IN THE

COURT OF APPEALS OF VIRGINIA

CASE NUMBER 0096-26-2

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AUGUSTUS SOL INVICTUS

F/K/A AUSTIN GILLESPIE

APPELLANT

V.

COMMONWEALTH OF VIRGINIA

APPELLEE

____

BRIEF OF AMICUS THE FREE EXPRESSION FOUNDATION, INC.

IN SUPPORT OF APPELLANT AUGUSTUS SOL INVICTUS

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AMICUS STATEMENT OF INTEREST

The Free Expression Foundation, Inc. ("FEF") is a Texas 501(c)(3) nonprofit dedicated to the propositions that discord is inevitable in a free society and that our differences ought to be addressed through open, if robust, debate and genuine dialogue. FEF's mission is to provide moral, legal, and financial support for persons and entities that have suffered or are at risk of suffering legal, financial, and/or social harm as a result of the exercise, attempted exercise, or intention to exercise their rights of free expression, including their rights under the First Amendment of the U.S. Constitution and analogous rights under international, state, and local charters and laws; and to support other organizations with similar purposes.

FEF's outlook aligns with the remarkable and precious tradition of First Amendment protections provided by the United States Supreme Court in cases such as *Brandenburg v. Ohio* (1969), *R.A.V. v. City of St. Paul* (1992), and *Snyder v. Phelps* (2011). FEF's mission is to be a true friend of the court by presenting issues and arguments that are broader than may be presented by the parties. In this case in particular, FEF believes its amicus brief provides perspectives on the Tiki Torch issues different from those set forth in the briefs of the parties.

FEF and its attorneys frequently litigate and assist in cases, both criminal and civil, involving First Amendment issues in federal and state courts. FEF's counsel have read the briefs filed by Petitioner in this Court and in the trial court, are familiar with the scope of the arguments presented by Petitioner, and will not unduly repeat arguments raised by Petitioner.

FEF believes its experience in First Amendment litigation will assist the Court in deciding the present case by providing a more granular perspective on the First Amendment issues raised by the present case that the individual parties cannot provide.

CERTIFICATION IN ACCORDANCE WITH VIRGINIA SUPREME COURT RULE 5:30

FEF certifies that (1) no party's counsel authored this amicus brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this amicus brief; and (3) no person other than amicus FEF, its members, or its counsel, contributed money that was intended to fund preparing or submitting this amicus brief.

FEF further certifies that it has sought and obtained the consent of all parties to the filing of this amicus brief.

INTRODUCTION

On the night of Friday, August 11, 2017, there was a protest march in Albemarle County on the campus of the University of Virginia in Charlottesville. The August 11 protest was a prelude to a permitted rally, advertised as the "Unite the Right rally" (UTR), which was scheduled to take place the following day, August 12, to protest the planned removal of a statue of Confederate General Robert E. Lee in a Charlottesville park which at the time bore Lee's name. *See* Appellate R. 2927 (noting UTR's permit "described the event as a 'free speech rally in support of the Lee Monument.'"); *see also* Appellate R. 2618:2-4 ("[I]t's important that we have those statues and that's just a visible object of our entire culture that's trying to be wiped out right now.") (statement of Mr. Invictus).

As the rally's name indicated, the UTR organizers also hoped the event would serve to unite the country's political right-wing across its distinct ideological and organizational lines at a time when the American right was simultaneously in a perceived period of popular ascendency following the first inauguration of President Donald Trump earlier that year, and when Trump's presidency had sparked "resistance" in Charlottesville. *See* Appellate R. 2859, 2862, 2882; *see also* Appeal R. 2618:18–20 ("[I]t was not just statue removal, but also Unite the Right, which means our attempt to unite the factions of the right-wing in America.") (statement of Mr. Invictus). To that end, it was hoped that the August 11 march would

demonstrate to the broader public the political solidarity of the UTR rallygoers. The marchers believed that by peacefully marching in a disciplined formation and chanting slogans in unison, the public would see that they were setting aside their political differences, uniting under a common cause, and acting as one to promote a unified, coherent, and sympathetic message. *See* Appellate R. 2936–37 (describing UTR organizers' efforts to advise attendees to avoid violence and refrain from the use of the Nazi salute). To symbolize their solidarity, many of the August 11 marchers carried properly lit tiki torches, the torchlit march being a form of expressive conduct UTR's organizers had previously employed in Charlottesville in May 2017. *See* Appellate R. 2859; *see also* "Christopher Cantwell August 11, 2017 Bodycam Footage" (at approximately 0:13:32: "We shouldn't be looking at a Battle of Berkeley Situation here, we should just be looking at it as we are going to do a demonstration and then we are going to leave. The narrative that the media is going to want to use . . . number one it's always been 'Oh, this is United the Right, look how ununited and disorganized they are,' so I think we pretty effectively stopped that from happening.") (statement of Jason Kessler).

The tiki torch bearers were instructed by the march's organizers to march together side-by-side in pairs, flanked by individuals who were not carrying torches and who would provide distance and separation between the tiki torch bearers and onlookers. *See* "Christopher Cantwell August 11, 2017 Bodycam Footage" (at

approximately 0:57:49: "When we're there everyone's going to start lining up in rows of two, everyone with the torches will be in the middle . . . if there's people without torches they will automatically be put to the outside . . . if we need to pull people that have torches, like big guys that can do security type stuff, we will change out their torches and get them on the outside as security.") (statement of unidentified UTR organizer); *see also* Appeal R. 2623:4–7 ("[T]here were supposed to be people on both sides, and we're supposed to be marching in a file. They were supposed to keep the two groups separate.") (statement of Mr. Invictus). While the marchers informed the police they would be marching through the University of Virginia campus and obtained the police's permission to do so, the march's organizers did not publicize the August 11 march to avoid potential confrontations with counter-protestors who UTR's organizers feared were already planning to disrupt the August 12 protest. *See* Appellate R. 2969–71. The marchers believed that if they encountered counter-protestors, the police would keep them separated from the marchers. *See* "Christopher Cantwell August 11, 2017 Bodycam Footage" (at approximately 0:56:47: "[The police] are going to be protecting us and letting us do this torchlight march tonight . . . if counter-protestors do show up . . . if they see a bloc, like a black bloc or whatever, coming towards us the police are going to move in to stop it before it comes up to us. Ok? So we should be ok") (statement of unidentified UTR organizer); *see also* Appellate R. 2623:9–11 ("The cops are going

to keep them away, the security detail is going to keep them away, and there's not going to be any conflict.") (statement of Mr. Inivctus), Appellate R. 2975. Indeed, fear that the August 12 rally would be shut down by a heckler's veto of disruptive counter-demonstrators—and that the UTR rallygoers would therefore have travelled to Charlottesville for nothing—in large part convinced the August 11 protestors they should go forward with their march. *See* Appellate R. 2622:2–6 ("So as far as why were we there on the 11th, I mean, part of it was this could get shutdown tomorrow. Another part of it was just, hey, we had a successful event back in May, let's do that again, because this time there are more people. This time we have more organization.") (statement of Mr. Invictus). The marchers intended to walk from one end of campus to the Thomas Jefferson statue outside of the campus's Rotunda (a building designed by Jefferson) where they would gather to hear a speech by political commentator Richard Spencer.

Defendant-Appellant Augustus Sol Invictus was invited to speak at the August 12 protest and was also invited to participate in the August 11 march. Mr. Invictus stood some distance back from the front of the march, carried a properly lit tiki torch, and filmed his walk with the marchers. His footage provides evidence from his position of what occurred during the protest from its beginning to its conclusion following Mr. Spencer's speech. Mr. Invictus's video shows that when the marchers arrived at the Jefferson statue, which sits in a small plaza at the foot of

the Rotunda building, they encountered dozens of counter-protestors who were chanting various slogans and surrounding the statue itself. Being within their rights to also demonstrate at the Jefferson statue, the marchers crowded into the plaza and exchanged competing chants with the counter-protestors. Mr. Invictus's video captures some minor altercations between the two groups, but Mr. Invictus neither participated in those altercations nor spurred others to participate. In fact, for most of the time in which Mr. Invictus was at the Jefferson statue plaza, he stood some distance back from the area in which the marchers and the counter-protestors directly faced each other, with dozens of his fellow marchers standing in between him and the counter-protestors around the statue. At no time while Mr. Invictus was at the Thomas Jefferson statue or elsewhere on the campus of the University of Virginia did Mr. Invictus threaten, obstruct the free movement of, or attack any individual.

Despite Mr. Invictus's presence at the August 11, 2017 march being public knowledge, and despite being easily locatable, Mr. Invictus was not indicted for his actions on August 11, 2017 until April 3, 2023, approximately 68 months later. The Grand Jury indicted Mr. Invictus on one count, not for battery, assault, kidnapping, or arson, but for allegedly "burn[ing] an object on the property of another or a highway or other public place with the intent to intimidate in violation of Virginia code section 18.2-423.01." Jurors in the trial of Mr. Invictus were instructed that a conviction under Virginia Code § 18.2-423.01 required that the Commonwealth

prove beyond a reasonable doubt that (1) the defendant burned an object; and (2) that he did so in a public place; and (3) that he did so with the intent to intimidate any person or group of persons; and (4) that the burning was done in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury. The Commonwealth argued that by holding a torch and being a part of a crowd which allegedly surrounded the counter-protestors, Mr. Invictus had committed the actus reus of the charged offense and that his intent to intimidate could be inferred from his holding of a tiki torch, the marchers' chants, and the number of marchers at the protest. Mr. Invictus was convicted on this count on October 11, 2024.

Considering the evidence presented at Mr. Invictus's trial, this Court should find that his conduct at the August 11, 2017 march was protected under the First Amendment of the United States Constitution and set aside his conviction with prejudice.

ARGUMENT

I. INVICTUS'S PARTICIPATION AT THE CAMPUS MARCH WAS EXPRESSIVE ACTIVITY. PROTECTED BY THE FIRST AMENDMENT.

A. Use of Tiki Torches at a Political Rally Is Symbolic Expression Protected by the First Amendment under *Virginia v. Black*.

In *Virginia v. Black*, the United States Supreme Court considered the validity of Virginia's then enacted version of Virginia Code § 18.2-423.01 (then § 18.2-423),

which provided that "[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." *Virginia v. Black*, 538 U.S. 343, 348 (2003). The Court held that "the First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." *Id*. at 363. In reaching this holding, the Court discussed the history of cross burnings in America and concluded that "often the cross burner intends that the recipients of the message fear for their lives" and that "when a cross burning is used to intimidate, few if any messages are more powerful." *Id*. at 357.

Indeed, the Court's holding that cross burnings used to intimidate could be proscribed clearly followed from its longstanding "true threats" doctrine, which allows punishment for "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). However, the Court struck down the Virginia statute's requirement that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id*. at 363. This was because, while history demonstrated that cross burning could be done with the intent to threaten, this was not the only reason why someone would burn a cross; rather, cross burning

could also be used as “a statement of ideology, a symbol of group solidarity,” or for artistic purposes. *Id*. at 365–66. Because these latter examples of cross burning carried out without an intention to intimidate amount to a form of expression that could “be fairly considered as relating to any matter of political, social, or other concern to the community,” such cross burning would occupy the “highest rung of the hierarchy of First Amendment values” and would thus be “entitled to special protection.” *See Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted). “Thus, ‘[b]urning a cross at a political rally would almost certainly be protected expression.’” *Black*, 538 U.S. at 366 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 402 n.4 (1992) (White, J., concurring in judgment)).

And so, too, peacefully carrying a properly lit tiki torch at a political rally must also be First Amendment protected expression. This conclusion is all the more forceful when the historical significance and symbolism of the lit tiki torch is contrasted with that of the burning cross. Put simply, unlike a burning cross a properly lit tiki torch does not have a “long and pernicious history as a signal of impending violence.” *Id*. at 363. In fact, the tiki torch does not have a relatively long history at all, and as a symbol its history is anything but pernicious or violent. While “[c]ross burning originated in the 14th century as a means for Scottish tribes to signal each other,” *id*. at 352, as one writer has noted “[t]he story of tiki torches entwines with the rise of the tiki culture in mid-20th-century America.” Jack Smith,

Everything You Need To Know About the History & Cultural Significance of Tiki Torches, Outdoor Fire and Patio, https://tinyurl.com/yfcadds9 (last accessed Apr. 19, 2026). Moreover, "tiki culture," of which the tiki torch is a ubiquitous symbol, has historically represented "for an army of American bachelors, housewives, and suburban commuters, a dream of escape and sexual liberation, conjuring up scenes of pagan fertility rituals and a world filled with endless sensuality . . . the most accessible means by which to plunge into a world of pagan madness." Francesco Adinolfi, *Mondo Exotica: Sounds, Visions, Obsessions of the Cocktail Generation* 15 (Karen Pinkus & Jason Vivrette, eds. & trans., Duke University Press, 2008).

Indeed, one commentator who was critical of UTR, Jordan von Manalastas, himself a lawyer, *see* About, Aestheticide, https://aestheticide.com/about/ (last accessed May 8, 2026) [https://archive.is/DfCKg], was familiar with the "mid-20th century" history of "the tiki style as a popular theme of bars and bistros" and argued not long after the march occurred that the "incongruence" between the tiki torch marchers' slogans and their use of the "backyard decorations" was "weird", "rather rich", "kitschy," and "made them look ridiculous." Jordan von Manalastas, Aestheticide (Aug. 27, 2017), https://aestheticide.com/2017/08/27/the-luau-at-the-end-of-the-world/ [https://archive.is/39one]. Mr. Manalastas opined that

> The only thing [the marchers] share in common is a mawkish longing for the exploded myths and ideologies of the past. Kitsch is the glue that keeps them all together. It's better not to see these fascist thugs as

> some *sui generis* threat, some long-banished evil now returned, but rather as the putrefying waste of capitalist modernity.

Id. CNN noted even sooner after the march that similar criticisms and mockeries were widespread:

> The bamboo-wrapped beacons are decidedly nonwhite, having roots in Polynesian and Hawaiian cultures – a fact that white-nationalist marchers might not have meant to highlight. Tiki torches made their entrance in the US in the early 1900s in Hawaiian-themed restaurants. According to Tiki Brand, the torches "gained more popularity in the 1950s, when Pacific Island-themed restaurants, bars and even living rooms were all the rage. "
>
> Outrage on social media over the Friday night tiki-torch march quickly turned to mockery as users pointed out the irony of the tiki-lit demonstration.
>
> Even Republican Sen. Orrin Hatch of Utah got in on the ribbing.
>
> "It's unclear why the white supremacist used tiki torches, given their opposition to non-European Caucasian," he tweeted.

Paul P. Murphy, *White nationalists use tiki torches to light up Charlottesville march*, CNN (Aug. 14, 2017), https://edition.cnn.com/2017/08/12/us/white-nationalists-tiki-torch-march-trnd [https://archive.is/qyoHE].

These reactions are important. "The Federal Courts of Appeal have uniformly held that 'evidence of the recipient's reaction is relevant and admissible' to the inquiry of whether it was reasonable for the victim to believe an individual had a serious intention of inflicting physical harm" and "'proof of the effect of the alleged threat upon the addressee is highly relevant.'" *Holcomb v. Commonwealth*, 709

S.E.2d 711, 716 n.4 (Va. Ct. App. 2011) (citations omitted). Audience reactions that indicate expressive conduct was not taken seriously as a sign of impending violence, particularly a reaction which involves laughter or mockery, justifies the reversing of a true threats conviction and the entry of a judgment of acquittal. *See Watts*, 394 U.S. at 706–08 (overturning defendant's conviction partly on the grounds of "the reaction of the listeners" because "the crowd laughed after the statement was made").

This is not to suggest that Mr. Invictus or the UTR demonstrators were marching in support of the romantic, libertine ideals of "tiki culture" or that they had a desire to appear "kitschy"; it is only to show that a tiki torch is, symbolically, a far cry from a burning cross and that many of those who observed the tiki torch march viewed it as risible rather than intimidating.[1] Regardless, it does seem clear from the

[1] The Commonwealth has obfuscated the fact that Mr. Invictus and the UTR marchers held *tiki* torches, referring to the tiki torches throughout the proceedings as mere "torches," and in one instance attempting to compare the tiki torch to a blowtorch used in a 1937 lynching in Duck Hill, Missouri. *See e.g.*, "Response to Defendant's Motion to Dismiss," Appeal R. 50. But a tiki torch is much different than a simple torch (and certainly even more different than a blowtorch), which Merriam-Webster defines as "a burning stick of resinous wood or twist of tow used to give light and usually carried in the hand" or "any of various portable devices for emitting an unusually hot flame" *See torch*, Merriam-Webster Dictionary (online ed.), https://www.merriam-webster.com/dictionary/torch. Moreover, as noted above, that Mr. Invictus and his fellow marchers carried *tiki* torches was well understood by outside observers at the time and long after the march. *See*, *e.g.*, Brett Barrouquere, *Here's what Charlottesville is like one year to the day after infamous tiki torch march*, Southern Poverty Law Center (Aug. 11, 2018), https://www.splcenter.org/resources/hatewatch/heres-what-charlottesville-one-year-day-after-infamous-tiki-torch-march/. The tiki torch became such an iconic symbol of UTR that those accompanying Richard Spencer back to Charlottesville in

name and declared purpose of the rally itself and the uniform, disciplined way in which Mr. Invictus and his fellow marchers carried their lit tiki torches that the symbolic intent of the tiki torch carrying was to demonstrate the "group solidarity" of the UTR marchers,[2] and for this reason alone Mr. Invictus's expressive conduct is entitled to strong First Amendment protection. *See Black*, 538 U.S. at 365–66.

Additionally, a tiki torch differs from a burning cross or even a "classic" or "regular" torch[3] in a practical respect as well as a symbolic one. Unlike a burning cross or a "classic" or "regular" torch, which burn in an uncontained and openly exposed manner, and thus cannot be easily extinguished, the burning oil fuel of a tiki torch is contained within the head of the torch itself, and its combustible material is not directly exposed to the atmosphere except for through the small hole at the top

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October 2017 again carried tiki torches during his speech in Emancipation Park. Megan Woo, *White Nationalist group returns to Charlottesville with tiki-torches*, WWBT NBC12 (Oct. 8, 2017), https://tinyurl.com/3zvzhdn5 [https://archive.is/XDw5c].

[2] Additionally, as defense counsel has ably noted, the torchlight rally has a long history in the history of American presidential campaigns. *See, e.g.,* "Motion to Set Aside Verdict," Appeal R. 619; *see also* Lisa Wiltse, Park Ranger, Address at the Quadrennial Reenactment of the Franklin D. Roosevelt Torchlight Victory Parades at Hyde Park (Oct. 14, 2016), https://www.youtube.com/watch?v=dDQX4DbETYI (beginning around 0:07:45, following a reenactment of a torchlight parade, discussing the history of torchlight parades to rally voters beginning with the election of Martin Van Buren and focusing on the parades celebrating FDR's gubernatorial and presidential election victories at Hyde Park).

[3] By the phrase "classic" or "regular" torch, we mean the kind of torch that consists solely of an openly burning item attached to some kind of stick or rod, or that is simply a burning stick or rod alone.

of the torch from which the flame is able to exit in a controlled manner. Furthermore, the tiki torch which Mr. Invictus himself carried featured a cap attached to the head via a small rope. That cap could be used to safely block the exit hole and extinguish the flame. Indeed, Mr. Invictus, along with some of his fellow marchers, can be seen putting out their torches in this manner shortly after arriving at the Thomas Jefferson statue. This practical difference between a tiki torch and a burning cross or a “classic” or “regular” torch is legally significant: a mere lit tiki torch, even when carried aloft, which is plainly designed to serve as a decoration and a safe means of holding a flame, and cannot reasonably be described as a weapon, “do[es] not convey a real possibility that violence”—or any other form of reasonably foreseeable danger—"will follow.” *See Counterman v. Colorado*, 600 U.S. 66, 74 (2023); *cf.* “Jury Instruction 11,” Appeal R. 496 (requiring the Commonwealth to prove beyond a reasonable doubt that Mr. Invictus’s use of a lit tiki torch “was done in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury”). Thus, because a tiki torch is not a relatively dangerous instrument, simply carrying a lit tiki torch cannot constitutionally form the predicate for a true threats conviction. *Cf. Turner v. Commonwealth*, 792 S.E.2d 299, 305 (Va. Ct. App. 2016) (comparing a noose to a burning cross and explaining that “a state may ‘choose to prohibit only those forms of intimidation that are *most likely* to inspire *fear of bodily harm*.’. . . Thus, Virginia can ‘outlaw cross burnings done with

the intent to intimidate because burning a cross is a particularly virulent form of intimidation.'") (emphasis added and in original) (citing *Black*, 538 U.S. at 363).

B. The Commonwealth Concedes the Legality of the Tiki Torch Carrying.

To the Commonwealth's credit, it seemed at trial to concede the legality of merely carrying a lit tiki torch at the August 11 march. In his closing argument to the jury, Assistant Commonwealth's Attorney Zijerdi stated it was "not illegal to walk through the grounds in a procession with lit torches and chanting." Appeal R. 2741:11–13. On this point the Commonwealth, Mr. Invictus, and amicus FEF agree.

Rather, the Commonwealth's theory of the case was that Mr. Invictus violated Virginia Code § 18.2-423.01 when he allegedly surrounded counter-protestors at the Thomas Jefferson statute outside the Rotunda. Appeal R. 2741:18–22 ("When that torch lit procession bounds towards [the counter-protestors] and begins to encircle them and eventually successfully completely encircles them with the torches, that's the moment. Those minutes are where the case is. That's where all of the elements line up, and the law has been broken.") (statement of Mr. Zijerdi). This was also the trial court's understanding of the Commonwealth's theory when it held a January 8, 2025 hearing on Mr. Invictus's motion to set aside the verdict. *See* Appeal R. 1647:7–17. This theory is both legally and factually deficient on this record.

C. The Marchers' Ability to Outnumber and Peacefully Surround Counter-protestors without Obstructing their Egress Is Protected under the First Amendment.

In its closing argument, *see* Appeal R. 2754–55 (closing argument by Mr. Zijerdi), the Commonwealth relied on a concert of action theory to persuade the jury to convict. Jury instruction number ten (hereinafter "Instruction 10") read

> If there is concert of action with the resulting crime one of its probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime. To be concert of action, the defendant must share the group's intent to intimidate.

"Instruction 10," Appeal R. 495. Given the First Amendment interests at stake, this instruction was inadequate. As the Court explained in *N.A.A.C.P. v. Claiborne Hardware*, "[c]oncerted action is a powerful weapon . . . one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 932–33 (1982). When marchers' "ultimate objectives [are] unquestionably legitimate" they may not be collectively punished even though "[t]he taint of violence color[s] the conduct of some" whom they temporarily associate with in their march. *See id*. at 933. Individuals who commit violence may of course be punished, but it is not sufficient to show that all marchers may be found guilty for the acts of some of their fellows simply upon presenting "evidence that violence occurred or

even that violence contributed to the success of the [march].” *Id*. Rather, the Commonwealth’s burden is far more onerous, and a concert of action theory sufficient to find a defendant guilty for his conduct at an otherwise First Amendment protected demonstration

> [M]ust be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.

Id. at 933–34. The Court characterized this burden as “heavy” and cautioned that “[a] court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.” *Id*. at 934.

None of the specific findings required by *Claiborne* were made by the jury. At trial, Mr. Invictus’s counsel argued that Instruction 10 was inadequate because it would have permitted the jury to convict Mr. Invictus based on merely being present in the crowd at the Thomas Jefferson statue. *See* Appellate R. 2720:11–15 (“It's almost like saying, if you're merely present then that's good enough. I mean, you know, participates just by walking in the march could be---they could take, construe that as being enough to make concert of action.”) (statement of Mr. Roberts). To this objection, the trial court seemed to indicate agreement, *see* Appellate R. 2720:16 (“Yeah”) (statement of the court), but nevertheless the trial court justified its

decision to give Instruction 10 on the basis that defense counsel could "say [Mr. Invictus's] participation was minimal." Appellate R. 2720:20–23.

Instruction 10 was deficient because it did not explicitly indicate that Mr. Invictus could not be convicted merely for participating in the tiki torch march. Indeed, in instructing the jury that "whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime," "Instruction 10," Appeal R. 495, the trial court indicated that Invictus could be convicted merely for participating in the tiki torch march if the jury believed that the march itself was a way in which an alleged crime was brought about. This theory is contrary not only to well-established First Amendment precedent, but to general principles of Virginia criminal law.

In *Jones v. Commonwealth*, the evidence established at trial showed that the defendants "were surrounded with the members of a group of approximately 30 people . . . that some members of the group were yelling, cursing and using obscene language, and that several bottles, pieces of brick, sticks and two knives were found on the ground where the surrounded group stood." *Jones v. Commonwealth*, 170 S.E.2d 779, 782 (Va. 1969). However, "[n]o witness identified the defendants as the persons who were cursing and using obscene language or the possessor of the articles found on the ground" and "[t]here was no proof that the defendants joined the crowd

‘for the purpose of disturbing the peace or exciting public alarm or disorder.’” *Id*. Thus, “the Commonwealth's evidence show[ed] nothing more than presence at the scene” and because it has been “well established that mere presence is not enough to support a conviction,” the evidence was insufficient to sustain the convictions of the defendants. *Id.*; *see also Jones v. Commonwealth*, 157 S.E.2d 907, 909 (Va. 1967) (“It is, of course, well settled that mere presence and consent are not sufficient to constitute one an aider and abettor in the commission of a crime.”).

If mere presence is not sufficient to support a conviction for unlawful assembly, it necessarily cannot be sufficient to support a conviction of a participant at a First Amendment protected assembly based upon a concerted action theory where sporadic acts of violence were alleged to occur by persons other than the defendant. *Cf. Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996) (“The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence . . . and to arrest those who actually engage in [violence], rather than to suppress legitimate First Amendment conduct as a prophylactic measure.”) (first citing *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); and then citing *Kunz v. New York*, 340 U.S. 290, 294–95 (1951)). And as explained in Part II, infra, Mr. Invictus did not personally engage in violence, nor did he counsel or abet violence.

Nor can it be sustained that the tiki torch marchers committed a criminal act by "outnumbering" the counter-protesters grouped around the Jefferson statue without any evidence that they violated a valid prior restriction on crowd size. "[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech" only if "the restrictions 'are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quotations omitted). Without the prior notice of valid time, place, and manner restrictions, the government cannot act consistently with the First Amendment by discriminating *ex post facto* against one group of spontaneous demonstrators because of their ability to muster a more numerous group than a competing group of spontaneous demonstrators. Our Constitution abhors *ex post facto* regulation because it is "arbitrary and potentially vindictive," *see Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citations omitted), and arbitrary application of government regulations are "'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth Cnty, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

Finally, a less numerous group of spontaneous demonstrators cannot be allowed to circumscribe the scope of competing demonstrators in the same public square by preemptively positioning themselves at the center of the public square and then crying foul when a later-arriving, larger group necessarily crowds themselves into the area around the occupied center of that public square to demonstrate in opposition to the earlier group. To do so on the grounds that the later-arriving, larger group is inherently threatening to the smaller group the larger group must necessarily surround, given the prior positioning of the smaller group and the limited space of the public square, would provide those earlier-arriving, smaller groups with a heckler's veto. *Cf. Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277, 284 (W.D. Va. 2020) ("The state undertakes a heckler's veto when it suppresses speech based on the threat, or possibility, of a hostile or violent response from the audience."). Unless there is evidence that the later-arriving group prevented the earlier-arriving group from leaving or otherwise threatened, assaulted, or battered members of the earlier-arriving group, it is not a crime for members of the later-arriving group to surround those occupying the center of the public square. Indeed, it can be safely assumed that a group of demonstrators occupying the center of a public square consciously invites a crowd to gather around them as witnesses to their demonstration. In doing so these demonstrators must take the bitter with the sweet and thus must assume the "risk" that the crowd will disagree with their message. *See*

Terminiello v. City of Chciago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."). Additionally, as explained above, evidence that certain individuals other than Mr. Invictus obstructed the egress of the counter-protestors or engaged in violence with them cannot alone sustain Mr. Invictus's conviction on a concert of action theory.

The Commonwealth's theory of the case is legally deficient because it would permit criminal liability to attach to an otherwise lawful protest based only upon the relative size of competing protest groups and the preemptive positioning of the smaller group in a public square, and without any evidence that a defendant in the more numerous group took any action to prevent individuals in the smaller group from leaving the public square or otherwise committed violence against them. In doing so, the Commonwealth would manufacture a legal blueprint for prosecuting future First Amendment protected demonstrations based on what would in essence amount to nothing more than a heckler's veto by outnumbered and strategically pre-positioned demonstrators. This would be unconstitutional and intolerable enough in a vacuum, but this Court should not ignore the possibility that such legal maneuverings will be applied selectively to punish speech which is politically

disfavored, or that cunning counter-protestors will feign victimhood to provide the Commonwealth pretext for punishing politically disfavored demonstrators.

II. THE RECORD PROVIDES INSUFFICIENT EVIDENCE TO SUSTAIN INVICTUS'S CONVICTION.

"[Q]uestions of both constitutional interpretation and statutory construction are reviewed *de novo*." *Turner v. Commonwealth*, 792 S.E.2d 299, 303 (Va. Ct. App. 2016) (citing *Lawlor v. Commonwealth*, 738 S.E.2d 847, 877 (Va. 2013)). Normally, in determining the sufficiency of evidence to support a criminal conviction the appellate court views the facts in the light most favorable to the Commonwealth. *See, e.g., Seat v. Commonwealth*, 905 S.E.2d 171, 175 (Va. Ct. App. 2024). However, Virginia appellate courts must conduct an "independent examination of the whole record" and "exercise independent judgment" when First Amendment issues are at stake to fulfill "the obligation of reviewing judges to assure that governing federal constitutional law has been applied properly." *See Gazette, Inc. v. Harris*, 325 S.E.2d 713, 727–28 (Va. 1985); *accord In re Morrissey*, 168 F.3d 134, 137 (4th Cir. 1999) ("In cases raising First Amendment challenges, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.") (cleaned up) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)). Two particular areas of constitutional factual concern are of great importance in the instant case: the conduct and mindset

of the counter-protestors who arrived first to the Thomas Jefferson statue, and the conduct and mindset of Mr. Invictus during the march.

The "Independent Review of the 2017 Protest Events in Charlottesville, Virginia" (hereinafter "Heaphy Report," *see* Appellate R. 2845–3065) establishes that opponents of the UTR rallygoers organized and trained "on nonviolent techniques for disrupting hate speech and obstructing law enforcement." "Heaphy Report," Appellate R. 2972. One of these individuals was Emily Gorcenski, *see id.* at 2970, who was later present at the Thomas Jefferson statue during the pertinent events. *Id*. at 2976. Gorcenski is a "writer and 'doxing activist' for Antifa[4]," *see* "Mot. to Dismiss for Preindictment Delay," Appellate R. 145 (citing Andy Ngo,

[4] "Antifa," short for anti-fascism or anti-fascist, is a catch-all term for, in the words of Professor Mark Bray, one of Antifa's advocates, "a method of politics, a locus of individual and group self-identification, and a transnational movement that adapted preexisting socialist, anarchist, and communist currents to a sudden need to react to the fascist menace." Mark Bray, *Antifa: The Anti-Fascist Handbook* xiv (2017). As Professor Bray proudly boasts, "[a]t the heart of the anti-fascist outlook is a rejection of the classical liberal phrase incorrectly ascribed to Voltaire that 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.* at xv. According to Professor Bray, "historically, fascist and fascistic ideas have thrived in open debate," and, because public discourse has often been insufficient to "squash fascism," anti-fascists "refuse to pin their hopes for the freedom and security of humanity on processes of public discourse that have already shown themselves to be fallible." *Id*. at 147–48. Thus, "anti-fascists prioritize the political project of destroying fascism and protecting the vulnerable regardless of whether their actions are considered violations of the free speech of fascists or not." *Id.* at 144. While Professor Bray asserts that most Antifa activism does not involve violence, he also admits that "it is also true that some [anti-fascists] punch Nazis in the face and don't apologize for it." *Id*. at 168.

Unmasked: Inside Antifa's Radical Plan to Destroy Democracy 180, 188 (2021)). Gorcenski surveilled the tiki torch marchers at their gathering point at Nameless Field and informed the counter-protestors at the Jefferson statue that the marchers were en route to their location carrying tiki torches. "Heaphy Report," Appellate R. 2976. Gorcenski also remained with the counter-protestors until the conclusion of the march. *Id.* Thus, the counter-protestors were familiar with the size of the march and the fact that many marchers would be carrying tiki torches. It was, of course, the right of the counter-protestors to remain at the Thomas Jefferson statue; and certainly the fact that they remained would not justify any acts of violence against them. But it also cannot be asserted that these counter-protestors were unaware of the scale and nature of the march and the "hate speech" they sought to "nonviolent[ly] disrupt."

Additionally, the Heaphy Report establishes that the tiki torch march's organizers sought to avoid contact with counter-protestors and took actions to that effect. Organizers emphasized that attendees should not publicize their plans to march. *Id.* at 2969. Additionally, UTR organizer Chris Cantwell, "noting that Antifa and other anti-racist groups often interfere with free speech events held in public areas," refused to take part in the march unless primary UTR organizer Jason Kessler informed law enforcement of their plans and attempted to coordinate with them, which Kessler did do shortly before the beginning of the march. *Id*. at 2971.

Mr. Invictus videotaped himself for more than 27 minutes on the night of August 11, 2017 during the tiki torch march as part of his livestream reporting on the event. This video demonstrates conclusively that Mr. Invictus did not engage in violence or threaten any counter-protestor at the Thomas Jefferson statue. Beginning at around 0:18:30 of his video, Mr. Invictus walks down the steps of the Rotunda with the marchers towards the Jefferson statue. He then circles around the statue, following the marchers in front of him. At 0:19:34 he calls out to the counter-protestors "Thank you for protecting our statue" and then calmly says to someone near him (or to his livestream audience) "That's so kind of them to do that for us." At 0:19:54 we see the first signs of violence: a counter-protestor knocks a camera out of the hands of a marcher. Mr. Invictus immediately walks away. At 0:20:05 he again thanks the counter-protestors for "protecting our statue." At 0:20:30, while pointing his camera towards the statue itself, he says "And there's Thomas Jefferson, rolling in his grave." He then steps to the back of the crowd near the statue and speaks to Richard Spencer at 0:21:07. While pointing his camera at Spencer, Mr. Invictus says "This is our speaker for the night, this is why we're here, everybody."

At 0:22:40 a small altercation breaks out between a number of marchers and a number of counter-protestors; a tiki torch is dropped in front of the counter-protestors and one counter-protestor picks it up and throws it away from the statue towards the marchers. Marchers and counter-protestors can then be seen covering

their face, presumably due to pepper spray or mace being used. At around 0:23:20 counter-protestors can then be seen walking away from the statue through the crowd of marchers. There is no indication that they are being obstructed. At 0:23:30 two individuals who are not carrying tiki torches walk directly in front of Mr. Invictus and appear to be leaving; one of them is holding a cell phone and appears to be filming the faces of the marchers. At the same time, Mr. Invictus, narrating the events, says that Antifa "gassed themselves." At 0:23:40 a marcher states that the group should put their tiki torches out, which many of those around Mr. Invictus appear to do. At 0:23:58 Invictus pans over to his left side to film counter-protestors unfurling a banner behind him. The camera captures a uniformed police officer. At 0:24:04 Invictus calls out to them "Way to gas yourselves you fucking idiots." At around 0:24:20 he then mocks the group of counter-protestors for unfurling their banners upside down. At 0:24:20 the camera pans back to the statue and Spencer and his entourage are now standing at the base of the statue. The marchers cheer. At around 0:25:05 Spencer begins his speech, and his speech concludes at 0:25:47. At 0:25:53 the marchers tell each other to get off the base of the statue and leave the area. At 0:26:17 Mr. Invictus turns the camera towards his face and provides a brief narration of the events of the march as he encourages his audience to come to the UTR demonstration the next day. The video then concludes at 0:27:13. At no point

during the video does Mr. Invictus counsel or encourage violence, nor does he ever engage in violence himself or abet violence.

Mr. Invictus was constitutionally permitted to march on the campus of the University of Virginia while carrying a tiki torch. *See* supra Part I.A. The Commonwealth has conceded this point. *See* supra Part I.B. Mr. Invictus was also constitutionally permitted to be a part of a larger spontaneous group than the counter-protestors, and he was permitted to gather around the outside of the center of the public square the counter-protestors were occupying. *See* supra Part I.C. And as explained above, there is no evidence that Mr. Invictus ever committed or encouraged any acts of violence at the Thomas Jefferson statue. Mr. Invictus's conviction can only stand if in this totality of different exercises of standalone rights the Court finds a wrong. But First Amendment freedoms cannot be so blithely rationed, *cf. Buckley v. Valeo*, 424 U.S. 1, 19 n.18 (1976) ("Being free to engage in unlimited political expression subject to a ceiling . . . is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."), and so Mr. Invictus's conviction should not stand.

CONCLUSION

For the reasons described above, this Court should set aside with prejudice the conviction of Augustus Sol Invictus for burning an object in a public place with intent to intimidate in violation of Virginia Code § 18.2-423.01.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

I hereby certify on this 9th day of June, 2026, that the foregoing amicus brief complies with Rule 5A:23 of the Virginia Supreme Court Rules and all other applicable rules.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2026, true and correct electronic and email copies of the foregoing amicus brief were filed with the Court of Appeals of Virginia and served upon:

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