IN THE

SUPREME COURT OF VIRGINIA

Record No. 200790

THE CITY OF CHARLOTTESVILLE, VIRGINIA and
CHARLOTTESVILLE CITY COUNCIL,

Appellants,

v.

FREDERICK W. PAYNE, et al.,

Appellees.

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICUS CURIAE

The Commonwealth of Virginia has an interest in ensuring that its localities are not compelled to maintain government-owned monuments commemorating racial oppression and disunity. That is especially true where, as here, the General Assembly specifically changed the underlying statutes to both: (a) eliminate the language that formed the basis for plaintiffs' ability to bring suit and for the circuit court's injunction; and (b) include new language that specifically authorizes removal of *all* such monuments. The Court should reverse the circuit court's judgment in its entirety (including the declaratory judgment, the injunction, and the award of attorney's fees that depend on it), enter judgment in favor of the City, and bring this long-running litigation to a close.

STATEMENT

This case involves the City of Charlottesville's now three-and-a-half year-long effort to remove two City-owned monuments from prominent places on City-owned property. The first is a 24-foot-tall equestrian monument to Thomas (Stonewall) Jackson that was dedicated in 1921 and is located in a public park. See JA 77. The

second is a 26-foot-tall equestrian monument to Robert E. Lee that was dedicated in 1924 and is the centerpiece of a public park that takes up an entire city block. JA 73. The two statues are located approximately three blocks apart.

A. Historical Background

1. Lee and Jackson were two of the most prominent leaders of a four-year, armed rebellion against the United States Government that was fought to perpetuate the enslavement of millions of people of African descent.[1] Neither of them ever lived in or around Charlottesville.

2. After the war ended, biographers, writers, and various organizations embarked on a propaganda campaign to recast the object of the war away from the preservation of slavery.[2] As part of this

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[1] The Sixteenth Judicial Court recently acknowledged "the significantly prevalent image of Robert E. Lee as a figure of racial hatred and prejudice" and Lee's "significant role in a war which had a goal of preserving the institution of slavery." *Commonwealth v. Darcel Murphy*, Nos. CR16000204-01 to -05, CR16000239-01 to -02 and CR17000054-00, Order on Renewed Mot. To Conduct Trial in a Courtroom That Does Not Contain Confederate Symbols, Memorials and Iconography 3 (Sept. 10, 2020).

[2] Numerous contemporaneous sources explain the reason for secession. On March 21, 1861, for example, the Vice President of the Confederacy made clear that the new government's "corner-stone

campaign, Lee, Jackson, and other Confederate leaders were lionized as icons of a Lost Cause who represented the "finer virtues" of the South,[3] a euphemism that belied the cause for which they fought.

Less than two weeks after Lee's death in 1870, Confederate General Jubal Early—"the prototypical unreconstructed Rebel"[4]—called on surviving Confederates to join him in Richmond to organize efforts to build a "suitable and lasting memorial" that would honor their "immortal C[hief]" and "manifest to the world" that they "[were] not now ashamed of the principles for which Lee fought and Jackson died" during the Civil War.[5] The next month, the first meeting of the Lee Monument Association (LMA) was held, with Early serving as president

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rests . . . upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition" and lauded the fact that it was "the first [government], in the history of the world, based upon this great physical, philosophical, and moral truth." Alexander H. Stephens, Cornerstone Speech Address (Mar. 21, 1861), available at https://www.battlefields.org/learn/primary-sources/cornerstone-speech.

[3] Thomas Lawrence Connelly, *The Marble Man: Robert E. Lee and His Image in American Society* 103 (1977).

[4] Gaines M. Foster, *Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South* 55 (1987).

[5] *Organization of the Lee Monument Association and the Association of the Army of Northern Virginia, Richmond, Va., November 3d and 4th, 1870* 5 (1871) (reprinting "address" that "appeared in the public prints" on October 25, 1870).

and President of the Confederacy Jefferson Davis delivering an address in Lee's honor.[6]

The LMA's efforts culminated in the 1890 dedication of a massive 60-foot monument to Lee on Richmond's Monument Avenue. The unveiling ceremony included a parade led by 50 former Confederate Generals and 15,000 uniformed Confederate veterans,[7] a spectacle that was criticized—even at the time—as "handing down . . . a legacy of treason and blood."[8] The Lee statue was followed by several additional Confederate memorials on Monument Avenue, including those honoring Davis and Confederate General J.E.B. Stuart in 1907, a monument honoring Jackson in 1919, and one honoring Matthew Fontaine Maury, a Commander in the Confederate Navy, in 1929.

Efforts to lionize Confederates and the cause for which they fought were not confined to the Commonwealth's capital city. Over the next several decades, statues went up throughout Virginia, and, as of 2016,

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[6] *Id.* at 12–17, 38.

[7] Kathy Edwards, Esme Howard & Toni Prawl, *Monument Avenue: History and Architecture* 16 (1992).

[8] *What It Means*, The Richmond Planet, May 31, 1890, at 4, available at https://chroniclingamerica.loc.gov/data/batches/vi_yes_ver01/data/sn84025841/00175032290/1890053101/0051.pdf.

the Commonwealth had the most Confederate monuments of any State.[9]

3. The monuments to Lee and Jackson at issue in this case were built during the first half of the 1920s—a period that saw "a significant rise in the dedication of monuments" to the Confederacy, as well as "a dramatic resurgence of the Ku Klux Klan."[10] Both statues were commissioned by Paul Goodloe McIntire, who donated the statues and the land on which they sit to the City of Charlottesville.[11]

a. The Jackson statue was dedicated on October 19, 1921, as the headline event of a "great Confederate Reunion" that took place in

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[9] Booth Gunter, Jamie Kizzire & Cindy Kent, *Whose Heritage? Public Symbols of the Confederacy*, S. Poverty Law Ctr. 11 (2016), https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf.

[10] *Id.*

[11] See Nat'l Register of Historic Places Registration Form, Robert Edward Lee Sculpture (Apr. 13, 1996), https://www.dhr.virginia.gov/VLR_to_transfer/PDFNoms/104-0264_Robert_Edward_Lee_Sculpture_1997_Final_Nomination.pdf; Nat'l Register of Historic Places Registration Form, Thomas Jonathan Jackson Sculpture (Apr. 13, 1996), https://www.dhr.virginia.gov/VLR_to_transfer/PDFNoms/104-0251_Thomas_Jonathan_Jackson_Sculpture_1997_Final_Nomination.pdf.

Charlottesville over several days.[12] The unveiling ceremony began with a parade of more than 5,000 people, including "the children of the city public schools," who, as part of the procession, "formed en masse into a living representation of [a] Confederate banner" as "the old soldiers . . . stood at attention . . . in the form of the Stars and Bars."[13] At the conclusion of the parade, Edwin Alderman, then-President of the University of Virginia, presented the gift to the City of Charlottesville.[14]

b. As with Jackson, the unveiling of the Lee statue was the main event of a much-anticipated Confederate reunion. JA 75.[15] On May 21, 1924, former Confederate soldiers "flock[ed] to Charlottesville" to witness the dedication of "the monument of the chieftain of the

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[12] See also *Jackson Statue Is Unveiled*, The Daily Progress, Oct. 19, 1921, at 1, available at https://v3.lib.virginia.edu/catalog/uva-lib:2120387/view#openLayer/uva-lib:2120388/4644/2538/1/1/1.

[13] *Id.*

[14] *Id.* at 1, 3.

[15] See John S. Patton, *Proceedings of the 37th Annual Reunion of the Virginia Division of the Grand Camp U.C.V. and of the 29th Reunion of the Sons of Confederate Veterans* 5 (1924), available at https://archive.org/details/ProceedingsOfTheThirty-seventhAnnualReunionOfTheVirginiaGrandCamp/page/n33/mode/2up.

Southern Confederacy."[16] In remarks during the unveiling ceremony, the President of Washington and Lee University insisted that, after the end of the Civil War, "the impartial verdict of the slow-moving years [had] crowned as the real victor of Appomattox not Ulysses S. Grant and his swarming armies, but the undefeated spirit of Robert E. Lee."[17] President Alderman accepted the statue on behalf of the City.[18] See JA 75.

c. The installation of the Jackson and Lee statues in Charlottesville were inextricably intertwined with a rise in "public and celebratory white supremacy" and "the local embrace of the KKK . . . and Lost Cause mythologizing."[19] The summer before the Jackson statue was unveiled, for example, the Ku Klux Klan posted a "notice" on "[v]arious bulletin boards" throughout Charlottesville—that was

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[16] *Confederate Groups Meet Tomorrow*, The Daily Progress, May 19, 1924, at 1 available at https://v3.lib.virginia.edu/catalog/uva-lib:2590120/view#openLayer/uva-lib:2590121/5247/1721/2/1/1.

[17] Patton, *supra* note 15, at 67.

[18] *Id.* at 69.

[19] Kirt von Daacke & Ashley Schmidt, *UVA and the History of Race: When the KKK Flourished in Charlottesville*, UVA Today, Sept. 25, 2019, available at https://news.virginia.edu/content/uva-and-history-race-when-kkk-flourished-charlottesville (noting that Charlottesville was included "in the national resurgence of public and celebratory white supremacy and the KKK" around this time).

reprinted in full in the local daily newspaper—inviting "[o]nly native-born, white Americans" who "believe[d] in . . . White Supremacy" to join the Klan's ranks.[20] At a Republican nominating convention the following year, two different delegations attended from Charlottesville—one included "two . . . negro Republicans in their number," but only "the 'lily white' delegation" was allowed to participate on behalf of the City.[21]

Two months before Charlottesville's Lee statue was unveiled, the General Assembly enacted Virginia's infamous Racial Integrity Act, which prohibited interracial marriage and defined as "white" a person "who has no trace whatsoever of any blood other than Caucasian." 1924 Va. Acts ch. 371. The weekend before the Lee statue's dedication, an "immense throng of spectators" gathered in Charlottesville to watch a Ku Klux Klan parade in which "white robed figures . . . marched to music" through the city, where "[t]housands lined the sidewalks . . . in

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[20] *Ku Klux Klan Issues "Warning,"* The Daily Progress, July 19, 1921, at 1, available at https://v3.lib.virginia.edu/catalog/uva-lib:2119725/view#openLayer/uva-lib:2119726/5856/2672/3/1/1.

[21] *Negroes Get Jolt at Convention*, The Daily Progress, July 24, 1922, at 5, available at https://v3.lib.virginia.edu/catalog/uva-lib:2122460/view#openLayer/uva-lib:2122465/5677.5/3876.5/2/1/1.

eagerness to see."[22] Later that summer, the Klan held "[a] demonstration . . . near the colored church" in the Charlottesville area that involved setting off "heavy explosions from three bombs" and then burning "a large cross," such that "it was instantly understood that the hooded knights were in that locality."[23] The following year, hundreds of "Klansmen and a number of Klanswomen" from all over Virginia paraded down Main Street in Charlottesville, after which a "ceremony admitting a large class of initiates took place under the light of three burning crosses."[24]

B. Statutory Background

The laws underlying this litigation have undergone several changes over the years. The four most important laws were enacted in 1904 (before the Charlottesville statues were erected), in 1997 and 2000 (more than half a century after they had gone up), and 2020 (after the

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[22] *Klan Parade Drew Big Crowd*, The Daily Progress, May 19, 1924, at 1, available at https://v3.lib.virginia.edu/catalog/uva-lib:2590120/view#openLayer/uva-lib:2590121/5316.5/2223.5/2/1/1.

[23] *Klan Burns Cross Near Mechums River*, The Daily Progress, June 23, 1924, at 1, available at https://v3.lib.virginia.edu/catalog/uva-lib:2590407/view#openLayer/uva-lib:2590408/5128/3823/4/1/1.

[24] *Klan Parade a Big Success*, The Daily Progress, Aug. 25, 1925, at 1, available at https://v3.lib.virginia.edu/catalog/uva-lib:2595027/view#openLayer/uva-lib:2595028/5853/2672/3/1/1.

circuit court's decision in this case). See 2017 Op. Va. Att'y Gen. 32 (Aug. 25, 2017) (2017 AG opinion) (describing the evolution of the various statutes).

1. The 1904 law

In 1904, the General Assembly enacted legislation creating a process by which a "county" could "authorize and permit the erection of a Confederate monument upon the public square of such county at the county seat thereof." 1904 Va. Acts ch. 29 (1904 Act). The 1904 Act further imposed consequences "if the same shall so be erected," providing that "it shall not be lawful thereafter for the authorities of said county, or any other person or persons 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.*

2. The 1997 and 2000 laws

In 1997, the General Assembly re-enacted the 1904 Act and altered its language in several respects. Most notably, the General Assembly replaced the word "county" with "locality" throughout. See 1997 Va. Acts ch. 587 (adopting former Va. Code Ann. § 15.2-1812)

(1997 Act). That was significant because, under longstanding Virginia law, the term "locality" includes separately incorporated cities, whereas the term "county" does not. See Va. Code Ann. § 15.2-102 (stating that "'locality' . . . shall be construed to mean a county, city, or town as the context may require"); see also Va. Const. art. VII § 1 (distinguishing between counties and cities). Similar to the 1904 Act, the 1997 Act stated that "localit[ies]" were allowed to "authorize and permit the erection of monuments or memorials . . . upon any of [their] property," and that, "[i]f such [were] erected," it was "unlawful for the authorities of the locality . . . to disturb or interfere with any monuments or memorials so erected." 1997 Act (codified at former Va. Code Ann. § 15.2-1812).[25]

In 2000, the General Assembly created a civil action to address "violat[ions] or encroach[ment] upon" any "monument, marker, or memorial for war veterans as designated in" the then-governing version of Code § 15.2-1812. 2000 Va. Acts ch. 812 (2000 Act) (codified at former

[25] The 1997 amendments also broadened the statute's coverage beyond "Confederate monument[s]," 1904 Act, to authorize monuments commemorating a variety of armed conflicts. Today, the statute covers monuments for "any war or conflict, or any engagement of such war or conflict." Va. Code Ann. § 15.2-1812.

Va. Code Ann. § 15.2-1812.1(A)). "For a publicly owned monument," the 2000 Act provided a 60-day period during which "the attorney for the locality in which it is located" had the exclusive right to bring suit and provided that, if no such action was brought within 60 days, "any person having an interest in the matter" could bring suit. *Id.* (codified at former Va. Code Ann. § 15.2-1812.1(A)(1)). The 2000 Act also provided that "[t]he party who initiates and prevails in an action authorized by this section shall be entitled to an award of the costs of the litigation, including reasonable attorney's fees." *Id.* (codified at former Va. Code Ann. § 15.2-1812.1(C)).

3. The 2020 law

During its most recent session, the General Assembly made comprehensive changes to both Code §§ 15.2-1812 and 15.2-1812.1 with the express purpose of giving all of the Commonwealth's localities control over all government-owned monuments on government-owned property.[26] In the same act, the General Assembly specifically repealed both the previous language that had prohibited "disturb[ing] or

[26] The General Assembly also eliminated a State holiday "honor[ing] Robert Edward Lee . . . and Thomas Jonathan (Stonewall) Jackson." 2020 Va. Acts ch. 418.

interfer[ing]" with covered monuments *and* the language that had authorized private lawsuits arising out of removal or alteration of publicly owned monuments. See 2020 Va. Acts ch. 1100 (2020 Act) (modifying Va. Code Ann. §§ 15.2-1812 and 15.2-1812.1(A)(1)). The General Assembly also declared that, "[n]otwithstanding any other provision of law, general or special, a locality may remove, relocate, contextualize, or cover any such monument or memorial on the locality's public property . . . regardless of when the monument or memorial was erected, after complying with the provisions of subdivision B." *Id.* (adding new language to Va. Code Ann. § 15.2-1812(A)).[27] As provided in the Virginia Constitution, see Va. Const. art. IV § 13, these new provisions took effect on July 1, 2020, two weeks after the City filed its petition for appeal.

C. This Litigation

1. During the last several years, Charlottesville's Confederate monuments and others like them have again become hotbeds for

[27] The General Assembly is considering legislation that would remove this process. See HB5030 (2020 special session I). Should that legislation take effect, Code § 15.2-1812 will specifically permit localities to "remove, relocate, or alter any such monument or memorial" on public property without requiring the locality to follow any particular process.

controversy:

- In February 2017, Charlottesville's city council voted to remove the Lee statue, rename the park in which it is located, and develop a master plan for the redesign of its historic downtown area, including parks. JA 15, 17–18, 20.
- In March 2017, plaintiffs filed suit, contending that removal of the Lee statue would violate the 1997 Act. JA 405.
- On May 2, 2017, the circuit court issued an oral ruling granting a temporary injunction prohibiting the City from "moving . . . the Lee statue" for six months. JA 155; see also Temporary Inj. Order 3 (June 6, 2017) (referencing temporary injunction that took effect on May 2, 2017).
- On May 13, 2017, less than two weeks later, avowed white supremacist Richard Spencer led a nighttime, torch-lit rally in the park containing the Lee statue to protest the City's decision to remove it.[28]

[28] Laura Vozzella, *White nationalist Richard Spencer leads torch-bearing protesters defending Lee statue*, Wash. Post., May 14, 2017, available at https://www.washingtonpost.com/local/virginia-politics/alt-rights-richard-spencer-leads-torch-bearing-protesters-defending-lee-statue/2017/05/14/766aaa56-38ac-11e7-9e48-c4f199710b69_story.html;

- On July 8, 2017, a Ku Klux Klan chapter held a rally in downtown Charlottesville to protest the removal of the Lee statue.[29]
- On August 11–12, 2017, white nationalist groups descended on Charlottesville for the "Unite the Right" rally, which also opposed the City's proposed removal of the Lee statue.[30] The protestors waved Confederate flags and chanted white supremacist slogans as they marched through educational facilities and residential neighborhoods.[31] Three people died, dozens were injured, and countless more were traumatized.[32]
- On September 5, 2017, Charlottesville's city council voted to

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see also *Virginia's Response to the Unite the Right Rally: After-Action Review* 4 (2017) (Review), https://www.pshs.virginia.gov/media/governorvirginiagov/secretary-of-public-safety-and-homeland-security/pdf/iacp-after-action-review.pdf.

[29] Review at 4.

[30] *Id.* at 4–5.

[31] *Deconstructing the Symbols and Slogans Spotted in Charlottesville*, Wash. Post, Aug. 18, 2017, available at https://www.washingtonpost.com/graphics/2017/local/charlottesville-videos/.

[32] Review at 2, 11.

remove the City-owned Jackson statue.[33]

- On October 11, 2017, plaintiffs filed an amended complaint, seeking to enjoin the removal of the Jackson statue as well. JA 311.
- On October 24, 2017, the circuit court expanded the temporary injunction to cover removal of the Jackson statue and stated that the revised injunction would remain in effect "until entry by this Court of a final order in this case." JA 348–49.

2. The case then spent more than two years pending in circuit court with the "temporary" injunction in place. On October 15, 2019—before the 2020 Act had been passed or taken effect—the circuit court entered a permanent injunction barring the City "from disturbing, interfering with, violating, or encroaching upon, the monuments of Confederate General Robert E. Lee . . . and Confederate Lt. Gen. Thomas Jonathan 'Stonewall' Jackson, . . . at issue in this matter." JA 1011–13. The court made clear that its order precluded the City from "remov[ing]" either "monument[]." JA 1013. The court entered its final

[33] See Minutes of Sept. 5, 2017, Meeting of Charlottesville City Council, at 15–17, available at https://charlottesvilleva.civicclerk.com/Web/Player.aspx?id=669&key=-1&mod=-1&mk=-1&nov=0.

judgment on January 29, 2020, which was still before the 2020 Act had been enacted or taken effect. JA 1049–51.

3. The City filed a petition for appeal and later filed with this Court a motion to dissolve the permanent injunction based on changes to the underlying statutes made by 2020 Act. This Court awarded an appeal, accelerated the briefing schedule, and specifically directed the parties to be prepared to address the City's motion to dissolve the permanent injunction.

ASSIGNMENTS OF ERROR

1. 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 recovery of attorneys' fees.

2. 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 statues of Robert E. Lee and Thomas J. Jackson (together "Statues") from its parks, because neither § 15.2-1812 nor §15.2-1812.1 authorizes such actions.

3. 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.

4. 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.

ARGUMENT

This case is profoundly timely and profoundly important. But the specific *legal* question is quite simple and was directly addressed by Chief Justice John Marshall more than two centuries ago.

"It is in the general true," Chief Justice Marshall explained, "that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. *But 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, or its obligation denied." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (emphasis added); see *City of Norfolk v. Stephenson*, 185 Va. 305, 315 (1946) (*Stephenson*) (quoting the same language). This is precisely such a case and the circuit court's judgment should be reversed in its entirety for that reason alone. See Part I, *infra.* In any event, the circuit court's decision was always wrong because even the (now-superseded) 1997 Act did not forbid the City of

Charlottesville from relocating two City-owned statues that were erected more than half a century before that law was enacted. See Part II, *infra*. And, in either event, reversal of the circuit court's judgment requires elimination of all forms of relief that were encompassed within and depend on that judgment, including the declaratory judgment, the permanent injunction, and the award of attorney's fees.

I. 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

Standard of review: The question of what law governs a particular case is a matter of law that this court decides de novo. *Chamberlain v. Marshall Auto & Truck Ctr., Inc.*, 293 Va. 238, 242 (2017).

1. Plaintiffs brought this suit under former Code §§ 15.2-1812 and 15.2-1812.1(A)(1), which prohibited localities from "disturb[ing] or interfer[ing]" with certain specified "monuments or memorials" and authorized private parties to bring suit in certain situations involving the "violat[ion] or encroach[ment] upon" "publicly owned monument[s]." 1997 Act (codified at former Va. Code Ann. § 15.2-1812); 2000 Act (codified at former Va. Code Ann. § 15.2-1812.1(A)(1)). Those laws were also still on the books on January 29, 2020, when the court entered its

final judgment.

But things have now changed, and, under the *Schooner Peggy* principle, this Court is required to decide this appeal under the current law, not the former. And, under current law, Code § 15.2-1812(A) does not forbid localities from removing *any* "monuments or memorials"—to the contrary, it specifically *authorizes* localities to "remove, relocate, contextualize, or cover over *any* such monument or memorial on the locality's public property." Va. Code Ann. § 15.2-1812(A) (emphasis added). Just as importantly, current Code § 15.2-1812.1(A)(1) makes clear that there is no right of action against "a locality or its duly authorized officers, employees, or agents" *and* that any action involving "a publicly owned monument or memorial" (such as this one) may only be brought "by the attorney for the locality in which it is located" after obtaining "the consent of the governing body or public officer having control of the monument or memorial." Va. Code Ann. § 15.2-1812.1(A)(1).

Under current and controlling law, this suit thus fails for at least three reasons: (a) the plaintiffs are not authorized to bring suit; (b) the defendants are not among the category of those who may be sued; and

(c) the circuit court's finding of a violation was based on statutory language that no longer exists. This Court should thus reverse the circuit court's judgment, vacate all forms of relief (including the award of attorney's fees) that are encompassed within that judgment, and direct the entry of judgment in favor of the City.

2. None of this requires the Court to break any new doctrinal ground. In *Schooner Peggy* itself, an American ship captured a French vessel during the undeclared war with France that lasted from 1798 until 1800. The government filed a prize action against the captured vessel, and a circuit court entered an order finding that the schooner and its cargo were lawful prizes. *Schooner Peggy*, 5 U.S. (1 Cranch) at 104, 106. After the circuit court's decision, however, the United States and France entered into a treaty under which "[p]ropery captured, and not yet *definitively* condemned . . . shall be mutually restored." *Id.* at 107 (internal quotations omitted). Despite specifically stating that the circuit court's decision had been "rightful when rendered," the Court emphasized that it was required to decide the appeal "according to existing law[]" and thus "set aside" the circuit court's judgment. *Id.* at 110; see also *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 26–27 (1940)

(describing *Schooner Peggy* as stating the "controlling rule" that, even if "the determination of the court below was correct upon the record before it and in the light of the law as it then stood," it is the "duty" of a reviewing court "to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable" (citing cases)).[34]

3. The principles that an appellate court must decide a case under the law that exists at the time of the appeal is all the more salient where, as here, one of the primary remedies granted by the circuit court was an injunction. Unlike an award of damages (which cannot be modified following the entry of a genuinely "final" judgment, see, *e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)), an injunction is "a continuing, executory decree" and thus *always* "remains subject to alteration due to changes in the underlying law." *Miller v. French*, 530 U.S. 327, 344 (2000). So when the legislature "changes the law underlying a judgment awarding prospective relief, that relief is no

[34] Here, in contrast, the circuit court's decision was wrong when it was issued. See Part II, *infra*. The Court need not decide that issue, however, because it is required to decide this appeal under the current law, not the former one, and current law requires reversal of the circuit court's judgment in full.

longer enforceable to the extent it is inconsistent with the new law." *Id.* at 347.

Here too, a historic decision of the United States Supreme Court provides a telling and directly on-point example. A half a century after *Schooner Peggy*, the Court, in the exercise of its original jurisdiction, directed the removal of a bridge the Court determined was an obstruction of free navigation on the Ohio River and enjoined the defendants against any reconstruction or continuance. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 429–30 (1855) (*Wheeling Bridge*); see *Stephenson*, 185 Va. at 316 (citing *Wheeling Bridge*). Three months later, Congress passed a statute declaring that the bridge was lawful in its present location and authorized the company that owned the bridge to maintain it at its present site and elevation. *Wheeling Bridge*, 59 U.S. at 429. The Court dissolved its own prior injunction, explaining that, "since the decree, this right [of navigation underlying the injunction] has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction[.]" *Id.* at 432. The Court concluded that because of this change in law, "it is quite plain the decree of the court cannot be

enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law[.]" *Id.*

"The principles of the Wheeling Bridge case have repeatedly been followed by lower federal and state courts," *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 650 (1961) (footnote omitted), and there is no reason for a different result here. Indeed, to permit the current injunction to further outlive the General Assembly's amendments to Code §§ 15.2-1812 and 15.1812.1 that removed the entire predicate for the circuit court's judgment "would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union." *Id.* at 648.

4. Plaintiffs insist that this Court is powerless to address the separation of powers problem with affirming a lower-court judgment that was specifically based on laws that no longer exist because the assignments of error do not encompass the change in law and this is not an appeal under Code § 8.01-626. See Opp. to Mot. to Dissolve 2–5. Those arguments are without merit.

a. The City's second assignment of error specifically sets out

the claim that "[t]he 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" the Lee and Jackson statues. Pet. 1. In addressing that claim this Court must, by necessity, construe and follow the *current* versions of those statutory provisions rather than the now-superseded ones. See *Schooner Peggy*, 5 U.S. (1 Cranch) at 110. And, as previously explained, those statutory provisions do not authorize this suit or the circuit court's judgment. Nothing more is required.

Even if the Court were to conclude that issues involving the proper construction of current law were not sufficiently set out in the City's assignments of error, the Court should "exercis[e] its discretion to address the merits of [this] case[]" under current law. *Henderson v. Cook*, 297 Va. 699, 709 (2019). At minimum, issues involving the proper construction of current law "pertain[] to" the assignments of error set out in the petition for appeal and the City's motion to dissolve the temporary injunction, and plaintiffs' response ensures that the issue will be "sufficiently briefed." *Id.* at 710 (citation omitted). This case has already been pending for more than *three-and-a-half years* and every

day that the circuit court's decision remains in effect past July 1, 2020, is one that the City is under a court order that was premised on now-defunct law and that forbids it from doing something that the General Assembly specifically authorized all localities to do.[35] "It has many times been said that the primary object of a court of equity is to do complete justice." *Chapman v. Delk*, 178 Va. 113, 121 (1941). Here, "complete justice" counsels against prolonging this long-delayed suit one moment beyond that which is necessary.

b. Plaintiffs also err in suggesting that the circuit court is the only court with authority to dissolve the injunction now. See Opp. to Mot. to Dissolve 2. This Court's power to review permanent injunctions is not confined to Code § 8.01-626, which sets forth a procedure for expedited appellate proceedings in certain circumstances, but also arises as a necessary part of the Court's review of a final judgment under Code § 8.01-670(A)(3) regardless of what forms of relief (including

[35] Indeed, since the petition for appeal was filed, Albemarle County has *completed* the entire process of removing a Confederate statue that was formerly located in front of its county courthouse. See Gregory S. Schneider, *Confederate statue taken down in Charlottesville near the site of violent 2017 rally*, Wash. Post., Sept. 12, 2020, available at https://www.washingtonpost.com/local/virginia-politics/charlottesville-confederate-statue-removed/2020/09/11/f3f6ee24-f2b4-11ea-b796-2dd09962649c_story.html.

an injunction) that were granted pursuant to that judgment. Indeed, this Court regularly dissolves or vacates injunctions as part of its normal appellate review process.[36] The Court also has the power, as part of its general appellate review, to "reverse the judgment of [a] trial court and remand [a] case with instructions to dissolve the injunction and enter final judgment on behalf of [the City]," which would have the same practical effect. *Peace v. Conway*, 246 Va. 278, 282 (1993); see also *Brainerd v. Dickinson*, 217 Va. 637, 643 (1977) (remanding case for new decree that, among other things, would "dissolve the injunction").

c. As a last-ditch effort, plaintiffs suggest that "complete

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[36] See *Beach v. Turim*, 287 Va. 223, 230 (2014); *Tran v. Gwinn*, 262 Va. 572, 585 (2001); *Ridgwell v. Brasco Bay Corp.*, 254 Va. 458, 463 (1997); *Davis v. Henning*, 250 Va. 271, 277 (1995); *State Highway & Transp. Com'r of Virginia v. Creative Displays of Norfolk, Ltd.*, 236 Va. 352, 355 (1988) ("revers[ing] the judgment of the trial court, vacat[ing] the injunction, and enter[ing] final judgment for [appellant]"); *Wood v. Bd. of Sup'rs of Halifax Cty.*, 236 Va. 104, 115 (1988); *Raney v. Four Thirty Seven Land Co.*, 233 Va. 513, 520 (1987); *Robb v. Shockoe Slip Found.*, 228 Va. 678, 683 (1985); *Board of Sup'rs of Henrico Cty. v. Mkt. Inns, Inc.*, 228 Va. 82, 87 (1984); *Brown v. Tazewell Cty. Water & Sewerage Auth.*, 226 Va. 125, 132 (1983); *City of Martinsville v. Board of Sup'rs of Henry Cty.*, 222 Va. 505, 510 (1981); *City of Colonial Heights v. Loper*, 208 Va. 580, 586 (1968); *State-Planters Bank of Com. & Trs. v. Standard Cary Corp.*, 208 Va. 298, 308 (1967) ("Our order will reverse the decree, dissolve the injunction and dismiss [the] bill of complaint."); *Baber v. Caldwell*, 207 Va. 694, 700 (1967); *Joy v. Green*, 194 Va. 1003, 1010 (1953).

dissolution is unwarranted because the injunction under the old law properly prohibits more than the new law newly authorizes." Opp. to Mot. to Dissolve 7. But, even accepting plaintiffs' reading of the current law, that law gives plaintiffs no private right of action to enforce any such obligation by way of an injunction. See Va. Code Ann. § 15.2-1812.1(A)(1) (emphasizing that no action may be brought "against . . . a locality or its duly authorized officers, employees or agents" and that any action involving "a publicly owned monument" may only be brought "by the attorney for the locality in which it is located"). And without a valid cause of action, there is no basis for plaintiffs to maintain this suit or to obtain any form of relief (including an award of attorney's fees). See, *e.g.*, *Cherrie v. Virginia Health Servs.*, 292 Va. 309, 315 (2016) (explaining that "[i]t is simply not enough that the plaintiff has a personal stake in the outcome of a controversy, or that the plaintiff's rights will be affected by the disposition of the case"; "[r]ather, the plaintiff must possess the legal right to bring the action," which turns on "substantive law" (quotation marks and citation omitted)).

* * *

The judgment that is challenged in this appeal was based on

substantive prohibitions and procedural entitlements that the General Assembly has specifically revoked. It prevents the City from exercising authority that the General Assembly specifically gave to all localities with respect to all monuments. See Va. Code Ann. § 15.2-1812(A) (stating that "[n]otwithstanding any other provision of law, general or special, a locality *may* remove, relocate, contextualize, or cover *any* such monument or memorial on the locality's public property" (emphasis added)). As much as plaintiffs may disagree with the General Assembly's decision, they have no right to invoke the powers of a court to keep alive a dead law or to obtain any form of relief based on a law that no longer exists. Accordingly, the judgment of the circuit court should be reversed and all forms relief that were based on that judgment—including the award of attorney's fees—should be set aside.[37]

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[37] Code § 15.2-1812.1(C) continues to provide that "[t]he party who initiates and prevails in an action authorized by this section shall be entitled to an award of the cost of the litigation, including reasonable attorney fees." But, under current law, that section does not authorize *anyone* to bring suit against "a locality," nor may private parties bring suit with respect to "a publicly owned monument or memorial." Va. Code Ann. § 15.2-1812.1(A)(1). And plaintiffs will not have "prevail[ed] in [this] action" once this Court holds that their claims fail as a matter of law under current law. Va. Code Ann. § 15.2-1812.1(C).

II. The circuit court also erred in interpreting the former law

Standard of review: The interpretation of a statute presents a purely legal question that is reviewed de novo. See *Jackson v. Jackson*, 298 Va. 132, 139 (2019).

As explained in the previous Part, this Court need not decide whether the circuit court's decision was correct when it was issued because this Court is required to decide this case under the current law, not the former one, and current law requires that the circuit court's judgment be reversed in full. But if the Court were to reach the issue, it should hold that the circuit court erred in interpreting the pre-2020 law. Although the circuit court's reasoning may have been faulty in other respects as well, the Commonwealth will focus on the circuit court's error in construing former Code § 15.2-1812. Simply put, the restrictions contained in that provision did "not apply to any monument or memorial erected on any property within an independent city prior to 1997." 2017 AG opinion at 4.

1. From its initial enactment in 1904 through its near-complete rewrite in 2020, former Code § 15.2-1812 contained two parts. The first sentence granted certain entities (originally only counties and later all

localities) authority to do something ("authorize and permit the erection of monuments or memorials for any war or engagement") by following a specific process. See 1997 Act (codified at former Va. Code Ann. § 15.2-1812); see also 1904 Act. The next sentence of both versions of the statute described the consequences "*[i]f such are erected*." 1997 Act (codified at former Va. Code Ann. § 15.2-1812) (emphasis added); see also 1904 Act. In that case, the statutes continued, "it shall be unlawful for . . . any other person or persons, to disturb or interfere with any monuments or memorials *so erected*." 1997 Act (codified at former Code § 15.2-1812) (emphasis added); see 1904 Act (providing the same "shall not be lawful").

2. Because neither the 1904 Act nor the 1997 Act supplied the legal authority for the City to erect its Lee and Jackson monuments, former Code § 15.2-1812 did not prohibit the City from removing them.

a. In both 1921 and 1924, the process later codified in Code § 15.2-1812 was available only to counties. See 1904 Act (authorizing "the circuit court of any *county*" to take certain actions with the "concurrence of the board of supervisors of such *county*" (emphases added)). Charlottesville, however, has been an incorporated city since

1888—more than three decades before its Lee or Jackson statues were erected. See 1888 Va. Acts ch. 411–417. Whatever authority the City may have had to erect those monuments in 1921 and 1924, therefore, it did not flow from the 1904 Act. See Amanda Lineberry, Note, Payne v. City of Charlottesville *and the Dillon's Rule Rationale for Removal*, 104 Va. L. Rev. Online 45, 47 (2018) (arguing that "monuments built in cities prior to 1997 . . . are either unauthorized (ultra vires) or authorized by a specific Act of Assembly" other than the 1904 Act).

The unavoidable result is that, when the Charlottesville monuments were erected in 1921 and 1924, the prohibitions and protections described in step two of the 1904 Act likewise did not apply to them. Like its 1997 successor, the 1904 Act spoke in distinctly prospective, "if-then" language, stating that "if the same shall be *so erected*, it shall not be lawful *thereafter* for the authorities of said county . . . to disturb or interfere *with any monument so erected*." 1904 Act (emphases added). Because the 1904 Act was not the source of the City's authority to build the Lee and Jackson monuments, however, that provision had nothing to say about those monuments and the City's rights with respect to them.

b. Nor did the 1997 Act apply to the monuments at issue here. To be sure, the 1997 Act expanded the 1904 Act's coverage to include any "locality," which includes incorporated cities. 1997 Act (codified at former Va. Code Ann. § 15.2-1812). But the 1997 Act also specifically retained the 1904 Act's two-step, "if-then" structure: Just like the 1904 Act, the 1997 Act's restrictions on "disturba[nce] or interfere[nce]" did not apply to *all* monuments and memorials—but *only* to "such" monuments that were "so erected" pursuant to the authority granted in the previous sentence. *Id.*

Given this structure, the only way that the 1997 Act's second sentence could possibly have applied to the monuments at issue in this case is if the 1997 Act also retroactively *granted* the City the authority to "authorize and permit the erection of [two] monuments" that had already existed on City-owned property for more than half a century at that point. 1997 Act (codified at former Va. Code Ann. § 15.2-1812). That reading, however, encounters numerous and fatal problems.

For one thing, like its 1904 predecessor, the 1997 Act used distinctly prospective language, stating that localities could "authorize and permit" certain things to happen, prescribing consequences "[i]f

such [monuments] are erected" in the future, and authorizing localities to appropriate "funds to complete or aid in the erection of monuments" and "care for, protect and preserve *such* monuments" in the future. 1997 Act (codified at former Va. Code Ann. § 15.2-1812). But the 1997 Act contained no language—much less unmistakably clear language—demonstrating that it was intended to apply to pre-1997 monuments located outside of counties.

That absence of clear language is fatal to plaintiffs' claims that the 1997 Act imposed new restrictions on pre-1997 monuments located inside incorporated cities. 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*, 103 Va. 250, 252 (1904). And if "[i]t is reasonable to conclude that the *failure* to express an intention to make a statute retroactive evidences a lack of such intention," *Ferguson v. Ferguson*, 169 Va. 77, 87 (1937) (emphasis added), things become *a fortiori* where, as here, the General Assembly specifically *declines* to make legislation retroactive. See 1997 Act, enactment clause para. 7 (stating that the new law "shall not affect any

act or offense done or committed" before December 1, 1997).[38]

3. The circuit court's reasons for its contrary conclusion are unpersuasive. The court began with the premise that "[t]he main purpose of the [1997] statute" was "to extend protection to war memorials and monuments in cities as previously protected in counties." JA 255. From this, the court concluded that the General Assembly most likely "*meant* for [the 1997 Act] to apply to all statues then existing and built in the future." JA 258 (emphasis added).

With respect, that is not how statutory construction works. "The question here is not what the legislature intended to enact, but what is the meaning of that which it did enact." *Carter v. Nelms*, 204 Va. 338, 346 (1963); accord Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 22–23 (1997) (agreeing with Justice Oliver Wendell Holmes, Jr.'s remark that courts "do not inquire what the legislature meant; we only ask what the statute means") (quoting Oliver Wendell Holmes, Collected Legal Papers 207 (1920)). And here, what the

[38] In 2016, the General Assembly passed legislation that would have made clear that former Code § 15.2-1812 applied to monuments erected by incorporated cities before 1997. That legislation never became law because it was vetoed by the Governor. See 2017 AG opinion at 4 (Aug. 25, 2017) (describing amendment).

General Assembly said in the 1997 Act is the same thing it said in the 1904 Act: that the restrictions imposed by former Code § 15.2-1812's second sentence did not apply to "*all* monuments or memorials"—or even "monuments and memorials" generally—but only "*such*" monuments and memorials "*so erected*." 1997 Act (codified at former Va. Code Ann. § 15.2-1812) (emphases added).[39] Because courts must "presume that the legislature sa[id] what it mean[t] and mean[t] what it sa[id]," *In re Woodley*, 290 Va. 482, 491 (2015), that should be the end of the matter.

[39] Because it cannot account for the presence of the words "so erected," the circuit court's interpretation also violates the "elementary canon of construction" that "[n]o sentence, clause or word should be construed as unmeaning or surplusage, if a construction can be legitimately found which will give force to and preserve all the words of the statute." *King v. Empire Collieries Co.*, 148 Va. 585, 589–90 (1927); see also *Smith v. Bryan*, 100 Va. 199, 202–03 (1902) (similar).

CONCLUSION

The judgment of the circuit court should be reversed and all forms of relief that depend on and are encompassed within that judgment (including the declaratory judgment, permanent injunction, and award of attorney's fees) should be set aside. In the alternative, the judgment of the circuit court should be vacated, and the Court should remand the case to the circuit court with directions to a enter a final judgment in favor of appellants with respect to all issues (including attorney's fees).

Respectfully submitted

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I certify under Rule 5:26(h) that on September 18, 2020, this document was filed electronically with the Court through VACES, and three printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was electronically mailed to:

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