In The

Supreme Court of Virginia

RECORD NO. 200790

THE CITY OF CHARLOTTESVILLE, VIRGINIA and CHARLOTTESVILLE CITY COUNCIL,

***Petitioners – 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.,

Respondents – Appellees.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

Kevin C. Walsh (VSB No. 70340)
UNIVERSITY OF RICHMOND SCHOOL OF LAW
203 Richmond Way
Richmond, Virginia 23173
(804) 287-6018 (Office)
kwalsh@richmond.edu

Counsel for Respondent – Appellee The Monument Fund, Inc.

Ralph E. Main, Jr. (VSB No. 13320)
DYGERT, WRIGHT, HOBBS & HERNANDEZ PLC
415 4th Street, NE
Charlottesville, Virginia 22902
(434) 979-5515 (Office)
rmain@charlottesvillelegal.com

Counsel for Respondents – Appellees

S. Braxton Puryear (VSB No. 30734)
ATTORNEY AT LAW
121 South Main Street
Post Office Box 291
Madison, Virginia 22727
(540) 948-4444 (Office)
sbpuryear@verizon.net

Counsel for Respondents – Appellees

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The City of Charlottesville and Charlottesville City Council (the "City") petition for appeal from a judgment enforcing a statutory prohibition against the removal of war memorials or monuments. Plaintiffs are individuals and organizations who brought suit in March 2017 to enforce this state-law prohibition using a statutory private right of action keyed to that prohibition. At issue were two equestrian statues in downtown Charlottesville public parks—one of Confederate General Robert E. Lee and the other of Confederate General Thomas ("Stonewall") Jackson. The case involved almost three years of litigation and generated a 9,900 page record including eight opinion letters. It culminated in a permanent injunction and declaratory judgment in October 2019 and a final order on attorneys' fees and costs in January 2020.[1] The City's Statement of the Case is therefore necessarily selective. But rather than offer a counter-statement, Plaintiffs cite pertinent proceedings below in the analysis of the City's Assignments of Error.

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[1] Oct. 3, 2017 Op. Ltr. (standing; applicability of Va. Code §§ 15.2-1812 & 18121.1); Feb. 23, 2018 Op. Ltr. (expanding inj., tarps); June 13, 2018 Op. Ltr. (immunity; eligibility for attorneys' fees) Nov. 17, 2018 Op. Ltr. (allowing complaint amendment); January 22, 2019 Op. Ltr. (reconsidering legislative immunity); April 25, 2019 Op. Ltr. (summary judg't "war monuments and veterans memorials"); July 6, 2019 Op Ltr. (dismissing indiv. defendants); Jan. 21, 2020 Op. Ltr. (costs and fees).

Effective July 1, 2020, the General Assembly has repealed both the statutory prohibition on war memorial or monument removal by localities in Va. Code § 15.2-1812 and the private right of action for damages in Va. Code § 15.2-1812.1.[2] The City's Petition, filed June 15, 2020, does not mention these changes in the law. That is understandable because the judgment below became final well before this new law became effective, and the City's four Assignments of Error relate only to the old law. Plaintiffs note these changes in law here only to forestall potential confusion that might result from pending motions relating to the effect of this new law on the permanent injunction entered under the old law. On June 5, 2020, Plaintiffs filed in the Circuit Court a motion for partial dissolution to conform the permanent injunction to the changed law.[3] The Defendants opposed it, and filed a motion for complete dissolution in this Court on June 30, 2020.[4] Both motions remain pending as of this filing.

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[2] *See* 2020 Va. Acts Ch. 1101.

[3] *See* Va. Code § 8.01-625 (providing that "any court wherein an injunction has been awarded may at any time when such injunction is in force dissolve the same after reasonable notice to the adverse party").

[4] Plaintiffs will file a timely response in opposition stating: (1) the only court with authority to dissolve the permanent injunction in whole or in part under Va. Code § 8.01-625 is the Circuit Court for the City of Charlottesville; (2) the City's motion falls outside the scope of this appeal, which (a) is defined by the City's Petition and Assignments of Error, *see* Rule 15(c)(1)(i), and (b) is not

STATEMENT OF FACTS

The City's Statement of Facts did not include uncontested facts relied upon by the Circuit Court in overruling the City's demurrer on Plaintiffs' standing, and in finding that Plaintiffs had suffered actual harm even if not quantifiable and compensable as money damages.[5] Again, rather than burden the Court with a competing Statement of Facts, Plaintiffs simply integrate these facts into the arguments in opposition.

ARGUMENT

The City's petition presents no matters of ongoing significance for Virginia law or for the City's state-law authority to remove its Confederate monuments. Nor does the petition identify any reversible error. The Circuit Court correctly ruled that Plaintiffs had standing to seek injunctive and declaratory relief; the City's Lee and Jackson statues were within the

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based on the new law effective July 1, 2020, upon which the City's motion to dissolve entirely rests; and (3) this Court possesses neither original jurisdiction nor appellate jurisdiction at this juncture to grant the relief requested in the City's post-petition motion. The City's motion inappropriately shortcuts Va. Code § 8.01-626, the proper provision for this Court's appellate review of a circuit court's entry or dissolution of an injunction.

[5] Oct. 3, 2017 Op. Ltr. at 7-11 (standing); Oct. 15, 2019 Order: Damages (harm); see also Sept. 13, 2019 Ruling from the Bench, Tr. at 626 l.25 to 641 l.1 (finding testimony established damage and harm from tarps encroachment preventing use and enjoyment of a monument but not quantifiable).

protections of former Va. Code §§ 15.2-1812 and -1812.1; these provisions authorized the award of declaratory and injunctive relief; and Va. Code § 15.2-1812.1 authorized the award of fees and costs to Plaintiffs as prevailing parties. The Court should deny the City's petition.

I. Because the statutory prohibition and private right of action at issue in this appeal no longer exist, the City's Petition presents no matters of ongoing significance for Virginia law or for the City's state-law authority to remove its Confederate monuments.

This appeal is about the correctness of the Circuit Court's orders and final judgment under Virginia law as it existed from Plaintiffs' filing of their complaint on March 20, 2017 through the Circuit Court's entry of final judgment on January 29, 2020. Effective July 1, 2020, the City can lawfully remove its statues of Confederate Generals Lee and Jackson if it follows the proper procedures in the new law. The City's Assignments of Error pertain entirely to the Circuit Court's interpretation and application of the old law. This appeal is therefore not about whether Charlottesville's Confederate statues stay or go under the new law.

This appeal, instead, is about whether the City can escape accountability for its past actions under the old law. The City attacks Plaintiffs' standing (City's Error III), the purportedly "retroactive" application of law as amended in 1997 to the City's actions in 2017 (City's Error IV), the authority of the Circuit

Court to award declaratory and injunctive relief (City's Error II), and the authority of the Circuit Court to award attorneys' fees and costs to plaintiffs as prevailing parties under the private right of action set forth in Va. Code § 15.2-1812.1 (City's Error I). All this is under the old law. A live dispute remains under that old law, to be sure, as the City has a final judgment to satisfy. But the City's Assignments of Error present no issues of general significance for Virginia law going forward or for the City's statutory authority to remove its Confederate monuments under Virginia law now. The Court should conserve judicial resources for questions more deserving of its discretionary review and deny the City's petition for appeal.

II. The City's Petition identifies no reversible error.

The Circuit Court's interpretations and applications of the old law were correct. This Brief in Opposition responds to the City's four assignments of error in the order these issues arose below: first, Plaintiffs' standing to seek declaratory and injunctive relief (City's Error III); then the City's retroactivity claim (City's Error IV); next the availability of declaratory and injunctive relief in an action under Va. Code §§ 15.2-1812 and -1812. 1 (City's Error II); and finally the award of attorneys' fees and costs to plaintiffs as prevailing parties under

Va. Code § 15.2-1812.1 (City's Error I). This Court should deny review because the City's Petition identifies no reversible error.

A. The Circuit Court correctly determined that Plaintiffs had standing to seek declaratory and injunctive relief in addition to damages. (Response to City's Error III)

Standard of review: Whether Plaintiffs have standing is a question of law reviewed de novo. *See, e.g., Howell v. McAuliffe*, 292 Va. 320, 330 (2016).

In this appeal, the City challenges neither the facts supporting Plaintiffs' standing nor the Circuit Court's legal determination that Plaintiffs had standing under general principles. This alone is fatal to the City's limited contentions regarding taxpayer standing to seek declaratory and injunctive relief because "a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling." *Manchester Oaks Homeowners Ass'n, Inc. v. Batt*, 284 Va. 409, 421 (2012). "Where, as here, an appellant's assignments of error leave multiple bases for the challenged ruling uncontested, our review is satisfied by a determination that any one of them provides a sufficient legal foundation for the ruling." *Id.* at 422.

In overruling the City's demurrer on Plaintiffs' standing, the Circuit Court held that (1) most Plaintiffs had individual or organizational standing

under general principles, and The Monument Fund, Inc. had corporate representative standing derived from the individual standing of its members; (2) all plaintiffs had statutory standing under (former) Va. Code §§ 15.2-1812 and -1812.1; and (3) several individual plaintiffs had taxpayer standing to challenge City action *ultra vires*.[6]

Standing requires "'a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large.'" *Howell*, 292 Va. at 330, quoting *Goldman v. Landsidle*, 262 Va. 364, 374 (2001). Aesthetic or recreational use is a sufficient interest regardless of pecuniary or financial losses—and even an "identifiable trifle" will do. *Chesapeake Bay Foundation v. Commonwealth*, 52 Va. App. 807, 822-23 (2008). The Circuit Court's conclusions that Plaintiffs had individual and organizational standing under general principles were supported by the facts and legally sound.[7] Appropriately, the City's Petition does not contest that Plaintiffs were properly before the Court.

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[6] Oct. 3, 2017 Op. Ltr. at 7-14; discussion of general principles of standing at 8-12; statutory standing at 12-13; taxpayer standing at 13-14; Order entered December 6, 2017.

[7] The Circuit Court found that Plaintiffs Payne, Yellott, Tayloe, and Webber are Charlottesville residents, property owners, and taxpayers (Oct. 3, 2017 Op. Ltr. at 9); that Plaintiff Payne "'utilizes and enjoys' both Lee and Jackson Parks and the statues on a regular basis" (*id.*); that Plaintiff Yellott "'uses one or both

Moreover, the Circuit Court's ruling that some of the individual Plaintiffs additionally possess standing as taxpayers was also correct. The Circuit Court held that Plaintiffs established the required "connection to government expenditures" to support taxpayer standing.[8]

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parks daily', and conducts historic tours of the park; he is Executive Director of The Monument Fund, and has worked to preserve both statues" (*id.*); that Plaintiff Tayloe is "a past president of the Lee-Jackson Foundation, which helped pay for the restoration of the statue in 1997-99, and he 'has a special interest in the protection and preservation of war memorials and monuments located in' Charlottesville, these two in particular" (*id.* at 9-10); that Plaintiff Marshall "is Chairman of The Monument Fund, Inc., and has expended her own funds and time in cleaning the Lee statue and removing graffiti in 2011 and 2015" (*id.* at 10); that Plaintiff Weber "'has a special interest in the protection and preservation of war memorials and monuments located in' Charlottesville, these two in particular" (*id.*); that Plaintiff Virginia Division of the Sons of Confederate Veterans "has an interest in preserving and protecting both statues and parks, and contributed funds towards restoration of both statues" (*id.*); and that Plaintiff The Monument Fund, Inc. "has an interest in preserving and protecting both statues, its purpose being to support historical preservation with a focus or emphasis on monuments, memorials, statues, and the grounds thereof" (*id.*)

[8] Op. Ltr. Oct. 3, 2017 at 14, quoting *Lafferty v. School Board of Fairfax County*, 293 Va. 354, 363 (2017). The City misquotes *Lafferty* as requiring "a direct, immediate connection to government expenditures." Petn. at 16. The words "direct" and "immediate" do not appear in the quoted sentence. This Court used those words elsewhere in *Lafferty* to describe how taxpayer standing "'is premised on the peculiar relationship of the taxpayer to the local government that makes the taxpayer's interest in the application of municipal revenues direct and immediate,' giving local taxpayers a personal stake in the outcome of the controversy." *Lafferty*, 293 Va. at 363, quoting *Goldman v. Landsidle*, 262 Va. 364, 372 (2001).

The City contends "there is no allegation that the City Council actually approved the expenditure of any funds for removal of either Statue."[9] This ignores both the City's actual expenditures of thousands of dollars for unlawfully encroaching on the statues with tarp coverings,[10] and also that over a million more taxpayer dollars were at risk if the Circuit Court's injunction had not prevented removing the statues.[11] These unlawful actual and prospective expenditures more than sufficed as grounds for standing for the taxpayer Plaintiffs. See *Lynchburg & Rivermont-Street Railway Co. v. Dameron*, 95 Va. 545, 546 (1898) (affirming jurisdiction of a court of equity to restrain threatened financial wrong that the plaintiff municipal taxpayers sought to forestall).

Finally, the Circuit Correct was also right about Plaintiffs' statutory standing. Former Va. Code § 15.2-1812.1 conferred standing to sue on "any

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[9] Petn. at 16.

[10] Apr. 5, 2019 Revised Second Amended Complaint ["RSAC"] ¶¶ 30B & C (regarding the City Council's vote to cover both monuments); ¶ 31 (regarding City Manager Maurice Jones's statement that the covers cost $3,000 each).

[11] RSAC ¶ 31 (City budgeting $1 million to carry out the removal resolution, and specific dollar estimates for monument removal; and stating "whatever the costs of these unauthorized and illegal actions, and City salaries expended in furtherance of them, the cost has been borne and will be borne by the taxpayers of the City, including those of Plaintiffs who are City residents and taxpayers").

person with an interest in the matter," if the attorney for the locality was notified of a violation or encroachment and failed to act within sixty days. The City contests whether there was a sufficient "matter" without physical harm.[12] But the question is whether the Plaintiffs are persons with an interest in stopping a violation or encroachment, including a violation or encroachment by local authorities. As Judge Moore concluded, Va. Code §§ 15.2-1812 and -1812.1 are to be read *in pari materia,* and "statutory standing would apply to any action relating to the enforcement of these statutes."[13] The Court should deny review of City's Error III.

B. The Circuit Court correctly held that Va. Code § 15.2-1812, as amended in 1997 to cover all localities, prohibited the City's decisions in 2017 to remove and to cover its Lee and Jackson statues. (Response to City's Error IV)

Standard of review: The City's assignment of error about the purported "retroactivity" of applying Va. Code § 15.2-1812 to the City's disposition of its Lee and Jackson statues presents a question of statutory interpretation subject to de novo review. *Friedman v. Smith*, 68 Va. App. 529, 539 (Va. App. 2018). The Court determines the legislative intent from the words used in the statute, "applying the plain meaning of the words unless they are ambiguous or would

[12] Petn. at 12.
[13] Op. Ltr. Oct. 3, 2017, at 12-13.

lead to an absurd result." *Id.*, see also *Grafmuller v. Commonwealth*, 57 Va. App. 58, 61 (2010) (quoting *Wright v. Commonwealth,* 278 Va. 754, 759 (2009)). Further, a Court "should avoid interpretations that 'would negate the legislative intent and would require an unreasonably restrictive interpretation of the statute.'" *Id.* (quoting *Ansell v. Commonwealth*, 219 Va. 759, 763 (1979)).

The Circuit Court correctly applied the version of Va. Code § 15.2-1812 that governed Charlottesville and every other locality in Virginia since 1997.[14] There is nothing "retroactive" about applying a statutory prohibition to acts performed after that prohibition has gone into effect. The statute prohibits the acts of disturbance or interference, which includes removal.[15] This prohibition had been in force against "the authorities of the locality" of

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[14] The City's retroactivity argument is also inconsistent with its recognition that the version of Va. Code § 15.2-1812 as amended effective July 1, 2020 applies to the Lee and Jackson statues from the effective date of the 2020 amendment onwards. It is unclear how the City squares this position on the coverage of the 2020 amendments with its position that the 1997 amendments did not extend the law's coverage to the same statues from the effective date of those 1997 amendments onwards.

[15] *See* Va. Code § 15.2-1812 ("[I]t 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 . . . . For purposes of this section 'disturb or interfere with' includes removal of, damaging or defacing monuments or memorials . . . .").

Charlottesville for twenty years before the City violated it. The City's retroactivity claim is therefore misdirected.

The Circuit Court carefully considered and thoroughly rejected the City's arguments about the alleged inapplicability of Virginia Code §§ 15.2-1812 and -1812.1 to the City's Lee and Jackson monuments.[16] Beginning with the text of the statute, Judge Moore reasoned that the main purpose of the 1997 amendments "appears to be to extend protection to war memorials and monuments in cities as previously protected in counties."[17]

Noting the specific inclusion of memorials and monuments to wars back into the eighteenth century, Judge Moore noted the peculiarity of accepting—as the City's interpretation required—that "the General Assembly intended and expected such memorials and monuments to the named conflicts to be erected after [1997], and that all of the then-existing monuments to all of those past wars and those soldiers in every city throughout the Commonwealth were not protected."[18] In a variety of ways, the Circuit Court expressed its conviction

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[16] *See* Oct. 3, 2017 Op. Ltr. at 3-7.
[17] Oct. 3, 2017 Op. Ltr. at 4; *see also id.* at 3-4 (quoting the text of Va. Code § 15.2-1812 and noting "its clarity of purpose and intent"); *id.* at 4 ("This Court's ruling is based on the content and wording of the statute itself").
[18] Oct. 3, 2017 Op. Ltr. at 6-7.

that a purported legislative intent to deprive already-erected memorials and monuments of statutory protection beggared belief.[19]

In addition to statutory text, the Circuit Court also relied on the broader structure of statutory protections for the war memorials and monuments covered by Va. Code § 15.2-1812. Specifically, Judge Moore interpreted the coverage of Va. Code § 15.2-1812's prohibition on removal by localities in connection with the criminal vandalism statute in Va. Code § 18.12-137 and the private right of action in Va. Code § 15.2-1812.1. The criminal prohibition in Va.

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[19] *See id.* at 4 ("Logic and common sense prevent me from reaching such a conclusion."); *id.* at 4 n. 2 ("I find it impossible to think that when this bill was passed, it was the intended effect that none of the existing monuments in cities were protected."); *id.* at 4-5 ("It seems inescapable that the General Assembly had to have had in mind those monuments and memorials already erected. Nothing else would make sense."); *Id.* at 6 ("[T]o offer protection for statues erected by cities to the Algonquin War, French and Indian War, Revolutionary War, War of 1812, Mexican War, Civil War, Spanish American War, World War I, World War II, and Viet Nam War only if built after 1997 seems absurd and would make the statute virtually meaningless as to the protections purportedly offered, as there is no realistic reasonable expectation that additional monuments or memorials to these wars (with the possible exception of the last three) would yet be built, and there were numerous such already in existence which had to be on the mind of the legislators."); *id.* at 6-7 ("I find it impossible to believe that by including cities to expand the effect of this protective legislation, the General Assembly was really saying and intended to say to the cities: 'you may finally now construct memorials to the Revolutionary War, Mexican War, Civil War, Spanish-American War, World War I, but such are protected (and you cannot move or damage or destroy them) only if you build them now and all of the statutes that exist are not protected'.").

Code § 18.2-137 makes it a crime "[i]f any person unlawfully destroys, defaces, damages or removes without the intent to steal … any monument or memorial for war veterans described in § 15.2-1812." Va. Code § 18.2-137(A). If the City were correct that Virginia Code § 15.2-1812 does not protect any war memorials or monuments erected in cities before 1997, then neither does this criminal vandalism statute. But that is not the law. Judge Moore noted this anomaly in rejecting the City's interpretation of Va. Code § 15.2-1812 and recognizing the interlocking nature of this provision with Va. Code § 18.2-137.[20]

Similar logic applies to the interlocking structure of Va. Code §§ 15.2-1812 and -1812.1. When the General Assembly amended the law in 2001 to add the private right of action against local authorities in Va. Code 15.2-1812.1, the General Assembly tied it directly to Va. Code § 15.2-1812.[21] The City never explains why the General Assembly would provide strong enforcement mechanisms against local authorities while simultaneously leaving

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[20] *See id.* at 7 n.5 ("[I]t is impossible for the Court to conclude that § 18.2-137 would not make it a crime to damage such statues erected before 1997.").

[21] *See* Va. Code § 15.2-1812.1 (providing a right of action "[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"). With specific reference to memorials or monuments owned by a locality, the General Assembly provided a private right of action in § 15.2-1812.1 as a backstop against official inaction if "the attorney for the locality" in which a publicly owned monument, marker or memorial refuses to bring a civil action.

unprotected any war memorials or monuments erected in Virginia cities before 1997. The City acknowledges that the 1997 amendment to § 15.2-1812 came as part of a general recodification of local government law in Title 15.[22] But the City's interpretation of § 15.2-1812 to exclude from protection war monuments or memorials erected in Virginia's cities before 1997 undermines a principal objective of this massive recodification project, which was to "provide uniformity among counties, cities, and towns, as appropriate."[23] With respect to war memorials and monuments, this meant uniform protection.

In sum, the Circuit Court properly held that Va. Code § 15.2-1812, as amended in 1997, prohibited the City from removing or encroaching upon the Lee and Jackson statues in 2017. This application of Va. Code § 15.2-1812 was

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[22] *See* Petn. at 7.

[23] *See* Virginia Code Commission, SD5 Report - Recodification of Title 15.1 of the Code of Virginia, *available at https://rga.lis.virginia.gov/Published/1997/SD5* (explaining with respect to Chapter 18 ("Buildings, Monuments and Land Generally"), where Va. Code § 15.2-1812 is located, that "[s]imilar sections are gathered with an effort to delete repetitive material and provide uniformity among counties, cities, and towns, as appropriate."). One way the General Assembly pursued this objective of uniformity was to substitute the general term "locality" for lists of specified local government authorities throughout Title 15. *See id.* (explaining in "changes made repeatedly throughout Title 15.2" that "[t]he term 'locality' generally replaces phrases such as 'counties, cities and towns' and 'counties and municipalities'"); *see also* Va. Code § 15.2-102 (providing that "'Locality' or 'local government' shall be construed to mean a county, city, or town as the context may require").

not "retroactive," but gave effect to the law's uniform protections for war memorials and monuments in localities across Virginia. Because the Circuit Court ruled correctly, and also because the removal prohibition has been repealed effective July 1, 2020, the Court should deny review of City's Error IV.

C. The Circuit Court correctly ruled that Va. Code §§ 15.2-1812 and -1812.1 authorized this private civil action not only for damages but also for declaratory and injunctive relief. (Response to City's Error II)

Standard of review: the grant of equitable relief is "within the sound discretion of the chancellor," whose findings "are entitled to great weight and should not be disturbed unless plainly wrong." *Blue Ridge Poultry & Egg Co. v. Clark*, 211 Va. 139, 144 (1970).

The Plaintiffs' invocation of (former) Va. Code §§ 15.2-1812 and -1812.1 as grounds for seeking injunctive and declaratory relief is at this point cumulative. Several plaintiffs had independent grounds to seek such relief as taxpayers.[24] The injunction also had an independent factual basis. The Circuit Court found that Plaintiffs proved facts establishing irreparable harm if the

[24] *See* pp. 6-10 *supra*; *Lynchburg & Rivermont-Street Railway Co. v. Dameron*, 95 Va. 545, 546 (1898) (holding taxpayers' ability to enjoin a municipal corporation and its officers from unauthorized acts "is too well settled to admit of dispute.").

City carried out its resolution to move the Lee monument.[25] The Court subsequently ruled in February 2018 that the tarps obscuring the monuments interfered with Plaintiffs' right to see them.[26] In addition to being a statutorily prohibited encroachment, the Circuit Court concluded that "while there was in fact harm from covering the statues, the harm was not easily quantifiable."[27] This finding about a violation of plaintiffs' right to see the monuments causing discrete but difficult to quantify harm serves as an additional basis for the injunction.[28] See *Black and White Cars Inc. v. Groome Transp., Inc.*, 247 Va. 426, 430 (1994) (holding injunction appropriate to enforce a statute when harm not readily quantifiable). The City did not challenge this finding, which in itself vitiates their appeal. *See Manchester Oaks*, 284 Va. at 422.

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[25] May 2, 2017 Tr. at 267 l. 23 to 292 l.1 (ruling from bench on damage); *id.* at 281 l. 14 to 282 l. 18 (ruling from bench on irreparable harm). The Circuit Court's rulings from the bench on May 2, 2017 and subsequent Order June 6, 2017 were among the findings merged and incorporated by reference in the permanent injunction Order dated October 15, 2019.

[26] Feb. 23, 2018 Op. Ltr. at 8 (if statues cannot be seen, tantamount to a removal); *see also* Nov. 17, 2018 Op. Ltr. at 4 (tarps an encroachment).

[27] Jan 21, 2020 Op. Ltr. at 2. For this reason, the Circuit Court denied Plaintiffs' claim for money damages. Oct. 15, 2018 Order: Damages at 1.

[28] Oct. 15, 2019 Order: Damages, at 1 (holding harm established but could not be quantified); see also Sept. 13, 2019 Ruling from the Bench, Tr. at 626 l.25 to 641 l.1 (finding testimony established damage and harm from tarps encroachment preventing use and enjoyment of a monument but not quantifiable).

Because these alternative grounds are dispositive, this Court need not reach whether an injunction was also available as a form of relief directly under Va. Code §§ 15.2-1812 and 1812.1 before they were amended, and whether the old law was a sufficiently explicit waiver of sovereign immunity. The City acknowledges that former Va. Code § 15.2-1812.1 explicitly authorized a private right of action for 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."[29] The City's construction of this explicit right of action for damages to foreclose declaratory and injunctive relief conflicts directly with the statute's direction 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."[30] As the Circuit Court explained, Va. Code §§ 15.2-1812 and -1812.1 "anticipate localities attempting to move, remove, destroy or damage such monuments or memorials, as well as the local authorities and their legal

[29] *See* Va. Code § 15.2-1812.1; Petn. at 9 & 15.

[30] Va. Code § 15.2-1812.1(C) (emphasis added); *see also* Va. Code § 8.01-184 (stating "[i]n 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 ...."); Va. Code § 8.01-620 ("Every circuit court shall have jurisdiction to award injunctions.")..

counsel doing nothing to stop or prevent it."[31] To address this anticipated combination of problems, Va. Code § 15.2-1812.1 provides that "[i]n the event that the City Attorney does not take action, any interested citizen ('any person with an interest in the matter') is authorized to bring such."[32]

The City's invocation of sovereign immunity to bar injunctive relief is inconsistent with the City's representation to the Circuit Court in successfully obtaining dismissal of individual City councilors 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)."[33]

The City's invocation of sovereign immunity is also mistaken because the General Assembly explicitly conferred a private right of action to provide judicial relief for violation of a statutory provision that expressly prohibits "the authorities of a locality," along with any other person, from disturbing or interfering with statutorily protected war memorials and monuments. Va. Code § 15.2-1812.1.

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[31] Oct. 3, 2017 Op. Ltr. at 12.
[32] *Id.* (quoting Va. Code § 15.2-1812.1).
[33] Aug. 27, 2018, Defendants' Brief in Support of Motion for Reconsideration on Legislative Immunity at 18.

Moreover, the Circuit Court held that the Plaintiffs have statutory standing. Statutory standing is just another label for the determination that Plaintiffs possessed a right of action against the City. *See Cherrie v. Virginia Health Services, Inc.*, 292 Va. 309, 315 (2016), quoting *Small v. Federal Nat'l Mortgage Ass'n*, 286 Va. 119, 125 (2013) (explaining that "[t]he existence of any viable right of action" is "[s]ometimes called 'statutory standing'" and "asks 'whether the plaintiff is a member of the class given authority by a statute to bring suit'"). The Circuit Court properly rejected the City's argument that the explicit provision of a private right of action for damages somehow foreclosed declaratory and injunctive relief. As explained earlier, Judge Moore did so by reading §§ 15.2-1812 and -1812.1 *in pari materia* and ruling that "the standing provision should have no different application if it is for an injunction under § 15.2-1812 or damages under § 15.2-1812.1."[34] Given the circumstances of this case, there can be little doubt that declaratory and injunctive relief were "otherwise allowed by law" within the meaning of Va. Code § 15.2-1812.1(C). The Court should deny review of City's Error II.

[34] *Id.*

D. The Circuit Court correctly held that Va. Code §§ 15.2-1812 and -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 City 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 at all under former Va. Code § 15.2-1812.1.[35] The City contends physical harm is a prerequisite for an award of fees and costs. This is doubly wrong because the only statutory precondition is prevailing party status, and the statute expressly includes litigation costs among available damages to be awarded.

The law states: "[t]he 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."[36] The prevailing party "is one in whose

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[35] Although not required to do so, *Lambert*, 293 Va. at 257 (stating court need not pore over billing records), the Circuit Court examined the time logs and expenses line by line. Jan. 21, 2020 Op. Ltr. at 8. The Court reduced Plaintiffs' award request by approximately 1/3, primarily for issues on which Plaintiffs did not prevail. Plaintiffs have declined to assign cross error in the interests of finality and judicial economy with respect to this award under a now-repealed private right of action. As a consequence, neither the City nor Plaintiffs now contend that the amount awarded under Va. Code § 15.2-1812.1 was not "reasonable" within the meaning of that provision.

[36] Va. Code § 15.2-1812.1(C).

favor a judgment is rendered regardless of the amount of damages." *Lambert*, 293 Va. at 256 n.5. Plaintiffs initiated the action and won a permanent injunction forbidding monument removal and a declaratory judgment that the City had acted *ultra vires*. Having won on "the significant issue in dispute," *Hallowell v. Virginia Marine Resources*, 56 Va. App. 70, 86 (2020), Plaintiffs prevailed and were therefore statutorily eligible for fees and costs under Va. Code § 15.2-1812.1.

The City's constricted focus on "physical harm to the Statues"[37] also neglects the Circuit Court's finding that Plaintiffs had established "harm and loss flowing from the City's actions," but that harm was not readily quantifiable as damages.[38] The words "physical harm" appear nowhere in former Va. Code § 15.2-1812.1, but the statute did provide a private right of action for "preserving" the protected war memorials or monuments and also "restoring" them to their "preencroachment condition." Va. Code § 15.2-1812.1(A). Plaintiffs both preserved the statues from unlawful removal and

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[37] Petn. at 10.

[38] Oct. 15, 2019 Order: Damages; *see also* Sept. 13, 2019 Tr. at 626 l.25 to 641 l. 1 (ruling from the bench finding harm established, but difficult to quantify, thus denying money damages for this harm); Feb. 23, 2018 Op. Ltr. at 7 (recognizing obstructed rights to view the statues "as a legitimate harm is a policy decision the General Assembly has already made, and is not mine to ignore").

restored them to their preencroachment condition after the City covered them with tarps. To exclude this kind of relief as not "an action authorized by this section [i.e., Va. Code § 15.2-1812.1]," is to ignore the express intent of the General Assembly's authorization of this private right of action.

Finally, the City's "physical harm" prerequisite for a fee award under Va. Code § 15.2-1812.1(C) is squarely foreclosed by statutory text that the City's petition omits. The first section of Va. Code § 15.2-1812.1 explicitly includes "litigation costs" among the "damages" available under this statutory right of action. *See* Va. Code § 15.2-1812.1(A)(2) ("*Damages other than those litigation costs recovered from any such action* shall be used exclusively for [other statutorily specified purposes.]") [emphasis added]. This capacious statutory understanding of "damages" is broader than the common understanding of the term, but that is all the more reason why the General Assembly's explicit words must not be ignored. There are only two sentences in the paragraph of Va. Code § 15.2-1812.1(A) about damages. The City quotes the first but not the second, thus omitting the statutory text that includes litigation costs among damages.

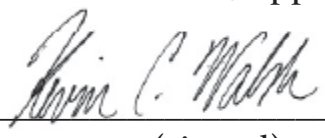
The General Assembly's express provision for attorneys' fees in the former Va. Code § 15.2-1812.1 manifests the General Assembly's intent "to

encourage private citizens to enforce the statute through civil litigation." *Lambert*, 293 Va. at 251. This Court should deny review of City's Error I.

CONCLUSION

The City's Petition for Appeal pertains entirely to the interpretation and application of now-repealed provisions of Virginia law that the Circuit Court correctly interpreted and applied. Plaintiffs respectfully request the Court to deny the Petition for Appeal.

For the Plaintiffs/Appellees:



July 6, 2020
(signed) (date)

Kevin C. Walsh (VSB # 70340)
University of Richmond School of Law
203 Richmond Way
Richmond, VA 23173
kwalsh@richmond.edu
(804) 287-6018 (office)
Counsel for Plaintiff/Appellee The Monument Fund, Inc.

Ralph E. Main, Jr., (VSB # 13320)
Dygert, Wright, Hobbs & Hernandez PLC
415 4th Street, NE
Charlottesville, VA 22902
(434) 979-5515 (Telephone)
Counsel for all Respondent/Appellees

S. Braxton Puryear (VSB # 30734)
Attorney at Law
121 South Main Street
Post Office Box 291
Madison, VA 22727
(540) 948-4444 (Telephone)
Counsel for all
Respondent/Appellees

CERTIFICATE BY APPELLEES

The names of all appellants and appellees are:

Appellants

CITY OF CHARLOTTESVILLE, VIRGINIA, &
CHARLOTTESVILLE CITY COUNCIL

Appellees

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.
THE MONUMENT FUND, INC.

The name, Virginia State Bar number, mailing address, telephone number (including any applicable extension), facsimile number (if any), and e-mail address (if any) of counsel for each party, are:

Counsel for Appellants:

Lisa A. Robertson (VSB # 32486)
Chief Deputy City Attorney
John C. Blair, II (VSB # 65274)
City Attorney
Charlottesville City Attorney's Office
Post Office Box 91
Charlottesville, Virginia 22902
(434) 970-3131 (Telephone)
robertsonl@charlottesville.org
blairjc@charlottesville.org

Counsel for Appellees:

Kevin C. Walsh (VSB #: 70340)
University of Richmond School of Law
203 Richmond Way
Richmond, VA 23173
kwalsh@richmond.edu
(804) 287-6018 (office)
Counsel for Respondent/Appellee The Monument Fund, Inc.

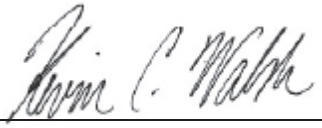
Ralph E. Main, Jr. (VSB #13320)
Dygert, Wright, Hobbs & Hernandez PLC
415 4th Street, NE
Charlottesville, Virginia 22902
(434) 979-5515 (office)
rmain@charlottesvillelegal.com
Counsel for all Respondent/Appellees

S. Braxton Puryear (VSB #30734)
Attorney at Law
121 South Main Street
Post Office Box 291
Madison, Virginia 22727
(540) 948-4444 (office)
sbpuryear@verizon.net
Counsel for all Respondent/Appellees

I hereby certify that, pursuant to Rule 5:18 and Virginia Supreme Court COVID-19 Emergency Orders, a copy of the foregoing Brief in Opposition has been filed with the Clerk of the Supreme Court of Virginia by electronic filing and one copy of the same has been served, via email and US mail, postage prepaid, this 6th day of July, 2020 upon the following:

Lisa A. Robertson (VSB # 32486)
Chief Deputy City Attorney
John C. Blair, II (VSB # 65274)
City Attorney
Charlottesville City Attorney's Office
Post Office Box 91
Charlottesville, Virginia 22902
(434) 970-3131 (Telephone)
robertsonl@charlottesville.org
blairjc@charlottesville.org

Counsel for Appellant



By Counsel