In the United States District Court
Southern District of Iowa
(Western Division)

Margie J. Phelps, Elizabeth M. Phelps, and Timothy B. Phelps, Petitioners *vs.* Red Oak Police Chief Drue Powers; Montgomery County Sheriff Joe Sampson, and Council Bluffs Police Chief, Ralph O'Donnell, Respondents and State of Iowa, *ex rel.* the Iowa Attorney General, Intervenor	Docket No. 1-13-CV-00011

Petitioners' Brief
Motion for Summary Judgment
(F. R. Civ. Pro. 56)

C O N T E N T S

I. Statement of the Case

The Petitioners in this case are members of the Westboro Baptist Church of Topeka Kansas. In accordance with their profound religious convictions they actively spread God's message through public demonstrations and picketing throughout the country including Iowa. As witnesses for God, they expose the United States Flag as an idolatrous symbol undeserving of any special reverence, respect or treatment. The Petitioners and other members of their church often publicly display contempt and lack of reverence for the flag in their public demonstrations by mishandling the flag, dragging it on the ground, wearing it on their bodies and engaging in other perceivable transgressions of the U.S. Flag code[1] and the Iowa flag desecration and misuse statutes ["*flag statutes*"].[2] Consistently with their beliefs, the Petitioners take no special care in the handling of their flags for purposes of showing respect even when not actively engaged in expression. The U.S. flag code is merely precatory[3], but the Iowa flag statutes impose real criminal penalties including the possibility of arrest and confinement and for violators. Both Iowa statutes were declared unconstitutionally void for vagueness by this court in a previous

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[1] Title 4 U.S.C.A. § 3 *et seq.*

[2] Iowa Code, Chapter 718A (including § 718A.1, "flag desecration") and Iowa Code § 723.4(6) ("flag misuse") [hereinafter: "*flag desecration and misuse statutes*"]

[3] "Government may create national symbols, promote them, and encourage their respectful treatment.[9] …[9] See, e.g., 36 U.S.C. §§ 173-177 (**suggesting** manner in which flag **ought to be** displayed)." United States v. Eichman, 496 U.S. 310, 318 (1990) {emphasis added}

"The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations …" 4 U.S.C.A. § 5 (West)

case. Roe v. Milligan, 479 F. Supp. 2d 995, 1010 (S.D. Iowa 2007). Shortly after the decision in *Roe,* both statutes were amended in an apparent attempt to remedy their vagueness.[4] A new section, added to the "flag desecration" statute as Iowa Code 718A.1, defines "contempt" as "intentional lack of respect or reverence by treating in a rough manner." In the "flag misuse" statute, the Iowa legislature narrowed the definition of "disrespect" to instances of defacement, defilement, mutilation or trampling of the flag.

Notwithstanding, the amendments to Iowa's flag statutes, the Petitioners have continued to demonstrate, protest and picket in the State of Iowa. In many of these events, the Petitioners and their co-demonstrators have sought or attempted to use and handle their own U.S. flags without the respect or reverence required by Iowa's flag desecration and abuse statutes. On multiple occasions, the Petitioners have been prevented and limited in their handling and expressive use of flags under threatened enforcement of the Iowa flag statutes. The Respondents in this case have overall supervisory authority over law enforcement departments and personnel that have threatened or indicated that they would enforce Iowa's flag desecration and abuse statutes in the course of one or more of the Petitioner's protests. The Petitioners have a well founded fear of prosecution under Iowa's flag desecration and misuse statutes, based on their experiences in Iowa and similar jurisdictions.

[4] VETERANS—VETERANS ORGANIZATIONS—UNITED STATES FLAG, 2007 Ia. Legis. Serv. Ch. 202 (WEST) (H.F. 817) §§ 13–14

II. Statement of the Proceedings

The Petitioners filed this action seeking only injunctive and declaratory relief against the Respondents in their capacities as the administrators of their respective law enforcement departments and as representatives of a proposed class consisting of all active duty county sheriffs and municipal police chiefs in the State of Iowa. The State of Iowa *ex rel* the Iowa Attorney General, was allowed to intervene as a party in defense of the constitutionality of the amended statutes. All motions for class certification were denied by the Court on the premise that any ruling by the Court concerning the constitutionality of the revised statutes would be uniformly accepted and adhered to by law enforcement officials across the State of Iowa. [docket # 60] Thus, although this Court could change its mind, this action has essentially become a request for declaratory relief concerning the constitutionality of the amended statutes.

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III. ARGUMENT

A. Due Process

Iowa's flag statutes are still unconstitutionally vague. A legislature cannot salvage a statute that has been declared unconstitutional by making meaningless, ineffective or insignificant changes. Yet, all the Iowa General Assembly did in response to this court's decision in *Roe* amounted to half measures incognizant of other constitutional authority. In *Roe, Iowa's* flag desecration and misuse statutes were compared to the statute declared void for vagueness in *Smith v. Goguen*, 415 U.S. 566, 572, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) [*Goguen* II]. As in *Goguen II*, both of the Iowa statutes failed for vagueness because they utilized almost identical subjective terminology to define illegal conduct and what constitutes a "flag."

1. Flag Desecration Statute (Iowa Code 718A.1A)

The statute examined in *Goguen* II punished a person who "treats [*a flag*] contemptuously." At the time of the *Roe* decision, Section 718A.1 punished "casting contempt upon" a protected flag. Seeing no functional or even linguistic distinctions between the two statutes, this court followed *Goguen II's* holding I that, ""… the phrase 'treats contemptuously' was void-for-vagueness because '…what is contemptuous to one man may be a work of art to another.' 415 U.S. at 573…" *Roe*, 479 F. Supp. 2d at 1010. This court also held the definition of "flag" "suffers from the same problem." *Roe*, 1011.

Iowa Code Section 718A.1A (having been renumbered by the amendments[5]) remains unchanged but a new definitional section, 718A.1, was enacted shortly after the *Roe* decision in an apparent effort to cure the constitutional deficiencies of vagueness identified by the Court in *Roe*. Note that the Iowa General assembly avoided the simple expedient of deleting the phrase "cast contempt upon." So, the statute's stated purpose still is to punish those who engage in incitement, derision or other expressive conduct of a similar ilk in reference to our national symbol. However, Section 718A.1 now defines "contempt" as "intentional lack of respect or reverence by treating in a rough manner."

This amendment has not made any real difference. Treatment of a flag in a "rough manner" is an equally indecipherable physical standard. What constitutes "rough treatment"? The perception of this threshold into criminality is very subjective and will vary greatly from one individual to the next—often in proportion to their own personal aesthetics, customs, mannerisms and reverence for the flag. At the same time, a new constitutional problem is created by the amendments, because not all "manner" of rough treatment is prohibited. Only rough treatment intended to convey a message of "lack of respect or reverence" is punishable. Yet, expressive abuse of the flag is the very sort of use that cannot be proscribed by a flag protection statute under the First Amendment. *See* Texas v. Johnson, 491 U.S. 397,*421, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

[5] Following the enactment of a new Section 718A.1 adding definitions, this Section (formerly codified as Section 718A.1 was re-numbered as Section 718A.1A.

Compared to the vague term it seeks to clarify, "*contempt*," "lack of respect or reverence" is just as vague. Incredibly, in *Roe*, this Court, itself, explicitly held that "disrespect" was an unconstitutionally vague term and yet the legislature chose to use it to cure the term "contempt" of its vagueness. One cannot successfully clarify a vague, subjective term by simply equating it with another term already legally judged to be just as vague and nebulous. At what level does "lack of respect or reverence" become criminally culpable. This Court previously highlighted the difficulty in *Roe:*

> "The Supreme Court noted that 'casual treatment of the flag in many contexts has become a widespread contemporary phenomenon[,]' and aptly summarized:
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> > Flag wearing in a day of relaxed clothing styles may be simply for adornment or a ploy to attract attention. It and many other current, careless uses of the flag nevertheless constitute unceremonial treatment that many people may view as contemptuous. Yet in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag. That statutory language under which [the defendant] was charged, however, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not. Due process requires that 'all be informed as to what the State commands or forbids,' *Lanzetta v. New Jersey,* 306 U.S. 451…(1939), and that 'men of common intelligence' not be forced to guess at the meaning of the criminal law.

Roe, 479 F. Supp. 2d at 1010–11.

2. Flag Misuse Statute

Iowa Code Section 723.4 "Disorderly Conduct," sub. 6 [the "*flag misuse statute"*] only punishes those actions when they happen in reference to the flag "**as a symbol**" *i.e.*, as expression. As such, the section may be subjected to First Amendment scrutiny. See, *Johnson*, analyzing a flag desecration statute as a pure regulation of expression[6] and *Eichman* subjecting the Flag Protection Act to strict scrutiny.[7]

In *Roe,* however, this court focused on the equally dispositive vagueness of the statute under principles of due process (*Goguen II*) and it held it to be unconstitutional:

> …[*T*]he phrase "show disrespect" in the flag misuse statute is void-for-vagueness. The term "disrespect" is defined as "lack of respect or reverence." Webster's Third New International Dictionary 656 (1965). …Thus, similar to the discussion above on the term "contempt," the term "disrespect" is subjective and subject to widely varying attitudes and tastes. *See Goguen II,* 415 U.S. at 573–74, 94 S.Ct. 1242.

Roe v. Milligan, 479 F. Supp. 2d 995,*1011 (S.D. Iowa 2007)

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[6] "…we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. … The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol…. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression."

Texas v. Johnson, 491 U.S. 397, 407, 109 S. Ct. 2533, 2541, 105 L. Ed. 2d 342 (1989)

[7] "The Act therefore must be subjected to "the most exacting scrutiny," *Boos, ...*, and for the reasons stated in *Johnson,* … the Government's interest cannot justify its infringement on First Amendment rights.

United States v. Eichman, 496 U.S. 310, 318, 110 S. Ct. 2404, 2409, 110 L. Ed. 2d 287 (1990)

In response the legislature inserted a behavioral definition for "show disrespect," but these changes only served to make the Iowa statute more identical to the national "Flag Protection Act" that was ruled unconstitutional by the U.S. Supreme Court in *Eichman* (496 U.S. at 317). As this court noted in *Roe* at p. 1011:

> The Supreme Court has stated that terms such as mutilate, deface, defile, and trample all connote disrespect." *Roe* at 1011, *quoting Eichman,* 496 U.S. at 317{"criminalizing the conduct of anyone who 'knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag' ... [where] [e]ach of the specified terms—with the possible exception of 'burns'—unmistakably connotes disrespectful treatment of the flag

Apparently, the fatal result in *Eichman*, failed to affect the Iowa General Assembly, for it used identical language in its attempt to cure the unconstitutional vagueness of "show disrespect," *viz*: "to deface, defile, mutilate, or trample." This created an interesting statutory construct. The legislature could have simply dispensed with the words "show disrespect" once it had redefined that word in terms of certain physical actions but it kept them. Iowa courts attempt to provide significance to all words in a statute[8], and the significance of non-deletion here is not hard to miss: The legislature did really not want to lose the statute's focus upon outlawing "disrespect" for the flag.

[8] We look to the specific words of the statute when we attempt to construe a provision and we give each word effect. *See* 2A N. Singer, *Sutherland Statutory Construction* § 46.06, at 104 … The legislature could have deleted the words "a period of" and intended the result urged by ISEA. "A period of" is included in the statutory language, however, and must be given meaning. Iowa Ass'n of Sch. Bds. v. Iowa Pub. Employ. Relations Bd., 400 N.W.2d at 574-75 (Iowa 1987)

Nonetheless, the Iowa General Assembly at least displayed some intellectual integrity. In *Eichman*, Congress tried to conceal its desire to regulate expressive use of the flag behind the same behavioral proscriptions, but the U.S. Supreme Court saw the Flag Protection Act for what it was—an attempt to reverse the decision in *Johnson*, and outlaw disrespectful symbolic use of the flag. Despite its explicit honesty, the Iowa statute even more clearly meets the objection that its purpose is to proscribe constitutionally protected speech than the coyly drafted "Flag Protection Act.

The Iowa legislature also failed to cure the other problems of vagueness identified in *Roe*. For example this court noted that:

> …the imposition of the intent element in the flag misuse statute, 'with the intent or reasonable expectation that such use will provoke or encourage another to commit a public offense,' adds another level of uncertainty and vagueness.

Roe at 1011. The legislature sought to address this by replacing the words "public offense" with "a public offense, **trespass or assault**," but adding seemingly redundant offenses did not address this court's true concern over the unpredictability of human behavior. In *Roe* at 1011, the opinion goes on to state:

> … a person of reasonable intelligence must not only guess as to what conduct would constitute 'disrespect,' but also guess as to what conduct would also 'provoke or encourage another to commit a public offense.' * * * The flag misuse statute, as written, 'could authorize conviction simply because the form of the protest displeased some of the onlookers,' sufficient to provoke or encourage … a public offense.

First Amendment law supplies the unstated objection to this consequence:

An entire parade of U.S. Supreme Court decisions, spanning decades, prohibit speakers from being punished for the unlawful actions or feared reactions of onlookers.

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, … is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger ….

Terminiello v. City of Chicago, 337 U.S. 1,*4, 69 S. Ct.894,*896, 93 L. Ed. 1131 (1949)

> [*T*]he ordinance goes on to state that it shall be a crime for persons to 'collect in bodies or crowds … for any purpose, to the annoyance or disturbance of other persons * * *.' Such language could authorize conviction simply because the form of the protest displeased some of the onlookers, and of course a conviction on that ground would encroach on First Amendment rights. See Thornhill v. Alabama, …; Edwards v. South Carolina, …; Cox v. Louisiana, 379 U.S. 536, …(1965)."

Gregory v. City of Chicago, 394 U.S. 111,*119, 89 S. Ct. 946,*95 (1969)

> The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction… or even stirs people to anger." *Terminiello* …. See also *Cox v. Louisiana,* 379 U.S. 536, (1965); *Tinker v. Des Moines Ind. Comm. School Dist.* 393 U.S., at 508–509, 89 S.Ct., at 737–38; *Coates v. Cincinnati,* 402 U.S. 611 (1971); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988)

Johnson at 408-09. {*full cites in quotes above are omitted*}.

In *Roe*, this court also found that the term "flag" as used in Iowa's flag desecration and abuse statutes was unconstitutionally vague.

> "The term 'flag,' likewise, suffers from the same problem. In *Parker v. Morgan,* 322 F.Supp. 585, 588 (W.D.N.C.1971), the district court stated that 'for a flag control statute to be constitutional it must precisely define a flag and carefully avoid expropriation of color and form other than the defined emblem itself.' The definition of 'flag' in *Parker* is practically identical to Iowa's definition of 'flag.' * * *
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> The Court finds the reasoning of *Parker* to be persuasive. Again, as with the terms, 'contempt' and 'disrespect' discussed above, the term 'flag' is subjective, at least as it is defined in the statutes here at issue. What one person may view as a flag, another may view as red, white and blue trousers."

Roe at 1011–12.

Again, the Iowa legislature enacted no cure for this fatal defect. First, the amendments to Iowa's flag desecration statute (Chapter 718A) entirely ignore this problem—no curing definition of "flag was added. "Flag" under Iowa Code §718A. 1A is still described in sweeping terms that seek to punish use of even alterations of flags,[9] and would be broad enough to mete out punishment for the Petitioners' handling of alternative U.S. flags such as their "homosexual flag with a rainbow stripes superimposed on the U.S. flag in place of the familiar red and white." {See *Phelps Affidavit, ¶5*}

[9] "Any person who in any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, ensign, shield, or other insignia of the United States, or upon any flag, ensign, great seal, or other insignia of this state,…" Iowa Code § 718A.1A

The amendments to the flag misuse statute, by contrast, attempted a cure by defining "flag" as "a piece of woven cloth or other material," (*i.e.*, anything physical) "designed to be flown from a pole or a mast." However the limits of this definition are still substantially prone to disagreements among persons of ordinary intelligence and understanding. Must a flag must have eyelets or other means of attachment? Must it be weather resistant? What is the minimum size of a pole or mast; are hand held flags included), *etc*.—does the "designed to be flown" requirement depend on the manufacturer's intended use?

Moreover, since the statute refers not to the current "official" flag emblem of the United States, or a flag owned by the United States, but instead, to any flag whatsoever when it is "used" "as a symbol of the United States," an impermissible subjective test enters into the picture. A court must now make a generally prohibited "content-based" inquiry[10] as to the message being conveyed in order to determine whether it is a "flag" use prohibited by the statute. For example, if a person altered or mutilated part of a flag in order to display it upside down, would that be displaying it "as a symbol of the United States," or only as a symbol of distress or protest.

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[10] "Content-based regulations are presumptively invalid. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991) *id.,* at 124, 112 S.Ct., at 512–513 (KENNEDY, J., concurring in judgment); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 536, 100 S.Ct. 2326, 2332–2333, 65 L.Ed.2d 319 (1980); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2289–2290, 33 L.Ed.2d 212 (1972)."
R.A.V. v. City of St. Paul, Minn., 505 U.S. 377,*382, 112 S. Ct. 2538,*2542 (1992)

B. Freedom of Conscience & Religion

1. Forced Expression (*Barnette*)

In *West Virginia v. Barnette,* the U.S. Supreme Court confronted a statutorily supported state school board resolution that required all students to regularly "salute" the U.S. Flag under penalty of total expulsion from school until compliance was obtained. The high court had no difficulty in concluding that such enforced patriotism amounted to a direct violation of the First Amendment. The fact that the salute was purely **symbolic** speech did not deprive students of their expressive freedom.

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624,*632, 63 S. Ct.1178,*1182 (1943)

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. …
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word **or act** their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id., 319 U.S. at 624{*emphasis added*}. Both statutes under attack in this action are a direct violation of the protections enunciated with such unequivocal force in *Barnette*.

a. Chapter 718A "Flag Desecration"

By its own express terms, Iowa's flag Desecration statute is a pure regulation of expression. The opening words of section 718A.1A are: "Any person who in any manner, **for exhibition or display,** shall [*alter a flag*]…." Next it moves on to any person "who shall **expose to public view**…[*or possess or sell*]… any such flag…or… **representation** of any such flag to… **advertise, call attention to, decorate, mark, or distinguish** [*an article upon which the flag is placed*]. It concludes with the clause that concerns us most: "or who **shall publicly** mutilate, deface, defile or defy, trample upon, **cast contempt upon**, **satirize**, **deride** or **burlesque**, either by words or act such flag, …"

Adopted almost verbatim from a precursor to the Uniform Flag law,[11] this is a 337 word sentence containing a daunting litany of proscriptions, all prohibiting expression and actions with expressive significance when done in exclusively expressive contexts

[11] The great majority of state flag desecration statutes are patterned after the "Uniform Flag Law of 1917." *See*, *Goguen II*, 415 U.S. at 583, fn. 31. According to the Freedom Forum there is a great amount of historical conformity among state flag desecration statutes:

> Although the U.S. Supreme Court has twice invalidated state flag laws, 47 states still have on the books laws, many modeled after the Uniform Flag Law of 1917, that prohibit the desecration of the flag or its use for advertising and publicity purposes.

http://www.freedomforum.org/packages/first/Flag/flaglaws.htm. Flag desecration statutes as quoted in reported decisions, do seem to be virtually identical in wording and construction. This is due to the common derivation of flag desecration statutes:

> While the acts which have been held to constitute flag desecration are many, there is little variance in the state statutes. New York's General Business Law [17] is a standard enactment, whose precursor was the model for most state statutes. * * *
>
> The Uniform Flag law postdated the New York flag statute; the two are virtually identical in language.

Rosenblatt, "Flag Desecration Statutes: History and Analysis" 1972 Wash. L.Q., 193 at 195-97. Iowa's flag desecration statute most closely resembles the original New York enactment.

(*e.g.,* "publicly"). Each part of the sentence informs the sense of others, and it clearly intends to reach disfavored expressive uses of the flag. Indeed, the flag, itself, is, by definition, a symbol and therefore any regulation of its usage as a flag is implicitly a regulation of pure expression.

In State v. Janssen, 219 Wisc. 362,*380, 580 N.W.2d 260,*267 (Wisc.1998), the Wisconsin Supreme Court was unable to sever or salvage a nearly identical statute (based on the Uniform Flag Law) where it appeared that throughout life of statute and its precursors the primary (and patently unconstitutional) intent of legislature was to suppress unpatriotic or irreverent expression.} *See also* Rosenblatt, "Flag Desecration Statutes: History and Analysis" 972 Wash. L.Q., 193 at 211, {documenting the original purpose of flag desecration statutes based on the Uniform Flag Law to be the enforcement of patriotism; *accord*, Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz. 1970) {Three judge panel, facially invalidating flag desecration statute because all parts were directed at expression.}

Iowa's flag desecration statute punishes "intentional lack of respect" for the flag, ill treatment of the flag "in public,"[12] "public" "defiance" of the flag, "publicly" casting "contempt upon, satiriz[*ing*], derid[*ing*] or burlesqu[*ing*]" a flag, and "placing such flag

[12] "…or who shall publicly mutilate, deface, defile or defy, trample upon, cast contempt upon, satirize, deride or burlesque, either by words or act, such flag…"

on the ground" or "where …[*it*] may be trod upon." Iowa Code §718A.1(1)}.[13] Clearly all of these prohibitions (especially when read together) exist to enforce reverence, and respectful treatment of the flag as expression, for they only apply when treatment of the flag can be seen by others. Moreover, the symbolic meaning of certain actions with reference to the flag are widely known and appreciated. *Compare, Eichman:*

> the precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction. The Act criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag." …Each of the specified terms-with the possible exception of "burns"-unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value. **the precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction**.

Eichman, 496 U.S. at 317 {*emphasis added*}. All of the flag desecration statutes' prohibitions on "words or act" require flag handlers to express respect for the flag.

Because it so clearly commands symbolic and verbal respect, Iowa's flag desecration statute runs completely afoul of the fundamental constitutional prohibitions recognized in *Barnette*. All persons, whether respectful of the flag or not, have the right to be free from compelled displays and expressions of patriotism in public settings.

[13] Iowa's flag desecration statute also punishes wearing of the flag and its symbolic elements along with other unconventional displays of the flag—actions that the Petitioners in this case routinely engage in. No modern court in the U.S,. however would enforce this part of the statute. *C.f., Goguen*, 415 U.S. at 574 {"[*I*]n a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flat or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag."}

It might be noted that the flag desecration statute also violates the Petitioners' freedom of religion. Just as the Jehovah's Witnesses in *Barnette* were required to salute the flag even when they had no intention of engaging in any such expression, Iowa's flag desecration statute requires the Petitioners in this case to evidence respectful treatment of the flag even in moments in which they are not themselves attempting to engage in any expression—for example, when they are storing or transporting their flags in the unceremonious manner that they believe God requires. Their religion commands abstention from treating the flag with any special deference, yet the statute commands that they evidence completely otherwise to onlookers. It might be tempting to resolve this case on a narrow "as applied to the Petitioners religion" ground alone, but to do so would be to short change constitutional principles. In *Barnette*, the U.S. Supreme Court emphasized the need to address the more universally applicable principle of expressive and intellectual freedom.

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. … It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634–35 (1943)

b. Iowa Code §723.4(6) "flag misuse"

Iowa's Flag misuse statute masquerades as a regulation of conduct, but on closer examination, it too engages in impermissible speech control. The statute provides that it is a simple misdemeanor for a person to:

> …6. Knowingly and publicly uses the flag of the United States in such a manner as to show disrespect for the flag as a symbol of the United States, with the intent or reasonable expectation that such use will provoke or encourage another to commit trespass or assault.
>
> b. As used in this subsection:
>
> (1) "Deface" means to intentionally mar the external appearance.
>
> (2) "Defile" means to intentionally make physically unclean.
>
> (3) "Flag" means a piece of woven cloth or other material designed to be flown from a pole or mast.
>
> (4) "Mutilate" means to intentionally cut up or alter so as to make imperfect.
>
> (5) "Show disrespect" means to deface, defile, mutilate, or trample.
>
> (6) "Trample" means to intentionally tread upon or intentionally cause a machine, vehicle, or animal to tread upon.
>
> c. This subsection does not apply to a flag retirement ceremony

Iowa Code §723.4(6).

i. Fighting Words

That Iowa's flag misuse statute is purely a governmental regulation of speech is undeniable since a violation requires "use" of "a flag as a symbol" to "show disrespect." *Compare U.S. v. Eichman*, holding a similar statute to be an unconstitutional regulation of expression:

> The Government contends that the Flag Protection Act is constitutional because, unlike the statute addressed in *Johnson,* the Act does not target expressive conduct on the basis of the content of its message. The Government asserts an interest in "protect[ing] the physical integrity of the flag under all circumstances" in order to safeguard the flag's identity " 'as the unique and unalloyed symbol of the Nation.' " …
>
> **Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is "related 'to the suppression of free expression,'** " 491 U.S., at 410… and concerned with the content of such expression. … the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals. *Ibid.*
>
> …the precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction. The Act criminalizes the conduct of anyone who "knowingly **mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag**." … Each of the specified terms-with the possible exception of "burns"-unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value.

Eichman, 496 U.S. at *315-17{*emphasis supplied*}

The obvious rationale of the Iowa flag misuse statute, given its apparent concern with maintenance of the peace, is the state's ability to prohibit "fighting words." But the statute markedly departs the concept of "fighting words" and therefore cannot be justified by *Chaplinski's*[14] well known exception. In State v. Fratzke, 446 N.W.2d 781 (Iowa 1989) a "magistrate found that the [*Fatzke's*] letter annoyed Trooper Keenan and was written without legitimate purpose because Fratzke's manner of complaint 'would more quickly result in a fist fight' than bring about social change." *Id.* at 782 The Iowa Supreme Court agreed the words chosen by Fratzke were intended to annoy but mere use of irritating, combative language was not enough to meet *Chaplinski's* definition of fighting words.

> The Supreme Court has made it clear that in order to uphold the constitutionality of a state statute that attempts to criminalize the use of opprobrious words or abusive language the statute must, by its own terms or as construed by the state's courts, be limited in its application to "fighting words" **and must not be susceptible of application to speech that is protected by the first and fourteenth amendments**. *Chaplinsky,* 315 U.S. at 573, …; *Gooding,* 405 U.S. at 523, …; *Lewis,* 415 U.S. at 134, ….

Fratzke at 784 {*emphasis added*}.

An examination of the decisional language in *Chaplinski* confirms that fighting words, however incendiary, do **not** include expressions that have legitimate First Amendment purpose. There the U.S. Supreme Court defined "fighting words" as:

[14] Chaplinsky v. New Hampshire, 315 U.S. 568,*572, 62 S.Ct. 766,*769, 86 L.Ed. 1031,*1035 (1942)

> '…those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that **such utterances are no essential part of any exposition of ideas**, and **are of such slight social value** as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[5] '**Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution**, and its punishment as a criminal act would raise no question under that instrument.' q*uoting* Cantwell, 310 U.S. 296.

Chaplinsky, 315 U.S. at 572 {*emphasis added*} Fighting words then are not simply words that provoke great anger in bystanders, they are transactional words of only the slightest utility, that are universally recognized as an invitation to immediate violence:

> The English language has a number of words and expressions **which by general consent are 'fighting words'** when said without a disarming smile. … Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings.

Chaplinsky, 315 U.S. at 573 {*emphasis added*.

By contrast, the flag of our country is a powerful symbol used to express a wealth of important ideas in public discourse. Its display is not "obscene," "personal abuse of another," derogatorily epithetic, or a traditionally understood invitation to fight. Iowa Code Section 723.4(6) does not expressly mention, describe or even regulate true "fighting words." It curtails the expressive use of an important ideological symbol that serves a critical role in the "exposition of ideas." As one of the most powerful symbols in our country, the Flag has great "social value." Iowa's flag misuse statute cannot be justified as a check on "fighting words."

ii. Viewpoint Discrimination

Even if disrespectful display of a flag could amount to unprotectible "fighting words, Iowa's flag misuse statute would still fall short of a constitutionally permissible regulation, because it is not speaker, nor content, nor even viewpoint neutral. Not all fighting words are banned by this statute—only those involving use of a flag, and only a flag used to represent the United States at that. Not all flag users are prosecutable—only those who are **not involved** in a flag retirement ceremony. {*Compare* Eichman, 496 U.S. at 317 *citing Johnson* to make the point that this is an unconstitutional speech discrimination.} Most telling of all, only disrespect for the U.S. flag is punished. By contrast, all other flag related expression is permitted, even when it would imminently lead to violence.[15] In other words, the State of Iowa has singled out a narrow range of speakers and messages that it would like to suppress through the intimidating threat of criminal prosecutions under a generally vague[16] and overly broad public disorder statute.

The U.S. Supreme Court has already ruled that such selectively focused "fighting words" statutes are an unconstitutional form of viewpoint discrimination:

[15] For example, imagine a "patriot" proudly marching Old Glory through an angry crowd protesting U.S. atrocities such as the killing of civilians, defilement of corpses or burning a Koran. Despite the high probability of violence, this would be allowed.

[16] *Compare*, Edwards v. S. Carolina, 372 U.S. 229 {noting problem of defining "breach of the peace" *vis a vis* peaceful demonstration}.

> Applying these principles to the St. Paul ordinance… [*prohibiting* ***racist*** *cross burning*]…, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. See *Simon & Schuster,* 502 U.S., at 116, 112 S.Ct., at 508; *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229–230, 107 S.Ct. 1722, 1727–1728, 95 L.Ed.2d 209 (1987).
>
> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender— aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377,*391, 112 S. Ct. 2538,*2547, 120 L. Ed. 2d 305 (1992)

This principle carries fully over to the context of flag abuse and desecration. In *Johnson* the U.S. Supreme Court said: "We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents." 491 U.S. at 417. In *Eichman*, the Supreme Court later observed:

> As we explained in *Johnson, supra,* at 416-417, 109 S.Ct., at 2546: "[I]f we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role–as where, for example, a person ceremoniously burns a dirty flag–we would be ... permitting a State to 'prescribe what shall be orthodox' by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity."

Eichman, 496 U.S. at 317. The flag misuse and desecration statutes under challenge here make just such impermissible distinctions. Iowa Code §723.4(6)(c) and §718A.7 each specifically exempt flag retirement ceremonies. *See generally*, Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105,*115-16, 112 S. Ct. 501,*508, 116 L. Ed. 2d 476 (1991):

> This is a notion so engrained in our First Amendment jurisprudence that last Term we found it so "obvious" as to not require explanation. *Leathers, supra,* 499 U.S., at 447…. It is but one manifestation of a far broader principle: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." …the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.… The First Amendment presumptively places this sort of discrimination beyond the power of the government.

C O N C L U S I O N

Iowa's flag desecration and flag misuse statutes have not been cured of their unconstitutional vagueness by legislative amendments. Moreover, this time the Court should reach the overarching First Amendment issues posed by these statutes, because they unconstitutionally chill and prohibit legitimate expressive use of the U.S. Flag and cannot be allowed to stand.

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CERTIFICATE OF SERVICE & FILING:

I certify that on May 15st, 2014, I served each of the parties to this action and filed this document in compliance with Fed. R. Civ. Pro. 5 and Local Rule 5 by electronic service or such other method as is checked below:

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