Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

VIRGINIA *v.* BLACK ET AL.

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 01–1107. Argued December 11, 2002—Decided April 7, 2003

Respondents were convicted separately of violating a Virginia statute that makes it a felony "for any person . . . , with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place," and specifies that "[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group." When respondent Black objected on First Amendment grounds to his trial court's jury instruction that cross burning by itself is sufficient evidence from which the required "intent to intimidate" could be inferred, the prosecutor responded that the instruction was taken straight out of the Virginia Model Instructions. Respondent O'Mara pleaded guilty to charges of violating the statute, but reserved the right to challenge its constitutionality. At respondent Elliott's trial, the judge instructed the jury as to what the Commonwealth had to prove, but did not give an instruction on the meaning of the word "intimidate," nor on the statute's prima facie evidence provision. Consolidating all three cases, the Virginia Supreme Court held that the cross-burning statute is unconstitutional on its face; that it is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* v. *St. Paul,* 505 U. S. 377; that it discriminates on the basis of content and viewpoint since it selectively chooses only cross burning because of its distinctive message; and that the prima facie evidence provision renders the statute overbroad because the enhanced probability of prosecution under the statute chills the expression of protected speech.

Held: The judgment is affirmed in part, vacated in part, and remanded.

262 Va. 764, 553 S. E. 2d 738, affirmed in part, vacated in part, and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, and III, concluding that a State, consistent with the

First Amendment, may ban cross burning carried out with the intent to intimidate. Pp. 6–17.

(a) Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence, although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. To this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 771. While cross burning does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful. Pp. 6–11.

(b) The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e.g.*, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572. For example, the First Amendment permits a State to ban "true threats," *e.g., Watts* v. *United States,* 394 U. S. 705, 708 *(per curiam),* which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, see, *e.g., id.,* at 708. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R. A. V., supra,* at 388. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence. Pp. 11–14.

(c) The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of

intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. A ban on cross burning carried out with the intent to intimidate is fully consistent with this Court's holding in *R. A. V.* Contrary to the Virginia Supreme Court's ruling, *R. A. V.* did not hold that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists entirely of the very reason its entire class of speech is proscribable. 505 U. S., at 388. For example, it is permissible to prohibit only that obscenity that is most patently offensive in its prurience—*i.e.,* that which involves the most lascivious displays of sexual activity. *Ibid.* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.,* at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. Pp. 14–17.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER, concluded in Parts IV and V that the Virginia statute's prima facie evidence provision, as interpreted through the jury instruction given in respondent Black's case and as applied therein, is unconstitutional on its face. Because the instruction is the same as the Commonwealth's Model Jury Instruction, and because the Virginia Supreme Court had the opportunity to expressly disavow it, the instruction's construction of the prima facie provision is as binding on this Court as if its precise words had been written into the statute. *E.g., Terminiello* v. *Chicago,* 337 U. S. 1, 4. As construed by the instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. It permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. As so interpreted, it would create an unacceptable risk of the suppression of ideas. *E.g., Secre-*

tary of State of Md. v. *Joseph H. Munson Co.,* 467 U. S. 947, 965, n. 13. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. The prima facie evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut. Thus, Black's conviction cannot stand, and the judgment as to him is affirmed. Conversely, Elliott's jury did not receive any instruction on the prima facie provision, and the provision was not an issue in O'Mara's case because he pleaded guilty. The possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under the statute, is left open. Also left open is the theoretical possibility that, on remand, the Virginia Supreme Court could interpret the prima facie provision in a manner that would avoid the constitutional objections described above. Pp. 17–22.

JUSTICE SCALIA agreed that this Court should vacate and remand the judgment of the Virginia Supreme Court with respect to respondents Elliott and O'Mara so that that court can have an opportunity authoritatively to construe the cross-burning statute's prima-facie-evidence provision. Pp. 1, 12.

JUSTICE SOUTER, joined by JUSTICE KENNEDY and JUSTICE GINSBURG, concluded that the Virginia statute is unconstitutional and cannot be saved by any exception under *R. A. V.* v. *St. Paul,* 505 U. S. 377, and therefore concurred in the Court's judgment insofar as it affirms the invalidation of respondent Black's conviction. Pp. 1, 8.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, in which REHNQUIST, C. J., and STEVENS, SCALIA, and BREYER, JJ., joined, and an opinion with respect to Parts IV and V, in which REHNQUIST, C. J, and STEVENS and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which THOMAS, J., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion.