SUPREME COURT OF THE UNITED STATES

No. 01–1107

VIRGINIA, PETITIONER *v.* BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[April 7, 2003]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992), a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. Accordingly, I join Parts I–III of the Court's opinion. I also agree that we should vacate and remand the judgment of the Virginia Supreme Court so that that Court can have an opportunity authoritatively to construe the prima-facie-evidence provision of Va. Code Ann. §18.2–423 (1996). I write separately, however, to describe what I believe to be the correct interpretation of §18.2–423, and to explain why I believe there is no justification for the plurality's apparent decision to invalidate that provision on its face.

I

Section 18.2–423 provides that the burning of a cross in public view "shall be prima facie evidence of an intent to intimidate." In order to determine whether this component of the statute violates the Constitution, it is neces-

sary, first, to establish precisely what the presentation of prima facie evidence accomplishes.

Typically, "prima facie evidence" is defined as:

> "Such evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence." Black's Law Dictionary 1190 (6th ed. 1990).

The Virginia Supreme Court has, in prior cases, embraced this canonical understanding of the pivotal statutory language. *E.g., Babbitt* v. *Miller*, 192 Va. 372, 379–380, 64 S. E. 2d 718, 722 (1951) ("*Prima facie* evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted"). For example, in *Nance* v. *Commonwealth*, 203 Va. 428, 124 S. E. 2d 900 (1962), the Virginia Supreme Court interpreted a law of the Commonwealth that (1) prohibited the possession of certain "burglarious" tools "with intent to commit burglary, robbery, or larceny . . . ," and (2) provided that "[t]he possession of such burglarious tools . . . shall be prima facie evidence of an intent to commit burglary, robbery or larceny." Va. Code Ann. §18.1–87 (1960). The court explained that the prima-facie-evidence provision "cuts off no defense nor interposes any obstacle to a contest of the facts, and 'relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence.'" *Nance* v. *Commonwealth*, 203 Va., at 432, 124 S. E. 2d, at 903–904; see also *ibid.*, 124 S. E. 2d, at 904 (noting that the prima-facie-evidence provision "'is merely a rule of evidence and not the determination of a fact . . .'").

The established meaning in Virginia, then, of the term "prima facie evidence" appears to be perfectly orthodox: It

is evidence that suffices, on its own, to establish a particular fact. But it is hornbook law that this is true only to the extent that the evidence goes unrebutted. "Prima facie evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and, *if not rebutted*, remains sufficient for the purpose." 7B Michie's Jurisprudence of Virginia and West Virginia §32 (1998) (emphasis added).

To be sure, Virginia is entirely free, if it wishes, to discard the canonical understanding of the term "prima facie evidence." Its courts are also permitted to interpret the phrase in different ways for purposes of different statutes. In this case, however, the Virginia Supreme Court has done nothing of the sort. To the extent that tribunal has spoken to the question of what "prima facie evidence" means for purposes of §18.2–423, it has not deviated a whit from its prior practice and from the ordinary legal meaning of these words. Rather, its opinion explained that under §18.2–423, "the act of burning a cross alone, with no evidence of intent to intimidate, will . . . suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va. 764, 778, 553 S. E. 2d 738, 746 (2001). Put otherwise, where the Commonwealth has demonstrated through its case in chief that the defendant burned a cross in public view, this is sufficient, at least until the defendant has come forward with rebuttal evidence, to create a jury issue with respect to the intent element of the offense.

It is important to note that the Virginia Supreme Court did not suggest (as did the trial court's jury instructions in respondent Black's case, see n. 5, *infra*) that a jury may, in light of the prima-facie-evidence provision, ignore any rebuttal evidence that has been presented and, solely on the basis of a showing that the defendant burned a cross, find that he intended to intimidate. Nor, crucially, did

that court say that the presentation of prima facie evidence is always sufficient to get a case to a jury, *i.e.*, that a court may never direct a verdict for a defendant who has been shown to have burned a cross in public view, even if, by the end of trial, the defendant has presented rebuttal evidence. Instead, according to the Virginia Supreme Court, the effect of the prima-facie-evidence provision is far more limited. It suffices to "insulate the Commonwealth from a motion to strike the evidence *at the end of its case-in-chief*," but it does nothing more. 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added). That is, presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal.

II

The question presented, then, is whether, given this understanding of the term "prima facie evidence," the cross-burning statute is constitutional. The Virginia Supreme Court answered that question in the negative. It stated that "§18.2–423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech." *Ibid.* "The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad." *Id.*, at 777, 553 S. E. 2d, at 746.

This approach toward overbreadth analysis is unprecedented. We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is, we have inquired whether individuals who engage in pro-

tected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution. *E.g., Houston* v. *Hill,* 482 U. S. 451, 459 (1987) (a statute "that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid" (emphasis added)); *Grayned* v. *City of Rockford,* 408 U. S. 104, 114 (1972) (a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct" (emphasis added)); *R. A. V.* v. *St. Paul,* 505 U. S., at 397 (White, J., concurring in judgment) (deeming the ordinance at issue "fatally overbroad because it *criminalizes* . . . expression protected by the First Amendment" (emphasis added)).

Unwilling to embrace the Virginia Supreme Court's novel mode of overbreadth analysis, today's opinion properly focuses on the question of who may be convicted, rather than who may be arrested and prosecuted, under §18.2–423. Thus, it notes that "[t]he prima facie evidence provision permits a jury *to convict* in every cross-burning case in which defendants exercise their constitutional right not to put on a defense."[1] *Ante*, at 19 (emphasis added). In such cases, the plurality explains, "[t]he provision permits the Commonwealth to arrest, prosecute, *and convict* a person based solely on the fact of cross burning itself." *Ibid.* (emphasis added). And this, according to the plurality, is constitutionally problematic because "a burning cross is not always intended to intimidate," and

---

[1] The plurality also asserts that "even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *Ante*, at 19. There is no basis for this assertion. The Virginia Supreme Court's opinion in *Nance* v. *Commonwealth*, 203 Va. 428, 432, 124 S. E. 2d 900, 903–904 (1962), states, in no uncertain terms, that the presentation of a prima facie case "'relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of *the whole evidence*.'" (Emphasis added.)

nonintimidating cross burning cannot be prohibited. *Ante*, at 20. In particular, the opinion notes that cross burning may serve as "a statement of ideology" or "a symbol of group solidarity" at Ku Klux Klan rituals, and may even serve artistic purposes as in the case of the film Mississippi Burning. *Ibid*.

The plurality is correct in all of this—and it means that some individuals who engage in protected speech may, because of the prima-facie-evidence provision, be subject to conviction. Such convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis. The plurality, however, with little in the way of explanation, leaps to the conclusion that the *possibility* of such convictions justifies facial invalidation of the statute.

In deeming §18.2–423 facially invalid, the plurality presumably means to rely on some species of overbreadth doctrine.[2] But it must be a rare species indeed. We have noted that "[i]n a facial challenge to the overbreadth and

---

[2] Overbreadth was, of course, the framework of analysis employed by the Virginia Supreme Court. See 262 Va. 764, 777–778, 553 S. E. 2d 738, 745–746 (2001) (examining the prima-facie-evidence provision in a section labeled "OVERBREADTH ANALYSIS" and holding that the provision "is overbroad"). Likewise, in their submissions to this Court, the parties' analyses of the prima-facie-evidence provision focus on the question of overbreadth. Brief for Petitioner 41–50 (confining its discussion of the prima-facie-evidence provision to a section titled "THE VIRGINIA STATUTE IS NOT OVERBROAD"); Brief for Respondents 39–41 (arguing that "[t]he prima facie evidence provision . . . render[s] [the statute] overbroad"); Reply Brief for Petitioner 13–20 (dividing its discussion of the prima-facie-evidence provision into sections titled "There Is No Real Overbreadth" and "There Is No Substantial Overbreadth"). This reliance on overbreadth doctrine is understandable. This Court has made clear that to succeed in a facial challenge *without* relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno,* 481 U. S. 739, 745 (1987). As the Court's opinion concedes, some of the speech covered by §18.2–423 can constitutionally be proscribed, *ante*, at 17.

vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U. S. 489, 494 (1982). If one looks only to the core provision of §18.2–423—"[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross . . ."—it appears *not* to capture any protected conduct; that language is limited in its reach to conduct which a State is, under the Court's holding, *ante*, at 17, allowed to prohibit. In order to identify *any* protected conduct that is affected by Virginia's cross-burning law, the plurality is compelled to focus not on the statute's core prohibition, but on the prima-facie-evidence provision, and hence on *the process* through which the prohibited conduct may be found by a jury.[3] And even in that context, the plurality cannot claim that improper convictions will result from the operation of the prima-facie-evidence provision *alone*. As the plurality concedes, the only persons who might impermissibly be convicted by reason of that provision are those who adopt a particular trial strategy, to wit, abstaining from the presentation of a defense.

The plurality is thus left with a strikingly attenuated argument to support the claim that Virginia's cross-burning statute is facially invalid. The class of persons that the plurality contemplates could impermissibly be convicted under §18.2–423 includes only those individuals

---

[3] Unquestionably, the process through which elements of a criminal offense are established in a jury trial may raise serious constitutional concerns. Typically, however, such concerns sound in due process, not First Amendment overbreadth. *E.g., County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 156–157 (1979); *Barnes* v. *United States,* 412 U. S. 837, 838 (1973); *In re Winship,* 397 U. S. 358, 359 (1970). Respondents in this case have not challenged §18.2–423 under the Due Process Clause, and neither the plurality nor the Virginia Supreme Court relies on due process in declaring the statute invalid.

who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense. *Ante*, at 19 ("The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense").

Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment overbreadth doctrine. For this Court has emphasized repeatedly that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Osborne* v. *Ohio,* 495 U. S. 103, 112 (1990) (internal quotation marks omitted; emphasis added). See also *Houston* v. *Hill,* 482 U. S., at 458 ("Only a statute that is substantially overbroad may be invalidated on its face"); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"); *New York* v. *Ferber,* 458 U. S. 747, 771 (1982) ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications . . ."). The notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute *substantially* overbroad is fanciful. The potential improper convictions of which the plurality complains are more appropriately classified as the sort of "marginal applications" of a statute in light of which "facial invalidation is inappropriate." *Parker* v.

Levy, 417 U. S. 733, 760 (1974).[4]

Perhaps more alarming, the plurality concedes, *ante*, at 18, 20, that its understanding of the prima-facie-evidence provision is premised on the jury instructions given in

---

[4] Confronted with the incontrovertible fact that this statute easily passes overbreadth analysis, the plurality is driven to the truly startling assertion that a statute which is not invalid in all of its applications may nevertheless be facially invalidated *even if it is not overbroad*. The *only expression* of that proposition that the plurality can find in our jurisprudence appears in footnote dictum in the 5-4 opinion in *Secretary of State of Md.* v. *Joseph H. Munson Co.,* 467 U. S. 947, 965–966, n. 13 (1984). See *id.*, at 975 (REHNQUIST, J., joined by Burger, C. J., and Powell, and O'CONNOR, JJ., dissenting). *Stare decisis* cannot explain the newfound affection for this errant doctrine (even if *stare decisis* applied to dictum), because the holding of a *later* opinion (joined by six Justices) flatly repudiated it. See *United States* v. *Salerno,* 481 U. S. 739, 745 (1987) (REHNQUIST, C. J., joined by White, Blackmun, Powell, O'CONNOR, and SCALIA, JJ.) (to succeed in a facial challenge without relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid").

Even if I were willing, as the plurality apparently is, to ignore our repudiation of the *Munson* dictum, that case provides no foundation whatever for facially invalidating a statute under the conditions presented here. Our willingness facially to invalidate the statute in *Munson* without reliance on First Amendment overbreadth was premised on our conclusion that the challenged provision was invalid *in all of its applications.* We explained that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Munson*, 467 U. S., at 965–966. And we stated that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.*, at 966. Unless the plurality is prepared to abandon a contention that it takes great pains to establish—that "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence," *ante*, at 14—it is difficult to see how *Munson* has any bearing on the constitutionality of the prima-facie-evidence provision.

respondent Black's case. This would all be well and good were it not for the fact that the plurality *facially invalidates* §18.2–423. *Ante*, at 21 ("[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face"). I am aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction.[5] And it is altogether unsurprising that there is no precedent for such a holding. For where state law is ambiguous, treating jury instructions as binding interpretations would cede an enormous measure of power over state law to trial judges. A single judge's idiosyncratic reading of a state statute could trigger its invalidation. In this case, the troubling instruction—"The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent," App. 196—was taken verbatim

---

[5]The plurality's reliance on *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), is mistaken. In that case the Court deemed only the jury instruction, rather than the ordinance under review, to be constitutionally infirm. To be sure, it held that such a jury instruction could *never* support a constitutionally valid conviction, but that is quite different from holding the *ordinance* to be facially invalid. Insofar as the ordinance was concerned, *Terminiello* made repeated references to the as-applied nature of the challenge. *Id.*, at 3 (noting that the defendant "maintained at all times that the ordinance *as applied to his conduct* violated his right of free speech . . . " (emphasis added)); *id.,* at 5 (noting that *"[a]s construed and applied* [the provision] at least contains parts that are unconstitutional" (emphasis added)); *id.*, at 6 ("The pinch of the statute is in *its application*" (emphasis added)); *ibid.* ("The record makes clear that petitioner at all times challenged the constitutionality of the ordinance *as construed and applied to him*" (emphasis added)). See also Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 433, n. 333 (characterizing *Terminiello* as "adopting a court's jury instruction as an authoritative narrowing construction of a breach of the peace ordinance but ultimately confining its decision to overturning the defendant's conviction rather than invalidating the statute on its face").

from Virginia's Model Jury Instructions. But these Model Instructions have been neither promulgated by the legislature nor formally adopted by the Virginia Supreme Court. And it is hornbook law, in Virginia as elsewhere, that "[p]roffered instructions which do not correctly state the law . . . are erroneous and should be refused." 10A Michie's Jurisprudence of Virginia and West Virginia, Instructions §15, p. 35 (Supp. 2000).

The plurality's willingness to treat this jury instruction as binding (and to strike down §18.2–423 on that basis) would be shocking enough had the Virginia Supreme Court offered no guidance as to the proper construction of the prima-facie-evidence provision. For ordinarily we would decline to pass upon the constitutionality of an ambiguous state statute until that State's highest court had provided a binding construction. *E.g.*, *Arizonans for Official English* v. *Arizona,* 520 U. S. 43, 78 (1997). If there is any exception to that rule, it is the case where one of two possible interpretations of the state statute would clearly render it unconstitutional, and the other would not. In that situation, applying the maxim "*ut res magis valeat quam pereat*" we would do *precisely the opposite* of what the plurality does here—that is, we would adopt the alternative reading that renders the statute constitutional rather than unconstitutional. The plurality's analysis is all the more remarkable given the dissonance between the interpretation of §18.2–423 implicit in the jury instruction and the one suggested by the Virginia Supreme Court. That court's opinion did not state that, once proof of public cross burning is presented, a jury is permitted to infer an intent to intimidate *solely* on this basis and regardless of whether a defendant has offered evidence to rebut any such inference. To the contrary, in keeping with the black-letter understanding of "prima facie evidence," the Virginia Supreme Court explained that such evidence suffices only to "insulate the Commonwealth from a mo-

tion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The court did not so much as hint that a jury is permitted, under §18.2–423, to ignore rebuttal evidence and infer an intent to intimidate strictly on the basis of the prosecution's prima facie case. And unless and until the Supreme Court of Virginia tells us that the prima-facie-evidence provision permits a jury to infer intent under such conditions, this Court is entirely unjustified in facially invalidating §18.2–423 on this basis.

As its concluding performance, in an apparent effort to paper over its unprecedented decision facially to invalidate a statute in light of an errant jury instruction, the plurality states:

> "We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. . . . We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility." *Ante*, at 21.

Now this is truly baffling. Having declared, in the immediately preceding sentence, that §18.2–423 is "unconstitutional *on its face*," *ibid.* (emphasis added), the plurality holds out the possibility that the Virginia Supreme Court will offer some saving construction of the statute. It should go without saying that if a saving construction of §18.2–423 is possible, then facial invalidation is inappropriate. *E.g.*, *Harrison* v. *NAACP,* 360 U. S. 167, 176 (1959) ("[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them"). So, what appears to have happened is that the plurality has facially invalidated not

§18.2–423, but its own hypothetical interpretation of §18.2–423, and has then remanded to the Virginia Supreme Court to learn the *actual* interpretation of §18.2–423. Words cannot express my wonderment at this virtuoso performance.

III

As the analysis in Part I, *supra*, demonstrates, I believe the prima-facie-evidence provision in Virginia's cross-burning statute is constitutionally unproblematic. Nevertheless, because the Virginia Supreme Court has not yet offered an authoritative construction of §18.2–423, I concur in the Court's decision to vacate and remand the judgment with respect to respondents Elliott and O'Mara. I also agree that respondent Black's conviction cannot stand. As noted above, the jury in Black's case was instructed that "[t]he burning of a cross, *by itself*, is sufficient evidence from which you may infer the required intent." App. 196 (emphasis added). Where this instruction has been given, it is impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross.[6] Still, I cannot go along with the Court's decision to affirm the judgment with respect to Black. In that judgment, the Virginia Supreme Court, having erroneously concluded that §18.2–423 is overbroad,

[6] Though the jury may well have embraced the former (constitutionally permissible) understanding of its duties, that possibility is not enough to dissipate the cloud of constitutional doubt. See *Sandstrom* v. *Montana,* 442 U. S. 510, 517 (1979) (refusing to assume that the jury embraced a constitutionally sound understanding of an ambiguous instruction: "[W]e cannot discount the possibility that the jury may have interpreted the instruction [improperly]").

not only vacated Black's conviction, but dismissed the indictment against him as well. 262 Va., at 779, 553 S. E. 2d, at 746. Because I believe the constitutional defect in Black's conviction is rooted in a jury instruction and not in the statute itself, I would not dismiss the indictment and would permit the Commonwealth to retry Black if it wishes to do so. It is an interesting question whether the plurality's willingness to let the Virginia Supreme Court resolve the plurality's make-believe facial invalidation of the statute extends as well to the facial invalidation insofar as it supports dismissal of the indictment against Black. Logically, there is no reason why it would not.