In The

Supreme Court of Virginia

RECORD NO. 200790

THE CITY OF CHARLOTTESVILLE, VIRGINIA and CHARLOTTESVILLE CITY COUNCIL,

Appellants,

v.

FREDERICK W. PAYNE, JOHN BOSLEY YELLOTT, JR. (aka Jock Yellott), EDWARD D. TAYLOE, II, BETTY JANE FRANKLIN PHILLIPS, EDWARD BERGEN FRY, VIRGINIA C. AMISS, STEFANIE MARSHALL, CHARLES L. WEBER, JR., VIRGINIA DIVISION, SONS OF CONFEDERATE VETERANS, INC., ANTHONY M. GRIFFIN, BRITTON FRANKLIN EARNEST, SR., and THE MONUMENT FUND, INC.,

Appellees.

BRIEF OF APPELLEE THE MONUMENT FUND, INC.

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Statement of the Case

This appeal involves only the older version of recently amended state law that governs how localities honor war veterans and memorialize the wars they fought in. Application of the amended law going forward is for the trial court to address in the first instance.

Until July 1, 2020, Virginia law uniformly prohibited localities statewide from removing, altering, or destroying even their own monuments or memorials for wars or war veterans. This law prohibited "the authorities of the locality" or "any other person" from "disturb[ing] or "interfer[ing]" with any such monuments or memorials erected in the locality. Va. Code § 15.2-1812.[1] "For purposes of this section," the law specified, "'disturb or interfere with' includes removal …. ." *Id.* From 2000 up until the same time, Virginia law provided a private right of action to accompany this preservation provision. *See* Va. Code § 15.2-1812.1; JA 62-63. In addition to providing for attorneys' fees and other litigation costs among available damages in such an action, the General Assembly instructed that "the provisions of this section …

[1] Unless otherwise noted, all references to Va. Code § 15.2-1812 and -1812.1 are to the version of that law as it existed until July 1, 2020. All four assignments of error relate entirely to the application of that old law.

shall not be construed to limit the rights of any person … to pursue any additional civil remedy otherwise allowed by law." Va. Code § 15.2-1812.1(C).

Effective July 1, 2020, the prohibition against localities removing their own monuments or memorials, and the accompanying private right of action to protect them, have been repealed. 2020 Va. Acts Ch. 1100.[2]

This appeal arises out of a civil action brought by private plaintiffs in 2017 who successfully obtained declaratory and injunctive relief, along with fees and other costs of litigation incurred in enforcing Virginia's monument-disturbance prohibition against the City of Charlottesville and the Charlottesville City Council (collectively, "the City"). The City contends that Judge Richard E. Moore of the Circuit Court for the City of Charlottesville erred in: (I) awarding attorneys' fees; (II) granting declaratory and injunctive relief in connection with the statutory private right of action; (III) recognizing taxpayer standing to seek declaratory and injunctive relief; and (IV) finding that Va. Code § 15.2-1812 prohibited the removal of monuments

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[2] The new law is not in the Joint Appendix because it was enacted five months after the judgment below became final and all of the Assignments of Error pertain to the old law. A version of 2020 Va. Acts Ch. 1100 showing the amendments effective July 1, 2020 is attached as Exhibit B to the City's June 30 Motion to Dissolve.

or memorials erected in independent Virginia cities before 1997—the year that the General Assembly provided a uniform rule regarding preservation of war monuments and memorials for all localities, not just counties as previously.

Plaintiffs contend that Judge Moore properly applied that law and request this Court to affirm the declaratory judgment, fee award, and injunction order under the law governing through June 30, 2020. That affirmance should end this appeal, leaving to the Circuit Court the authority and obligation—in the first instance—to adjust the permanent injunction to the requirements of the amended law from July 1 onward.

Assignments of Error

The City's Assignments of Error, as set forth verbatim in the petition, are:

I. The trial court erred when it interpreted the provisions of Virginia Code § 15.2-1812 and § 15.2-1812.1 to allow award of attorneys' fees and costs against the City, because Payne neither alleged nor proved any damages or attorneys' fees recoverable under § 15.2-1812.1, § 15.2-1812 does not authorize attorneys' fees, and the complaint identifies no other basis for the recovery of attorneys' fees.

II. The trial court erred in construing the provisions of Va. Code § 15.2-1812 or § 15.2-1812.1 to authorize a civil action against the City for declaratory judgment or a permanent injunction prohibiting the City from removing statutes of Robert E. Lee and

Thomas H. Jackson (together "Statues") from its parks, because neither § 15.2-1812 nor § 15.2-1812.1 authorizes such actions.

III. The court erred by adjudicating claims for declaratory and injunctive relief, because the doctrine of taxpayer standing does not provide a basis for the Payne plaintiffs to assert an action against the City for declaratory judgment that the City's resolutions violated Va. Code § 15.2-1812, or for a permanent injunction prohibiting removal of the Statues.

IV. Va. Code § 15.2-1812 (1997, as amended) does not govern the City's Statues, which were erected in the 1920s, and the trial court erred by interpreting the statute as operating retroactively to prohibit removal of the Statues from the City's parks.

This brief for Appellee The Monument Fund, Inc. addresses Assignments of Error I, II, and IV. Assignment of Error III is about local taxpayer standing, which The Monument Fund, Inc. does not possess. The separate Brief of Individual Appellees and Sons of Confederate Veterans, Virginia Division, Inc. addresses Assignment of Error III.

Counterstatement of Facts and Material Proceedings Below

The City's changing stance toward its Lee and Jackson monuments should be framed against the backdrop of state historic preservation law for war and veteran monuments and memorials. That law changed over the course of several decades from 1930 to 2010, but remained unchanged at all times at issue from the filing of the complaint in March 2017 through entry of the Final Order in January 2020.

A. The Lee and Jackson monuments are erected in Charlottesville (1918-1924).

In 1918, the City of Charlottesville accepted from philanthropist Paul Goodloe McIntire the gifts of property that became Lee Park and Jackson Park. These gifts were coupled with McIntire's commission of equestrian monuments to Confederate General Robert E. Lee and Lt. Gen. Thomas "Stonewall" Jackson.[3] The monuments were erected in 1921 (Jackson) and 1924 (Lee). The sculptures depict the two Confederate generals in full military uniform, riding their horses; the Jackson statue lists three battles in campaigns from the Civil War.[4] Both are registered on the Virginia and the National Register of Historic Places.[5]

State law authorizing cities and towns "to establish and maintain parks, playgrounds and boulevards, and cause the same to be laid out,

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[3] 7/13/19 Tr. at 7-8, JA 806-07 (dedication ceremonies in 1921, 1924; statues remained on city property 100 years, citing City minutes and resolution submitted as exhibits); *id.* at 8-9, JA 807-08; (undisputed the city anticipated erecting monuments when it accepted the land for the parks); *id.* at 9-10, JA 808-09 (describing city resolutions accepting gifts of land to include statues); *id.* at 10, JA 809 (deeds said statues would be erected; resolution thanked the donor for statue of "our beloved hero, General Robert E. Lee").
[4] 7/31/19 Tr. at 9, JA 808 (describing statues; noting also their description on City Parks & Recreation websites); 10/14/17 Exhs. 4, 5, 8 & 9, JA 305-06, 309-10 (photos of statues of Generals Lee and Jackson).
[5] 5/2/17 Exh. 20, R.8632-8708.

equipped, or beautified," provided the City legal authority to accept the parks and statues.[6] In accepting the Lee park deed by resolution, the City thanked the donor for the statue of "our beloved hero, General Robert E. Lee."[7] Likewise the Jackson park deed specified the purpose was to erect a statue of General Jackson, and that the park be named Jackson Park.[8] After the statues were erected in 1921 (Jackson) and 1924 (Lee), the City convened formal acceptance ceremonies in the parks; after the festivities were parties and balls.[9]

B. The General Assembly extends Va. Code § 15.2-1812 to protect monuments or memorials for all wars in all localities; adds criminal penalties and a private right of action for damages (1930-2010).

When Charlottesville erected its Lee and Jackson monuments, a separate provision of law that then applied only to counties allowed those localities to authorize and permit the erection of Confederate veteran memorials near county courthouses. Over several decades, the General Assembly transformed that provision from a narrow law regarding

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[6] *See* 1908 Va. Acts Ch. 349.
[7] RSAC Exh. B, JA 4 (City resolution calling Lee "our beloved hero.").
[8] 7/31/19 Tr. at 10, JA 809 (Court reviewing terms of Jackson park deed, including name was to be Jackson park).
[9] 5/2/17 Exhs. 23 & 24, JA 73-80.

Confederate veteran memorials near county courthouses into a general historical preservation law for memorials and monuments relating to all wars and veterans, in all of Virginia's localities. *See generally* JA 42-70 (collecting versions of the law from 1904, 1910, 1930, 1942, 1945, 1962, 1982, 1988, 1997, 2000, 2005, and 2010).

From 1930 through 1981, the General Assembly expanded the list of war memorials or monuments covered. See JA 47 (in 1930 adding "World War veterans"); JA 51 (in 1945 authorizing "a Confederate, Spanish-American War, World War I or World War II monument or memorial"); JA 56 (in 1981 adding "Korean War and Viet Nam War monuments or memorials").

In 1988, the General Assembly amended the law to add "Revolutionary War, War of 1812, [and] Mexican War" to the list of covered wars. JA 58. This 1988 amendment also changed the verb form in the prohibition against disturbing or interfering to the simple present, passive voice, and eliminated "thereafter." *See id.* (showing change from "If such shall be erected it shall not be lawful *thereafter*," to "If such *are erected* it shall be unlawful ....") (emphases added). These three combined changes had the effect of bringing existing Revolutionary War, War of 1812, and Mexican War monuments or memorials in county seat public squares within the law's coverage.

In 1997, as part of a recodification of Chapter 15.1 of the Virginia Code, the General Assembly amended and reenacted this provision to cover all localities. *See* SD5, JA 38-40. This amendment also expanded coverage to war and veteran monuments or memorials "upon any of [a locality's] property." JA 60.

In 1998, the General Assembly further expanded this provision's reach by (1) making the list of covered wars illustrative rather than exclusive, and (2) extending monument or memorial locations to anywhere "within the geographical limits of the locality." JA 62.

In 1999 and 2000, the General Assembly added enforcement provisions in other sections that covered the monuments and memorials protected by Va. Code § 15.2-1812. The 1999 enactment amended Va. Code § 18.2-137 to make it a crime "[i]f any person … breaks down, destroys, defaces, damages or removes without intent to steal, *any monument or memorial for war veterans described in § 15.2-1812*." (emphasis added).

The 2000 enactment created a civil right of action for damages. JA 62-63. The new Va. Code § 15.2-1812.1 authorized an action for recovery of damages "[i]f *any monument, marker or memorial for war veterans as designated in §§ 15.2-1812 and 18.2-137* is violated or encroached upon." Va.

Code § 15.2-1812.1(A) (emphasis added). For violation of or encroachment upon a publicly owned monument, "the attorney for the locality in which it is located" had the first right to bring such an action. § 15.2-1812.1(A)(1). But "if no such action has commenced within sixty days following any such violation or encroachment," the action could be brought by "any person having an interest in the matter." *Id.* The General Assembly specified that "[d]amages may be awarded in such amounts as necessary for the purposes of rebuilding, repairing, preserving, and restoring such memorials or monuments to preencroachment condition." § 15.2-1812.1(A). This new civil enforcement right of action included attorneys' fees among available damages: "The party who initiates and prevails in an action authorized by this section shall be entitled to an award of the cost of litigation, including reasonable attorney's fees." § 15.2-1812.1(C); *see also* § 15.2-1812.1(A)(2) ("Damages other than those litigation costs recovered from any such action shall be used exclusively for [specified] purposes."). Having created this new right of action and endowed it with these features, the General Assembly further provided that "[t]he provisions of this section shall not be construed to limit the rights of any person, organization, society, or museum to pursue any additional civil remedy otherwise allowed by law." *Id.*

Minor amendments not material to this case followed in 2005 and in 2010. These amendments put Virginia's monument protection laws into the form they held throughout the events that gave rise to this lawsuit. The law as it stood after 2010 then remained unchanged through all the events of this case until July 1, 2020.

C. Plaintiffs seek and obtain judicial relief after Charlottesville orders the Lee and Jackson monuments removed and covered (2017-2020).

The Court below found that the City authorized the Lee and Jackson monuments at the time of erection and that the City "not only has acquiesced in these statues remaining on city property for almost 100 years, but the [C]ity itself has called attention to them as an asset, as improvements, as beautifying as recently as modern times, up until 2016."[10]

Until recently, the City's actions regarding these monuments paralleled the General Assembly's preservation efforts. While the General Assembly was expanding protections for all war and veteran monuments and

[10] 7/31/19 Tr. at 7-8, JA 806-07; *see also* 9/3/19 Tr. at 11-12, JA 887-88 (Court restating that evidence shows "there was official city approval and acceptance and permission . . . [t]here were votes. There were ceremonies. The city was intimately involved in how these statues came to be where they are. They'd been there almost 100 years"); 4/25/19 Op. at 2-5, JA 711-14 (reviewing evidence regarding the identity and features of the statues).

memorials throughout the Commonwealth during the late 1990s, for example, Charlottesville was continuing to preserve and to celebrate its Lee and Jackson monuments. On November 26, 1997 the City entered a letter contract accepting privately donated funds for professional restoration of the Lee and Jackson monuments. JA 71-72. The City's contract promised "periodic maintenance," and "an appropriate ceremony celebrating the restoration." *Id.*

More recently, local opinion toward the Lee and Jackson monuments has become sharply divided.[11] In February 2017, the City Council voted 3-2 to remove the Lee monument from its park.[12] Subsequently the City Council voted 5-0 to remove the Jackson monument as well (pending the outcome of this lawsuit) and to conceal both the Lee and Jackson monuments permanently under black tarps until they could be removed.[13]

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[11] *See* 4/25/19 Op. at 6-7, JA 715-16 ("While some people obviously see Lee and Jackson as symbols of white supremacy, others see them as brilliant military tacticians or complex leaders in a difficult time....").
[12] 10/15/19 Order at 2, JA 1025 (declaring first clause of February 6, 2017 City resolution removing Lee statue void for being ultra vires).
[13] 2/23/18 Op. at 1-3, JA 404-06 (discussing chronology of City covering statues with plastic tarps); *id.* at 6, JA 409 (concluding Court "cannot find that Council ever intended to them to be temporary").

Over a dozen plaintiffs, including Charlottesville taxpayers, veterans, and two historic preservation and heritage organizations, filed suit in March 2017 for an injunction, a declaratory judgment that the City had acted outside its authority, and damages including attorneys' fees and other costs of litigation.[14] On May 2, 2017 the Trial Court granted a temporary injunction prohibiting removal of the Lee monument.[15] In October 2017 the Court expanded it to protect the Jackson monument, and in February 2018 confirmed that covering both monuments with tarps violated the injunction, requiring the City to remove them.[16]

Ruling on a City Demurrer in a letter opinion October 3, 2017 the Court held that Virginia Code §§ 15.2-1812 and 1812.1 applied to the monuments, and that the Plaintiffs had standing to sue to protect them.[17] The Court subsequently disposed of most of the case in a series of motions for summary judgment by Plaintiffs and motions and cross-motions for summary

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[14] 11/17/18 Op. at 3-7; JA 577-81 (reviewing amendments to complaint). Plaintiffs filed a Revised Second Amended Complaint February 19, 2019, which became the operative Complaint. *See* RSAC, JA 672-99.
[15] 6/6/17 Order, R.214-18.
[16] 10/24/17 Order, JA 348-49 (extending Lee monument injunction to apply, mutatis mutandis, to Jackson statue); 6/19/18 Order, JA 465 (incorporating letter opinion February 23, 2018; requiring removal of tarps).
[17] 10/3/17 Op. at 7-12, JA 258-63.

judgment by the City. The Court found that the City's admissions and its own records and resolutions showed there was no genuine dispute that the Lee and Jackson statues were Confederate veterans' memorials; that the City had authorized and permitted them to be erected and to stand in City parks for over 100 years; and that Va. Code § 15.2-1812 proscribed disturbing or interfering with them.[18]

The only issues remaining for trial were damages and statutory attorneys' fees.[19] After hearing evidence September 13-15 2019, on October 15,

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[18] The summary judgment decisions and orders incorporated by reference previous rulings., *e.g.* 4/25/19 Op. at 2-5, JA 711-14 (reviewing undisputed evidence Lee and Jackson statues are Civil War veterans memorials); 7/31/19 Tr. at 6-13, JA 805-12 (detailing undisputed evidence indicating City authorized and permitted Lee and Jackson monuments in parks); 10/3/17 Op. at 3, JA 254 (defining issues to include whether Va. Code § 15.2-1812 applies); *id.* at 4-7, JA 255-58 (concluding Va. Code § 15.2-1812 does apply); 9/3/19 Tr. at 10-12, JA 886-88 (declining to reconsider summary judgment ruling on authorized and permitted as to Dillon rule authority to accept); 9/3/19 Order, JA 863-64 (denying City motion for summary judgement whether monuments "authorized and accepted"); 9/11/19 Ord., JA 870-73 (granting Plaintiffs' Motion for Partial Summary judgment on whether Lee and Jackson statues are Civil War memorials as per letter opinion April 26, 2019, and stating as final and law of the case Court's previous rulings on standing, and on Count 1 (granting Plaintiffs summary judgment on City statutory violations), Count II (granting Plaintiffs summary judgment City had acted ultra vires) and Count III (denying and dismissing Plaintiffs' claim City violated terms of gifts)).

[19] 9/3/19 Tr. at 28-29, R. 6598-99 (Plaintiffs and City agree damages and attorneys' fees are all that is left for trial).

2019 the Court entered orders granting Plaintiffs a declaratory judgment declaring that the City Resolution on removing the Lee statute was ultra vires (but not the Jackson statue resolution, which by its terms was conditioned "law permitting"). The Court also granted a permanent injunction prohibiting disturbing or interfering with either the Lee or Jackson monuments.[20] The Court found that the Plaintiffs had proven harm but that it was not quantifiable as damages.[21]

The attorneys' fee award remained under advisement. In awarding statutory attorneys' fees, the Court described the three years of litigation as "one of the most complex cases I have ever heard or been involved in."[22] The City contested issues that "to the Court seemed self-evident:" whether the statues were monuments or memorial to Civil War veterans; whether the City had authorized and permitted them in City parks, which was "unnecessary and seemingly accomplished nothing."[23] The Court concluded

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[20] 10/15/19 Order: Declaratory Judgment, JA 1024-26; 10/15/19 Order: Permanent Injunction, JA 1011-13; 10/15/19 Order: Damages, JA 1029-30.
[21] 10/15/19 Order: Damages, JA 1029-30.
[22] 1/21/20 Op. at 5, JA 1039 (reviewing complexity of the case).
[23] 1/21/20 Op. at 5-6, n.5, JA 1039-40 (remarking on City needlessly contesting self-evident issues).

Plaintiffs "should be reimbursed for such time, which was a large part of the case.[24]

In a Final Order entered January 29, 2020 the Court ruled it would award some but not all the costs and attorneys' fees, reducing the attorneys' fees from the $554,751.60 to $364,989.60. Of $49,286.83 in costs the Court awarded only filing fees of $441, and service costs of $250.[25]

The Defendants appealed, asserting four assignments of error. Appellees have not assigned cross-error.

Argument and Authorities

The law that governed Charlottesville's actions in 2017 was the law in existence in 2017. The law that governs this appeal is the same, as it is the law applied by the Circuit Court in reaching the judgment challenged on appeal. That law applied uniform protections to war or veteran monuments and memorials, whenever erected, wherever located. Va. Code § 15.2-1812. Among those protections were criminal penalties, Va. Code § 18.2-137, and a private right of action for damages, including reasonable attorneys' fees, Va. Code

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[24] *Id.*

[25] 1/21/20 Op. at 1 & 12, JA 1035 & 1046 (attorneys' fees); *id.* at 13, JA 1047 (costs); 1/29/20 Order at 2, JA 1050 (awarding $364,989.60 in attorneys' fees plus $441 in filing fees, and $250 in service costs).

§ 15.2-1812.1. In the rulings challenged on appeal, Judge Moore properly applied Va. Code §§ 15.2-1812 and -1812.1.

The City's Assignments of the Error and the Commonwealth's arguments as amicus curiae present variations on the same theme. Each aims to avoid the legal consequences that straightforwardly follow from the law in existence at the time the City chose to break it. The Commonwealth tries to brush that law away entirely. And while the City is not so bold as to assert that the law when it acted simply does not matter anymore, the City's consequence-avoidance claims are bold enough in their own right. The City attempts to make fee-shifting disappear, to treat § 15.2-1812.1 as nothing but a "tear-down-first, pay later" damages action, and to read § 15.2-1812 as a preservation law that the General Assembly expanded to Virginia's cities in 1997 not to protect already existing war monuments and memorials there, but only those yet to be erected. The precise legal problems with these claims vary in their particulars. But each implausible interpretation is equally an effect of those "ill humors … which in smaller societies … [can] contaminate the public councils." The Federalist No. 27 (Alexander Hamilton).

I. The controlling law for this appeal is the law in existence when the claims arose and were decided below.

Standard of Review: Identification of the law that controls this appeal is a question of statutory interpretation reviewed de novo. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007). But there is no trial court decision to "review" on the question of whether the amended law governs instead of the law in existence at the time the claims arose and were decided upon. The amended law's effective date came over five months after the Final Order was entered January 29, 2020. The suggestion that the amended law applies in reviewing that judgment appeared for the first time in an amicus curiae brief filed September 18, 2020.

Argument: The City's assignments of error all involve the Circuit Court's application of Virginia law as it existed prior to July 1, 2020. *See* Petition for Appeal (assigning error to decisions applying Va. Code §§ 15.2-1812 and -1812.1 (2010) without mentioning 2020 Va. Acts Ch. 1100). The City insists—and Plaintiffs/Appellees agree—that "[t]he 2020 amendments do not render moot any of the City's assignments of error." City Br. at 1. The parties also agree that the injunction in this case must be at least partially dissolved to conform the relief granted under the old law to the requirements of the amended law. The parties disagree about both the appropriate procedure for

addressing the interaction between the injunction and the amended law, and also the scope of injunction dissolution required to conform the two to each other. *See* 6/30/2020 Petitioners'-Appellants' Mtn. to Dissolve; 7/10/2020 Respondents'-Appellees' Opp. to Mtn. to Dissolve. Plaintiffs have contended that the amended law should be applied in the first instance by the Circuit Court, while the City has moved this Court to do so. But nothing about that dispute over initial application of the amended law to the injunction going forward bears on this Court's appellate review of the Circuit Court's interpretation and application of the law that undergirds the declaratory judgment and fee award in this case. The Circuit Court has yet to apply the amended law, and no order applying that law is before this Court in this appeal.

Appearing on behalf of amicus curiae Commonwealth of Virginia, the Attorney General contends that all of the parties are mistaken about what law applies to what conduct and claims. In the opinion of the Attorney General, "The judgment of the circuit court should be reversed in its entirety because this Court is required to apply *current* law to this appeal and the circuit court's judgment is inconsistent with current law." AG Br. at 19 (emphasis in original). But the Attorney General fails to address controlling

Virginia statutory law about the effect of amended law on claims arising under a law repealed after the claims arose. Virginia Code § 1-239 states: "No new act of the General Assembly shall be construed to repeal a former law … as to any … claim arising under the former law, or in any way whatever to affect any … claim arising before the new act of the General Assembly takes effect."

It may be that the Attorney General simply overlooked Va. Code § 1-239, for this rule of construction is absent from the Attorney General's brief. In any event, its application is easy here. To apply the newly amended law in the manner advocated by the Attorney General would directly contradict the rule of construction in Va. Code § 1-239.

This Court's decision in *Jones v. Commonwealth ex rel. Von Moll*, 295 Va. 497 (2018)— in which the Attorney General represented the Commonwealth—provides a straightforward illustration of how Va. Code § 1-239 should operate here. In *Jones*, this Court reviewed a circuit court determination that a retired firefighter was not a disabled person entitled to receive certain health insurance benefits. The law governing Jones's claim for benefits changed between the time he applied for benefits and the time this Court reviewed Jones's appeal of the benefits denial. The Court applied the

pre-amendment version, stating "This opinion interprets the Act as it existed in 2014 because Jones filed his claim for benefits with the Comptroller in 2014." *Id.* at 499 n.1. The Court reasoned that "[t]he Act was subsequently amended, but 'rights accrued, claims arising, ... under the former law, or judgments rendered before the passage of an amended statute, will not be affected by it, but will be governed by the original statute, unless a contrary intention is expressed in the later statute.") (quoting *Ferguson v. Ferguson*, 169 Va. 77, 87 (1937) and citing Va. Code § 1-239).

Instead of following a similar approach here, the Attorney General floats an argument from *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). In this treaty and admiralty case from John Marshall's first year as Chief Justice, the Supreme Court was asked to interpret the fourth article of a convention with France that "provided for the mutual restoration of 'property captured, and not yet *definitively* condemned.'" Editorial Note, 6 Papers of John Marshall 99 (2014). The French schooner, *Peggy*, had been "condemned as a lawful prize" in September 1800 by a Circuit Court sitting in admiralty jurisdiction, but the case was still pending before the Supreme Court on a writ of error when the treaty was ratified. *Id.* Applying the treaty, the Court determined that the Circuit Court's condemnation was not

“definitive” within the meaning of the treaty. Chief Justice Marshall noted that “[t]he terms used in the treaty seem to apply to the actual condition of the property and to direct a restoration of that which is still in controversy between the parties. On any other construction the word *definitive* would be rendered useless.” *Schooner Peggy*, 5 U.S. at 109. In other words, Chief Justice Marshall was noting that the prior action of the circuit court was not yet “definitive”—because it was still on appeal—and therefore the new treaty required a different result.

The Attorney General’s *Schooner Peggy* argument in this case emphasizes Chief Justice Marshall’s statement that “*if subsequent to the judgment and before the decision of the appellate court*, a law intervenes and positively changes the rule which governs, the law must be obeyed.” City Br. at 18, quoting 5 U.S. at 110 (emphasis added by City). But this argument-by-italics emphasizes the wrong phrase. The treaty provision at issue in *Schooner Peggy* by its terms required the Supreme Court to apply that new law to determine the legal effect of the Circuit Court’s pre-ratification prize condemnation. By contrast, there is nothing comparable in the post-July 1, 2020 law here to displace the rule of construction in Va. Code § 1-239. To the contrary, Va. Code § 1-239 confirms that no new law has “intervene[d] and

positively change[d] the rule which governs" this appeal. *Schooner Peggy*, 5 U.S. at 110.

Although the change in law effective July 1, 2020 does not apply to what happened before that effective date, Va. Code § 1-239 further provides that "proceedings thereafter held shall conform, so far as practicable, to the laws in force at the time of such proceedings." Va. Code § 1-239. The significance of that proviso here is that in further proceedings regarding the forward-looking aspects of injunctive relief, the amended law operates as an outer limit on the reach of the relief granted under the earlier law. The City's appeal, then, is to be judged under the earlier law; its motion to dissolve is to be assessed under the amended law.

II. The Circuit Court correctly applied former Va. Code §§ 15.2-1812 and -1812.1.

The City's Assignments of Error I, II, and IV all relate to the substantive coverage and remedial features of former Va. Code §§ 15.2-1812 and -1812.1. These provisions, together with Va. Code § 18.2-137, provide a textually and structurally interlocking scheme of protections to be interpreted *in pari materia*. *See Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957) ("The general rule is that statutes may be considered as *in pari materia* when they relate to … the same class of persons or things …."). Accordingly,

these statutes are to be considered "as a single and complete statutory arrangement. . . . [T]hey should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness." *Id.*; *see also* 1 James Kent, *Commentaries on American Law* 433 (1826) ("Several acts *in pari materia*, and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system."). While Appellees will address the City's Assignments of Error individually, the proper analysis of each one flows from the others. That is because the different pieces of the old law all functioned together to effectuate the legislature's preservative purposes with respect to the same set of war and veteran monuments and memorials statewide.

A. Former Virginia Code § 15.2-1812.1 authorized the award of attorneys' fees and costs to Plaintiffs as prevailing parties. (Response to City's Error I)

Standard of Review: An award of attorneys' fees is reviewed for abuse of discretion. *Lambert v. Sea Oats Condo. Ass'n, Inc.*, 293 Va. 245, 252 (2017). The scope of a statutory fee-award provision is a question of statutory

interpretation reviewed de novo. *Manchester Oaks Homeowners Ass'n, Inc. v. Batt*, 284 Va. 409, 427 (2012).

Argument: The City's lead assignment of error is that the trial court lacked authority to award Plaintiffs attorneys' fees and costs. But Judge Moore had not only authority, but also an obligation to do so. That is because: (1) Plaintiffs were prevailing parties on their claim under the private right of action supplied by Va. Code § 15.2-1812.1 (2000); and (2) prevailing-party status on this claim is the only condition for statutory entitlement to a mandatory fee award. *See* Va. Code § 15.-1812.1(C) ("The party who initiates and prevails in an action authorized by this section shall be entitled to the cost of the litigation, including reasonable attorney's fees."); *see also Lambert*, 239 Va. at 254 (explaining that use of "shall be entitled" in a statutory fee provision "makes an award of reasonable attorney's fees to the prevailing party mandatory, in contrast to other statutes making such an award discretionary").

In this case, Plaintiffs obtained (1) a declaratory judgment that the City acted ultra vires (10/15/19 Order: Declaratory Judgment, JA 1024-26); (2) a temporary injunction that prevented the immediate removal of the Lee monument (6/6/17 Order: Temporary Injunction, JA 81-85); (3) an expanded

injunction that prevented removal of the Jackson monument (10/24/17 Order Extending Temporary Injunction, JA 348-49); (4) an order requiring removal of the tarps covering the Lee and Jackson monuments (6/19/18 Order Enforcing and Enlarging Temporary Injunction, JA 465-68); (5) a permanent injunction that protected the monuments under Va. Code § 15.2-1812 going forward (10/15/19 Order: Permanent Injunction, JA 1011-13); and (6) a Final Order that included award of fees and costs (1/29/20 Final Order, JA 1049-51). Having won on "the significant issue in dispute," *Hollowell v. Virginia Marine Resources*, 56 Va. App. 70, 86 (2020), Plaintiffs prevailed and were therefore statutorily entitled to a mandatory award under Va. Code § 15.2-1812.1(C). That is enough to defeat this assignment of error, which challenges neither the amount nor the reasonableness of attorneys' fees and costs awarded, but rather the court's authority to award any fees and costs in this case.

The City's principal counterargument appears to be that Plaintiffs were not prevailing parties *in an action for recovery of damages* because the trial court determined the harm suffered by plaintiffs was not quantifiable as damages. 10/15/19 Order, JA 1030. But that is not how this Court has formulated the prevailing-party inquiry. To the contrary, "a comparison of damages recovered to damages sought is not relevant when determining the

threshold question of which party is the prevailing party on a claim. The prevailing party is the party in whose favor judgment is rendered, regardless of the amount of damages." *Lambert*, 293 Va. at 256 n.5 (internal quotation marks and citations omitted).

The City argues further that "[i]n the absence of any allegation of physical harm to the Statues, and in the absence of an *ad damnum* within the RSAC alleging damages that were necessary to return either Statue to some 'preencroachment condition', there exists no statutory basis under Va. Code § 15.2-1812.1(C) for an award of attorney's fees to [Plaintiffs]." City Br. at 17. The City's "physical harm" limitation is not in the law. The law does speak, though, of "preserving" and "restoring." Va. Code § 15.2-1812.1. Because of this lawsuit, the monuments have been preserved. And restoration of the monuments to their preencroachment condition took place when Plaintiffs successfully obtained an order requiring the City to remove the tarps. Judge Moore forced the City to internalize the costs of that relief, rather than awarding corresponding damages to Plaintiffs. But that does not change the fact that Plaintiffs were prevailing parties in an action that restored the monuments to their preencroachment condition within the meaning of § 15.2-1812.1. And again, prevailing-party status on such a claim is the only

condition for statutory entitlement to a mandatory fee award. *See* Va. Code § 15.-1812.1(C).

Finally, the statute classifies fees and costs among recoverable damages. The section describing available damages says that "*damages other than those litigation costs recovered from any such action* shall be exclusively for [other specified purposes]." Va. Code § 15.2-1812.1(A) (emphasis added). Lest there be any question about the meaning of "litigation costs," another provision of the statute makes clear that "the cost of the litigation" includes "reasonable attorney's fees." Va. Code § 15.2-1812.1(C). Because fees and costs are "damages" within the meaning of this statute, the City is wrong that obtaining an award of some of other damages is an additional precondition to being a prevailing party in order to obtain an award of fees and costs.

The City's brief omits the statutory language classifying "litigation costs" among damages. The brief states: "The only action authorized by Va. Code § 15.2-1812.1 is 'an action for recovery of damages', *expressly restricted to* amounts 'as necessary for the purposes of rebuilding, repairing, preserving, and restoring such memorials or monuments to 'preencroachment condition'." City Br. 14, quoting Va. Code § 15.2-1812.1(A) (emphasis added). The quoted language supporting the "expressly restricted to" claim leaves

out the very next sentence in the statute. That omitted sentence begins: "*Damages other than* those litigation costs recovered from any such action ...." Va. Code § 15.2-1812.1(A) (emphasis added).

It is true that "attorney's fees" and "damages" are distinct categories in other areas of the law and have been distinctly provided for in other statutory fee-shifting provisions. The General Assembly could have treated these as two separate categories if it had wished to do so. But that is not what it did here. The private right of action in Virginia Code § 15.2-1812.1 law classifies "litigation costs" within the operative statutory meaning of recoverable "damages." The General Assembly has operated on a similar understanding of damages as including litigation costs incurred in successfully pursuing one's claims in other areas, too. *See e.g.*, Va. Code § 8.01-413 ("[T]he court may award damages for all expenses incurred by the patient or authorized insurer ... , including a refund of fees if payment has been made ... , court costs, and reasonable attorney fees."); Va. Code § 55.248-11 ("[T]he applicant may recover as damages suffered by him that portion of the application deposit wrongfully withheld and reasonable attorney fees.").

The recognition that the operative statutory meaning of damages in § 15.2-1812.1 includes litigation costs also provides an answer to the City's concluding assertion that "Plaintiffs waived any claim for attorney's fees under or in connection with [the operative complaint's sixth] prayer for relief." City Br. at 19-20 (citing Va. Sup. Ct. R. 3:25(B)). This is incorrect because that prayer for relief requests "litigation costs including but not limited to attorney's fees as described above in paragraph 2 …." And Paragraph 2, in turn, specifies Va. Code §§ 15.2-1812 and -1812.1 as a statutory basis for the fee award. *See* RSAC pp. 25-27, JA 696-98. Plaintiffs' pleadings plainly satisfy the requirements in Rule 3:25(B) that "[a] party seeking to recover attorney's fees shall include a demand therefor in the complaint …" and that "[t]he demand must identify the basis upon which the party relies in requesting attorney's fees."

B. The private right of action in former Va. Code § 15.2-1812.1 should not be construed to foreclose the remedies of declaratory judgment and injunction. (Response to City's Error II)

Standard of Review: The scope of a statutory cause of action is a question of law subject to de novo review. *See Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, Inc.*, 289 Va. 34, 51 (2014). "[T]he

‘decision whether to grant [or deny] injunctive relief … will not be disturbed on appeal unless it is plainly wrong.’” *Sosebeee v. Franklin Cty. Sch. Bd.*, 843 S.E.2d 367, 369 (Va. 2020), quoting *Nishanian v. Sirohi,* 243 Va. 337, 340 (1992).

Argument: The City’s second assignment of error is that the purported silence of Va. Code §§ 15.2-1812 and -1812.1 regarding the availability of declaratory and injunctive relief should be construed to foreclose those remedies in an action against the City. But the legislature’s directive regarding the relationship between its private right of action and other civil remedies directs the opposite of the interpretive move attempted by the City. Virginia Code § 15.2-1812.1(C) states that “[t]he provisions of this section shall not be construed to limit the rights of any person … to pursue any additional civil remedy otherwise allowed by law.” To imply from the General Assembly’s provision of this damages action the exclusion of declaratory and injunctive relief as available remedies is to do exactly what the General Assembly said not to: limit the rights of Plaintiffs to pursue additional civil remedies otherwise allowed by law.

The civil remedy of a declaratory judgment is “otherwise allowed by law.” *See* Va. Code § 8.01-184 (“In cases of actual controversy, Circuit Courts

within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed ....”). The remedy of an injunction is also “otherwise allowed by law.” *See* Va. Code § 8.01-620 (“Every Circuit Court shall have jurisdiction to award injunctions.”).

After expanding the protections of Va. Code § 15.2-1812 to all localities in 1997, making the list of covered wars non-exclusive in 1998, and adding the protections of the criminal law in 1999, the General Assembly did not create this private right of action in 2000 as a “tear-down-first, pay later” monument preservation plan. After all, the prohibition against monument removal in Va. Code § 15.2-1812 applies specifically to “the authorities of the locality,” and the private right of action is triggered “if any monument, marker or memorial for war veterans as designated in §§ 15.2-1812 and 18.2-137 is violated or encroached upon.” Va. Code § 15.2-1812.1. The statute specifically contemplates a private right of action for damages in the case of the attorney for the locality’s inaction with respect to “a publicly owned monument, marker, or memorial.” *Id.* As Judge Moore observed, these provisions “anticipate localities attempting to move, remove, destroy or damage such monuments or memorials, as well as the local authorities and

their legal counsel doing nothing to stop or prevent it." 10/3/17 Op.Ltr. at 12, JA 263. Given the evident intent of the General Assembly when these provisions are considered *in pari materia*, Judge Moore was correct that "[i]t would be an interesting thing indeed if citizens would only have the right to ask for damages after the fact because the City Attorney does not, but the same citizen would not have the ability to attempt to stop the damage in the first place. That has no logic." *Id.* 12-13, JA 263-64.

The General Assembly's provision of a right of action for damages to enforce a prohibition that (1) applies specifically to "the authorities of the locality," and (2) is not to be construed to foreclose additional remedies otherwise allowed by law, is a full answer to the City's invocation of sovereign immunity in this appeal. "The General Assembly, not the courts, wholly occupies this field of law," *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469, 485 n.9 (2017), and courts have repeatedly recognized in other contexts the basic principle that the creation of a cause of action for damages abrogates immunity. *See, e.g., Owens v. City of Independence, Mo.*, 445 U.S. 622, 647 (1980) ("[T]he municipality's 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit."); *United States v. Georgia*, 546 U.S. 151, 159 (2006) ("[I]nsofar as Title II

[of the Americans with Disabilities Act] creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title I validly abrogates sovereign immunity."). Again, Judge Moore was correct: "It would make no sense at all for the legislature to give a remedy for such action, and then to say the local authorities are immune to and protected from any actions or efforts under the statute to do anything about it." 6/13/18 Op. at 5, JA 460; *see also id.* (explaining that it "would seem to fly in the face of the language and intent" of Va. Code §§ 15.2-1812 and -1812.1 to find the City of Charlottesville or City Council is immune, because "[c]learly it is a statutory scheme put in place by the state legislature for the express purpose of protecting certain monuments and memorials (statues) and forbidding localities from doing harm or removing them, and establishing a remedy if the locality does so or attempts to").

The City's contention confuses (1) the question of what civil remedies are available within the right of action supplied by the General Assembly, with (2) the distinct question of whether the General Assembly has supplied a right of action. Because a right of action against the defendants existed under former Va. Code § 15.2-1812.1, there is no need to imply it. *See Levar Marcus Stoney, Mayor v. Anonymous*, Record No. 200901, 8/26/20 Ord. at 6

("Prior to the amendments to Code § 15.2-1812.1, which became effective on July 1, 2020, 'any person having an interest in the matter' was permitted to bring an action for encroachment upon a publicly owned war memorial, provided the attorney for the locality had not already done so."). Indeed, the express private right of action in former Va. Code § 15.2-1812.1 is exactly the ingredient that was missing in *Cherrie v. Virginia Health Services, Inc.*: "clear statutory language expressly authorizing or implying that private parties can file a civil action in circuit court to enforce" the law. 292 Va. 309, 317 (2016).

The City also describes too narrowly the nature of the right of action supplied under former Va. Code § 15.2-1812.1. The City says it is limited to "a civil right of action for recovery of money damages necessary to repair a damaged monument." City Br. at 22. As we have already seen above, though, the private right of action in Va. Code § 15.2-1812.1 includes a fee-shifting provision among the available damages, and the specified objects of awardable damages include "preserving" and "restoring to … preencroachment condition," in addition to "repairing." *See* pp. 25-28 above.

Finally, and independently of the problems already identified, the City's invocation of sovereign immunity contradicts the City's position in successfully advocating for dismissal of the individual City councilors as

defendants. In arguing for reconsideration of an earlier ruling that left the councilors in, the City joined the councilors in asserting that "[s]o long as the City remains a defendant, this Court has the power to award damages and injunctive relief (if either is appropriate on the merits)." Def. Mem. in Supp. of Mot. For Reconsideration at 18, R.1510. Having used the availability of damages and injunctive relief against the City in order to secure dismissal of the individual councilors, the City cannot now turn around on appeal and reassert sovereign immunity. *See Babcock & Wilcox v. Areva NP, Inc.*, 292 Va. 165, 204 (2016) ("To permit [a party] to disavow on appeal the very argument it made at trial would allow [that party] to approbate and reprobate."); *Wooten v. Bank of Am., N.A.*, 290 Va. 306, 310 (2015) (explaining that the approbate-reprobate doctrine "protects a basic tenet of fair play: No one should be permitted, in the language of the vernacular, to talk through both sides of his mouth").

C. Charlottesville's Lee and Jackson Monuments are protected by Va. Code §§ 15.2-1812, -1812.1, and 18.2-137. (Response to City's Error IV)

Standard of Review: The City's fourth assignment of error presents a matter of statutory interpretation, which is reviewed de novo. *See, e.g.*, *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007).

<u>Argument</u>: Text, context, and purpose all point toward uniform protection for all war and veteran monuments or memorials statewide. The City's contrary interpretation stretches the text, ignores statutory context, and frustrates the General Assembly's preservative purpose. According to the City, the General Assembly's expansion of its war and veteran monuments or memorials law to every locality—rather than just the public square in county seats—did not add protection for any already existing monuments or memorials within the expanded coverage area. If this Court were to adopt the City's interpretation, the resulting patchwork of protection under Va. Code §§ 15.2-1812, -1812.1, and 18.2-137 would be arbitrary.

1. Text, Context, and Purpose

In 1999, the General Assembly amended § 18.2-137 to protect "any monument or memorial for war veterans *described in § 15.2-1812*." Va. Code § 18.2-137 (emphasis added). And in 2000, the General Assembly added the right of action for damages "if any monument, marker or memorial for war veterans *as designated in §§ 15.2-1812* and 18.2-137 is violated or encroached upon." Va. Code § 15.2-1812.1 (emphasis added). The referent of each explicit incorporation appears in the second half of the first sentence of Va. Code

§ 15.2-1812 (1998): "monuments or memorials for any war or conflict, or for any engagement of such war or conflict."[26]

According to the City, the set of protected monuments or memorials in Va. Code § 15.2-1812 does not include any war monuments or memorials erected in any of Virginia's independent cities before 1997. City Br. at 35-36.

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[26] The first paragraph of Va. Code § 15.2-1812, in full, states:

> A locality may, within the geographical limits of the locality, authorize and permit the erection of monuments or memorials for any war or conflict, or for any engagement of such war or conflict, to include the following monuments or memorials: Algonquin (1622), French and Indian (1754-1763), Revolutionary (1775-1783), War of 1812 (1812-1815), Mexican (1846-1848), Confederate or Union monuments or memorials of the War Between the States (1861-1865), Spanish-American (1898), World War I (1917-1918), World War II (1941-1945), Korean (1950-1953), Vietnam (1965-1973), Operation Desert Shield-Desert Storm (1990-1991), Global War on Terrorism (2000-), Operation Enduring Freedom (2001-), and Operation Iraqi Freedom (2003-). If such 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 to prevents its citizens from taking proper measures and exercising proper means for the protection, preservation and care of same. For purposes of this section, "disturb or interfere with" includes removal of, damaging or defacing monuments or memorials, or, in the case of the War Between the States, the placement of Union markings or monuments on previously designated Confederate memorials or the placement of Confederate markings or monuments on previously designated Union memorials.

Because of the way that § 18.2-137 and § 15.2-1812.1 incorporate by reference the monuments or memorials described in § 15.2-1812, monuments or memorials unprotected against removal by local officials are also unprotected by the criminal penalties in Va. Code § 18.2-137, and can be violated or encroached upon with impunity from damages liability under Va. Code § 15.2-1812.1. On this, the texts are clear.

The City's cramped interpretation of these provisions' protections is wrong. Simply put, it is hard to imagine why Virginia's General Assembly would have enacted a law protecting war or veteran monuments or memorials with the features that the City attributes to these laws. According to the City, one must study both the history of, and also the state-law enabling authority for, each such monument or memorial that has been erected in order to know whether it is protected not just against removal by the local authorities, but also covered by the criminal vandalism prohibition of § 18.2-137 or the civil damages protections of § 15.2-1812.1. One wonders whether the City (or the General Assembly, for that matter) has any idea just how few monuments or memorials are protected under the City's interpretation.

The plain meaning of Va. Code § 15.2-1812 includes within its protection against disturbance or interference by "authorities of the locality" *all* "monuments or memorials for any war or conflict, or for any engagement of such war or conflict." Va. Code § 15.2-1812. This law says that "if such are erected, it shall be unlawful …." The most natural reading of "such" is to refer back to the general category description preceding the list of specific examples: "monuments or memorials for any war or conflict, or for any engagement of such war or conflict." The City contends that "such" also incorporates the "authorizing words" in the first sentence. City Br. at 38; *see also* City Br. at 35-36 ("Whether a particular statue or monument was intended by the General Assembly to be protected by state law from disturbance or interference depends on the specific enabling legislation by which a locality derived authority to erect it."). But reading "such" this way excludes all existing war or veteran monuments or memorials previously erected pursuant to other sources of local government authority. That exclusion undermines the point of expanding the preservation rule to every locality and all local property.

This brings us to "are erected," a present-tense, passive-voice verb. The present tense "are erected" makes the statute's coverage easy to ascertain at

the time of application. That is the critical time one cares about in looking to the law's coverage. With the present tense, one need only observe that certain monuments "are erected" to know it is unlawful to disturb or interfere with them. Consider, by contrast, the statutory language that the General Assembly moved away from in 1988: "If such *shall be erected* it shall not be lawful *thereafter*." JA 58 (emphases added). That abandoned approach might have been construed (mistakenly or not) to have a temporal limitation the present version does not have. By removing "thereafter," the General Assembly eliminated the potential need for the individualized factual and legal genealogical inquiry required by the City's interpretation.

Let us now consider the end of the sentence: "any monuments or memorials so erected." As with "such," the City contends that "so erected" refers back to "the manner in which the memorials are erected (i.e., pursuant to the authority conferred by the statute)." City Br. at 38. But it is difficult to understand why one would think "so erected" at the end of the second sentence refers all the way back to the first half of the first sentence. A more straightforward reading pairs "so erected" at the end of the second sentence with "are erected" at the beginning of that same sentence. A simple way to appreciate the practical point of this pairing is to consider how this provision

would have read without the phrase "so erected" at the end: "If such 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." The fact that monuments or memorials "are erected" is what brings them within the coverage of the protection against disturbance or interference; "so erected" similarly qualifies "any monuments or memorials" to exclude those that are not erected.

To conclude this close textual analysis, we can summarize the basic operative principle in a simple phrase: "if such are erected, then such are protected." And "such," as we have seen, refers to "monuments or memorials for any war or conflict, or any engagement of any war or conflict." It does not sweep in anything about the precise enabling authority by which "such are erected."

This detailed textual parsing can be further elaborated by reference to the broader statutory context. The trajectory of Virginia Code § 15.2-1812 over time is toward more expansive reach. Within this trajectory, it does not make much sense for the General Assembly to have brought in monuments or memorials for more and more wars while simultaneously excluding from coverage those monuments or memorials in existence when expanding the

subject-matter coverage. The evident purposes are preservation and protection. It would be a very odd preservation or protection law that applies only to monuments or memorials yet to come into existence in cities rather than also including those already in existence there.

Another aspect of the broader statutory context to consider is the proliferation of protections for covered monuments from 1997 to 2000. After the General Assembly expanded Va. Code § 15.2-1812 to all localities in 1997, it extended the protections of the criminal law in § 18.2-137 to § 15.2-1812's monuments and memorials in 1999. And then in 2000, the General Assembly created the private right of action for damages, with fee-shifting. It would seem unusual to have trundled out this heavy artillery to protect in cities only post-1997 war and veteran monuments or memorials. We may never know what the precise reasons were for the expansion of Va. Code §§ 15.2-1812, -1812.1, and 18.2-137 over just a few years—whether historical preservation generally, promotion of historical tourism, lingering worries from battles over Disney America, or concern about other kinds of developments and developers that could tempt governments. But we need not speculate about subjective motivations to recognize this expansion for what it was. Yet the City's interpretation would have the General Assembly

piling on greater and greater legal protections for a small set of monuments or memorials that excludes all existing monuments and memorials in the most populous locales.

2. Prospective Application

Stymied by the plain meaning of the statutory text in context, the City summons forth the presumption against retroactivity to place a thumb on the interpretive scale. But the Circuit Court correctly applied the version of Va. Code § 15.2-1812 that governed Charlottesville and every other locality in Virginia from 1997 through July 1, 2020. There is nothing "retroactive" about applying a statutory prohibition to acts performed after that prohibition has gone into effect.

The City's fundamental error on retroactivity is to neglect what the monument and memorial protections actually regulate, which are the *activities* of disturbance or interference with protected monuments or memorials, including removal. *Cf. Landgraf v. USI Film Products*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring in the judgments) ("The critical issue [is] … the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered."). After the General Assembly extended Virginia Code

§ 15.2-1812 to all localities in 1997 and added the private right of action in Va. Code § 15.2-1812.1 in 2000, Charlottesville and every other city in Virginia were on notice not only that they could not disturb or interfere with their protected monuments or memorials, but also that they were subject to suit if they did.

Instead of looking at the imposition of a prospective duty not to disturb or interfere with protected monuments, the City looks backward to the time of each monument's erection, as if the City's rights and duties in relation to each monument or memorial became fixed then. But that is not how Va. Code § 15.2-1812 works. It describes the class of monuments or memorials that are protected and then sets forth a rule to govern "the authorities of the locality" with respect to their activities and choices regarding those protected monuments or memorials going forward.

Even if one were to adopt an analytical framework around the monuments themselves rather than the City's obligations in connection with those monuments, the City's monument-removal and -covering orders would still be prohibited by Va. Code § 15.2-1812 under this Court's analysis in *Sussex Community Services Association v. Virginia Society for Mentally Retarded Children, Inc.*, 251 Va. 240 (1996) and related cases. In *Sussex*, the Court

interpreted "any restrictive covenants" to regulate both restrictive covenants in existence before the legislation at issue was enacted and also restrictive covenants entered into thereafter. *Id.* at 243-44. To exclude from coverage restrictive covenants already in existence would require the Court implicitly to write in a "hereafter" limitation. *Id.* at 244; *see also Allen v. Mottley Constr. Co.*, 160 Va. 875, 889-90 (noting that in order to apply the statute prospectively only, it would be necessary to judicially amend the statute, "supply[ing] words not found in the statute," so that the phrase would read "*any* award *hereafter made*"); *Harbour Gate Owners' Ass'n v. Berg*, 232 Va. 98, 103 ("all condominiums" encompasses all condominiums existing at the time of enactment); *Buenson Div. v. McCauley*, 221 Va. 430, 433 (Workers' Compensation Act amendment referring to "an award" applied to awards made before and after amendment); *Town of Danville v. Pace*, 66 Va. 1, 4 (1874) ("any action" includes actions filed both before and after the passage of the statute in which the phrase was used). Similar logic counsels against the City's attempt to exclude from coverage monuments or memorials already in existence when the General Assembly expanded the coverage of Va. Code § 15.2-1812.

3. Dillon Rule

The final portion of the City's brief garnishes the City's flawed analysis of alleged retroactivity with appeals to protection of the City's "substantive rights" against the Commonwealth. The City's appeal to its purported federal constitutional rights are unavailing, for "a political subdivision created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysursa v. Pocatello Educ. Ass'n*, 55 U.S. 353, 363 (2009).[27] And as a matter of state law, the City has only those authorities and powers that the Commonwealth grants to it. *See, e.g.*, *Advanced Towing Co. v. Fairfax Cnty. Bd. of Supervisors*, 280 Va. 187, 193 (2010) ("[M]unicipal corporations have only those powers expressly granted by statute, those necessarily implied therefrom, and those that are essential and indispensable to the exercise of those expressly granted."). Under the Dillon Rule, curtailing a locality's power to disturb or interfere with public property protected by

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[27] For Judge Moore's more detailed reasoning regarding his rejection of the City's Equal Protection defense, see 9/11/19 Tr. at 8-40, R. 6630-62.

State law is a simple exercise of State authority to define the limits of a locality's powers.[28]

III. The Circuit Court, not this Court, should apply the amended law in the first instance.

This last issue arises on the City's motion under the amended law. It does not involve any of the assignments of error; those call for application of the earlier law. It does not relate to any order entered by the Circuit Court; that court has yet to apply the amended law.

A motion for partial dissolution is pending in the Circuit Court and a motion for complete dissolution is pending in this Court. As set forth more fully in Respondents'-Appellees' response in opposition to the City's motion to dissolve the permanent injunction, this Court should not accept the City's invitation to travel beyond the Assignments of Error under the pre-July 1 law. *See* 7/10/20 Opposition. Instead of addressing the amended law's application to the injunction in the first instance, this Court should enforce the limit imposed by Rule 5:17(c)(1)(i) that "[o]nly assignments of error assigned in the petition for appeal will be noticed by this Court."

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[28] For Judge Moore's reasoning rejecting the City's Dillon Rule argument regarding its acceptance and permission of the Lee and Jackson monuments, see JA 886-91.

The Circuit Court possesses authority to dissolve the injunction "at any time" under Va. Code § 8.01-625, with any aggrieved party able to seek this Court's prompt review pursuant to Va. Code § 8.01-626. The Circuit Court also retains concurrent jurisdiction pursuant to Va. Sup. Ct. R. 1:1B(a)(1) and 1:1B(a)(3)(H). Rule 1:1B(a)(1) provides that, "[a]fter the filing of the notice of appeal, … the circuit court retains concurrent jurisdiction for the purposes specified in this Rule, including acting upon any of the matters set forth in subparts (a)(3)(A)-(H) of this rule." Rule 1:1B(a)(3)(H) includes within that concurrent jurisdiction "taking any other action authorized by statute or Rule of Court to be undertaken notwithstanding the expiration of the 21-day period prescribed by Rule 1:1, …. so long as the party requesting the action complies with the applicable time limitation in the statute or Rule authorizing such action." The statutory authority allowing "any court wherein an injunction has been awarded" to dissolve that injunction "at any time," Va. Code § 8.01-625, fits within this (a)(3)(H) authority.

Plaintiffs' motion for partial dissolution has been pending in the Circuit Court for over four months. Plaintiffs filed it on June 5, ten days before the City filed its Petition for Appeal. The City opposed Plaintiffs' motion and then filed its own motion to dissolve in this Court on June 30.

"The judge closest to the contest is the judge best able to discern where the equities lie." *Hamad v. Hamad*, 61 Va. App. 593, 606 (Va. App. 2013). It is understandable, however, that the Circuit Court would await guidance from this Court on how to proceed while an appeal of its judgment and rulings under the earlier law remains pending, and also would await the outcome in the General Assembly Special Session considering further amendments to Va. Code § 15.2-1812 and -1812.1. *See* HB 5030.

Plaintiffs respectfully request this Court to deny the City's motion to dissolve as outside the scope of the appeal under Rule 5:17(c)(1)(i) and to allow the Circuit Court to address the effect of the amended law in the first instance. Partial or total dissolution of the injunction can be accomplished very promptly, as Judge Moore is intimately acquainted with the issues presented and the parties are prepared to move expeditiously. Indeed, this Court could exercise its discretion to deny the City's motion to dissolve before deciding the merits of this appeal. The propriety of the injunction under the earlier law and under the amended law present distinct issues.

Conclusion

Plaintiffs respectfully request the Court to affirm Judge Moore's Order: Declaratory Judgment (JA 1024-26), to affirm Judge Moore's Final Order

awarding costs and fees (JA 1049-51), and to remand for calculation of attorneys' fees and appeal costs for defending the judgment on the claim under former Va. Code § 15.2-1812.1. With respect to the permanent injunction (JA 1011-14), Plaintiffs request that the Court either order the Circuit Court to exercise its concurrent jurisdiction over dissolution of the injunction while this appeal is pending, or remand for dissolution of the permanent injunction to conform to the amended law at the conclusion of this appeal.

For Appellee The Monument Fund, Inc.:

______________________________ October 8th, 2020
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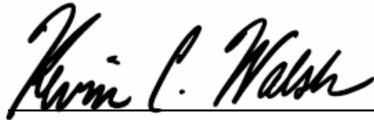
Certificate of Compliance

I certify that this brief complies with Rule 5:26 in that its length is 50 pages, excluding these portions that by rule do not count towards the length limit.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Certificate of Service

Pursuant to Rule 5:26, I hereby certify that on this 8th day of October, 2020, an electronic copy of Brief of Appellee The Monument Fund, Inc. was filed with the Clerk of the Supreme Court of Virginia, via VACES. On the same day, an electronic copy of the Brief was served, via e-mail, to:

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