IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CITY OF NORFOLK, VIRGINIA et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:19-cv-00436-AWA-DEM
	)	
COMMONWEALTH OF VIRGINIA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

The City of Norfolk and its City Council (together, the City) ask this Court to void as unconstitutional statutes that do not apply to the monument in question and that no defendant in this case intends to enforce against the City.[1] For that reason, there is no justiciable "Case" or "Controversy" within the meaning of Article III, and the complaint should be dismissed, both for lack of jurisdiction and for failure to state any claim on which relief may be granted.

The City alleges that three separate Virginia statutes prevent it from moving a Confederate monument located on City property (the Monument). The City brings four constitutional claims against three defendants: the Commonwealth of Virginia, as well as the Commonwealth's Attorney for the City of Norfolk and the Attorney General, both of whom are sued solely in their official capacities. The complaint seeks four forms of relief: a declaratory judgment; a permanent injunction; nominal damages; and attorney's fees.

Most fundamentally, there is no justiciable case or controversy because the operative provision (Va. Code Ann. § 15.2-1812) does not forbid the City from moving the Monument and all of the defendants either lack the authority to enforce Section 15.2-1812 or have expressly disclaimed any intention of invoking any of the challenged statutes against the City. The complaint asserts that the City built the Monument nearly a century before the General Assembly amended the relevant laws to cover monuments erected by independent cities, and, under settled principles of state law, the provisions of Section 15.2-1812 have only prospective effect. None of the defendants has ever sought to enforce Section 15.2-1812 against the City or otherwise prevent it from moving the Monument. Indeed, the defendants have specifically acknowledged

[1] Indeed, the Attorney General and Commonwealth's Attorney support the City removing the monument.

that, if the City attempts to move the Monument, none of the defendants has either a legal right or any intention of stopping it from doing so. For that reason, the complaint should be dismissed for lack of jurisdiction.

Even putting aside these global justiciability defects, each of the complaint's individual allegations is also insufficient to survive a motion to dismiss. The Commonwealth of Virginia itself should be dismissed for three separate reasons: (1) the Commonwealth is not a "person" who can be sued under 42 U.S.C. § 1983; (2) the Commonwealth has sovereign immunity against all of the City's claims; and (3) pursuant to Virginia's state-law *Dillon* rule, the City lacks any authority to sue its parent State. The Attorney General is likewise not a proper party because he lacks any authority to enforce the statutory provisions at issue.

The City's remaining claims fail as a matter of law as well. The City may not recover damages because Section 1983 does not authorize such relief against state officers (including Commonwealth's Attorneys) sued in their official capacities. And the City's remaining claims—for declaratory and injunctive relief against the Commonwealth's Attorney—fail as a matter of law because there is no cognizable danger of harm where the Commonwealth's Attorney has never attempted to enforce the challenged statutes against the City and has stated under oath that he has no authority or intention to do so. For that reason, even if this dispute presented a justiciable controversy—which it does not—it would not warrant the exercise of this Court's equitable powers.

BACKGROUND

A. Statutory Background

1. The statute at the heart of this litigation, Virginia Code § 15.2-1812 (Section 15.2-1812), is the descendant of legislation enacted by the Virginia General Assembly in 1904, which established a process for authorizing Confederate war memorials. See 1904 Va. Acts ch. 29

(1904 Act).[2] Unlike later versions of the statute, only counties were subject to the 1904 Act. *Id.*; see also Note, Amanda Lineberry, Payne v. City of Charlottesville *and the Dillon's Rule Rationale for Removal*, 104 Va. L. Rev. Online 45, 49 (2018) (noting that "the [1904 Act's] grant of authority is limited exclusively to counties" (footnote omitted)). As relevant here, the 1904 Act provided that if "any county" "authoriz[ed]" or "permit[ted] the erection of a Confederate monument upon [its] public square," "it shall be not be lawful thereafter for the authorities of said county . . . to disturb or interfere with any monument so erected *or to prevent the citizens of said county* from taking all proper measures and exercising all proper means for the protection, preservation, and care of the same." 1904 Va. Acts ch. 29 (emphasis added).

The original 1904 Act has undergone several revisions in the century since its passage. Most relevant here, in 1997, the General Assembly extended the statute's reach from counties to any "locality." 1997 Va. Acts ch. 587.[3] Accordingly, the current statute provides that "[i]f such [covered monuments] are erected, it shall be unlawful for the authorities of *the locality*, or any other person or persons, to disturb or interfere with any monuments or memorials so erected, or

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[2] The 1904 Act stated, in its entirety:

> Be it enacted by the general assembly of Virginia, That the circuit court of any *county* be, and it is [sic] hereby, empowered, with the concurrence of the board of supervisors of such *county* entered of record, to authorize and permit the erection of a Confederate monument upon the public square of *such county* at the county seat thereof. And if the same shall be so erected, it shall be not be lawful thereafter for *the authorities of said county*, or any other person whatever, to disturb or interfere with any monument so erected, *or to prevent the citizens of said county* from taking all proper measures and exercising all proper means for the protection, preservation, and care of the same.

Id. (emphases added).

[3] The statute is also no longer limited to monuments honoring the Civil War, instead covering monuments "for any war or conflict, or any engagement of such war or conflict." Va. Code Ann. § 15.2-1812.

to prevent its citizens from taking proper measures and exercising proper means for the protection, preservation and care of same." Va. Code Ann. § 15.2-1812 (emphasis added).

Violators are subject to either civil or criminal liability. Civil liability arises under Virginia Code § 15.2-1812.1(A), which authorizes the "attorney for the locality in which [the monument] is located" to bring suit.[4] If no such action is brought within 60 days, "any person having an interest in the matter" may bring suit. *Id.* Criminal liability arises under Virginia Code § 18.2-137, which makes it a Class 3 misdemeanor to "unlawfully destroy[], deface[], damage[] or remove[] without the intent to steal" any monument subject to the protections of Section 15-1812. Those who "intentionally cause[] such injury" are guilty of either a Class 1 misdemeanor or a Class 6 felony, depending on the "value of or damage to the property." *Id.* § 18.2-137(b).

2. These provisions have generated multiple requests for opinions from Virginia's Attorney General, one of which is particularly relevant to this litigation. See Va. Code Ann. § 2.2-505 (authorizing the Attorney General to "give his advice and render official advisory opinions in writing" when specified officials submit requests). In 2017, the Director of Virginia's Department of Historic Resources sought guidance about "how the provisions of § 15.2-1812 of the *Code of Virginia*, or other legal restrictions, may impact the authority of a locality to remove or relocate war or veterans monuments on property owned or controlled by the locality." 2017 Op. Va. Att'y Gen. 32 at 1 (Aug. 25, 2017) (2017 AG opinion).[5]

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[4] Section 15.2-1812.1 applies only to "a publicly owned monument, marker or memorial." Va. Code Ann. § 15.2-1812.1(a)(1). In contrast, a similar provision that applies to "a privately owned monument, marker or memorial" does not permit the Commonwealth's Attorney to file a civil action against violators. See Va. Code Ann. § 15.2-1812.1(a)(2). Here, there is no dispute that the Monument in question is publicly owned. See, *e.g.*, Amended Complaint ¶ 13 ("[The Monument] is owned by the City and is situated on property that the Norfolk City Council has opened for use by the public . . . .").

[5] See also 2017 Op. Va. Att'y Gen. 44 (Sept. 28, 2018) (addressing whether the Dickenson County Board of Supervisors would violate Section 15.2-1812 if it demolished a

The 2017 AG opinion reached several conclusions about the scope of the statutory provisions at issue here. It emphasized that Virginia laws (and subsequent amendments) presumptively lack retroactive effect, noting that "[w]hen the General Assembly omits a clear manifestation of intent that a statutory change should apply retroactively, it generally should be concluded that the legislature did not intend such an application." 2017 AG opinion at 3–4 (footnote omitted). Because Section 15.2-1812 and its predecessors lacked any such "clear manifestation of intent," the 2017 AG opinion concluded that these provisions were not retroactive. *Id.* at 3.

This lack of retroactivity, the 2017 AG opinion explained, had several important consequences. "First, the [statute] does not apply to *any* monument or memorial constructed prior to 1904." 2017 AG opinion at 4 (emphasis added). Second, the 1997 amendments—which substituted "locality" for the former "county"—"do[] not apply to any monument or memorial erected on any property within an independent city prior to 1997." *Id.*

B. Factual and Procedural Background[6]

1. The Monument "was erected and dedicated in 1907" by the Norfolk City Council and "is owned by the City." Amended Complaint ¶¶ 1, 13 (ECF No. 9). In August 2017, the City Council passed a resolution expressing "its desire" to "relocate[e] [the monument] away from its

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former high school building build in honor of veterans); 2017 Op. Va. Att'y Gen. 19 (Oct. 12, 2018) (analyzing whether Fluvanna County may place a stone memorial commemorating the Emancipation Proclamation in a public park); 2017 Op. Va. Att'y Gen. 13 (July 13, 2017) (considering whether the Virginia Constitution or Section 15.2-1812 would permit the City of Richmond to grant the Commonwealth an easement to repair and maintain a monument to the Emancipation Proclamation); 2015 Op. Va. Att'y Gen. 50 (Aug. 6, 2015) (examining whether removal of a memorial or marker erected to recognize the historical significance of a building would trigger Section 15.2-1812).

[6] Defendants accept as true "all well-pleaded, nonconclusory factual allegations in the complaint" for purposes of Rule 12(b)(6). *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011).

current location at the intersection of East Main Street and Commercial Place to a new location at a public cemetery in another part of the City." *Id.* ¶ 26. The City and the City Council have declined to take any such action, however, "out of uncertainty that the prohibition contained in [Va. Code Ann. § 15.2-1812] would make such an act unlawful and subject them to prosecution under [Va. Code Ann. § 15.2-1812.1 or § 18.2-137]." *Id.* ¶ 27. Two years after the City Council's resolution, the City filed this federal lawsuit. See Complaint (ECF No. 1).

2. The amended complaint asserts that "[t]his lawsuit is brought pursuant to the First and Fourteenth Amendments to the United States Constitution, Article I § 12 of the Constitution of Virginia, and 42 U.S.C. § 1983." Amended Complaint ¶ 4. That complaint includes four counts: (1) "unlawful restraint on free speech" in violation of "the constitutions of both the United States and the Commonwealth of Virginia," *id.* at 6 (header), ¶ 29; (2) "overbroad limitation on free speech," *id.* at 8 (header); see generally *id.* ¶¶ 30–39; (3) "violation of substantive due process," specifically the "right to speak and the right not to be compelled by the government to speak in support of content that the government endorses," and "[t]he right to exclusive possession, including the right to exclude all others from touching or interfering with one's property," *id.* ¶¶ 40, 41; and (4) "unconstitutional use of a public street," *id.* at 12 (header), ¶ 49.

The amended complaint names three defendants and seeks four forms of relief. The defendants are the Commonwealth of Virginia itself, as well as its Attorney General and the Commonwealth's Attorney for the City of Norfolk, each of whom is sued "in his official capacity." Amended Complaint ¶¶ 9–11; see *id.* at 1 (caption). As relief, the amended complaint seeks: (1) a declaratory judgment that each of the three Virginia statutory provisions at issue—Va. Code Ann. §§ 15.2-1812, 15.2-1812.1, 18.2-137—"violate the free speech clause of the First

Amendment, the due process clause of the Fourteenth Amendment, and the freedom of speech protections in Article I § 12 of the Virginia Constitution"; (2) a permanent injunction "prohibiting the Commonwealth, the Commonwealth's Attorney for the City of Norfolk, and any other person with an interest in the matter from enforcing any of the remedies or punishments authorized" by those statutes; (3) "nominal damages for the violations of constitutional rights alleged herein"; and (4) "attorney's fees, costs, and reasonable expenses." *Id.* ¶ 53.

LEGAL STANDARD

Because this motion is brought under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), two different standards apply.

Defendants bring their justiciability arguments pursuant to Rule 12(b)(1). A motion to dismiss under Rule 12(b)(1) may challenge subject matter jurisdiction in one of two ways: It "may attack a complaint on its face, insofar as the complaint fails to allege facts upon which the court can base jurisdiction, or . . . it may attack the truth of any underlying jurisdictional allegations contained in the complaint." *Kuntze v. Josh Enterprises, Inc.*, 365 F. Supp. 3d 630, 636 (E.D. Va. 2019). "In the former situation, known as a facial challenge, the court is required to accept all of the complaint's factual allegations as true, 'and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a 12(b)(6) consideration.'" *Id.* (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). "In the latter situation, known as a factual challenge, 'the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings.'" *Id.* (quoting *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)) (footnote and citation omitted). [7] In either case, "[t]he burden of

[7] For that reason, the Court may properly consider the 2017 AG opinion regarding the scope of Section 15.2-1812, and the Norfolk Commonwealth's Attorney's Declaration, in considering the motion to dismiss under Rule 12(b)(1).

establishing subject matter jurisdiction rests with the plaintiff." *Demetres v. East West Const., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015).

Under Rule 12(b)(6), a complaint should be dismissed if it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The Court must 'assume the facts alleged in the complaint are true and draw all reasonable factual inferences in [the plaintiff's] favor,' . . . but only to the extent those allegations pertain to facts rather than legal conclusions." *Graham v. City of Manassas School Bd.*, 390 F. Supp. 3d 702, 708–09 (E.D. Va. 2019) (quoting *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002)).

ARGUMENT

The City seeks to void three laws that do not apply to the Monument. None of the defendants has ever attempted or threatened to enforce any of the challenged statutes against the City, and all of the defendants either lack the authority or have expressly disclaimed any intention of doing so. Accordingly, there is no justiciable case or controversy under Article III, and the Court should dismiss the amended complaint for lack of jurisdiction. See Part I, *infra*.

Even if the City could overcome these justiciability defects, the amended complaint still could not survive a motion to dismiss. See Part II, *infra.* To begin, neither the Commonwealth nor the Attorney General is a proper party to this litigation. The Commonwealth is not a "person" subject to suit under 42 U.S.C. § 1983, and it is protected by sovereign immunity against any other sort of legal theory that the City may seek to bring against it. What is more,

under Virginia's state-law *Dillon* rule, political subdivisions like the City lack the power to sue their parent State. The Attorney General is likewise not a proper party because he is not authorized by law to enforce any of the statutes at issue.

The City's claims against the Commonwealth's Attorney also fail as a matter of law. The nominal damages claim fails because the Commonwealth's Attorney (like the Attorney General) is sued only in his official capacity, and Section 1983 does not authorize damages claims against state officials (including Commonwealth's Attorneys) who are sued in their official capacities. And the City's claims for declaratory and injunctive relief against the Commonwealth's Attorney are insufficient as a matter of law because the Commonwealth's Attorney has never sought to enforce the challenged statutes against the City and there is no legally cognizable danger that he will seek to do so in the future.

I. This case presents no Article III case or controversy because all parties agree that the City may remove the Monument

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation and quotation marks omitted). The essence of the City's amended complaint is that the challenged statutes are unconstitutional because they prevent the City from removing the Monument. But Section 15.2-1812 does not apply to the Monument, no defendant has ever attempted to enforce any of the challenged statutes against the City, and all defendants have expressly disclaimed any intention of doing so. Accordingly, this matter is non-justiciable for two related but distinct reasons: the City lacks standing and there is no adversity between the parties.

A. The City lacks standing because the defendants have never attempted to enforce the challenge statute against the City in the past and there is no credible threat of future enforcement

1. Standing doctrine "ensure[s] that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The "'irreducible constitutional minimum' of standing consists of three elements[:] The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). As "[t]he party invoking federal jurisdiction," the City "bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

The requirement of "injury in fact" is "the first and foremost of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (brackets, quotation marks, and citation omitted). Under that prong, the plaintiff must show that it has *already* suffered a legally cognizable injury *or* that faces "a realistic danger of sustaining a direct injury as a result of the [challenged] statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Even in the First Amendment context, a plaintiff must still establish "a credible threat" that a challenged statute will be enforced against it, because "without one, a putative plaintiff can establish neither a realistic threat of legal sanction if he engages in the speech in question, nor an objectively good reason for refraining from speaking and 'self-censoring' instead." *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018).

The "credible threat" rule keeps courts within their proper bounds by preventing plaintiffs from challenging provisions that do not apply to them. In *Abbott*, for example, the Fourth Circuit found no "credible threat" of prosecution where the plaintiffs could "point to no evidence of prior sanctions under" the disputed government policy, and could not establish that the government "would change its position" with respect to that policy's application to the plaintiffs'

speech. 900 F.3d at 176–77. The Sixth Circuit has similarly held that a student lacked standing to raise a First Amendment challenge to a school district's policy where the record was "silent" as to whether the policy would even apply to the student's speech. *Morrison v. Board of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008). The court declined to "find a justiciable injury where [the plaintiff's] own subjective apprehension counseled him to choose caution and where he assumed—solely on the basis of the [school board's former policies] and without any specific action by the Board—that were he to speak, punishment would result." *Id.*

2. Here, the City cannot demonstrate the requisite "credible threat of enforcement," *Abbott*, 900 F.3d at 176, because Section 15.2-1812 does not apply to the Monument and the defendants have expressly disclaimed any intention to seek to use Section 15.2-1812 to prevent the City from removing the Monument.

a. As the 2017 AG opinion explains, Section 15.2-1812 "does not apply to any monument or memorial erected on any property within an independent city prior to 1997." 2017 Op. Va. Att'y Gen. 32 at 4; accord *Heritage Preserv. Ass'n, Inc., et al. v. City of Danville*, Final Order at 2, Case No. CL15000500-00 (City of Danville Cir. Ct. Dec. 7, 2015) (Exhibit B) (finding, "[a]s a matter of law" that "Virginia Code § 15.2-1812 does not apply retroactively to the monument at issue in this litigation, which was donated to the City of Danville in 1994 and erected on the grounds of the Sutherlin Mansion in 1995"); but see *Payne v. City of Charlottesville*, Order at 2, Case No. CL17000145-000 (City of Charlottesville Cir. Ct. Dec. 6, 2017) (Exhibit C) (finding that "Va. Code § 15.2-1812 is applicable to monuments or memorials covered by that statute and in existence within a city prior to 1997").[8] The Monument at issue

[8] The City of Charlottesville voted to authorize an appeal in this case, though—at the time of filing—no appeal has yet been filed. See *Charlottesville to appeal lawsuit over Confederate statutes*, WSHV-TV3 (Oct. 8, 2019), https://www.whsv.com/content/news/Charlottesville-to-appeal-lawsuit-over-Confederate-statues-

here "was erected and dedicated in 1907," Amended Complaint ¶ 13, and it is located with and owned by the City Norfolk, an independent city, see *id.* ¶¶ 3, 7, 13. Accordingly, Section 15.2-1812 does not apply to the Monument, and the City may remove it without violating any Virginia statute.

As the Attorney General explained, this conclusion is supported by well-established interpretative principles. The 1904 Act only authorized activity by—and restricted the actions of—counties. See 1904 Va. Acts ch. 29.[9] In 1997, the General Assembly amended the statute to cover any "locality," which includes the City. 1997 Va. Acts ch. 587. But that statute contained no "clear manifestation of intent" that it was to apply to pre-1997 monuments located outside of counties, and, under longstanding Virginia law, statutes "are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question." *Arey v. Lindsey*, 48 S.E. 889, 890 (Va. 1904); accord *Bailey v. Spangler*, 771 S.E.2d 684, 687 (Va. 2015) ("It is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention." (quotation marks and citation omitted)).

Since its inception, Section 15.2-1812 has used distinctly prospective language. For example, the original 1904 Act provided that if "the circuit court of any county . . . with the

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562527071.html ("On Monday, October 7, Charlottesville City Council authorized the city attorney to appeal the lawsuit once a final ruling is issued."). As described in text, the Circuit Court of the City of Charlottesville failed to appreciate the significance of the statute's prospective language. See 1904 Va. Act ch. 29 ("[I]f the same shall be erected*, it shall not be lawful thereafter*. . . ." (emphasis added)).

[9] See also Note, Amanda Lineberry, Payne v. City of Charlottesville *and the Dillon's Rule Rationale for Removal*, 104 Va. L. Rev. Online 45, 47 (2018) ("[M]onuments built in cities prior to 1997 . . . are either unauthorized (ultra vires) or authorized by a specific Act of Assembly. The only restrictions on removal that are applicable to these pre-1997 monuments are those found within the original grant of authority, those imposed by localities on themselves, or the deeds associated with it—not Va. Code § 15.2-1812.").

concurrence of the board of supervisors of such county," authorized a war memorial, and "if the same shall be so erected*, it shall not be lawful thereafter* for the authorities of said county" to "disturb or interfere" with such monuments or "prevent the citizens of [the] county from taking all proper measures and exercising all proper means for the protection, preservation, and care of the same." 1904 Va. Acts ch. 29 (emphasis added). The current version of the statute continues to specify that it applies only *after* a covered monument's construction, providing, first, that "[a] locality may . . . authorize and permit the erection of monuments or memorials for any war or conflict" and then stating that "*[i]f such are erected, it shall be* unlawful . . . to disturb or interfere with any monuments or memorials *so erected*." Va. Code Ann. § 15.2-1812 (emphasis added). This forward-looking language confirms that only monuments built after the relevant statute's passage—here, the 1997 amendments—are subject to the restrictions established by Section 15.2-1812 and enforced by Sections 15.2-1812.1 and 18.2-137.

b. As just explained, the primary reason why the City faces no "credible threat of enforcement," *Abbott*, 900 F.3d at 176, is because Section 15.2-1812 does not apply to the Monument. But it is also undisputed that none of the defendants have ever attempted or threatened to use the challenged statutes against the City. As the City appears to acknowledge, the Attorney General has no enforcement authority with respect to Section 15.2-1812. See Amended Complaint ¶ 11 (asserting only that the Attorney General "is required to represent the interests of the Commonwealth in all matters before the Government of the United States, including this lawsuit" and that he "is required to provide all legal services in civil matters for the Commonwealth, including conducting all civil litigation in which the Commonwealth is interested)"; see also Part II(A)(2), *infra* (explaining why the Attorney General has no enforcement authority under Section 15.2-1812). And the only defendant who does have any

enforcement authority under Section 15.2-1812—the Commonwealth's Attorney—has stated under oath that he does not believe that the statute applies to the Monument and expressly disclaimed any intent or ability to enforce the statute against the City. See Exhibit A, Commonwealth's Attorney Declaration. That too underscores the City's lack of standing to bring its current challenge.

B. This suit is also nonjusticiable because there is no "real, earnest, and vital controversy" about whether the City may move the Monument

Separate and apart from standing doctrine, the Supreme Court has made clear that federal courts lack jurisdiction unless there is a "real, earnest, and vital controversy" between the parties. *Valley Forge Christian College v. Americans United for the Separation of Church & State*, 454 U.S. 464, 471 (1982) (quotation marks omitted). Here, there is not. The City wants to move the Monument and believes it has a legal entitlement to do so. All of the defendants agree that the City may move the Monument, none of the defendants has attempted to stop the City from moving the Monument, and all of the defendants have foresworn any ability to take action if the City attempts to move the Monument in the future.

Article III's adversity requirement explains both why the Supreme Court concluded in *United States v. Windsor*, 570 U.S. 744 (2013), that a federal district court had jurisdiction over that case, and why the analysis comes out the other way here. *Windsor* involved the constitutionality of the federal Defense of Marriage Act, and the "complication" was that the defendant (the federal government) agreed with the plaintiffs' view that the statute was unconstitutional. *Id.* at 756. But the Court held that a justiciable controversy remained because the federal government had refused to give Windsor the relief she sought—a tax refund—unless ordered to do so by a court. *Id.* "The Government's position," the Court explained, "agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable

controversy between the parties." *Id.*; accord *INS v. Chadha*, 462 U.S. 919, 939–40 (1983) ("[I]f we rule for Chadha, he will not be deported; if we uphold [the statute], the INS will execute its order and deport him."). In other words, "where 'the Government largely agrees with the opposing party on the merits of the controversy,'" there is still "sufficient adverseness and an 'adequate basis for jurisdiction'" so long as "'*the Government intend[s] to enforce the challenged law against that party*.'" *Windsor*, 570 U.S. at 759 (emphasis added) (quoting *Chadha*, 462 U.S. at 940 n.12).

Here, by contrast, no defendant "intends to enforce the challenged law" against the City. To the contrary, one of the defendants has publicly expressed his view that Section 15.2-1812 does not apply to monuments—like this one—that were erected by an independent cities before 1997, see 2017 AG opinion at 4, and the only defendant with enforcement authority under the statute has stated, under oath, that he agrees with that view, see Commonwealth's Attorney Declaration. And, unlike the tax refund in *Windsor* (which was something only the defendants could have provided), there is no relief that the City seeks that the defendants refuse to grant in the absence of a court order. Cf. *Windsor,* 750 U.S. at 756.

Accordingly, to the extent the City challenges a law that prevents the City from moving the Monument, it is clear in this case that the defendants do not intend to enforce such a statute, leaving this case without "sufficient adverseness and an adequate basis for jurisdiction." *Windsor*, 570 U.S. at 759 (quotation marks and citation omitted). For that reason, even if the City had Article III standing, this Court should still dismiss this action, pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of jurisdiction.

II. The amended complaint's individual allegations are separately insufficient to survive a motion to dismiss

Even if the City overcomes the justiciability hurdles outlined in Part I, the City's claims fail all the same. First, the City has failed to state a claim, warranting dismissal under Federal Rule of Civil Procedure 12(b)(6), for the same reasons this case is not justiciable: The City predicates its claims of constitutional violations on a statute that does not apply to the Monument at issue here.[10] Second, neither the Commonwealth nor the Attorney General is a proper party to this suit. Third, the City's claim for nominal damages fails under Rule 12(b)(6) because Section 1983 permits monetary damages only against state officers sued in their individual capacities, and both the Attorney General and the Commonwealth's Attorney are sued in their official capacities. And fourth, the only remaining claim—for equitable relief—should be dismissed because there is no cognizable danger that the party that does have enforcement authority, the Commonwealth's Attorney, will enforce the statute against the City.[11]

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[10] Because the rationale for that argument—Section 15.2-1812's inapplicability to the Monument—is outlined above, in Part I, *infra*, there is no separate section for this 12(b)(6) argument below.

[11] Because the City is imprecise as to the authority for the City's claims, see Amended Complaint ¶ 4, this motion assumes that 42 U.S.C. § 1983, the statute under which First and Fourteenth Amendment claims like the City's claims are generally raised, provides that authority. To the extent that the amended complaint seeks to state a claim under some authority aside from Section 1983, any such claim fails against all defendants for the reasons stated in Part I (lack of jurisdiction) and against the Commonwealth for the reasons identified in Part II(A)(1) (specifically, sovereign immunity and *Dillon*'s rule). Indeed, the Supreme Court of Virginia has made clear that Article I, § 12 of the Virginia Constitution mirrors the First Amendment of the Federal Constitution. "[T]he freedom of speech guaranteed by Article I, § 12 of the Constitution of Virginia is co-extensive with the protections guaranteed by the First Amendment of the Constitution of the United States." *Black v. Commonwealth*, 553 S.E.2d 738, 750 (Va. 2001), vacated in part on other grounds, 538 U.S. 343 (2003) (Kinser, J., concurring); see also *McCaffrey v. Chapman*, No. 1:17–cv–937, 2017 WL 4553533, at *5 (E.D. Va. Oct. 12, 2017) ("Therefore, Plaintiff's [Virginia] and federal constitutional free speech claims rise and fall together.").

A. The Commonwealth and the Attorney General are improper parties

1. The Commonwealth of Virginia should be dismissed for three separate reasons: (a) the only statute identified in the amended complaint—42 U.S.C. § 1983—does not authorize suits against sovereign States; (b) sovereign immunity shields the Commonwealth from any claims brought by the City; and (c) as a matter of state law, the City any lacks authority to sue the Commonwealth.

a. The only cause-of-action creating statute identified in the amended complaint is 42 U.S.C. § 1983, which provides a cause of action against any "person" who violates another's statutory or constitutional rights "under color of" state law. 42 U.S.C. § 1983; see Amended Complaint ¶ 4. But the Supreme Court has squarely held "that a State is not a 'person' within the meaning of § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). For that reason alone, the Commonwealth must be dismissed as a defendant.

b. Even if the City attempted to root its suit against the Commonwealth in some other source of authority, the Commonwealth enjoys immunity from suit under the Eleventh Amendment. "[A] suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends." *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J, concurring); see also 13 C. Wright & A. Miller, Federal Practice and Procedure § 3524 (3d ed. 2019) ("[I]f the defendant is entitled to immunity as a 'State,' and there has been no waiver or abrogation of its immunity, the suit is barred, regardless of whether the plaintiff is an alien or citizen of another state, a citizen of the state itself, a foreign government, an Indian tribe, or a *municipal authority*." (emphasis added)). "Rather, as the Constitution's structure, its history, and the authoritative interpretations by [the Supreme] Court make clear," the Commonwealth's "immunity from suit is a fundamental aspect of the sovereignty which [it] enjoyed before the

ratification of the Constitution, and which [it] retain[s] today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Because the City can identify no basis for overcoming the Commonwealth's sovereign immunity, its claims against the Commonwealth must be dismissed for that reason as well.

c. Finally, the City's claims against the Commonwealth must be dismissed because the City's powers are defined by state law and state law provides no authorization for the City to sue the Commonwealth. It is black-letter Virginia law that "[a] municipal corporation is a mere local agency of the State and has no powers beyond the corporate limits except such as are clearly and unmistakably delegated by the legislature." *City of Richmond v. Board of Supervisors of Henrico Cty.*, 101 S.E.2d 641, 645 (Va. 1958) (citation omitted). Virginia courts implement that limitation through the "*Dillon* rule of strict construction concerning the powers of local governing bodies." *Commonwealth v. County Bd. of Arlington*, 232 S.E.2d 30, 40 (Va. 1977). Under that rule, "a municipal corporation possesses and can exercise the following powers and no others:" (1) "those granted in express words"; (2) "those necessarily or fairly implied in or incidental to the power expressly granted"; and (3) "those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable." *City of Richmond*, 101 S.E.2d at 645 (citation omitted). "Any fair, reasonable doubt concerning the existence of the [municipality's] power is resolved by the courts against the corporation and the power is denied." *Id.* (citation omitted).

None of the three categories of municipal power identified by Virginia's highest court in *City of Richmond* authorizes the City to sue the Commonwealth to challenge the constitutionality of state law. Neither the state constitution, nor any state statute, nor the City's charter provides that the City may challenge the constitutionality of state laws or file suit against the

Commonwealth itself. See generally Va. Code Ann., tit. 15.2, ch. 9; City of Norfolk, Charter (1918), https://law.lis.virginia.gov/charters/norfolk/. The absence of an express authorization is fatal to the City's lawsuit, as the City cannot point to any power "necessarily or fairly implied" to an expressly granted power, nor to any "essential" power to "[its] declared objects and purposes," *City of Richmond*, 101 S.E.2d at 645 (citation omitted).[12]

2. The Attorney General is similarly not a proper party. To be sure, "a state official" (such as the Attorney General) is a "person" for purposes of Section 1983 when sued in his official capacity for declaratory or injunctive relief "because official-capacity actions for prospective relief are not treated as actions against the State." *Will*, 491 U.S. at 71 n.10 (quotation marks and citation omitted). See Part II(B), *infra* (explaining why the City's damages claims against both the Attorney General and the Commonwealth's Attorney fail as a matter of law). But the Attorney General is not a proper defendant because the amended complaint does not—and cannot—allege that he has any enforcement authority under the challenged statutes.

As described above, Section 15.2-1812 can be enforced in two ways. Neither form of enforcement authorizes the Attorney General as such to pursue an action against alleged violators. Under the civil enforcement provision, Va. Code Ann. § 15.2-1812.1, the Commonwealth's Attorney for the "locality in which" the monument "is located" has authority bring a civil action to recover damages. If the Commonwealth's Attorney fails to do so within 60

[12] The Supreme Court has also broadly held that municipalities lack the authority to bring the kind of suit the City pursues here. See *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges and immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."); *Hunter v. Pittsburgh*, 207 U.S. 161, 178–79 (1907) (emphasizing that "the State is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will [with localities], unrestrained by any provision of the Constitution of the United States"); accord *City of Charleston v. Pub. Serv. Comm'n of W. Va.*, 57 F.3d 385, 389 (4th Cir. 1995) (collecting cases applying this rule, which "has been followed largely in Fourteenth Amendment cases").

days, "any person having an interest in the matter" may pursue a civil case without his participation. *Id.* § 15.2-1812.1(a)(1). This provision plainly singles out the Commonwealth's Attorney, rather than the Attorney General (or any other state officer), to pursue civil remedies.

The Attorney General likewise lacks any specific enforcement authority under the criminal enforcement provision, Section 18.2-137. Section 15.2-1627(B) of the Virginia Code delegates to the Commonwealth's Attorney (not the Attorney General) "the duty of prosecuting all warrants, indictments or informations charging a felony," and grants the Commonwealth's Attorney the discretion to prosecute misdemeanors. Va. Code Ann. § 15.2-1627(B). These powers include the enforcement of Section 18.2-137.

In sum, because the Attorney General has no role in enforcing this statute in his official capacity (the only capacity in which he has been sued), he is not a proper party and should be dismissed.

B. The City is not entitled to damages, nominal or otherwise

The amended complaint is clear that both the Attorney General and the Commonwealth's Attorney are sued solely in their "official capacity." Amended Complaint at 1 (caption); see *id.* ¶¶ 10–11. But the Supreme Court has squarely held that "a suit against a state official in his or her official capacity" for damages is treated as "a suit against the official's office" and thus "no different from a suit against the State itself." *Will*, 491 U.S. at 71; see *Weiner v. Albermarle County*, No. 3:17-cv-00046, 2018 WL 542979, at *3 (W.D. Va. Jan. 24, 2018) (noting that "a bevy of federal district court judges in Virginia—at least eight—have squarely held that commonwealth's attorneys are entitled to Eleventh Amendment immunity from official capacity claims"). For that reason, the City's request for damages against the Commonwealth's Attorney and the Attorney General fails as a matter of law.

C. This case does not warrant the exercise of the Court's equitable powers because the Commonwealth's Attorney has never sought to enforce the challenged statutes against the City and there is no cognizable danger of future enforcement

As noted above, the Commonwealth's Attorney does have enforcement authority with respect to the challenged statutes. But the City has not alleged that the Commonwealth's Attorney has ever sought or threatened to enforce the statute against it, nor does the amended complaint establish any cognizable danger of such enforcement in the future. For that reason, even assuming that this case is otherwise justiciable, plaintiffs' request for equitable relief against the Commonwealth's Attorney fails as a matter of law.

The Supreme Court has specifically "declin[ed] . . . to slight the preconditions for equitable relief" in constitutional cases, emphasizing that "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the [S]tates' . . . laws." *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943) (noting that requests for declaratory relief are subject to equitable limitations). For that reason, even where a plaintiff succeeds in establishing Article III standing to seek an injunction, "[t]he equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged" in the future. *Lyons*, 461 U.S. at 111. To obtain an injunction against future actions, therefore, a plaintiff must establish "some cognizable danger" of future harm. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

There is no such "cognizable danger" here. As explained above, Section 15.2-1812 does not apply to the Monument the City seeks to move. See Part I, *supra*. None of the defendants has ever attempted or threatened to enforce Section 15.2-1812 against the City and each of the

defendants has expressly disclaimed any intention or ability to do so in the future. Because the City cannot establish "any real or immediate threat that [it] will be wronged," *Lyons*, 461 U.S. at 111, the Court should hold that its request for equitable relief fails as a matter of law.

CONCLUSION

State law permits the City to remove the Monument. For that reason, the amended complaint should be dismissed for lack of jurisdiction. In the alternative, the amended complaint should be dismissed, in whole or in part, for failure to state a claim on which relief can be granted.

Dated: October 22, 2019

Respectfully submitted,

COMMONWEALTH OF VIRGINIA, GREGORY D. UNDERWOOD, Commonwealth's Attorney for the City of Norfolk, and MARK R. HERRING, Attorney General for the Commonwealth of Virginia

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2019, a true and accurate copy of this paper was filed electronically with the Court's CM/ECF system, which will automatically effectuate service on:

Adam D. Melita, Esquire
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By: /s/
Toby J. Heytens

EXHIBIT A

TO MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

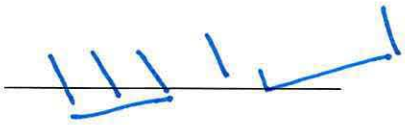
CITY OF NORFOLK, VIRGINIA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
COMMONWEALTH OF VIRGINIA, *et al*.,	)	Civil Action No. 2:190cv-00436-AWA-DEM
	)	
Defendants.	)	

DECLARATION OF GREGORY D. UNDERWOOD

I, Gregory D. Underwood, declare under penalty of perjury that the following is true and correct.

1. I am the Commonwealth's Attorney for the City of Norfolk.
2. In that capacity, I am charged with enforcing all applicable statutes of the Virginia Code, including Va. Code Ann. Sections 15.2-1812, 15.2-1812.1, and 18.2-137.
3. I have never taken any enforcement actions under Sections 15.2-1812, 15.2-1812.1, and 18.2-137 against the City of Norfolk or its City Council.
4. I have never threatened or suggested I may take any enforcement actions under Sections 15.2-1812, 15.2-1812.1, and 18.2-137 against the City of Norfolk or its City Council.
5. I have no intention of ever taking any enforcement actions under Sections 15.2-1812, 15.2-1812.1, and 18.2-137 against the City of Norfolk or its City Council in connection with the monument that is the subject of this litigation or any other monument installed before 1997.

6. In my judgment, I would lack the authority to bring any enforcement action regarding the monument at issue in this litigation because the City of Norfolk erected that monument nearly a century before the General Assembly amended these challenged statutes to apply to monuments and memorials constructed by independent municipalities like Norfolk.



Dated: October 18, 2019

Gregory D. Underwood,
Commonwealth's Attorney for the City of Norfolk

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2019, a true and accurate copy of this paper was filed electronically with the Court's CM/ECF system, which will then send a notification of such filing to the counsel of record in this case

By: /s/
Toby J. Heytens

EXHIBIT B

TO MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF DANVILLE

HERITAGE PRESERVATION ASSOCIATION, INC., DANVILLE CONFEDERATE MEMORIAL ASSOCIATION, INC., PITTSYLVANIA VINDICATORS CAMP NO. 828, SONS OF THE CONFEDERATE VETERANS, R. WAYNE BYRD, SR., HELEN HARRIS, FRANK HARVEY, and TONY L. LUNDY,	)	
Plaintiffs,	)	
v.	)	Case No.: CL15000500-00
CITY OF DANVILLE, VIRGINIA,	)	
Defendant.	)	

FINAL ORDER

On the 29th of October, 2015, the parties, by counsel, appeared before the Court on the plaintiffs' motion for temporary injunction and the defendant's demurrer and plea in bar.

The plaintiffs, by counsel, represented to the Court that they were withdrawing their motion for temporary injunction.

The Court then proceeded to consider the defendant's demurrer and plea in bar. Counsel previously filed memoranda on the issues presented, and counsel indicated they were prepared to proceed. The parties first presented evidence, including the agreed Stipulation of Evidence and exhibits filed on the day of the hearing and the testimony and exhibits offered by the plaintiffs. The parties then presented oral argument on the defendant's demurrer and plea in bar.

In ruling on the defendant's demurrer and plea in bar, the Court reviewed and considered the pleadings and memoranda filed in this action, the evidence presented by the parties, and the

arguments advanced by counsel on the record in open court. Based on the Court's consideration of the foregoing and for the reasons stated on the record in open court, the Court FINDS as follows:

1. As a matter of law, Resolution No. 94-9.1 is not a contract between the City of Danville and any of the plaintiffs, cannot bind future City Councils of the City of Danville, and cannot grant to any of the plaintiffs any right, interest or privilege in the City of Danville's property.

2. As a matter of law, Virginia Code § 15.2-1812 does not apply retroactively to the monument at issue in this litigation, which was donated to the City of Danville in 1994 and erected on the grounds of the Sutherlin Mansion in 1995.

3. Based on the plain language of Resolution No. 94-9.1, the monument at issue in this litigation is, as a matter of fact, a monument "commemorating the Sutherlin Mansion as the Last Capitol of the Confederacy," "recognizing the Sutherlin Mansion's historical status as the 'Last Capitol of the Confederacy,'" and "marking the Sutherlin Mansion as the Last Capitol of the Confederacy." The monument at issue in this litigation is not, as a matter fact, a monument "for any war or conflict, or for any engagement of such war or conflict" or for war veterans. As a monument to a building of historical significance rather than a monument to a war, conflict, engagement, or war veterans, the monument at issue in this litigation is not covered by Virginia Code § 15.2-1812.

Based on the above findings, the evidence and arguments presented by counsel, and for the reasons stated on the record in open court on October 29, 2015, it is ADJUDGED, ORDERED and DECREED as follows:

1. The allegations in the Complaint are insufficient as a matter of law to state a valid breach of contract claim against the City of Danville. Therefore, the Court SUSTAINS the defendant's demurrer and DISMISSES the plaintiffs' breach of contract claim with prejudice.

2. The allegations in the Complaint are insufficient as a matter of law to state a valid claim for violation of Virginia Code § 15.2-1812 against the City of Danville. Therefore, the Court SUSTAINS the defendant's demurrer and DISMISSES the plaintiffs' Virginia Code § 15.2-1812 claim with prejudice.

3. The monument at issue in this action is not covered by Virginia Code § 15.2-1812. Therefore, the Court SUSTAINS the defendant's plea in bar and DISMISSES the plaintiffs' Virginia Code § 15.2-1812 claim with prejudice.

4. The Clerk of this Court is directed to strike this matter from the active docket of this Court and to send certified copies of this Order to all counsel of record.

ENTER: This 7th day of ~~November~~ December, 2015.

Judge James J. Reynolds

WE ASK FOR THIS:

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Counsel for Defendant City of Danville, Virginia

SEEN AND OBJECTED TO for the reasons noted in Plaintiff's filings and pleadings with the Court, and for the reasons stated on the record at the Hearing on October 29, 2015, to include but not be limited to the following objections:

(1) Plaintiffs object to the Court's findings and decree as to paragraphs numbered 1 of this Order, as the determination of whether or not there was a contract between the parties should have been a determination of the trier of fact, and not dismissed by a Demurrer.

(2) Plaintiffs object to the Court's findings and decree as to paragraphs numbered 2 of this Order, as Code of Virginia § 15.2-1812 *does* apply retroactively to protect the monument at issue in this litigation; that the plain language of § 15.2-1812 affirms that the statute should apply retroactively; that the plain language of § 15.2-1812 references "previously designated Confederate memorials," which is language affirming such retroactive application; and that the intent of the General Assembly of Virginia was for § 15.2-1812 to apply retroactively, in that any other construction of the statute would manifest an absurd, irrational, and unreasonable result.

(3) Plaintiffs object to the Court's findings and decree as to paragraphs numbered 3 of this Order, as the monument at issue in this litigation *is* a monument of the War Between the States, a Confederate monument, *and* a monument to war veterans, and therefore protected by Code of Virginia § 15.2-1812.

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Counsel for Plaintiffs

A COPY TESTE:
GERALD A. GIBSON, CLERK
BY J Pelletier DEPUTY CLERK

EXHIBIT C

TO MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE *et al.*,
Plaintiffs,

v.

CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*,
Defendants.

Case No. CL17-000145-000

ORDER

On September 1, 2017, this Court heard argument on Defendants' Demurrer to Plaintiffs ' Complaint. Lisa Robertson and S. Craig Brown appeared for all Defendants, Ashleigh M. Pivonka and Richard H. Milnor appeared for Defendants City of Charlottesville and Charlottesville City Council, and Ralph E. Main, Jr., S. Braxton Puryear, and Elliot Harding appeared for Plaintiffs; and

On October 4, 2017, this Court entered an Order partially disposing of Defendants' Demurrer in accordance with the findings made by the Court from the bench on September 1, 2017, at which time several matters were taken under advisement; and

By letter opinion dated October 3, 201 7, this Court issued its rulings on the matters previously taken under advisement,

NOW, THEREFORE, upon argument of counsel, and for the reasons expressed in the Court's letter opinion dated October 3, 2017, which is incorporated herein by reference, the Court doth hereby ORDER as follows:

1. Paragraph 1 of Defendants' Demurrer is SUSTAINED in part, in that this Court finds that all of the individual Plaintiffs, except for Plaintiffs Phillips, Fry, Amiss, Griffin and Earnest, and including Plaintiff Sons of Confederate Veterans, Virginia Division, have individual standing to bring this action under general principles of standing, while Plaintiff The Monument Fund has representative standing to bring this action.

2. Paragraphs 1 and 2 of Defendants' Demurrer are OVERRULED in part, in that this Court finds that all named Plaintiffs would have standing to bring an action for damages under Va. Code §15.2-1812.1, and also in that Plaintiffs Payne, Yellott, Tayloe, Amiss, Weber and Smith have taxpayer standing for pursuing Count II as to unauthorized expenditures of money to move the Lee statue, based on the Court's finding in Paragraph 3, following below; otherwise, Paragraph 2 of the Demurrer is SUSTAINED as to taxpayer standing.

3. Paragraph 3 of Defendants' Demurrer is OVERRULED, and this Court finds that Va. Code § 15.2-1812 is applicable to monuments or memorials covered by that statute and in existence within a city prior to 1997.

4. Paragraph 4 of Plaintiffs ' Demurrer is SUSTAINED, and this Court finds that the Complaint fails to allege facts sufficient to support a conclusion that the Lee Statue is a monument or memorial to any of the wars or conflicts enumerated in Va. Code § 15.2-1812.

5. The Court hereby grants, *sua sponte,* leave to Plaintiffs to amend their Complaint. Plaintiffs shall have until October 25, 2017 to file an Amended Complaint.

This Court notes the Parties' objections to all rulings adverse as to them.

The CLERK is hereby ORDERED to forward certified copies of this Order to all counsel of record.

ENTERED: 12/6/17

JUDGE: Richard E. Moore

We ask for this, as to the Court's ruling sustaining the Demurrer as to Paragraph 1 (as to the part SUSTAINED), Paragraph 2 (as to the part SUSTAINED) and as to Paragraph 4 of the Demurrer; however, Defendants object to the Court's ruling on Paragraph 1 (as to the part OVERRULED), Paragraph 2 (as to the part OVERRULED) and Paragraph 3 of the Demurrer (as to the Court's overruling of the Defendants' assertion that Va. Code § 15.2-1812 does not apply to the Statutes and should not be applied retroactively, and in making their objections, the Defendants rely on arguments in their memoranda and those stated at the hearing of the Demurrer.

Lisa Robertson

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Lisa Robertson (VSB #32486)
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Seen and ~~Excepted to~~ for the reasons appearing on the following page:

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Counsel for Plaintiffs

Exceptions of Plaintiffs:

1. Plaintiffs except to ruling that Plaintiffs Phillips, Fry, Amiss, Griffin and Earnest do not have individual standing to bring this action under general principles of standing, and that Plaintiff Virginia Division, Sons of Confederate Veterans, does not have representative standing to bring this action.

2. Plaintiffs except to ruling that Paragraph 2 of demurrer is sustained except as set forth in foregoing paragraph 2 of order.

3. Plaintiffs except to sustaining of Paragraph 4 of demurrer. The complaint alleges sufficient facts to support conclusion that Lee Statue is a monument or memorial to a veteran of The War Between the States and to the War Between the States, a war or conflict enumerated in Virginia Code § 15.2-1812.