

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: R.A.V., Petitioners V. ST. PAUL, MINNESOTA

CASE NO: 90-7675

PLACE: Washington, D.C.

DATE: December 4, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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R.A.V., :
Petitioners :
v. : No. 90-7675
ST. PAUL, MINNESOTA :
- - - - -X

Washington, D.C.

Wednesday, December 4, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:05 a.m.

APPEARANCES:

EDWARD J. CLEARY, ESQ., St. Paul, Minnesota; on behalf of
the Petitioners.

TOM FOLEY, ESQ., Ramsey County Attorney, St. Paul,
Minnesota; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in 90-7675, R.A.V. v. St. Paul, Minnesota.

5 Mr. Cleary.

6 ORAL ARGUMENT OF EDWARD J. CLEARY

7 ON BEHALF OF THE PETITIONERS

8 MR. CLEARY: Mr. Chief Justice, and may it
9 please the Court:

10 Each generation must reaffirm the guarantee of
11 the First Amendment with the hard cases. The framers
12 understood the dangers of orthodoxy and standardized
13 thought and chose liberty.

14 We are once again faced with a case that will
15 demonstrate whether or not there is room for the freedom
16 for the thought that we hate, whether there is room for
17 the eternal vigilance necessary for the opinions that we
18 loathe.

19 The conduct in this case is reprehensible, is
20 abhorrent, and is well-known by now. I'm not here to
21 defend the alleged conduct, but as Justice Frankfurter
22 said 40 years ago, history has shown that the safeguards
23 of liberty are generally forged in cases involving not
24 very nice people. He might just as well have well said,
25 involving cases involving very ugly fact situations.

1 I am here to discuss and to ask the Court to
2 review the Minnesota supreme court's interpretation of a
3 St. Paul ordinance. Justice --

4 QUESTION: Mr. Cleary, in reading your briefs,
5 it appeared to me that you were arguing a case other than
6 the one presented, which I thought involved the statute as
7 construed by the Minnesota supreme court.

8 MR. CLEARY: I did go into great --

9 QUESTION: Now, do you agree at this point that
10 we are looking at the statute as the Minnesota supreme
11 court has interpreted it?

12 MR. CLEARY: Yes.

13 QUESTION: Not as it could theoretically have
14 been interpreted?

15 MR. CLEARY: Yes. The reason I went into as
16 much detail as I did with the ordinance as written was to
17 show the distance from A to B and the attempt to narrowly
18 construe that law. We have to acknowledge the State has a
19 right under Federal statute to construe their laws.

20 QUESTION: And in essence what the Minnesota
21 supreme court appears to have said is, we interpret the
22 law as reaching only those exceptions that the Supreme
23 Court has recognized to the First Amendment -- fighting
24 words, for instance, out of our prior Chaplinsky case.

25 Now, do you agree that that's what they've done?

1 MR. CLEARY: I agree that the Court attempted to
2 narrow the ordinance and in doing so cited Chaplinsky and
3 Brandenburg to this Court.

4 QUESTION: Right, and in essence they said what
5 that statute means is what the Supreme Court has permitted
6 in Brandenburg and Chaplinsky.

7 MR. CLEARY: They did cite those cases, Your
8 Honor. I do believe, however, that the expansive language
9 that was used shows a much broader reach than what this
10 Court indicated in those cases.

11 In discussing Chaplinsky they cite several times
12 the afflict injury dictum from that case. That took a
13 standard that was very close to an offensiveness standard
14 and raises the adverse emotional harm idea from the
15 Hustler Magazine case in that the outrageousness standard
16 is raised, and it really opens a hole to the First
17 Amendment.

18 QUESTION: Well, if we thought that the
19 Minnesota court recognized that the Minnesota statute
20 reaches only what was said in Chaplinsky could survive and
21 in Brandenburg what survived, would you still be here?

22 MR. CLEARY: I would still object to the
23 ordinance as construed, Your Honor.

24 QUESTION: So you would ask us to somehow
25 overturn those older holdings.

1 MR. CLEARY: No, I don't believe it's necessary
2 to do that, Your Honor, to get to the position that I'm
3 requesting. The Court has acknowledged that the court
4 cited Chaplinsky and Brandenburg, the lower court, but in
5 doing so in Brandenburg, for instance, they refer to the
6 provocative standard, and the Government may censor
7 provocative conduct, and it does so in a manner where it
8 cites the likely to incite imminent lawless action as
9 opposed to the likely to and directed to, and I think the
10 real significance of that is that you could have a hostile
11 audience censor the expression. I believe that
12 Brandenburg was written in terms of a sympathetic
13 audience, and I believe you get into the heckler's veto
14 problem if you allow that type of interpretation, and the
15 language of that opinion, combined with the language of
16 the ordinance as originally written, really leaves that
17 open as a possibility -- as a significant possibility,
18 combined with the injury language from Chaplinsky.

19 The problem is that the language is so broad
20 that it leaves open the possibility of an outrageousness
21 standard, a dignity standard as imposed, and just
22 generally an offensiveness standard, and that is --

23 QUESTION: Well, in your view, what is the
24 constitutional boundaries for the fighting words doctrine,
25 only those words which would provoke some other person to

1 an assault on the speaker, physical assault?

2 MR. CLEARY: From this Court's opinions, Your
3 Honor, I believe it's limited to those words that bring on
4 an immediate breach of peace, the reflexive violence idea.
5 I don't believe that the Court has construed, nor did the
6 New Hampshire court originally construe, the inflict
7 injury dictum as part of that holding. I believe the
8 Court has limited that to immediate breach of the peace
9 type of cases.

10 QUESTION: May a State validly proscribe words
11 that cause alarm and fear for one's safety, even if the
12 fear for the breach of the safety is some act that will
13 occur maybe 24 hours, 48 hours later?

14 MR. CLEARY: I believe so, Your Honor, and I
15 believe so in terms of a viewpoint-neutral type of law
16 that may address the content of what you're referring to
17 but would do so in terms of immediate breach of peace, or
18 would do so in terms of another law such as a threat law,
19 a terrorist or threat law which I think would be
20 permissible and even fit the alleged fact situation in
21 this case. I don't mean to downplay the victims -- in
22 this case, for instance, certainly in the fact situation
23 there were laws available to the State, significant and
24 hard and tough laws, to deal with an ugly fact situation.
25 Instead, they chose a law that's not as serious,

1 that addresses and attempts to address expression and the
2 content of that expression with interest in its
3 communicative impact, which is a totally different type
4 of --

5 QUESTION: Mr. Cleary, isn't one of your
6 complaints that the Minnesota statute as construed by the
7 supreme court of Minnesota punishes only some fighting
8 words and not others?

9 MR. CLEARY: It is, Your Honor. That is one of
10 my positions, that in doing so, even though it is a
11 subcategory, technically, of unprotected conduct, it still
12 is picking out an opinion, a disfavored message, and
13 making that clear through the State. It's a paternalistic
14 idea, and the problem that we have is that the Government
15 must not betray neutrality, and I believe it does, even
16 when it picks out a subcategory.

17 With the First Amendment, it does not
18 necessarily follow that if you punish the greater you can
19 punish the lesser. If we had a law that banned the
20 posting of signs, for instance, somewhat akin to Vincent,
21 and if we had in there including but not limited to signs
22 regarding the Democratic Party symbols, now that might be
23 a mere example, and it might be a subcategory, but I
24 believe this Court would be offended by that.

25 I believe the Court would feel that that was

1 betraying sympathy or hostility to a political viewpoint,
2 and I believe the same principle is in course here,
3 because I think the problem we have is that we have --
4 regardless of whether those symbols are mere examples, we
5 have the possibility, the real possibility, that we have a
6 Government signaling its disagreement with the particular
7 type of opinion.

8 QUESTION: Do you understand the Supreme Court
9 of Minnesota to have decided one way or another whether
10 the conduct of this particular petitioner is included in
11 the statute?

12 MR. CLEARY: No, I did not decide -- I did not
13 see their opinion as directly deciding whether or not the
14 conduct of the petitioner was included.

15 QUESTION: It left that presumably for the State
16 district court.

17 MR. CLEARY: Yes, Your Honor. Yes, Your Honor.
18 I believe that that -- this is significant to Justice
19 O'Connor's point, too. I did spend a lot of time in the
20 briefing on the --

21 QUESTION: But it held that the complaint should
22 not be dismissed, didn't it?

23 MR. CLEARY: I'm sorry, Justice.

24 QUESTION: Didn't it uphold the charge? Didn't
25 the case go back for trial?

1 MR. CLEARY: No, it has not gone back for trial.

2 QUESTION: The Supreme Court did not send it
3 back for trial?

4 MR. CLEARY: Oh, I'm sorry, I misunderstood the
5 question. I thought you asked whether it was tried.

6 QUESTION: If they did send it back for trial,
7 is it not necessarily true that they held that the
8 allegations in the complaint alleged a violation of the
9 statute?

10 MR. CLEARY: I don't believe so, Your Honor,
11 because it was an overbreadth challenge and I think what
12 they were saying was that the ordinance itself was
13 constitutional after the narrow construction, but I --

14 QUESTION: But in the other case you cite, or
15 your opponent, I guess, that's the S.L.J. case, when they
16 narrowly construed it they said, therefore the conduct
17 isn't within the statute and they dismissed the charge.

18 MR. CLEARY: They did. They handled that in a
19 different fashion than they handled this case.

20 QUESTION: But you think they left open the
21 question whether the complaint should be dismissed or not.

22 MR. CLEARY: Well, I think they left open how
23 the ordinance, once narrowly construed, would affect this
24 alleged conduct, yes. I think certainly the reasoning of
25 the opinion is such that they are --

1 QUESTION: But normally you're more interested
2 in judgments. I mean, the defendant ought to know whether
3 or not he's been charged with an offense or not, and he
4 still doesn't know. That's your point.

5 MR. CLEARY: If you've been charged with an
6 offense --

7 QUESTION: But whether permissibly
8 charged -- well, okay. I don't understand.

9 QUESTION: Mr. Cleary, I don't understand the
10 comments you made earlier in response to the Chief
11 Justice. You seem to concede that the statute here merely
12 gives -- or could be interpreted to be giving just some
13 examples of a general prohibition. How can it be read
14 that way? I mean, isn't it the case that the ordinance
15 only considers disorderly conduct the placing on public or
16 private property of a symbol, object, et cetera, which one
17 knows or has reasonable grounds to know arouses anger,
18 alarm, or resentment in others, on the basis of race,
19 color, creed, religion, or gender? Now, that's selective,
20 isn't it? Aren't there a lot of other reasons why anger
21 might be aroused?

22 MR. CLEARY: Yes, there are, Your Honor.

23 QUESTION: So then why do you have any doubt
24 about whether it's just giving examples? I mean, it does
25 give the examples of burning a cross or a Nazi swastika,

1 but in fact the text of the ordinance is limited to
2 causing alarm or resentment for only certain reasons, and
3 if you cause alarm or resentment for other reasons, that
4 is not unlawful under the ordinance, isn't that right?

5 MR. CLEARY: That is right.

6 QUESTION: That's what you said to me, was it
7 not?

8 MR. CLEARY: Well, what I said was, the
9 respondent's position is that these were mere examples and
10 that there was not a viewpoint selected and discriminated
11 against.

12 QUESTION: Yes, and I thought you said, even if
13 that is so, and I didn't understand you to be
14 contradicting that categorically.

15 MR. CLEARY: Well, I am -- I am suggesting
16 that's not true. I'm simply suggesting the worst-case
17 scenario, that if the Court were to believe that they were
18 mere examples, that there's still problems with the narrow
19 construction in that it does not address speech that would
20 not be -- that would either be tolerant or would be
21 intolerant in other areas, and in that sense it's
22 betraying a viewpoint from the Government that is no
23 longer neutral. They're picking out certain categories in
24 that sense.

25 QUESTION: With respect to words that injure, is

1 it your position that the only words that injure that can
2 constitutionally be punished are threats?

3 MR. CLEARY: No, Your Honor.

4 QUESTION: Threats to immediate harm?

5 MR. CLEARY: No, Your Honor. I'm not
6 suggesting --

7 QUESTION: How do you -- where do you want to
8 draw the line?

9 MR. CLEARY: Well, I'm not suggesting the Court
10 need overrule Chaplinsky, which talks about immediate
11 breach of peace, and those would not necessarily have to
12 be threatening words. What I am suggesting is that when
13 you get into an offensiveness standard --

14 QUESTION: I guess I was drawing the Chaplinsky
15 distinction between the fighting words and the words that
16 injure, and I thought they were talking about two separate
17 categories. Do you think they are not talking about two
18 separate categories, or the Court was not talking about
19 two separate categories in Chaplinsky?

20 MR. CLEARY: I think the Court was talking about
21 two separate categories.

22 QUESTION: Okay. Now, with respect just to the
23 words that injure, where would you draw the line on what
24 is permissible?

25 MR. CLEARY: I believe, Your Honor, that that --

1 I'll be very honest. I think that's a very hard line to
2 draw, and I think that's perhaps the crux of this case to
3 a certain degree, is the offensiveness idea and how --

4 QUESTION: Is it hard enough so that in fact we
5 have to say that that simply was a mistaken statement and
6 disavow it and leave Chaplinsky with the fighting words
7 category in the strict sense as a lone subject to
8 punishment?

9 MR. CLEARY: No, I don't believe so. I believe
10 that the Court must draw the line in favor of the
11 individual right of self-expression. I think that if the
12 line --

13 QUESTION: Well, I agree, but aren't you really
14 coming to the point of saying that the Chaplinsky
15 reference to words that injure was in fact, at least by
16 today's standards, an erroneous reference and we should
17 disavow Chaplinsky to that extent?

18 MR. CLEARY: I am.

19 QUESTION: Okay.

20 MR. CLEARY: The debate in this case is not
21 about the wisdom of eradicating intolerance, the debate is
22 about the method of reaching that goal. I believe that
23 the city council officials in this case and in other
24 communities are very well-meaning, and that's usually the
25 case, but the problem is that I believe these type of laws

1 cross the line from the Fourteenth Amendment duty of the
2 State to not participate in any racist State action or any
3 intolerant State action, in that sense, with the First
4 Amendment right of self-expression, even if it be
5 intolerant, provided it does not cross the line of illegal
6 conduct itself.

7 I believe the danger in a law like this is that
8 it does pick out viewpoints, that it is
9 viewpoint-discriminatory, and that there's nothing to stop
10 another State from taking a law just like this, having a
11 different symbol such as -- and it uses the example in the
12 briefs of the Star of David -- and suggesting that you can
13 narrowly construe that to fighting words, that leaving
14 that open to the law enforcement officials, it's not only
15 vague --

16 QUESTION: Mr. Cleary, do you think that
17 Chaplinsky was wrongly decided?

18 MR. CLEARY: No, Your Honor, I'm not suggesting
19 Chaplinsky has to be overruled. I believe the immediate
20 breach of peace language is still active, I believe
21 there's been a lot of confusion over the injury language.

22 QUESTION: Of course, it was written on behalf
23 of the Court by one of the great liberals of the country.
24 It always amused me that Chief Justice Stone assigned it
25 to Frank Murphy to write. But you feel it can still stand

1 as good law.

2 MR. CLEARY: I don't believe that it has to be
3 overruled to reverse this decision, Your Honor, because I
4 think the inflict injury and the Brandenburg
5 misconception is more important in terms of this
6 opinion.

7 QUESTION: I thought your answer to me was that
8 an immediate breach of the peace is not required.

9 MR. CLEARY: No, I didn't mean to suggest that,
10 Your Honor. I don't mean to suggest Chaplinsky is no
11 longer good law in terms of the immediate breach of peace
12 standard.

13 QUESTION: What is the constitutional test that
14 you propose for those fighting words, whatever that means,
15 which can be proscribed?

16 MR. CLEARY: If the Court -- the Court has spent
17 50 years redefining the lines of Chaplinsky. The
18 immediate breach of peace language, as I understand it, is
19 the only language that has really been construed because
20 that is what New Hampshire construed.

21 I believe the reflexive violence theory of it
22 perhaps is not as strong now as it was 50 years ago, but
23 at the same time, I think that the Court need not overrule
24 that type of thinking to get to this opinion and this
25 decision.

1 QUESTION: Well, is the theory that the hearer
2 will commit violence on the speaker?

3 MR. CLEARY: I think the theory of Chaplinsky is
4 a hostile audience idea as opposed to Brandenburg.

5 QUESTION: And is that the theory the State
6 proceeds on here so far as you understand the case?

7 MR. CLEARY: Yes, I believe so. But I believe
8 the State is --

9 QUESTION: And is that theory constitutional so
10 far as applied to this statute?

11 MR. CLEARY: It's constitutional in the sense
12 that immediate breach of peace is still good law under
13 Chaplinsky, yes. But it's my position that the balance of
14 the language in the opinion leads to a vagueness which
15 under Kolender is much more serious in terms of selective
16 and discriminatory law enforcement.

17 QUESTION: All right. Could this conduct be
18 punished by a narrowly drawn statute that proscribes
19 threats that cause violence? Could that state a cause of
20 action against your client?

21 MR. CLEARY: I believe it could.

22 QUESTION: On these facts?

23 MR. CLEARY: I believe it could. I believe, I
24 have never argued that -- again, that the conduct alleged
25 in this case could not be addressed by viewpoint-neutral

1 laws, but this type of a law leaves open the possibility
2 for viewpoint discrimination, and it opens up, again, the
3 selective enforcement idea.

4 QUESTION: Well, you say it's underinclusive.

5 MR. CLEARY: I do, Your Honor, in the sense, not
6 necessarily exactly like Erznosnik, but in the sense that
7 it definitely picks and betrays government neutrality. I
8 think the government must be neutral when they go about
9 compiling laws or construing laws that may effect First
10 Amendment rights.

11 Certainly in this current time there is a great
12 deal of fear, and that First Amendment -- and as it is
13 construed and as it is before this Court has to face the
14 environment that we find ourselves in as a Nation.
15 Justice Brandeis once said that fear breeds repression and
16 repression breeds hate.

17 I believe that this is the hour of danger for
18 the First Amendment in that there are many groups that
19 would like to encroach upon its principles with
20 well-meaning intentions, but in doing so, they are still
21 punishing the content of the communication and they are
22 doing so in a discriminatory manner, and the government is
23 betraying a neutral principle in the sense that they are
24 allowing that to happen and they are partaking in that.

25 QUESTION: Mr. Cleary, going back to what

1 Justice Kennedy was asking about, the fighting words
2 doctrine, it depends case by case on the reaction of the
3 person who hears the words, is that right?

4 MR. CLEARY: That is as I understand it, Your
5 Honor.

6 QUESTION: So you can use any language whatever
7 in a Quaker community, if you are in a solid Quaker
8 community, you can be much more insulting than you can
9 somewhere else. Does that make a lot of sense?

10 MR. CLEARY: I think it -- pardon me?

11 QUESTION: Does that make a lot of sense?

12 MR. CLEARY: No, but it does rely on audience
13 reaction, the idea of Chaplinsky does rely on audience
14 reaction, the reflexive violence idea, and everyone is
15 going to be different, but that kind of runs right into
16 what I am referring to on the injury idea. What if
17 someone injured offensively --

18 QUESTION: Might it not be a reasonable man
19 standard? I guess you could have to consider Quakers not
20 reasonable men, at least insofar as their strong aversion
21 to violence is concerned, but might not that be the
22 standard for the fighting words doctrine?

23 MR. CLEARY: In terms of the immediate breach of
24 peace, it might be.

25 QUESTION: Yes. I mean, if you happen to be in

1 a pacifistic community, why should the law take that into
2 account, why should the law subject these people to that
3 kind of abuse which other people would be provoked to
4 respond to with violence.

5 MR. CLEARY: I agree --

6 QUESTION: So it doesn't necessarily depend on
7 the particular people to whom the words are addressed. Is
8 that right?

9 MR. CLEARY: No, except that I think it has been
10 a case-by-case adjudication for 50 years under Chaplinsky
11 in terms of the immediate breach of peace and getting into
12 a reasonable man standard on immediate breach of peace I
13 think would be much easier to litigate than the inflict
14 injury because I think the inflict injury brings us back
15 to the Boos v. Barry and Hustler Magazine idea, that
16 political discourse involves outrageousness, and these are
17 the some of the major issues of our day and there are
18 going to be intolerant opinions displayed.

19 And the question --

20 QUESTION: Have you had anymore cross burnings
21 in St. Paul since this incident?

22 MR. CLEARY: I am not aware of any, Your Honor.
23 That doesn't mean there haven't been any, but I am not
24 aware of any.

25 QUESTION: Well, there certainly would be

1 publicity --

2 MR. CLEARY: I think there would in St. Paul,
3 Your Honor. The possibility, as Justice Scalia has
4 indicated earlier, for the application of this ordinance
5 to all kinds of opinions is clear. We have again the
6 most, perhaps the most hateful example that could come
7 under this type of a law, but we are left with all the
8 other political discourse and debate that could fall under
9 its parameters, and that is the danger of the Minnesota
10 supreme court opinion. It leaves that possibility wide
11 open.

12 It even talks about hate symbols at one point as
13 not being totally banned and then in another point
14 indicates, very close to indicating that they are fighting
15 words per se, that swastikas and burning crosses are
16 always symbols of hatred communities have the obligation
17 to confront. That reads very closely as being a ban in my
18 view.

19 QUESTION: So you think they can't be fighting
20 words per se?

21 MR. CLEARY: The symbols themselves?

22 QUESTION: There is no such thing as a fighting
23 word per se, you always -- this is going back to our prior
24 discussion. You have to look at the particular group.

25 MR. CLEARY: I agree. I don't think that

1 fighting words, per se, would ever work. I think that
2 that would really involve a censoring of expression and
3 that would --

4 QUESTION: So the Quakers have no protection or
5 the peaceful family that would not punch out someone who
6 waved a swastika in their face, that's their misfortune,
7 that they are so law-abiding as not to be violent, and
8 therefore, what would otherwise be fighting words can be
9 used against them.

10 MR. CLEARY: I think the tension, Justice Scalia
11 is between the First Amendment right of expression and
12 the --

13 QUESTION: Well, I know that is the tension, but
14 why is it that there can't be such a thing as a fighting
15 word per se, a kind of a word that would be likely to
16 provoke a violent reaction from an ordinary person.
17 Whether this person or this crowd in particular would be
18 violent doesn't matter.

19 MR. CLEARY: I think the danger in that is that
20 it could lead to a total ban of language or of symbols or
21 other expression that any community would call fighting
22 words per se. I think when you get --

23 QUESTION: Certainly the Court's opinion in
24 Texas against Johnson suggested that there couldn't be a
25 fighting symbol at any rate, per se, did it not?

1 MR. CLEARY: That's correct, Chief Justice. I
2 think that the Court's holding in Texas v. Johnson
3 supports the petitioner's position in this case, and I
4 also would point out that I do not think that the dissents
5 are necessarily inconsistent with the petitioner's
6 position on this law.

7 I would say that is particularly true because of
8 the fact that this Court put a great emphasis on the
9 unique nature of the American flag and in doing so, I
10 believe acknowledged the Stromberg red flag of the '30's,
11 the black armband in the '60's, a tinker, and was mindful
12 of the fact that once that door is opened, that it could
13 lead to a ban on symbolic behavior in such a fashion that
14 a great deal of expression would be prohibited.

15 QUESTION: Suppose the listener fears for the
16 listener's safety? Is that a proscribable kind of
17 expression?

18 MR. CLEARY: Describing a threat, Your Honor?

19 QUESTION: Yes. The listener fears for the
20 listener's safety.

21 MR. CLEARY: I think it is pursuant to a
22 viewpoint-neutral law in terms of a decision as to whether
23 there is an intent to threaten.

24 QUESTION: I take it the threat in your view has
25 to be imminent?

1 MR. CLEARY: I believe that there would need to
2 be a finding of intent to threaten and so therefore that
3 would be one of the considerations as to whether or not it
4 was imminent or not.

5 QUESTION: Suppose the listener fears for the
6 listener's safety over the period of the next month. Is
7 that an imminent danger?

8 MR. CLEARY: It is hard to draw the line on --

9 QUESTION: There are 15 policemen there when the
10 cross is being burned and so there is no imminent danger
11 in that sense.

12 MR. CLEARY: There is certainly communication
13 and it certainly could be considered a threat, and I
14 believe a prosecution pursuant to a viewpoint-neutral law
15 such as terroristic threats might address that, but I
16 don't believe this law either as written or narrowly
17 construed would be the law to address that.

18 I would like to reserve the balance of my time.

19 QUESTION: Thank you, Mr. Cleary. Mr. Foley, we
20 will hear now from you.

21 QUESTION: Mr. Foley, before you get started,
22 let me ask a couple of questions. You are the county
23 attorney, aren't you?

24 MR. FOLEY: Yes, I am, Justice Blackmun.

25 QUESTION: And yet the city is the respondent

1 here.

2 MR. FOLEY: Yes, under Minnesota law, Justice
3 Blackmun, the county attorney handles all matters
4 involving juveniles and this matter was a prosecution of a
5 juvenile, so we represent any activity, whether the matter
6 is under a city ordinance or State ordinance or a Federal
7 crime.

8 QUESTION: And this is why the city is a party to
9 one of the amicus briefs as well as being the respondent
10 in the case.

11 MR. FOLEY: That's correct, Justice Blackmun.

12 QUESTION: A little unusual, I suppose.

13 MR. FOLEY: It is an unusual --

14 QUESTION: Let me ask one other trivial
15 question. The cross burning took place on Earl Street,
16 didn't it?

17 MR. FOLEY: Yes, it did.

18 QUESTION: Whereabouts on Earl Street? That is
19 a long street, it runs from Mounds Park to Finland Park.

20 (Laughter.)

21 MR. FOLEY: 290 Earl Street.

22 QUESTION: Hm?

23 MR. FOLEY: 290 Earl Street.

24 QUESTION: I know that, but where is 290? What
25 is the cross street?

1 MR. FOLEY: I don't have the cross street,
2 Justice Blackmun.

3 QUESTION: You don't know --

4 (Laughter.)

5 QUESTION: It is near Mounds Park or is it near
6 Finland Park?

7 MR. FOLEY: It's near Mounds Park.

8 QUESTION: I was up there last June with some
9 U.S. Marshals who had never been there. And I think it's
10 one of the most beautiful views in the City of St. Paul.
11 But the grass was so high you couldn't see the view. Have
12 your maintenance man cut the grass.

13 (Laughter.)

14 MR. FOLEY: Justice, under our Constitution
15 everyone is presumed innocent until they've had a trial.

16 (Laughter.)

17 QUESTION: Mr. Foley, if you're going to make
18 all these concessions you might as well sit down now.

19 (Laughter.)

20 ORAL ARGUMENT OF THOMAS J. FOLEY

21 ON BEHALF OF THE RESPONDENT

22 MR. FOLEY: Mr. Chief Justice, and may it please
23 the Court:

24 The First Amendment was never intended to
25 protect an individual who burns a cross in the middle of

1 the night in the fenced yard of an African-American
2 family's home. The City of St. Paul has the right to
3 prohibit and prosecute such conduct.

4 The ordinance at issue in this case has been
5 interpreted by the Minnesota supreme court to prohibit
6 only conduct that inflicts injury, tends to incite an
7 immediate breach of the peace, or provokes imminent
8 lawless action.

9 QUESTION: Mr. Foley, do you agree with your
10 colleague on the other side that the supreme court of
11 Minnesota in its opinion did not decide whether the
12 conduct with which R.A.V. was charged came under the
13 ordinance?

14 MR. FOLEY: Your Honor, it's our contention that
15 the Minnesota supreme court, yes, did decide that the
16 conduct came under the ordinance and set it back for trial
17 on the merits.

18 QUESTION: So you and he disagree on that?

19 MR. FOLEY: Yes, sir.

20 And unless this Court is willing to abandon its
21 holdings in Chaplinsky and Brandenburg, holdings that it
22 has upheld for the last 50 years, this ordinance must be
23 upheld.

24 In this oral argument I'm going to touch on four
25 propositions. First is the purpose of the ordinance.

1 Second, that the ordinance has been narrowly construed by
2 the Minnesota supreme court only to apply to fighting
3 words. Third, that the ordinance as construed is not
4 overbroad or vague. And fourth, that the ordinance does
5 not interfere with legitimate First Amendment rights.

6 QUESTION: Well, Mr. Foley, would you address
7 the concern expressed by your opponent that the ordinance
8 is limited to only fighting words that arouse anger,
9 alarm, or resentment on the basis of race, color, creed,
10 or religion or gender and not other fighting words that
11 could cause the same reaction in people?

12 The argument is that the statute is
13 underinclusive.

14 MR. FOLEY: Your Honor, it's our position that
15 the statute is not underinclusive, that this is a fighting
16 words case, that this is unprotected conduct under the
17 First Amendment, and that the City of St. Paul has the
18 right to determine which harms it can proscribe within the
19 limits of its jurisdiction.

20 QUESTION: Well, certainly it is limited by
21 subject matter or content of the fighting words that are
22 spoken, is it not? In that sense it is a content-based
23 ordinance.

24 MR. FOLEY: Your Honor, it's our position that
25 it is not a content-based ordinance, that it certainly

1 could be used to be a content-neutral ordinance.

2 QUESTION: Well, but it doesn't cover fighting
3 words that are not limited to words on the basis of race,
4 color, creed, religion, or gender.

5 MR. FOLEY: That's correct, Your Honor.

6 QUESTION: So why, I mean, how can you possibly
7 say it isn't content-based to that extent?

8 MR. FOLEY: Your Honor, we have alternative
9 theories that it is content-based, but it is unprotected
10 conduct because it is fighting words, but we also believe
11 that the main purpose of the ordinance is not to limit
12 freedom of expression in that the harm that it's
13 attempting to regulate is neutral and it could be
14 considered content-neutral under the Renton-Barnes
15 analysis that this Court has engaged in, but even if the
16 Court feels that it is content-based, that there is a
17 compelling State purpose in public safety and order and
18 safety of their citizens for the City of St. Paul to pass
19 such an ordinance.

20 QUESTION: Why is that? Mr. Foley, suppose you,
21 the other major area of speech that we have called
22 nonspeech, I guess it's just a matter of analysis, but we
23 call it obscenity, not speech, not protected by the First
24 Amendment.

25 Now I assume that it would be bad, would it not,

1 to have an ordinance that says you cannot use obscene
2 photographs to advertise -- I don't know, the Republican
3 Party.

4 (Laughter.)

5 QUESTION: You may not use obscenity for the
6 following purposes, and then picking very content-based
7 purposes for advertising the Republican Party, this cause,
8 the other cause. That would be bad, wouldn't it, even
9 though you're dealing with unprotected speech. If you
10 want to prohibit obscenity, prohibit obscenity.

11 So it's the same here, if you want to prohibit
12 fighting words, prohibit fighting words. But why pick
13 only if you use fighting words for these particular
14 purposes, race, color, creed, religion, and gender? What
15 about other fighting words?

16 MR. FOLEY: I think the city has an absolute
17 right and purpose to try to regulate the harm that goes
18 onto its citizens. And certainly this bias-motivated
19 conduct and violence is much more harmful and has more
20 harmful impacts to its citizens --

21 QUESTION: That's a political judgment. I mean,
22 you may feel strongest about race, color, creed, religion,
23 or gender. Somebody else may feel strong as to about
24 philosophy, about economic philosophy, about whatever.
25 You picked out five reasons for causing somebody to breach

1 the peace. But there are a lot of other ones. What's
2 your basis for making that subjective discrimination?

3 MR. FOLEY: Your Honor, the City of St. Paul is
4 attempting to fashion responses to violence that it deems
5 necessary to prohibit and will add additional harms to be
6 regulated as it finds them.

7 Under this particular ordinance, it seemed that
8 this is a particular harm going on that is necessary
9 within the City of St. Paul to prohibit and regulate.

10 QUESTION: It doesn't have to add anything. You
11 could just drop the words and, you know, just say that
12 arouses anger, alarm, or resentment in others, period, or
13 shall be guilty of a misdemeanor. It didn't have to say
14 arouses anger, alarm, or resentment on the basis of race,
15 color, creed, religion, or gender. You don't need that
16 for Chaplinsky. If it's a fighting word, it's a fighting
17 word. They could get the cross burning, they could get
18 all sorts of activities.

19 MR. FOLEY: Your Honor, I think it's the city's
20 position that this is a fighting words case, that the
21 ordinance has been sufficiently narrowed by the Minnesota
22 supreme court. And you could reread that ordinance under
23 these facts to say that whoever based on race, places an
24 object or symbol with the intent to inflict injury, incite
25 immediate violence, or provoke imminent lawless action is

1 guilty of a crime. And I think that the Minnesota supreme
2 court's narrowing of that ordinance is sufficient to
3 uphold its constitutionality under the Chaplinsky and
4 Brandenburg holdings of this Court.

5 QUESTION: Well, are you saying that because
6 they can prevent or punish all fighting words, they can
7 select any category within the broad scope of fighting
8 words for it to be singled out?

9 MR. FOLEY: Yes, Your Honor.

10 QUESTION: If that is true, then why isn't it
11 equally true in a case in which there's a time, place, or
12 manner restriction? Why can't that be, since time, place,
13 and manner restrictions are constitutional, why can't
14 they, too, be limited to certain particular harms based on
15 content?

16 MR. FOLEY: The -- I think they can specify the
17 harm.

18 QUESTION: We can have content-based time,
19 place, and manner?

20 MR. FOLEY: Yes. No, no. Excuse me, Your
21 Honor, I didn't catch the question. The content-based
22 application of this ordinance, under fighting words, is
23 clearly within the power, if you find that it is a
24 fighting words case outside the protection of the First
25 Amendment, certainly the city has the right to prohibit

1 harms that it sees are very harmful to citizens of St.
2 Paul.

3 QUESTION: So you're saying fighting words
4 simply is not protected speech as such, and therefore, we
5 can select anything within the category of fighting words.
6 It's different from time, place, and manner in that
7 respect, is that what you're saying?

8 MR. FOLEY: Yes, Your Honor.

9 QUESTION: Isn't it true that the, at least up
10 to now, that any concept we may have had of fighting words
11 has been a concept which took fighting words as a whole
12 and assumed that to the extent that they could be
13 punished, they would be punished as fighting words, not as
14 categories within fighting words? So that if we accepted
15 your view, we would be making new law, wouldn't we?

16 MR. FOLEY: I don't believe we would be making
17 new law under that analysis.

18 I think under the fighting words doctrine, if
19 there is action that either inflicts injury or causes
20 immediate breach of the peace and under this particular
21 ordinance as construed by the Minnesota supreme court,
22 there has to be action combined with an intent to cause
23 that action with the defined affect of being based on the
24 race, in this particular case, of the Jones family. And I
25 think under that narrowing of the elements of this

1 particular crime, it falls within a very narrow category
2 of fighting words and falls within the
3 Chaplinsky-Brandenburg doctrine as outlined by this Court.

4 QUESTION: Mr. Foley, does the fact of the
5 burning of the cross on the lawn of the Jones family have
6 any bearing here? Perhaps I misunderstood you, but I take
7 it in your approach it doesn't have any great bearing.

8 MR. FOLEY: It does have a bearing on the
9 violation of this ordinance in how you analyze what is a
10 violation of fighting words.

11 In this particular case there was the burning of
12 the cross within the fenced yard of the Jones family. It
13 was an immediate threat to inflict injury and fear to the
14 Jones family to cause an immediate breach of the peace.
15 And in analyzing the ordinance, you really have to look at
16 the total circumstance and the context used. The
17 Minnesota supreme court indicated that not all cross
18 burnings were illegal, only those that --

19 QUESTION: What if the burning were done in
20 front of the Ramsey County courthouse at Wabasha and
21 Kellogg Boulevard?

22 MR. FOLEY: Your Honor --

23 QUESTION: Or in a different situation, around
24 the plaza of the State Capitol?

25 MR. FOLEY: Your Honor, we believe this

1 ordinance would not be applicable if the burning cross was
2 done in a public forum or in a political parade of some
3 sort. It's only when the conduct in this case is done in
4 a manner to inflict injury or cause an immediate breach of
5 the peace that it violates this particular narrowed
6 ordinance as construed by the Minnesota supreme court.

7 QUESTION: Let me -- may I interrupt with this
8 question? As you read the Minnesota supreme court, would
9 it violate the statute for a person to, who lived in an
10 integrated neighborhood to burn a cross in his own front
11 yard?

12 MR. FOLEY: Not with -- it would not unless
13 there was the intent to cause, to inflict injury --

14 QUESTION: Those are the only facts you know.
15 If they burn the cross, is there an element of intent that
16 you allege in your count against these people?

17 MR. FOLEY: There's an element of intent with
18 the ordinance saying know or have reason to know that it
19 would arouse --

20 QUESTION: That it would arouse anger, alarm, or
21 resentment in others. And if you made this same
22 allegation against a person who lived in an integrated
23 neighborhood where people go by his front yard all hours
24 of the day and night, would you not think that would
25 arouse, alarm, and resentment that perhaps --

1 MR. FOLEY: It would not arouse anger, alarm, or
2 resentment under the fighting words doctrine as the
3 Minnesota supreme court had previously construed that
4 language in the S.L.J. case. It's only when it arouses
5 anger, alarm, or resentment that arises to fighting words,
6 again, inflicting injury. It has to be more than
7 offending the sensibilities. I think you have to look at
8 the injury and the immediate breach of the peace. Is it
9 targeted and directed at a particular individual? And
10 under --

11 QUESTION: But you have not alleged in count 2
12 that is targeted at a particular individual, as I
13 understand it.

14 MR. FOLEY: The burning of the cross in the
15 fenced yard --

16 QUESTION: We don't know anything except what's
17 in the -- alleged in counts 1 and 2 of the information.

18 MR. FOLEY: I think it's important to look at
19 the facts that --

20 QUESTION: But this, it came up on motion to
21 dismiss, didn't it?

22 MR. FOLEY: Yes, Your Honor.

23 QUESTION: Now how can we look at anything
24 except what you've alleged in the complaint?

25 MR. FOLEY: On a, on a motion to dismiss the

1 facts of the file are all construed on behalf of the
2 nonmoving party.

3 QUESTION: But you can't make up that if you
4 have it alleged.

5 MR. FOLEY: No, but the facts that have been
6 submitted to the court and all of the police reports that
7 go to the intent of the --

8 QUESTION: You mean the police reports are a
9 part of the charging papers?

10 MR. FOLEY: In Minnesota we have filed all of
11 the police reports in, with the petition to the court.

12 QUESTION: Are they in the record?

13 MR. FOLEY: They should be submitted to you and
14 have all the police reports.

15 QUESTION: Mr. Foley, I'm having trouble with
16 terminology and it may be my fault, but I have assumed
17 that Chaplinsky spoke to two different categories, the
18 words that injure category and the fighting words
19 category.

20 Are you claiming that at least as the Minnesota
21 supreme court understands those two sets of terms, or
22 those two categories, that this is a fighting words case
23 or a word or expression that injures case? Or does it
24 have to be both as you understand the Minnesota supreme
25 court's construction?

1 MR. FOLEY: My understanding of the Minnesota
2 supreme court's construction is that it could be either.
3 It could either be the inflicts injury prong of the
4 Chaplinsky decision, which this Court has never really
5 addressed since announcing it in Chaplinsky, or the
6 immediate breach of the peace prong, and that the
7 Minnesota supreme court upheld both prongs as still good,
8 viable law and sent it back to the trier of fact to look
9 at the totality of circumstances in the context in which
10 this occurred.

11 QUESTION: Do you at least allege that there is
12 a fighting words offense here, that there is an immediate
13 breach of the peace implied by what you have alleged about
14 the burning of the cross?

15 MR. FOLEY: Your Honor, I think we allege both
16 prongs in this and that we would rely more heavily on the
17 inflicts injury prong to the family, the Jones family, the
18 burning of the cross in the middle of the night outside of
19 their home is more than just outrageous conduct. It is a
20 direct harm to these people, causing fear, intimidation,
21 threats, and coercion and I think that this Court could
22 look at that inflicts injury and indicate what does the
23 injury prong of Chaplinsky, what does it do?

24 It invaded a substantial privacy interest of
25 these people in a totally intolerable manner, and we think

1 that the injury prong should be addressed, but there is
2 still --

3 QUESTION: -- I am sorry, I didn't mean to
4 interrupt you.

5 MR. FOLEY: Excuse me. We also feel that the
6 immediate breach of the peace prong is viable under these
7 facts as alleged in the petition.

8 QUESTION: Going back to your earlier answer, if
9 I understand it, with respect to the infliction of injury
10 point, your theory is that because the category of words
11 that inflict injury are outside First Amendment
12 protection, it is not an objection in this case that the
13 particular words or expression that inflict injury are
14 identified by means of content. Is that a fair statement
15 of your position?

16 MR. FOLEY: We think they can be content-based
17 under those circumstances.

18 QUESTION: For the reasons I just gave?

19 MR. FOLEY: Yes. I think it is important to
20 look at bias-motivated violence which is significantly
21 more harmful on the impact than similar criminal conduct
22 not similarly motivated. The burning of the cross and the
23 African-American family is not the equivalent of a simple
24 trespass or minor arson, either to the targeted victims or
25 to the community in which it occurred.

1 QUESTION: Well, you say bias-motivated, but it
2 depends on what your biases are. If a family with a
3 mentally deficient child should move into the neighborhood
4 or if there should be established in the neighborhood a
5 home for the mentally ill, and someone should burn a cross
6 on the lawn of that home or institution with a sign that
7 says, mentally ill out, that would not be covered by this
8 ordinance, isn't that correct?

9 MR. FOLEY: I don't believe under the facts that
10 you described that it would.

11 QUESTION: It's the wrong kind of bias.
12 It's -- at least until they come around to adding -- which
13 may well be the next one, gender, religion, gender or
14 disability, until they come around to adding that, it's
15 the wrong kind of bias and therefore you can't --

16 MR. FOLEY: It's probably not addressed under
17 this particular ordinance. There are other alternative
18 criminal laws that may apply to that particular situation.

19 QUESTION: Why is that? I mean, if you are
20 concerned about breaches of the public peace, if it's a
21 fighting words problem, why is it okay for the State to
22 have the public peace broken for that reason? It's only
23 these other reasons they are worried about, why is that?
24 That seems to me like the rankest kind of subject matter
25 discrimination.

1 MR. FOLEY: Well, there are many reasons that
2 cities and State legislatures look to a particular wrong
3 that they are attempting to address, and I don't think
4 they address all of those wrongs at the same time, and
5 they attempt to get as many of them as they can and they
6 do address in a content-based -- under certain
7 circumstances, certain harms that they want to address and
8 including --

9 QUESTION: It wasn't hard, it wasn't hard to
10 write this in such a way that it wouldn't discriminate in
11 that fashion. They just had to drop out, on the basis of
12 race, color, creed, religion or gender, but those are the
13 only things that they seemed to be concerned about.

14 MR. FOLEY: I think the Minnesota supreme court
15 addressed or made reference to that issue when it said
16 that the particular city ordinance could have been drawn a
17 little bit better, but then went on to clearly narrow the
18 impact of that ordinance and narrowed it only to apply to
19 fighting words.

20 And in the context of the facts of this case,
21 the burning of the cross, the historical context of a
22 burning cross in the middle of the night is a precursor to
23 violence and hatred in this country --

24 QUESTION: Well, Mr. Foley, I would have thought
25 you might respond to Justice Scalia's question by citing

1 New York against Ferber for the proposition that if the
2 language is unprotected by the Constitution as you assert
3 is the case here, then underinclusiveness just doesn't
4 apply. The State can single out what it wants, at least
5 that's what the Court said in that case. Do you rely on
6 that?

7 MR. FOLEY: We do rely on Ferber and FCC v.
8 Pacifica as certain harms that this Court has looked at
9 and addressed to protect certain individuals from harm,
10 and certainly didn't mean to overlook the Ferber decision.

11 In the case of bias-motivated crimes, there is a
12 compelling State purpose to deal with what is a cancer on
13 society and it will unless effectively dealt with spread
14 throughout the community. Bias-motivated crimes have a
15 devastating effect on the particular target victims and
16 equally profound effect on all members of the minority
17 that is indirectly targeted and a pervasive effect on the
18 community as a whole.

19 QUESTION: Mr. Foley, I take it you are not
20 arguing that if the statute or the ordinance had not been
21 narrowed by the supreme court that it would have, that it
22 would be constitutional?

23 MR. FOLEY: No, Your Honor. We think it would
24 have been constitutional, unconstitutional under the --

25 QUESTION: Well, don't you have some trouble,

1 then, with the Lewis case in this Court --

2 MR. FOLEY: I don't believe so --

3 QUESTION: Lewis seemed to hold that although a
4 State supreme court purported to narrow an ordinance to
5 fighting words, that it just hadn't successfully done so,
6 and do you think the narrowing that was done or attempted
7 in this case was somewhat different than what the
8 Louisiana court did, for example?

9 MR. FOLEY: I believe, Justice White, your first
10 question is that it would have been unconstitutional as
11 written under the Gooding decision, and when the Lewis
12 case was sent back in light of Gooding, the Louisiana
13 supreme court essentially made very little effort to abide
14 by the Gooding decision in how it referenced fighting
15 words, but clearly the statute had a broader, more
16 sweeping view of --

17 QUESTION: Well, the supreme court said it was
18 narrowing the law to fighting words. It covers only
19 fighting words and any fool would know what a fighting
20 word is.

21 MR. FOLEY: It said it was narrowing it to
22 fighting words, but left in effect some of the language
23 that was clearly -- appropriate language that was clearly
24 broader --

25 QUESTION: Your court didn't -- it left the

1 ordinance reading exactly what -- left all the words in
2 the ordinance in there. They didn't say, which they might
3 have -- they should have said that to the extent this
4 statute reaches other than fighting words, the statute is
5 unconstitutional. It didn't say that, it just gave a
6 construction, and left those words -- all the words in
7 the --

8 MR. FOLEY: The Lewis Court just made a
9 reference to fighting words. The Minnesota supreme court
10 not only made reference to fighting words, but each of the
11 individual prongs cited in the opinion also cited
12 Brandenburg in the imminent lawless action, it attempted
13 to follow the directions of this Court as precisely as it
14 could from the Lewis decision and cites to -- and attempts
15 to distinguish the Lewis decision, and I think the
16 Minnesota supreme court did include fighting words and
17 limit according to previous rulings of Minnesota, very
18 similar to what the New Hampshire supreme court did in
19 Chaplinsky.

20 So I think it did make -- is different than the
21 Lewis holding. Given the historical experience of
22 African-Americans, a burning cross targeted at a black
23 family under the circumstances outlined is an unmistakable
24 threat. Terroristic conduct such as this can find no
25 protection in the Constitution.

1 Thank you, Your Honors.

2 QUESTION: Thank you, Mr. Foley.

3 Mr. Cleary, you have 4 minutes remaining.

4 REBUTTAL ARGUMENT OF EDWARD J. CLEARY

5 ON BEHALF OF THE PETITIONERS

6 MR. CLEARY: Thank you, Chief Justice.

7 In reference to Justice White's and Justice
8 O'Connor's observations, this is Lewis, this is not
9 Ferber. This is not marginal effects on the First
10 Amendment expression. This is a huge hole and I believe
11 it really represses a great deal of expressive conduct,
12 much more so than the marginal impact of Ferber.

13 Mr. Foley mentions in relation to Justice
14 Scalia's question concerning the underinclusiveness, there
15 was a content-neutral disorderly conduct ordinance
16 available that did not -- underinclusive, fighting words.

17 More importantly perhaps, since Mr. Foley spends
18 a lot of time talking about the terroristic factual
19 allegations here, there were other more serious laws
20 available that didn't make this kind of a political
21 statement.

22 This is not a question about whether anyone here
23 approves of this alleged conduct. There were tough ways
24 of dealing with it without implicating the First
25 Amendment.

1 QUESTION: Excuse me. Are you saying there was
2 another general breach of the peace ordinance that could
3 have covered this?

4 MR. CLEARY: Yes.

5 QUESTION: A general breach of peace ordinance
6 that would have covered fighting words?

7 MR. CLEARY: The S.L.J. was --

8 QUESTION: All fighting words.

9 MR. CLEARY: S.L.J. was narrowly construed by
10 the Minnesota court to read, just fighting words without
11 any subgroups or any of the rest of this language.

12 QUESTION: So then you could say that the
13 municipality's law as a whole did not discriminate on the
14 basis of subject matter? I mean, under this particular
15 ordinance you can only get certain types of fighting
16 words, but you are saying under another ordinance you
17 could get the rest. What's wrong with that?

18 MR. CLEARY: I am saying -- the other ordinance
19 would implicate the First Amendment but not in terms of
20 the viewpoint neutrality and not in terms of the under
21 inclusiveness.

22 QUESTION: Do we have that other ordinance,
23 that --

24 MR. CLEARY: It's cited in the briefs, Your
25 Honor.

1 QUESTION: Were there differences in penalties
2 under one or the other?

3 MR. CLEARY: No.

4 QUESTION: They are exactly the same --

5 MR. CLEARY: They are both misdemeanors.

6 QUESTION: In S.L.J. wasn't it a statute, not an
7 ordinance?

8 MR. CLEARY: Excuse me, it was a statute. The
9 penalty was the same, however. They are both 90 days
10 maximum.

11 QUESTION: Where is the citation? Will you
12 furnish it later so we don't use up your last minute?

13 MR. CLEARY: Certainly, Your Honor.

14 In closing, I would ask the Court to consider
15 this, that it would be a sad irony if we diminished the
16 First Amendment right of free expression to American
17 citizens in this way when the countries of Eastern Europe
18 and the Baltic States and the Soviet bloc are returning
19 their liberties to their citizens.

20 I would ask the Court to reverse the Minnesota
21 supreme court decision to remand this case for trial on
22 the remaining charge.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cleary.
25 The case is submitted.

1 (Whereupon, at 11:00 a.m., the case was
2 submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-7675 - R.A.V., Petitioners V. ST. PAUL, MINNESOTA

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BY Michelle Sander

(REPORTER)