag, when observed,

immediately connotes "some system, idea, institution, or personality" makes it a highly effective vehicle of communication—the flag functions as a powerful "shortcut from mind to mind." *Barnette*, 319 U.S. at 632.[3] Indeed, it is precisely the power of our flag as a symbol of pride in America that inspires the sort of reactive expression Johnson engaged in here.

In view of the formidable communicative powers of flags, the Court has not hesitated to extend First Amendment protection to the flying of a red flag as a gesture in support of communism, *Stromberg v. California*, 283 U.S. 359, the speaking of defiant words about our flag in protest of the racially motivated murder of a civil rights leader, *Street v. New York*, 394 U.S. 576, and to the display of a defaced American flag in opposition to the invasion of Cambodia, *Spence v. Washington*, 418 U.S. 405.

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3 This feature of flags (and other forms of symbolic expression) is particularly important to those seeking to convey unpopular messages. It is now well appreciated that the form in which a communication is couched may have as great an impact upon its efficacy as does the communication's content. M. McLuhan, *Understanding Media* 7-21 (1964). Unpopular messages which might otherwise be wholly disregarded by the public if confined by law to expression by speech or written word may, if conveyed by symbol, draw greater audience interest and attention. *See* Note, *First Amendment Protection of Ambiguous Conduct*, 84 Colum. L. Rev. 467, 471 (1988). This was a matter of no small importance to Johnson, given that mass media seldom pay much attention to politically unorthodox ideas. *See* Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1647 (1967).

As Johnson's conduct also demonstrates, symbols like flags not only may attract attention to unpopular messages but also can contribute emotional content to them "beyond the capabilities of language." Note, *Symbolic Conduct*, 68 Colum. L. Rev. 1091, 1108-09 (1968); *see also* W. Smith, *Flags Across the World* 5 (1980) ("National flags in particular stimulate the viewer to feel and act in a calculated way . . . They are employed to honor and dishonor, warn and encourage, threaten and promise, exalt and condemn, commemorate and deny. . . . Flags authenticate claims [and] dramatize political demands."). For these reasons, Johnson's choice of communicative form must be protected for it is an instance "in which the content or effectiveness of the message depends in some measure upon how it is conveyed." *Young v. American Mini Theatres*, 427 U.S. 50, 78 (1976) (Powell, J., concurring).

This consistent line of authority must control here. Johnson's act of flagburning was a " 'primitive but effective way of communicating ideas.' " *Spence*, 418 U.S. at 410 (quoting *Barnette*, 319 U.S. at 632). The First Amendment embraces Johnson's clear expression of political dissent.

II. THE TEXAS FLAG-DESECRATION STATUTE IS DIRECTED AT SUPPRESSING COMMUNICATION.

Indifferent to this Court's command that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . ," *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), Texas prohibits the destruction of an American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover" the desecration. Tex. Penal Code Ann. § 42.09(a)(3) (Vernon 1974). The Texas law's isolation of offensive communications all too clearly reveals its suppressive focus, which is in fact a feature of all flag-desecration statutes.

Where, as in this case, the government seeks to regulate expressive conduct, constitutional analysis of the regulation begins with application of the four-part test announced in *United States v. O'Brien*, 391 U.S. 367 (1968):

> [A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (emphasis added). When a law satisfies each aspect of the *O'Brien* calculus, it is not analyzed as a primary abridgement of expression and thus need not meet the otherwise stringent requirements imposed by the First Amendment as a precondition to such abridgements. However, as *amici* demonstrate in this section of the brief, flag statutes like Texas' are intimately "related to the suppression of free expression."

Therefore, *O'Brien*'s leniency is inapposite and the traditional First Amendment scrutiny applied to speech-suppressive measures governs.

Texas not surprisingly disclaims any speech-suppressive aim. The State maintains that its law forbidding destruction of flags serves two state interests unrelated to the suppression of expression: (1) protecting the flag as a symbol of national unity and (2) preventing breaches of the peace. *Amici* here demonstrate why these claimed state interests must, under this Court's decisions, be viewed as directly speech-suppressive. In Section III, *infra*, *amici* demonstrate why, in light of section 42.09's impermissible focus, the statute must be invalidated.

A. Flag-Desecration Statutes Necessarily Are Aimed at the Suppression of the Message Communicated by the Act of Desecration.

1. The State's Assertion That the Statute Protects the Flag As a Symbol of National Unity Underscores the Speech-Suppressive Nature of the Statute.

The first of Texas' two justifications for the proscription of flag desecration is the preservation of the flag as a "symbol of national unity." Texas claims that this interest is unrelated to the suppression of speech in that it applies without regard to the specific viewpoint conveyed by an act of desecration. Such an assertion misunderstands this Court's test for "content-relatedness" and ignores the most pertinent line of this Court's prior holdings.

a. *Street* and *Spence* Hold That a State's Interest in Protecting the Flag's Symbolic Value Is Speech-Suppressive.

In *Street v. New York*, 394 U.S. 576, the Court assessed a state's interest in preserving the symbolic values embodied by the flag and held that this interest could not outweigh the countervailing First Amendment interests of those who would deprecate the flag as a form of political expression. Drawing upon this Court's landmark decision in *Board of Educ. v. Barnette*,

319 U.S. 624, in which a statute requiring schoolchildren to salute the flag was struck down as violative of their right of free expression, the *Street* Court reasoned that a government prohibition on criticism of the flag in the name of protecting its symbolic value was tantamount to requiring adherence to a homogenous set of political and intellectual values. *Street*, 394 U.S. at 593.

While Texas strives to distinguish *Street* from the instant case on the ground that *Street* involved verbal rather than symbolic contempt for the flag, the State provides no principled justification for why this verbal/nonverbal distinction would have any relevance to the speech-suppressive nature of an anti-desecration law. The reasoning of *Street* applies with equal force to any form of expressing contempt, so long as the expression falls within the protective ambit of the First Amendment. Whether one uses opprobrious words towards the flag or desecrates the flag in protest, the nature of a state's interest in the flag as a symbol of the nation remains static. In either case, that interest is tied to the suppression of expression. Texas has failed to make any showing to the contrary.

Indeed, in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (1983) (en banc), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), Justice Scalia (then a Circuit Judge), made short shrift of the speech/conduct distinction now being advanced by the State of Texas to distinguish the present case from *Street*. As explained in his dissenting opinion, the speech/conduct dichotomy is simply irrelevant once the government's proscription of expressive conduct has been shown to be aimed at communicative effect: "A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Id.* at 622 (Scalia, J., dissenting) (emphasis in original). If, therefore, the state's interest in the flag as a symbol is, as the Court held in *Street*, aimed at the suppression of speech when it is used to justify prohibiting verbal assaults on the flag, there can be no separate rule regarding the identical state interest when it is used to justify prohibitions on nonverbal symbolic speech. The show-

ing that must be made by the state to justify the prohibition is the same.

Five years after its decision in *Street*, the Court, in *Spence v. Washington*, 418 U.S. 405, once again squarely faced the question of a state's interest in the flag's symbolic value. *Spence* involved symbolic and not verbal expression. Yet again the Court struck down application of the challenged statute after unambiguously characterizing this state interest as being "directly related to expression." *Id.* at 414 & n.8.[4]

If the State of Washington's interest in preserving the national flag as an "unalloyed symbol of our country" was construed by this Court over a decade ago as being aimed at the suppression of expression, *Spence*, 418 U.S. at 412-14, so too must Texas' interest in preserving the flag "as a symbol of nationhood and national unity." There is no principled way to distinguish the two cases. Although Texas seeks to exploit the superficial differences between the respective ways in which Spence and Johnson chose to express themselves (the former by defacing the flag, the latter by burning it), the State's interest in the flag's symbolic value and the recognized relationship of this value to the suppression of expression are unaffected by the communicator's method of flag desecration.

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4 The *Spence* Court's analysis continued:

> For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), is inapplicable.

418 U.S. at 414 n.8.

As Justice Brennan has pointed out, the holdings of *Street* and *Spence* should not be surprising:

> [T]he Government has no esthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Kime v. United States, 459 U.S. 949, 953 (1982) *denying cert. to* 673 F.2d 1318 (1982) (Brennan, J., dissenting).

b. This Court's Recent Decisions Require That a State Interest in Protecting the Flag as Symbol Be Regarded as Speech-Suppressive Even if That Symbol Is Deemed Ideologically Neutral.

Street and *Spence* thus compel the conclusion that Texas' interest in the flag as a symbol of nationhood is one that aims at expression. However, even had those cases never arisen, the same conclusion follows from application of this Court's settled approach to determining whether a law is directed at suppression of expression, or only incidentally impairs it.

A state's interest must be regarded as content-based if the harm to that interest which the law in question seeks to avert arises as a consequence of the communicative content or impact of expression. *See Boos v. Barry*, 485 U.S. ____, 108 S. Ct. 1157, 1163-64 (1988); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977); L. Tribe, *American Constitutional Law* § 12-3 at 794-804 (2d ed. 1988).[5] Only when

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5 As Justice Scalia has pointed out, specifically with reference to symbolic speech:

> Every proscription of expressive conduct struck down by the Supreme Court was aimed precisely at the communicative effect of the conduct. The only reason to ban the flying of a red flag (*Stromberg*) was the revolutionary sentiment that symbol expressed. The only reason for applying the "breach of the peace" statute to the silent presence of black protestors in the library in *Brown* was the effect which the communicative content of that presence had upon onlookers. The only reason for singling out black armbands for a dress proscription (*Tinker*) was precisely their expressive content, allegedly causing classroom disruption. The only reason to prevent the attachment of symbols to the United States flag (*Spence*) was related to the communicative content of the flag.

Community for Creative Non-Violence, 703 F.2d at 624-25 (Scalia, J., dissenting) (footnotes omitted).

Professor Ely has similarly cast the critical inquiry as:

> whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatsoever.

Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497 (1975).

the justification in question is divorced from the communicative impact of the expressive conduct does an interest qualify as "content-neutral" or "unrelated" to suppression of speech.[6]

Texas' interest in preserving the flag as a symbol of nationhood must be held to be related to suppression of expression under the Court's settled approach. The harm to that interest which section 42.09 and similar flag-desecration statutes seek to avert—the weakening of the flag as a symbol of nationhood caused by acts of flag destruction—arises (if at all) *only* because such acts of flag destruction are understood to communicate.

This communicative focus of typical flag-desecration statutes is evident from their differential treatment of private and public desecrations. A state's interest in the flag as a symbol of "national unity" is only implicated when the flag is burned *publicly*. Professor Tribe underscores this point by asking "whether the national symbol, which the government seeks to preserve unsullied, would be corrupted or interfered with in any way by 'closet' flag burnings—people drawing their own flags on flammable fabric and igniting them . . . in the privacy of their homes." L. Tribe, *supra* p. 12, § 12-3, at 801-02. The answer to the question is obviously no; degradation of the symbol occurs, if at all, only to the degree that the message is communicated to third parties. The state's interest, therefore, plainly is related to suppressing speech.

Texas' counter-argument—that the flag-as-symbol interest is unrelated to speech suppression because it is advanced in an

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6 An example might be a statute that proscribes the use of sound trucks after 9 o'clock p.m. as a public nuisance. Such a regulation is not aimed at the suppression of speech because the harm sought to be avoided—late-night noise—is not a function of a message's communicative impact but, rather, the noise pollution that is an incidental, non-communicative by-product of any message (or of plain static from the microphone). *Cf. Kovacs v. Cooper*, 336 U.S. 77 (1949). Similarly, the interest of the government in the smooth administration of the draft, advanced to justify a rule prohibiting the burning of draft cards, was held by this Court to be unrelated to the suppression of expression because the harm sought to be avoided—an inefficient draft—arose from noncommunicative consequences of destroying draft cards and not from the anti-draft message thereby conveyed. *United States v. O'Brien*, 391 U.S. at 381-82.

ideologically neutral manner—is unavailing. For even if section 42.09 or any other flag statute could be considered "viewpoint neutral" in the sense that it forbids offensive destruction of flags regardless of the discrete message sought to be conveyed by a particular flag desecrator, it is nevertheless "content-based" in that the State's justification for suppression relies precisely upon the fact that acts of flag destruction, because they communicate, impair the flag's status as a symbol of national unity.[7]

In challenging this principle, Texas seeks to reargue the very issue resolved last term in *Boos v. Barry*, 108 S. Ct. 1157. There the Court struck down a District of Columbia statute making it unlawful to "display . . . any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.' " *Id.* at 1160. The government argued that the provision was intended to protect the dignity of foreign diplomatic personnel, and did so in a content-neutral manner because the law forbade all signs containing critical messages regardless of ideological bent. *Id.* at 1162-63. The *Boos* Court held that, notwithstanding its ideological neutrality, that statute "must be considered content-based" because the justification for the law "focuse[d] *only* on the content of the speech and the direct impact that speech ha[d] on its listeners." *Id.* at 1164 (emphasis in original). *See also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (invalidating speech-suppressive regulation though it did not "favor either side of a political controversy").[8]

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7 Put otherwise, if acts of flag destruction did not themselves communicate, it would be difficult to fathom how such acts could impair the flag's capacity to communicate a message of nationhood. It is true that a particular exemplar of a flag, once destroyed, is no longer available to communicate any message. In that limited sense, an act of flag destruction, even if unwitnessed, might be said to impair the ability of that particular flag to continue communicating a message of national unity. But Texas surely cannot be asserting a state interest in assuring that the number of flags available for flying within the State is not diminished by acts of flag destruction.

8 *Amicus* Legal Affairs Council argues that *Boos* and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), support Texas here in that § 42.09

Under the teachings of both *Boos* and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Texas flag-desecration statute and others like it "target the direct impact of a particular category of speech," and thus "must be subjected to the most exacting scrutiny." *Id.* at 1163-64.

c. Flag-Desecration Statutes, Because They Limit Expressive Uses of the Flag to Only Those That Communicate Messages Approved of by the State, Are Not Ideologically Neutral.

Amici have demonstrated that a statute like section 42.09(a)(3) is content-based, even if regarded as neutral in terms of viewpoint or ideology. But in fact the statute is ideologically biased at the most elementary level.

Our flag, like most potent symbols, may be employed to communicate myriad messages. All such messages, however, relate back in some way to the flag's central significance as "an

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has only a secondary effect on speech. This argument ignores the Court's pronouncement in *Boos* that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." 108 S. Ct. at 1163.

Renton involved a law that regulated speech by reference to the type of movie theatres in which it was spoken, placing stringent restrictions solely on theatres specializing in adult films. 475 U.S. at 47. While this regulation affected the communication conveyed in such theatres, it was not targeted at such communications but rather at the "secondary effects of such theatres in the surrounding community." *Id.* (The effects in question—crime and loss in property values—were "secondary" because, although associated with adult film theatres, they did not result from the communicative impact of an airing of an X-rated film.) *Boos* was a very different case because it involved a regulation aimed at the *primary* impact of speech on listeners, and not at secondary effects unrelated to the content of speech. To use the *Boos* Court's own illustration,

> if the ordinance [in *Renton*] was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. This hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Boos, 108 S. Ct. at 1163.

emblem of National Power and National Honor." *Halter v. Nebraska*, 205 U.S. 34, 42 (1907). Desecration statutes like Texas' quite plainly seek to protect "National Honor" by preventing use of the flag to communicate discordant "unpatriotic" messages. This ideological bias alone, when used to justify limiting expressive conduct, necessarily violates the crucial third prong of the *O'Brien* test.

Texas resists acknowledging the flag's primary status as patriotic symbol. But the examples the State gives of the kinds of messages conveyed by the flag illustrate this point quite well.

> 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.

Petitioner's Brief at 27.

The flag's position as our nation's central patriotic symbol is well recognized in the opinions of this Court,[9] in Congressional statements concerning the flag,[10] and in lay expressions reflect-

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9 In *Halter v. Nebraska*, 205 U.S. at 41, the Court described the flag as "the emblem of the American Republic . . . [f]or [which] . . . every true American has not simply an appreciation but a deep affection." Subsequent opinions of the Court refer to the flag as a "symbol of adherence to government as presently organized," *Barnette*, 319 U.S. at 633, and "[f]or the great majority of us . . . the . . . symbol of patriotism, of pride in the history of our country, and of the service, sacrifice and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure." *Spence v. Washington*, 418 U.S. at 413.

10 *See, e.g.*, House Comm. of the Judiciary, *Penalties for Desecration of the Flag*, H. Rep. No. 350, 90th Cong., 1st Sess. at 4 (1967) (to "every true American the flag is the symbol of the Nation's power—the emblem of freedom in its truest, best sense") (quoting *Halter*, 205 U.S. at 43); *Desecration of the Flag: Hearings on H.R. 271 Before Subcomm. No. 4 of the*

ing on the flag's significance.[11] There can be no question that the flag, standing as it does for honor and allegiance to our national government, is a political symbol of ideological force. The nature of Texas' interest in the flag is equally ideological. It is precisely because the flag is a symbol affirming faith in our government that Texas asserts any interest in the flag's symbolic value.[12]

As Texas surely recognizes, just as there are few more powerful ways to convey feelings of pride in our country than to raise the flag high, there are few more powerful ways to express opposition to the government than to publicly destroy a flag for all to see.[13] When the flag is draped over the coffin of a fallen

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House Comm. on the Judiciary, 90th Cong., 1st Sess. (1967) 28 (statement of Hon. James H. Quillen, Rep. of Tenn.) ("For all of us . . . whose hearts are filled with patriotism and love and respect for all that our flag symbolizes, it is deplorable to think that anyone could be so . . . thankless . . . as to scar . . . the traditional symbol of our free land."); 132-33 (statement of Hon. E.Y. Berry, Rep. of S. Dakota) (the flag is a "source of pride and honor to all Americans"); 146 (statement of Hon. Paul G. Rogers, Rep. of Fla.) (flag symbolizes "patriotic reverence" for our government); 203 (statement of Hon. James Kee, Rep. of W. Va.) (flag is sacred emblem of nation inspiring feelings of patriotism).

11 *See, e.g.*, G.H. Preble, *Origin and History of the American Flag* 4 (1917) ("Fidelity to the Union blazes from its stars, allegiance to the government beneath which we live is wrapped in its folds."); B. Mastai & M.L. Mastai, *The Stars and Stripes* 175 (1973) (flag is "our one sole emblem of fidelity"); *The Stars and Stripes Forever*, American Heritage, June 1976 at 9 (flag is used "to signify loyalty, sacrifice, heroism, and other sentiments connected with patriotism").

12 Indeed, Texas describes its prosecution of Johnson as an effort "to punish [him] for trying to destroy the effectiveness of the flag as a symbol revered by the vast majority of Americans." Petition for Certiorari at 49.

13 The then-chairman of the Americanism Committee of the Veterans of Foreign War candidly acknowledged this fact in testifying in favor of the enactment of the federal flag desecration statute: "How could demonstrations against American policy be more vividly and dramatically manifested than by burning the very flag of the United States?" *Desecration of the Flag: Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 70, 71 (1967) (statement of Hon. Michael A. Musmanno, Justice, Supreme Court of Pennsylvania).

soldier, it bespeaks honor in service for America; while unfortunate, it should not be surprising that another American who objects to the war in which that soldier fell might burn a flag to symbolize his dissent. So might an American Indian, to show anger at his peoples' dispossession from their lands carried out in the name of this flag. The same flag that is waved proudly by the thousands at a Republican (or Democratic) National Convention could naturally be desecrated in an anti-establishment protest against that Party's governing platform; indeed, that is precisely what happened in this case. One need not applaud this form of expression to understand that flag-desecration statutes like section 42.09 seek nothing less than to reserve the flag's special communicative powers to express patriotic messages preferred by the state.

Such legislative sorting among preferred and disapproved messages is the very essence of content-oriented regulation. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (First Amendment forbids regulating expression "in ways that favor some viewpoints or ideas at expense of others."); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68 (1976) (noting need for "absolute neutrality" by the government when regulating communication). As Professor Ely has observed:

> Orthodoxy of thought can be fostered not simply by placing unusual restrictions on 'deviant' expression but also by granting unusual protection to expression that is officially acceptable. An 'improper use' statute, neutral respecting the messages it would inhibit though it may be . . . is, at best, analogous to a law prohibiting the interruption of patriotic speeches, and that is a law that is hardly 'unrelated to the suppression of free expression.'

Ely, *Flag Desecration*, *supra* note 5, at 1507-08 (footnotes omitted). In forbidding flagburnings the State not only grants "unusual protections" to acceptable patriotic points of view but, as well, "unusually restricts" expressions of disaffection with the government. This kind of regulation is bluntly speech-suppressive in focus.

2. The State's Interest in Preventing Breaches of the Peace Also Confirms the Speech-Suppressive Nature of the Statute.

The State also seeks to justify its flag-desecration statute on the basis of its interest in preventing breaches of the peace. Here again, however, the State acknowledges its preoccupation with the speech itself; the danger of a violent reaction is only created by what the flagburner communicates in destroying a flag.

For that reason, the Texas statute plainly fails under the *Renton/Boos* content-neutrality test discussed above in Section II.A.1.b. By emphasizing the possibility that bystanders might breach the peace in reaction to the message conveyed by a flag burning, the State justifies the law solely by "reference to the content of the regulated speech" and "focuses *only* . . . on the impact the speech has on its listeners." *Boos*, 108 S. Ct. at 1164 (emphasis in original).[14] Indeed, as footnote 4 of the Respondent's Brief points out, the record in this case demonstrates that both police officers were offended by the burning of the flag because the action *communicated* a lack of respect for our national symbol.

It follows that this case is readily distinguishable from *United States v. O'Brien*, 391 U.S. 367, in which the defendant claimed that the burning of his draft card was symbolic speech entitled to First Amendment protection. There, the Court sustained the defendant's conviction because it recognized "a sufficiently important governmental interest in regulating the non-speech element," *id.* at 376 (*i.e.*, the smooth administration of the Selective Service Act) that was "unrelated to the suppression of free expression." *Id.* at 377. The Court was careful to exempt from its holding those cases in which "the alleged governmental

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14 Professor Nimmer has similarly noted:

> In the context of flag desecration, it is precisely the particular idea conveyed by the act or desecration that is feared will lead to a violent or unlawful reaction. Thus, insofar as the governmental objective is the suppression of the communication of an idea in order to avoid resulting violence, it is an anti-speech interest, *i.e.*, an interest in the suppression of speech.

Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 53-54 (1973).

interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.* at 382. Texas' preoccupation with avoiding any violent reaction to a flagburning demonstrates well that such a statute, in the words of the *O'Brien* Court, regulates activity solely because the message that is "integral to the conduct" is "thought to be harmful."

B. On Its Face, the Texas Statute Is Aimed at the Suppression of Speech Because It Singles Out for Punishment Only Those Acts of Flag Destruction the Communicative Content of Which Is Likely to Offend Others.

Amici have argued above that flag-desecration statutes, by their very nature, aim at the suppression of speech. Nevertheless, as *amici* recognize, two members of this Court have indicated that a flag-desecration statute that even-handedly proscribed *all* public acts impairing the physical integrity of the flag would not violate the First Amendment because the operation of such a law would not "depend upon whether the flag is used for communicative or noncommunicative purposes." *Spence v. Washington*, 418 U.S. at 422 (Rehnquist, J., dissenting); *Smith v. Goguen*, 415 U.S. 566, 588 & n.3 (White, J., concurring). The Texas statute, as drafted, falls far short of even that standard.

Section 42.09(a)(3) conditions criminal liability for destroying a flag on whether the actor knows he "will seriously offend one or more persons likely to observe or discover his action." Texas thereby expressly requires communication—and offense—to third parties to trigger the law's proscriptions, and so makes "the communicative aspect of the proscribed conduct . . . a crucial element of the violation." *Smith v. Goguen*, 415 U.S. at 588 n.3 (White, J., concurring).

The Texas statute thus does much more than just remove the flag "from the roster of materials that may be used as a background for communications." *Spence*, 418 U.S. at 423 (Rehnquist, J., dissenting). This is a particularly objectionable law whose operation depends precisely "upon whether the use of the flag is respectful or contemptuous; or upon whether any

particular segment of the State's citizenry might applaud or oppose the intended message." *Id.* at 422-23 (Rehnquist, J., dissenting) (footnote omitted). Put otherwise, by criminalizing only those acts of flag destruction that offend, the State singles out for punishment "those who impair the flag's physical integrity for the purpose of disparaging it as a symbol." *Smith v. Goguen*, 415 U.S. at 597-98 (Rehnquist, J., dissenting). As the Chief Justice has suggested, "such a law . . . abridge[s] the right of free expression." *Id.*

III. BECAUSE ITS AIM IS SPEECH-SUPPRESSIVE, THE TEXAS STATUTE CANNOT WITHSTAND FIRST AMENDMENT SCRUTINY.

A. Laws Directed at the Communicative Impact of Expression Must Be Subjected to the Most Searching Scrutiny and Can Be Sustained Only Under the Most Exigent of Circumstances.

This Court has held repeatedly that laws aimed at the suppression of political expression or its communicative impact are subject to the "most exacting scrutiny." *See, e.g., Boos*, 108 S. Ct. at 1163-64 (1988); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1975) (per curiam). Under this strict standard, such laws must be invalidated unless they either can be shown to serve a demonstrably compelling governmental interest, *see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, ____, 107 S. Ct. 1722, 1728 (1987); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 540, or can be shown to suppress only expression falling into one of this Court's narrowly circumscribed categories of unprotected speech. *See Brandenberg v. Ohio*, 395 U.S. 444; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).[15]

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15 *Brandenberg* and *Chaplinsky* define the only two such categories in which speech may go unprotected because of its inflammatory impact on listeners. As discussed below in Section III.B.2, the speech proscribed by the Texas flag-desecration statute fits neither the "fighting words" category represented by *Chaplinsky*, 315 U.S. at 572-73, nor the category of speech "likely to incite lawless action" recognized in *Brandenberg*, 395 U.S. at 448-49.

When the government defends speech-suppressive legislation as necessary to further a compelling objective, the Court ensures free speech the greatest possible protection by insisting upon a further showing that such legislation is both a "necessary" and a "narrowly drawn" means of achieving that objective. *Boos*, 108 S. Ct. at 1164. Absent a sufficiently close nexus between a state-imposed abridgment of speech and the state interest justifying such abridgment, the Court will invalidate the regulation as unconstitutional in scope. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-39 (1980); *Street*, 394 U.S. at 592.[16]

Applying these stringent requirements, the Court has invalidated laws regulating symbolic conduct when those laws have no true justification apart from suppressing expression or its communicative impact. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1969). For the reasons set forth below, section 42.09 also must be invalidated as a measure directly aimed at suppression of speech, because Texas cannot meet its "heavy burden" of demonstrating that its flag-desecration statute presents "an exceptional case." *Cohen v. California*, 403 U.S. at 24.

B. Texas Has Failed to Demonstrate the Sort of Exigent Circumstances That Would Warrant the Curtailment of Expression.

Texas' first proffered interest in protecting the flag as a symbol of nationhood is not compelling as that requirement has come to be understood by the Court. For that reason it has

16 The First Amendment imposes an analogous requirement upon statutes that seek to proscribe unprotected speech. If such statutes sweep beyond the narrowly circumscribed categories of unprotected speech, they are invalidated as "overbroad." *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 107 S. Ct. 2568, 2571 (1987). Of course, the Constitution also requires that criminal statutes be precisely drafted so as to clearly define their proscriptions. *Amici* contend that § 42.09(a)(3)'s proscription of acts that "the actor knows will seriously offend one or more persons likely to observe or discover his actions" is both an overbroad and unconstitutionally vague standard. These arguments are fully briefed by the Respondent. *See* Respondent's Brief at Section II.C.

twice before been rejected as justifying prohibitions on expression. *Street*, 394 U.S. at 593; *Spence*, 418 U.S. at 412-414. In addition, this interest is not shown to be threatened by acts of flag destruction. Were the interest so threatened, there exist means of serving it that surely are less restrictive of free expression than section 42.09.

The State's other claimed interest in preventing breaches of peace is no more availing. To the extent section 42.09's proscription of "offensive" flag destructions relates to any interest in preserving public order, this Court's decisions leave no doubt that flag desecrations do not fall into the few categories of speech that remain unprotected by the Constitution because of their potentially excitive impact upon others.

1. Texas' Interest in Protecting the Flag as a Symbol of Nationhood Cannot Justify Section 42.09's Abridgment of Expression.

Texas defends its flag-desecration statute principally on the ground that it serves a state interest in preserving the flag as a symbol of national unity. One dimension of that interest is a concern on the part of Texas to promote an attitude of veneration for the flag and for our country. *See* Section II.A.1.c., *supra*. Its second dimension is, as depicted by the State, a non-ideological one: that the flag as symbol, venerable or otherwise, remain undiluted in meaning lest it lose its *capacity* to signify nationhood. Petitioner's Brief at 29. Neither aspect of Texas' interest in preserving the flag as a symbol is so compelling as to justify the statute's bald abridgment of expression.

Street plainly addresses, and dispenses with, just such a claimed state interest in promoting "respect for our national symbol":

> We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' 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 (quoting *Barnette*, 319 U.S. at 641-42). *See also Spence*, 418 U.S. at 412-14. The government, of course, is as free as its citizens to foster, through its good actions and powers of expression, sentiments of national pride and unity. But the Constitution forbids the government from pursuing those legitimate ends by punishing its citizens for expressing disrespect for national symbols, just as it prohibits the state from forcing citizens "to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

To hold otherwise would truly invite a reorientation in the government's relationship to the citizenry. The "very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating . . . speech." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (*quoted in Riley v. Nat'l Federation of the Blind*, ____ U.S. ____, 108 S. Ct. 2667, 2674 (1988)). Through section 42.09, the government of Texas assumes that role as guardian of the public mind, seeking to insulate the flag as a venerated sign of national unity. However virtuous that aim, the Constitution forbids its invocation as a ground for suppressing expression.

Section 42.09 can no more be justified, however, by the second dimension of Texas' interest in the flag as national symbol. Here, Texas seeks to prevent the dilution of the flag's capacity to communicate the concept of nationhood, quite apart from whatever subsidiary attitudes citizens may have toward flag and nation.[17]

Texas has, however, failed to make any showing that the flag's status as a symbol communicating nationhood is impaired by acts of flag desecration. The State's almost "talis-

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17 One may doubt whether a state interest in preserving the clarity of symbols is one compelling enough ever to justify the direct infringement of expression. It may be that the interest Texas asserts is not simply in ensuring that the flag continues to function as a clear symbol of nationhood but, as well, that it function as nothing *other* or *more* than a symbol of the greatness of our country. If this be Texas' true interest, it is one that collides with the Constitution. If the guarantee of free expression means anything at all, surely it does not abide government control of the very meaning of the symbols that compose our vocabulary of communication. State action of just that sort is a feature of totalitarian government.

manic reliance on the mere assertion of" this, *Riley*, 108 S. Ct. at 2674, cannot substitute for a demonstration of the actual nexus between asserted harm and regulated act which this Court demands. *See, e.g., Village of Schaumburg*, 444 U.S. at 633-34.[18]

It seems more plausible that flag desecrations have the opposite effect, by reinforcing in the public mind the connection between the flag as a physical object and its symbolic status as a sign of our nation. On the assumption, however, that acts of flag desecration somehow do impair the capacity of the flag to symbolize nationhood, Texas has available to it means of reinforcing that symbolic function that do not impair rights afforded to its citizens by the First Amendment.

The State may counteract such public desecrations by speech and conduct of its own. Texas is free to promote the flag's symbolic function by flying it on public grounds, by encouraging its citizens to fly the flag at home, by schooling children in its history, and by setting apart a regular day for observance of its function. *Cf. Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (noting that New Hampshire may disseminate ideology of state pride "in any number of" non-abridging ways); *Linmark*, 431 U.S. at 97 (suggesting less speech-restrictive alternatives of

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18 The failure of Texas to establish that nexus is a product of the State's confusion of the *concept* of the United States flag (*i.e.*, a design composed of fifty stars and thirteen stripes upon a red, white and blue background) with discrete physical renderings of that concept. When we say the flag symbolizes nationhood, we recognize a long-standing association in the public mind between the design described above and our nation. But the symbolic equation of flag and country is not destroyed (or even threatened) by the destruction of an individual reproduction of that design.

The same fallacy is embedded in analogies too easily made between desecrations of national monuments, such as the Lincoln Memorial, and desecrations of "the flag". There are countless United States flags but only one Lincoln Memorial (serving as both "concept" and government-owned corporeal manifestation). A true analogy therefore is not to a law that proscribes defacement of the Lincoln Memorial itself but to one that proscribes the destruction of a Lincoln Memorial replica purchased on a Washington, D.C. sidewalk. Of course, destruction of such a replica no more impairs the meaning of the Lincoln Memorial than does the desecration of a particular cloth or paper rendering of the flag impair the link between our flag and our nationhood.

government-sponsored publicity and education). As Justice Brandeis wisely counseled in *Whitney v. California*, 274 U.S. 357, 377 (1920): "If there be time to . . . avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[19]

Texas has made no such emergency showing. Indeed, the State has adduced no evidence at all that the flag's capacity to symbolize nationhood to its citizens is endangered in the least or that acts of flag destruction pose such threat.[20] A statute that abridges expression cannot be upheld on such slender grounds.

2. Texas' Interest in Preventing Breaches of the Peace Does Not Justify Section 42.09's Wholesale Prohibition of "Offensive" Flag Destruction.

Texas' second stated concern is to staunch possible violent reactions of observers offended by acts of flag desecration. The State's chosen method of doing so is to prohibit not those vio-

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19 Texas' argument that Johnson could have conveyed his message by alternative means thus stands the required analysis on its head. This Court's decisions clearly teach that Texas, not Johnson, is obliged to pursue alternative, less restrictive means of pursuing its ends. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 541 n.10 ("we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."); *Spence v. Washington*, 418 U.S. at 411 n.4 ("summarily" rejecting argument that prohibition of symbolic flag alterations was permissible as "trifling" speech abridgment because "other means" could be used to express the same views).

20 Interestingly, the Reporter who in 1968 prepared the preliminary draft of the Texas law at issue recognized that the burning of a flag as a form of protest posed no emergency. As then proposed, the statute would have criminalized flag desecration only when performed on a "national flag *owned by another*." A.W. Alschuler, "Article 250—Offenses Against Public Order: A Preliminary Draft for the State Bar Committee on the Revision of the Texas Penal Code" (Draft 1) (July 9, 1968) (attached hereto as Appendix B) (emphasis added). As the Reporter explained in his Comment to the provision:

lent reactions but the offending expressive acts that allegedly give rise to them. There is no question that the prevention of breaches of peace is a legitimate state interest that may be promoted by a law properly drawn and applied. But, equally clear is that section 42.09(a)(3), as applied to accomplish that end, fails to satisfy long-settled constitutional standards.

Brandenberg v. Ohio, 395 U.S. 444, holds that unless an expressive act is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action," *id.* at 447, a state's interest in preventing a breach of peace cannot support punishment of expression. Under this standard, Johnson's prosecution for flagburning was unconstitutional.

> The draft is . . . less stringent than the [Model Penal Code] in that it does not punish the desecration of an object owned by the actor himself, even if the desecration occurs in public. The practice of mutilating American flags as a form of protest has recently attracted public and legislative attention . . . . [T]he reporter considers criminal punishment an inappropriate sanction for this obnoxious but essentially harmless behavior.
>
> Flag-burning may be offensive to a large segment of the population. So is shouting 'To Hell with America!' and 'Hooray for Mao Tse Tung!'—both of which are plainly protected activities. In the reporter's opinion, America has broad enough shoulders to endure this sort of insult. Ignoring insulting behavior may, in fact, be a more effective remedy than punishment, for an indignant response is probably what most flag-burners expect and desire. Restraint may be a sign of self-confidence, not of weakness. It may be the better part of patriotism.

The treatment of flag desecration in other nations is also worthy of note. Great Britain, Canada and Australia, countries with democratic traditions closest to our own, have no such statute. Neither does France (with the exception of Article 440 of the Code de Justice Militaire, applicable to members of the armed forces), Switzerland, Sweden or Holland. Japan (Article 92, Criminal Code) only penalizes desecration of *another* nation's emblem. Yet the flags of the above countries—including the Union Jack, the Tricolore and the Hinomaru (Rising Sun)—have histories as rich as does our own. On the other hand, West Germany (Article 90a, Penal Code) has carried forward that country's long tradition of prohibiting displays of disrespect for state symbols. The Soviet Union has such a prohibition as well. *See* H. Berman and J. Spindler, *Soviet Criminal Law and Procedure* 181 (2d ed. 1972) (Article 190-2 of RSFSR Criminal Code).

The State of Texas admits that no actual breach of the peace occurred at the time of Johnson's act or in response thereto. The Texas Court of Criminal Appeals held that the situation in which Johnson burned the flag was not even "potentially explosive." (Pet. App. at 13.) The only citizen response to the flagburning appears to have been that of Daniel Walker, who gathered the remains of the flag and buried them in his backyard. (R.III 273-274).

Texas seeks, however, to justify its conviction of Johnson based upon the *possible* tendency of his expressive act to provoke violent reaction. This Court's opinion in *Street v. New York*, 394 U.S. 576, disposes of that attempt. In *Street*, after recognizing the possibility that those witnessing disrespectful treatment of the flag "might [be] moved to retaliate," the Court rejected the contention that desecrations of flags are so "inherently inflammatory" as to be " 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.' " 394 U.S. at 592 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 574). *See also Tinker v. Des Moines Indep. School Dist.*, 393 U.S. at 508 ("Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). For the same reason, this Court must reject Texas' breach-of-peace justification as applied to Johnson. Texas quite simply has failed to demonstrate that Johnson's conduct amounted to "fighting words" likely to provoke retaliation.[21]

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21 Johnson's action did not constitute "fighting words" for another basic reason: his message was not directed "to any person or group in particular." *Hess v. Indiana*, 414 U.S. 105, 107 (1973). But even had Johnson's specific acts been targeted at a particular individual and been likely to inspire that person to retaliate, § 42.09 is on its face unconstitutional. For that statute in no way limits its proscription to only those acts of flag desecration having "a direct tendency to cause acts of violence," as did the statute before the Court in *Chaplinsky*. *See Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2510 (1987). Rather, the Texas statute criminalizes any act of flag desecration likely to cause one who observes (or even later discovers) the act to take "serious offense." As written by the Texas legislature and as construed by Texas' highest criminal court, § 42.09's sweep is therefore far too broad to be adjudged constitutional. *See* Respondent's Brief at Part II.C.2.

Indeed, the courts have regularly extended protection to far more provocative symbolic expression than that at issue here. Our Constitution demands this. In *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), the Court of Appeals for the Seventh Circuit invalidated, on First Amendment grounds, an ordinance passed in Skokie, Illinois, which would have prohibited the American Nazi Party from marching in a predominantly Jewish neighborhood inhabited by a substantial population of Holocaust survivors. Acknowledging that the Nazis' march might disturb many residents to the point of violence, the court nevertheless struck down the ordinance.

Similarly, several of this Court's early civil rights cases overturned convictions in which symbolic speech had been silenced on a breach-of-peace rationale. Though these cases involved protests of segregation in the bitterly divided, and often violent, South of that era, this Court was not persuaded that symbolic speech should fall prey to the mere possibility of violence, even where that possibility had been amply demonstrated by example. *See, e.g., Taylor v. Louisiana*, 370 U.S. 154 (1962) (per curiam) (sit-in in segregated bus depot); *Garner v. Louisiana*, 368 U.S. 157 (1961) (sit-in at segregated lunch counter). *See also Terminiello v. Chicago*, 337 U.S. 1 (race-baiting speech likely to attract an "angry and turbulent" crown enjoys First Amendment protection).

Given the Court's shielding of these types of highly inflammatory expression in the face of possibly violent, and historically proven, retaliation, there should be little doubt that Johnson's burning of the flag to express opposition to our government, while offensive to many, was nonetheless protected speech.[22]

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22 If Texas is truly concerned with preventing a breach of the peace during a political rally, our constitutional order requires greater protection against threatened disruption, and not simply the proscription of controversial expression. *See* Z. Chafee, *Free Speech in the United States* 245 (1948); T. Emerson, *The System of Free Expression* 341 (1970). Johnson's expressive conduct occurred during the course of a planned, controversial demonstration held pursuant to police permit. As in *Edwards v. South Carolina*, 372 U.S. 229, 232-33 (1963), the city had ample opportunity to arrange for police protection for the demonstrators and no facts suggest that the police presence was insufficient "to meet any foreseeable possibility of disorder."

CONCLUSION

For the reasons set forth above, the judgment of the Texas Court of Criminal Appeals should be affirmed.

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January 25, 1989

Respectfully submitted,

JAMES C. GOODALE
(Counsel of Record)
JONATHAN H. HINES
JAMES B. HENLY
MARK P. GOODMAN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Amici Curiae