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 and Montgomery County Sheriff Joe Sampson, Respondents and State of Iowa, *ex rel.* the Iowa Attorney General, Intervenor	Docket No. 1-13-CV-00011

Petitioners' Brief
in Resistance to
State's Motion for Summary Judgment
(F. R. Civ. Pro. 56)

C O N T E N T S

I. Resistance Argument

A. Petitioners have Constitutional Standing

The State posits two theories in its challenge to the Petitioners' standing:

1. That the Petitioners have not **plead** sufficient facts to show a "particularized" injury or a well-founded fear of arrest or prosecution. [*State's SJ Brf.* 4-5], and
2. That the Petitioners lack standing because they have not actually been arrested under any of Iowa's Flag statutes. [*State's SJ Brf,* 5]

The State's first contention is restricted to an interpretation of the Complaint in this action and must condemned as a belated attempt to obtain a Rule 12(b) dismissal for failure to adequately state a claim. Because the record has since been supplemented by discovery and the Affidavit of Margie Phelps, judgment on the pleadings is inapposite argument. Moreover, the Complaint in this case does set forth sufficient facts upon which to base standing—especially when read in the light most favorable to the petitioners[1]

[1] In the introduction to their Complaint Petitioners make clear that in the course of their demonstrations, they "handle the U.S. flag without any particular care of deference."and that they "use the flag of the United States in unapproved ways." It says further that they have been chilled in their speech by fear of "arrest and prosecution." They use the flag to "convey to others" that the U.S. flag is "an idolatrous symbol" undeserving of "respect" [¶¶ 3,4]. The Westboro demonstrators were required to obey the flag statutes on "July 24th, 2010 and again on July 14th, 2012" in Red Oak [¶16]. They were threatened with arrest if they didn't "desist from certain expressive uses of the U.S. flag" [¶¶19,20]. They were legally limited in their expressive use of the flag by a Council Bluffs police officer enforcing the flag statutes on April 22, 2011. [¶¶22-24]. On December 8th the protestors were legally prohibited from destroying or destruction of the flag or dragging it on the ground [¶¶26, 27]. As a result, the Petitioners have been prevented from freely using the U.S. flag "as they had intended" [¶29], and to "freely engage in symbolic speech involving disrespectful treatment of the flag" and to exercise their religious rights to "treat the flag without special deference or in contempt" [¶30].

The State specifically contends that the Complaint fatally does not set forth how Petitioners would like to use their flags. In challenging an unconstitutionally vague statute [π's 2nd Amend Complaint ¶'s 15 -16, 38, App'x 18] the Petitioners should not be held to a pleading standard that requires them to precisely identify and particularly describe each and every way their generally irreverent treatment of the flag in future protests might violate the law in the eyes of variety of yet to be encountered law enforcement officials. Petitioners' freedom to treat the flag with contempt is general, it embraces not only traditional acts of disrespect but actions that are spontaneous and perhaps thus far unimagined. Surely relief cannot be limited to the right to display the flag only in a certain specific pre-requested ways as the state would have it. Such a piecemeal, litigation-intensive, approach to the vindication of expressive rights is impractical and disfavored. *E.g.* Citizens United v. Fed. Election Comm'n, 558 U.S. 310,*333-36, 130 S. Ct. 876,*894-96, 175 L. Ed. 2d 753 (2010) {"The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated."}

The State's claimed pleading deficiencies are, in the end, inadequate to establish the "**absence"** of a "material" fact essential to the Petitioners' standing. As its own brief recites, the State as a "moving party must show the absence of a material fact…" [*State's SJ Brf.,* 2] The State's mere suggestion that the Petitioners are not engaging in

expression that would lead to standing. [*State's SJ Brf.,* 2] strains ordinary credibility. There may be no group more well known for repeatedly desecrating the U.S. flag in expressive demonstrations than the members of the Westboro Baptist Church.

But this question need not be decided on review of the Complaint or on public reputation alone. The Affidavit of Margie Phelps, filed in conjunction with the Petitioners' Motion for Summary Judgment [*docket #84, attach. 2*], provides ample evidentiary rebuttal of the State's claimed absence of material facts essential to standing. In it she describes the high number of protests that she and her fellow church members engage in; how they use and treat the flag; the message they intend by that; law enforcement efforts to enforce Iowa's flag statutes; and how those efforts have blocked and chilled their expressive use of the flag and religious rights.

Taking authority from the prior decision of this court in *Roe*[2] however, the State puts its argument this way: "Petitioners do not suffer from an injury in fact that is both concrete and actual or imminent." [*State's SJ Brf.,* 4]. So the question put is: whether loss or restriction of a person's expressive rights is cognizable as such an injury. In *Elrod v. Burns*, the U.S. Supreme Court affirmed that loss of expressive rights is a serious matter: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[3]

[2] Roe v. Milligan, 479 F. Supp. 2d 995,*1002 (S.D. Iowa 2007)

[3] Elrod v. Burns, 427 U.S. 347,*373, 96 S. Ct. 2673,*2690, 49 L. Ed. 2d 547 (1976)

The second argument of the State in regard to standing is that Petitioners' fear of prosecution is unfounded because the have not actually been arrested[4]:

> …there is one significant difference between the plaintiffs' subjective fear of prosecution in *Roe* and the Petitioners' fear here—[*noting that the Roe plaintiffs were actually charged with flag statute violations*]…The Petitioners do not allege that they have been cited for or arrested under any of the challenged statutes. Under these circumstances, Petitioners fears of injury are wholly speculative.

[*State's SJ Brf,* 5]. The state cites no authority directly for this point (because there is none). In *Roe*, this Court made it very clear that arrest is not a prerequisite to standing when it addressed whether the plaintiffs in that case should be required to await renewed attempts at prosecution:

> Plaintiffs Roe and Klyn should not be required to undertake a prohibited activity under either the flag desecration or flag misuse statutes and risk physical arrest and/or prosecution in order to test out their fears and the contours of the statutes.

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[4]The fact that Petitioners have not been arrested is due to their own caution in avoiding confrontation, *i.e*., "self-censorship." *E.g.*, Phelps Affidavit at ¶ 2 "We obey the law and follow the directives of law enforcement" Despite that they have nearly been arrested several times:

> Phelps Affidavit ¶ 9: "This officer made phone contact with someone, and finally well into the picket told WBC members they could hold the flag upside down, but not drag or put it on the ground. As a result of these events, WBC members discontinued any expressive use of the flag during this picket;" ¶'s10-11: "Rebekah Phelps-Davis contacted Chief Drew Powers of…as part of a **routine protocol by WBC to contact local law enforcement** before conducting a picket in any jurisdiction. During this phone contact, Rebekah Phelps-Davis asked if the flag statutes of Iowa would be enforced, because of the church members' expressive use of the flag. …Even so, when WBC picketers arrived, Chief Powers informed one of the picketers, Elizabeth Phelps, that **he would enforce the flag desecration law**;" ¶16: "I immediately complied, because **I believed he would have arrested me** if I had not;" ¶19: "Timothy Phelps **had to persuade Chief Powers not to let his officers arrest** any of the picketers."

Roe at 1003. The caselaw is decidedly opposed to the State's proposition that First Amendement litigants must suffer arrest before they can challenge an unconstitutional restriction on their speech.

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383,*393, 108 S. Ct. 636,*643, 98 L. Ed. 2d 782 (1988)

Repeating a failed argument by the Defendants in *Roe*, the State likens this suit to the claims dismissed in Lawson v. Hill, 368 F.3d 955 (7th Cir. 2004) and Winsness v. Yocom, 433 F.3d 727 (10th Cir. 2006), in which plaintiffs had received authoritative assurances that there would be no prosecution under the challenged statutes. [*State's SJ Brf.,* 6] For the same reasons advanced in *Roe* at 1004, this case analogy should fail because there have been no assurances of non-prosecution, and because there has been a long history of enforcement of Iowa's flag desecration law.[5] The State even concedes that Petitioners have not been given assurances of non-enforcement [*State's SJ Brf,* 5-6].

[5] State v Waterman, 190 N.W.2d 809 (Iowa 1971) flag worn as poncho; State v Farrell, 223 N.W.2d 270 (Iowa 1974) burning of the flag; State v. Kool, 212 N.W. 2d 518 (Iowa 1973) displaying upside down flag; Bohman v. Petersen, *Unreported*, S.D. Iowa No. 4-02-CV-70610 (2003) displaying upside down flag; Roe v. Milligan, 479 F. Supp. 2d 995, (S.D. Iowa 2007) alteration of flag (*Roe)* and display of flag upside down (*Klyn*).

The Affidavit of Margie Phelps shows that, in fact, there have been threats of enforcement on a number of occasions. [*Phelps Aff'dvt, ¶'s* 9, 11, 21, App'x 7,8 &12] Far from providing assurances, the State contends in this action that that the statutes as amended, are constitutional. Active state litigation on behalf of a statute implies that it will be continue to be enforced. In its brief the State points to an advisory by the Attorney General's office that pre-amendment versions of the statutes in question had been declared unconstitutional [*State's SJ Brf,* 6], but in discovery, the Respondents have admitted that they have not conducted or received any training regarding the constitutionality or enforceability of Iowa's flag desecration or misuse statutes [Pet. Stmt Undisputed Facts ¶3, App'x 15–17] Furthermore, Iowa Code Section 718A.6 requires local law enforcement officials to enforce the statute or be removed from office.

For these reasons, direct threats being chief among them, the Petitioners have a well founded fear of enforcement of Iowa's flag statutes[6]. Their personal interests are at stake and they can benefit from a favorable legal ruling. They have standing.

B. The statutes are presumptively invalid direct proscriptions of speech

In their own brief seeking summary judgment the Petitioners' have extensively briefed this point as their principal argument. There is no reason to belabor the court with extensive argument here, however, it must be noted that Petitioners' facial claims have

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

recently been vindicated again by decision by the Eighth Circuit Court of Appeals handed down on May 30, 2014. Snider v. City of Cape Girardeau, 13-1072, 2014 WL 2314783 (8th Cir. May 30, 2014) Snider sued in federal court after being arrested for attempting to burn the flag, shredding it, and tossing it into the street. On cross motions for summary judgment, the district court entered an **injunction** against the State of Missouri from any further enforcement of Mo.Rev.Stat. § 578.095 which simply read:

> 1. Any person who purposefully and publicly mutilates, defaces, defiles, tramples upon or otherwise desecrates the national flag of the United States … is guilty of the crime of flag desecration.

The district court found, *inter alia,* that this statute directly proscribed expression.[7] As such, and because the state did "not, and likely could not, articulate an interest that would justify restricting expression" the district judge held the law facially invalid. *Id.* at 2. {The appeals court also upheld the overbreadth challenge[8] *Id*. at 5-6 observing that its history of enforcement and plain reach included "a substantial amount of expressive conduct judged in relation to its plainly legitimate sweep." *Id*. at 4}.

[7] "Conduct directed toward the United States flag has been recognized as " 'sufficiently imbued with elements of communication' to implicate the First Amendment." [*Johnson*]… at 406 (quoting *Spence* ..., 418 U.S. 405, 409–11 (1974)); see also *Eichman* ..., 496 U.S. 310, 315 (1990) (government concedes, "as it must," that the acts of flag burning at issue were expressive conduct); *Dunn* ..., 40 F.3d 287, 291–92 (8th Cir.1994) (wearing of flag patch on uniform in defiance of policy banning such constituted speech)." Snider v. City of Cape Girardeau, 1:10-CV-100 CEJ, 2012 WL 942082 (E.D. Mo. Mar. 20, 2012) (*Not Reported*)

[8] The *Snider* district court rejected a vagueness challenge, noting that the statute's avoidance of terms such as "cast contempt" or "show disrespect" helped insulate it from such a deficiency. Nevertheless, the court noted: "Paradoxically, the State's proposed limitation of the statute to apply only to nonexpressive activity might introduce vagueness by failing to give …guidance regarding the distinction between expressive and nonexpressive uses." *Id*. 6

On appeal, the Eighth Circuit affirmed, stating first, that "**Content-based regulations,** such as Mo.Rev.Stat. § 578.095 , are "**presumptively invalid**."{*citing* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377,*382, 112 S.Ct. 2538,*120, L.Ed.2d 305 (1992)—a case upon which the Petitioners in this case also rely.} See also, Boos v Barry, 485 U.S. 312,*322, 108 S.Ct. 1157,*1164, 56 USLW 4254, 99 L.Ed.2d 333 (1988)[9] The 8th Circuit also agreed that the Missouri statute facially targeted expression, by singling out the actions of persons who "purposefully and publicly" desecrate the flag. *Id.* An unbreakable comparison can be drawn with Iowa's flag statutes which similarly punish desecration done "for exhibition or display," or done "publicly" (§718A.1A), and "disrespectful" provocative "public use" of a "flag as a symbol" (§ 723.4(6)).

Not resting there, the 8th Circuit finished by invalidating the statute as overly broad because no interpretation of the Missouri statute limiting it to non-expressive activity could satisfy the legislature's primary intent of limiting expression:

> There exists no plausible way for the court to read such a limitation into Missouri's statute. The statute is clear: Any person who purposefully and publicly mutilates, defaces, defiles, tramples upon, or otherwise desecrates the national flag of the United States or the state flag of the state of Missouri is guilty of the crime of flag desecration. No limiting construction would be consistent with any plausible understanding of the legislature's intent.

[9] *Id.* invalidating a "**content based**" "public disorder" statute that criminalized "**display [of] any flag**, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization {*emphasis supplied*}

Snider, at 5 (Slip Op.) Accord, State v. Janssen, 219 Wisc. 362,*380, 580 N.W.2d 260, 267 (1998)[10]

C. Petitioners religious rights are being infringed

The State argues that the Petitioners' religious rights are not violated by Iowa's flag desecration and misuse statutes because they are laws of general applicability that only incidentally and unintentionally affect the Petitioners religious scruples[11] *a la* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). The State provides several historical examples of where this general principle has been applied, [*State's SJ Brf.,* 6], but it provides no analysis of **what** constitutes a law of "general applicability" as referred to in *Smith.*

The holding in *Smith* does not support characterization of Iowa's flag statutes as religiously neutral laws of general applicability. Even as a starting position *Smith* recognized that "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment

[10] Considering a flag desecration statute very similar to Iowa's, the Wisconsin Supreme Court was unable to sever or salvage a statute 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" 1972 Wash. L.Q., 193 at 211, documenting the original purpose of flag desecration statutes to be the enforcement of patriotism; accord, Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz. 1970) {invalidating flag desecration statute because all parts were directed at expression.}

[11] See Phelps affidavit at ¶5, App'x 3 *et seq*.

obviously excludes all "governmental regulation of religious *beliefs* as such." *Smith*, 494 U.S. at 877, 110 S. Ct. at 1599. Further, the Supreme Court expressed grave doubts that the state has the power to selectively compel acts avoided for religious reasons.[12]

In *Smith,* the majority carefully attempted to draw a clear distinction between general laws that incidentally burden religious practice and those that prohibit conduct that the state is not "free to regulate."[13] In its brief, the State does not explain why it is free to regulate expressive uses of the U.S. Flag. This becomes a critical failing, because the majority in *Smith* carved out a very important distinction that still must be observed:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut,* 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under

[12] "…[*T*]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith* at 877.

[13] "Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation … places them beyond the reach of a criminal law that **is not specifically directed at their religious practice**, and **that is concededly constitutional as applied to those who use the drug for other reasons**.…We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct **that the State is free to regulate.**" *Smith*, 494 U.S. at 878-9, 110 S. Ct. at 1599-1600 {*emphasis added*}

> which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).[1]
>
> **Some of our cases prohibiting <u>compelled</u> expression, decided exclusively upon free speech grounds, have also involved freedom of religion,** cf. *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984)

<u>*Smith*</u> at 881-82, 110 S. Ct. 1595 at 1601-02{*emphasis added*}. The *Smith* court also said: "The present case does not present such a hybrid situation, but a free exercise claim **unconnected with any communicative activity**." <u>*Id.*</u>

Thus, the proper way to resolve this particular issue, is to look first to see if, Iowa's flag desecration and misuse statutes involve a hybrid claim where the State is using a law of general applicability to regulate expressive activity that also burdens religious beliefs and principles. Since, the Petitioners' primary argument posits that the

statutes are regulations of expression, this court need look no further. The Eighth Circuit's decision in *Snider* confirms that such statutes are indeed regulations of expression. In this sense, the freedom of expression and free exercise claims of the Petitioners meld into a single threshold analysis, and the proper outcome, is of course for the Court to rule first on the more generally applicable freedom of expression and conscience grounds. W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624,*634-35, 63 S. Ct. 1178,*1183-84, 87 L. Ed. 1628 (1943)[14] Religious freedom then becomes an additional valid and yet still important reason why, in this case, Iowa's flag desecration and misuse statutes must be facially stricken by the Court.

Like the forced expressive display in *Wooley* and the required outward appearance of flag reverence in *Barnette* (both cited above in *Smith*), Iowa's statutes are in the words of the *Smith* majority a "hybrid situation" in which religious rights are constitutionally "connected to expressive activity." *i.e.,* the display and treatment of a symbol. They violate the Petitioners' free exercise of religion rights.

[14] "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. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.[15] 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." *Id.*

C. The flag statutes cannot be constitutionally applied to Petitioners' activities

In it exposition of the law on this point, the State begins with the proposition that "'Imposing criminal sanctions on 'protected speech is a stark example of speech suppression.'" *quoting Ashcroft v. Free Speech Coalition*.[15] In conveying God's message to the public by their symbolic use and handling of the flag the Petitioners are engaging in "protected speech" of the highest order: a religious message that calls for citizens and public officials to embrace policies, laws and practices that are in accordance with God's will so that this nation will be blessed, and not cursed, by God. [Phelps aff'dvt, ¶'s 4 & 5 App'x, 2–6] They believe that how their message "land[*s*] on the hearts of the individual is not …[*their*] prerogative,… but in God's control." [*Id.* ¶2, App'x 1]

Apparently, God has not yet opened the heart of the State enough to hear this message, because at page 11 of its summary judgment brief, its attorneys claim that they are simply unable to understand it. But whether the State is able to appreciate the Petitioners' message is a question going well beyond the fundamental point to be decided. Even without understanding their message, anyone can at least see that the Petitioners are engaging in demonstrations and that by using the powerful symbol of the U.S. Flag, they are truly engaged in protected expression.

[15] 535 U.S. 234,*244, 122 S. Ct. 1389,*1398 (2002).

If the Petitioners' handling and use of the U.S. Flag is protected expression, it follows that the Iowa flag statutes cannot be used to proscribe those activities. The freshly rendered decision in *Snider* confirms just how settled the law now is on this point:

> We agree with the district court. Beginning in 1974, with *Spence*, and culminating in 1989 and 1990, with *Texas v. Johnson* and *Eichman*, the Supreme Court clearly established the First Amendment prohibits the prosecution of an individual for using the American flag to express an opinion. This right had been clearly established for twenty years when Officer Peters arrested Snider on October 24, 2009, and, thus, a reasonably competent officer would have known Snider's expressive conduct was constitutionally protected.

Id. Strangely, as in the *Snider* case, prosecuting attorneys are seemingly the last to know about this clearly established law,[16] but it remains beyond dispute that the Petitioners' use and treatment of the U.S. flag in the course of their picketing is meant to convey a message and cannot subject them to prosecution under any of Iowa's flag desecration or misuse statutes. Petitioners must be allowed to prevail on their "as applied challenge."

Though Petitioners" as applied" challenge is wholly meritorious, this court has a duty not to rule so narrowly when the fundamental rights of those not before the Court are also generally at stake. The U.S. Supreme Court explained why in *Citizens United:*

[16] In *Snider* both a prosecuting attorney and a Circuit Court judge signed off on Snider's clearly unconstitutional arrest for flag desecration before he was taken to jail. In *Bohman*, an unreported flag desecration case that came previously before this court a prosecuting attorney authorized the citation. Again in the *Roe* case, Officer Milligan consulted with a legal advisor before giving Roe a citation, and it was actually the Wayne county attorney who "swore out" the complaint against petitioner Klyn.

> As noted above, Citizens United's narrower arguments are not sustainable under a fair reading of the statute. In the exercise of its judicial responsibility, it is necessary then for the Court to consider the facial validity of § 441b. Any other course of decision would prolong the substantial, nationwide chilling effect caused by § 441b's prohibitions on corporate expenditures. Consideration of the facial validity of § 441b is further supported by the following reasons.
>
> First is the uncertainty caused by the litigating position of the Government. …, the Government suggests, as an alternative argument, that an as-applied challenge might have merit. … When the Government holds out the possibility of ruling for Citizens United on a narrow ground yet refrains from adopting that position, the added uncertainty demonstrates the necessity to address the question of statutory validity.…
>
> Second, substantial time would be required to bring clarity to the application of the statutory provision on these points in order to avoid any chilling effect caused by some improper interpretation. …
>
> Third is the primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating political speech, any speech arguably within their reach is chilled. …
>
> **The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated.** See *WRTL, supra,* at 482–483, 127 S.Ct. 2652 (ALITO, J., concurring); *Thornhill v. Alabama,* 310 U.S. 88, 97–98, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). For these reasons we find it necessary to reconsider *Austin*.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310,*333-36, 130 S. Ct. 876,*894-96, 175 L. Ed. 2d 753 (2010) {*emphasis supplied, substantial elaboration omitted*};

E. Iowa's flag statutes are overly-broad and impermissibly vague

Iowa's flag desecration and misuse statutes should be facially invalidated as direct prohibitions of protected speech as argued in Petitioners' brief supporting their own summary judgment motion. But Iowa's flag statutes are also facially invalid due to fatal degrees of overbreadth and vagueness. Overbreadth and vagueness are argued together here because they are conceptually related in this case as they are in many others. "Especially where a statute's literal scope, as here, 'is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts.' *Goguen II,* 415 U.S. at 573, 94 S.Ct. 1242." Roe v. Milligan, 479 F. Supp. 2d 995, 1008 (S.D. Iowa 2007). When a law criminalizing expressive conduct is so vague that it offends due process, it certainly must be overly broad for First Amendment purposes due to the chilling effect of its uncertain application. See, *Grayned v. City of Rockford*, 408 U.S. 104,*109, 92 S.Ct. 2294,*2299, 33 L.Ed.2d 222 (1972)[17] In *Roe* (at 1012) this court held that Iowa's flag statutes suffered from this kind of vagueness.

> …[*A*]s currently written, the flag desecration and misuse statutes fail to provide adequate notice of prohibited conduct because "cast contempt upon," "show disrespect," and "flag," amongst other terms,[14] without more, is fatally vague.

[17] …[*W*]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,'[6] it 'operates to inhibit the exercise of (those) freedoms.'[7] Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'[8] *Id*.

The State argues that both the Iowa Supreme Court and this Court have previously held that Iowa's flag desecration statute was not facially invalid. First, the State notes that in State v. Waterman, 190 N.W.2d 809 (Iowa 1971) the Iowa Supreme Court held that the Iowa flag desecration statute was not unconstitutionally vague for purposes of due process. However, the *Waterman* case is a particularly poorly reasoned and researched opinion that will never be followed.[18] Whether the State agrees or not with that assessment, it must at least concede that this Court was not impressed with *Waterman's* analysis. In *Roe*, this court noted that "As for Waterman's contention that the statute was unconstitutionally vague, the court summarily held, without discussion, that 'the statute under attack provide[d] the requisite degree of certainty to provide men of ordinary intelligence with fair notice as to what conduct is proscribed.'" It footnoted the fact that the authority relied on by *Waterman* was ultimately based on authority that had been reversed. *Id*., fn. 12. And it fully rejected *Waterman* by concluding the Iowa flag desecration statute was, in fact, unconstitutionally vague. *Roe,* 1009.

[18] Some of the principal holdings of the Waterman majority were constitutionally dead on arrival: In *Street v. New York*, 394 U.S. 576 the United States Supreme Court had already held that both the possibly adverse reactions of bystanders, and the state's supposed need to command respect for the flag, were not sufficient grounds for curtailing verbal expression. Moreover, three years after *Waterman*, the United States Supreme Court reiterated the same conclusions in a case involving the upside down display of a U.S. Flag with a peace symbol affixed. (*Spence v. Washington*, 418 U.S. 405, 411 *et seq.*). Thus, *Waterman's* attempted distinction between verbal speech and symbolic speech, and its conclusion that symbolic speech (and a limited amount of verbal speech) can be punished to insure order and compel respect for the flag, were quickly demolished by U.S. Supreme Court decisions.

In attempting to draw support from *Roe*, the State first assumes that the Petitioners' are attempting to "prevail on the second type of overbreadth challenge" (*i.e.,* a "substantial overbreadth" argument) which it describes as one in which the "Petitioners, must show there is 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'"

In the polestar case of *Broadrick v. Oklahoma*[19] the U.S. Supreme court reviewed Oklahoma's version of a "Hatch Act" restricting the political speech activities of its civil servants. The appellants had unquestionably violated the statute in no uncertain terms by illegally soliciting funds from coworkers on behalf of their superior, but to escape their convictions, they sought to assert "overbreadth standing" to challenge how the statute might be applied to speakers in more innocent contexts. But having already ruled that day that the *Hatch Act* was not vague and upholding the context specific power of the state to control political abuse among civil servants, the court decided that the appellant's overbreadth arguments were too attenuated and speculative: "…[*P*]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial …, judged in relation to the statute's plainly legitimate sweep." *Id*., 413 U.S. at 615.

[19] Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)

Thus, substantial overbreadth doctrine is primarily applied to facial challenges of **behavioral** statutes that do not target expression. It poses requirements that do not apply to Iowa's flag desecration and misuse statutes which are laws that attempt to regulate only communicative abuse of a flag. {*See*, Petitioners' brief in support of their own motion for summary judgment}. Moreover, the Petitioners in this case do not need to assert "overbreadth standing"[20] in order to challenge the statutes—they are directly aggrieved by the application of the statutes to their constitutionally protected protests.

That said, there are a number of considerations that render the statutes challenged here overly broad: First, even if the statutes here were construed to punish some non-expressive behavior, they would be at least substantially overbroad because their primary focus is upon expressive acts whether intended, compelled or imputed. They exclusively prohibit unpatriotic expression whether intended or not. This fact is also borne out, when one considers Iowa's history of enforcement. {See fn. 5 *infra*}.

In *Goguen II* this U.S. Supreme Court noted that non-expressive desecrations of the flag are either not within the intended scope of the statutory language unlikely to be prosecuted:

> As both courts below noted, casual treatment of the flag in many contexts has become a widespread contemporary phenomenon. …. 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,

[20] In *Broadrick*, the concept of unconstitutional overbreadth seems to be somewhat conflated with the question of standing to challenge overbreadth.

> 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 flat or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag.

Smith v. Goguen, 574, 94 S. Ct. 1242, 1247, 39 L. Ed. 2d 605 (1974). One can easily imagine a New England Patriots fan who wraps himself in a U.S. Flag to attend a game, sits on it, drops mustard from his hotdog on it, and lets the edge drag on the ground as he walks; or a badly tattered and weathered flag flying over a rural county courthouse. Is it really conceivable that such displays would be prosecuted in any appreciable number—or at all? The history of reported decisions collected in footnote 5, *supra.* shows that actual prosecutions in Iowa are limited to situations perceived by officials to be unpatriotic expressive use of the flag. In *Roe* (p. 1013) this court observed that:

> "…it seems unlikely that a veteran wearing a shirt with an American flag, with the words "United We Stand" superimposed on it during a rally to support United States troops at war, even with the intent or reasonable expectation that the shirt will provoke or encourage a group of anti-war protesters watching the rally to commit a public offense, would be prosecuted under the statutes, while a war protestor, wearing a similar shirt with the words "Imperialist" superimposed may very likely be prosecuted…"

In this case, Petitioners Phelps' affidavit recites how flag law enforcement always focuses on the Westboro protestors despite the many flags being used by onlookers and counter-demonstrators—some in questionable ways. See, *e.g.,* photo of counter demonstrator abusing a flag at a WBC protest [App'x, 19]

The State poses a counter example based on a footnote in *Johnson* suggesting a **possibly** constitutional application of the Texas flag desecration statute to a tired person who merely drags a flag upon the ground. *Johnson*, 491 U.S. at 404, fn.3 This footnote did not carve out an exception insulating flag statutes from facially challenges. In its own words, the court, in this landmark case, was only "choos*ing*" to avoid a facial ruling. The later decision in *Eichman* knocked the wind out of the awkward notion that flag statutes are somehow immune from facial challenges, by facially invalidating the Flag Protection Act despite its ostensible focus on conduct. Since then the gates have opened.

It is hard to honestly posit that there is any non-communicative reach to Iowa's flag misuse statute which requires mindful, disrespectful abuse of the flag in the implied presence of an onlooker, or the flag desecration statute which requires either intentional public display, communications of disrespect, or symbolic acts of disrespect. Even if there could be such an exception, the prosecutions would be exceedingly rare. Judged in relation to their "plainly legitimate sweep" the expressive impact of the Iowa flag statutes' is both real and substantial. In *Broadrick,* the primary focus of the statute was not upon protected speech, and its application to legitimate speech, in the face of regulations to the contrary, was so unlikely and hard to imagine "that whatever overbreadth may exist should be cured through case-by-case analysis" *Broadrick* 413 U.S. at 615-16. In this case the statutory focus **is** upon protected speech, and the rare, difficult to imagine, highly speculative exceptions are no cure for substantial overbreadth.

C O N C L U S I O N

The Petitioners in this case do have standing. Iowa's flag desecration and flag misuse statutes are facially invalid as impermissible regulations of expression. Moreover, the challenged statues are still unconstitutionally vague and substantially overly broad and they do unconstitutionally infringe on the petitioners expressive and religious rights.

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Respectfully:

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CERTIFICATE OF SERVICE & FILING:

I certify that on June 9th, 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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