VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, *et al.*, Plaintiffs, v. CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*, Defendants.	Case No.: CL17-000145-000

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BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF DENIAL OF LEGISLATIVE IMMUNITY

COME NOW Defendants City of Charlottesville, Charlottesville City Council, and Robert Francis Fenwick, Jr., in accordance with leave of court granted on Friday, October 26, 2018, and submit this brief in support of the pending Motion for Reconsideration of the court's previous ruling on absolute common law legislative immunity.

As the Councilors explained in their August 27, 2018, Motion for Reconsideration of Denial of Legislative Immunity, legislative acts, regardless of whether they are ultimately lawful, are shielded by absolute common law immunity. At the hearing, Plaintiffs agreed. Thus, the only question remaining before the Court is whether the Councilors' *votes* on the decisions placed at issue in this case were legislative acts. Those *votes*—the only conduct challenged in this litigation—bear all the hallmarks of legislation. They were legislative in form and in function, and they reflect discretionary policymaking choices with broad implications. If implemented, the votes would have long-lasting, prospective effects within the community. Relying on just such characteristics, courts in case after case have held such actions to be legislative in nature. The result here should be no different.

ARGUMENT

The Court has already correctly determined that the Councilors' vote to remove the Lee statue was "legislative in nature and function." June 13, 2018, Ruling 5. Because the only requirement for common law legislative immunity is that the challenged acts be legislative, that determination should resolve the dispute over the Councilors' immunity. Plaintiffs' contrary arguments are unmoored from the case law and unpersuasive.

A. Officials are absolutely immune so long as they act in a legislative capacity

1. Absolute common law legislative immunity is a shield against liability for legislative acts even if those acts are unlawful

As the Councilors explained in their reconsideration motion, the common law provides immunity for legislative acts, even ones which may be unlawful if and when they are implemented. For that reason, the immunity is considered absolute, even under the Dillon Rule. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 218–19 (6th Cir. 2011) (en banc).*

Given the clarity of the common law, Plaintiffs *conceded* this point at oral argument. Explaining that legislative immunity is "very powerful," and that "[o]nce it attaches, it's absolute," Tr. 262:8–10, Plaintiffs argued only that "you can be civilly liable for your votes on city council if those votes are *not* legislative acts," Tr. 258:5–7 (emphasis added); *see* Tr. 266:4–5 ("It's whether in acting the council was acting as a legislative body.").

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* As noted at argument, absolute legislative immunity is consistent with the possibility of criminal prosecution for bribery or public corruption, as in the case of Congressman Richard Renzi. See Tr. 235:13–19, 236:2–6. In such cases, legislators are prosecuted not for their legislative acts, such as their votes, but rather for *their promises* to perform future legislative acts in return for personal monetary gain. *E.g.*, *United States v. Renzi*, 651 F.3d 1012, 1023 (9th Cir. 2011). What is criminalized is "acceptance of the bribe ... , not performance of the illegal promise." *United States v. Brewster*, 408 U.S. 501, 526 (1972); *see id.* at 525–29 (Congressman Brewster could be prosecuted for his promise to perform specific future "legislative acts" in exchange for a bribe).

2. The operative question here is whether the acts are legislative or administrative

The only remaining issue is whether the relevant conduct is legislative. Courts perform two basic inquiries to resolve that question, *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998). (As the Court may recall from Defendants' Brief in support of its Plea in Bar: *Bogan* is the case in which the United State Supreme Court held that common law legislative immunity applies to local legislators the same as legislators protected under United States Constitutional legislative immunity provisions (i.e., the "Speech or Debate Clause" of the U.S. Constitution), because the rationales for according absolute legislative immunity to federal, state and local legislators apply with equal force. *Bogan v. Scott-Harris,* 523 U.S. 44, 2 (1998)).

(i) *First*, is the action legislative "in form"?

"[V]oting for an ordinance" is "quintessentially legislative." *Id.* Voting on a motion or resolution, when the action embodied within the resolution involves a discretionary matter that will have long-lasting impact within the community, is likewise a legislative act.

(ii) *Second*, was the action "a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents," and did it "have prospective implications"?

"Enacting a budget is a legislative act," *Kensington Volunteer Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 471 (4th Cir. 2012), and quintessentially so, because it "reflect[s] the legislators' ordering of policy priorities in the face of limited financial resources," *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988). Also: legislators' "subjective intent" is not relevant. *See generally Bd. of Supervisors of Fluvanna Cty. v. Davenport & Co. LLC*, 285 Va. 580, 588–89 (2013) (relying on *Bogan*'s view of common law legislative immunity). In the case at hand, the resolutions of Council necessarily involved a determination that the City's financial resources should be allocated in favor of the actions authorized within the motions and resolutions

adopted by City Council. *See, e.g., Exhibit H* to the Amended Complaint (establishing a projected budget not to exceed $1,000,000.00). The straightforward result is that the challenged votes are legislative and the Councilors are entitled to immunity.

Plaintiffs did not mention *Bogan's* two-part test at oral argument, because it does not support their assertions. Instead, citing a number of Council powers, *e.g.*, Tr. 259–60, Plaintiffs ignore the *Bogan* ruling, in favor of continuing to repeat the overly-simplistic assertion that non-legislative acts include decisions "to do something to the city's property," "personnel decision[s]," Tr. 259:23, 260:11, and decisions to "sign[] a contract or accept[] money," because such decisions are "quintessential administration," Tr. 261:24, 262:4. But the fact that the City Council also possesses a variety of administrative powers does not address the question of whether the councilors' individual votes on the Resolutions attached to the Amended Complaint constituted legislative action. Case law makes clear that the question whether an act is legislative turns on whether legislators were engaging in discretionary policymaking decisions by traditional legislative means.

a. A decision is not non-legislative just because it might be characterized as a "personnel decision." Instead, the court looks to the factors set forth above. The facts at issue in *Bogan* present a prime example. There, the Supreme Court held that a city council's vote to adopt an ordinance (eliminating a government office in which a single person was an employee) was legislative and shielded by common law legislative immunity. 523 U.S. at 46–47. The Court noted that the decision was "a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents," and that it "may have prospective implications." *Id.* at 55–56. Indeed, the general rule is that eliminating a position by eliminating funding—a budgetary act—is legislative, whereas simply firing an employee is not.

b. Likewise, a locality's financial dealings also can be legislative. Although administering a contract might be administrative, deciding whether to enter into one—contrary to Plaintiffs' argument, Tr. 260:5–7 (regarding a lease)—is often legislative. In *Arabbo v. City of Burton*, 689 F. App'x 418, 419–20 (6th Cir. 2017), for example, the court concluded that a forgone financial deal was clearly a legislative decision. There, a real-estate developer of an apartment complex sued city councilmembers claiming that the councilors had voted not to engage in a transaction with him based on anti-Arab animus. *Id.* at 420. Specifically, the developer proposed that the city purchase a note on a mortgage loan from the federal Department of Housing and Urban Development and then sell it to the developer, because HUD would sell the note at a discounted price only to the city. *Id.* at 419–20. Holding the city councilmembers immune, the court explained that "[t]he decision to decline to engage in a financial transaction that could affect the city's budgetary priorities and that could expose it to financial risk is a legislative decision." *Id.* at 421. And the court rejected the developer's argument that "when a governing body's act is directed at an individual, that act is administrative, not legislative." *Id.* The council had "considered and rejected *legislation*—a resolution to approve the … proposal." *Id.* Other cases confirm *Arrabo*'s reasoning. *See, e.g.*, *Young v. Mercer Cty. Comm'n*, 849 F.3d 728, 734 (8th Cir. 2017) (termination of a lease agreement was legislative act entitled to immunity); *Cmty. House, Inc. v. City of Boise*, 623 F.3d 945, 952, 960–64 (9th Cir. 2010) (council members entitled to legislative immunity "for their actions in promoting and approving the lease and sale" of homeless shelter).

c. Similarly, and of special relevance here, a decision is not non-legislative just because it pertains to municipal property. At argument, Plaintiffs cited the Virginia Supreme Court's decision in *Isle of Wight County v. Nogiec*, 281 Va. 140 (2011), and appeared to take the

position that it was dispositive. Tr. 261–62. But the holding in *Nogiec* that a county and an assistant administrator were not shielded by immunity turned on the clearly "supervisory or administrative capacity" in which the board of county supervisors was acting at the time in question. *Id.* at 155. Specifically, "[t]he Board had convened to receive a report on the efforts being undertaken to repair County property," *id.*—a county "museum [that had] sustained flood damage after heavy rains." *Id.* at 145. Those proceedings to check the status of flood repairs were not an exercise of the county's "general police power," which is legislative. *Id.* at 154.

But the fact that keeping local government property in good repair may be an administrative or supervisory task does not make every property-related decision administrative. A number of cases illustrate that property-focused decisions are often legislative:

- In *Fry v. Board of County Commissioners*, 7 F.3d 936, 938–42 (10th Cir. 1993), the court held members of a county board immune from plaintiff's constitutional challenges to their vote to vacate several miles of roadways that connected plaintiffs' tracts of land. "[T]he resolution vacating the roads was clearly a legislative act," the court explained, because "the highway issue was a subject of wide public interest and debate, and the decision to vacate was made following an open public meeting in which all parties were heard." *Id.*

- In *Sable v. Myers*, 563 F.3d 1120, 1126–27 (10th Cir. 2009), the court held city councilors immune against a charge that they condemned the plaintiff's property in retaliation for an earlier lawsuit he had brought. Given the stated purpose to expand a public-works facility, the court explained, the eminent domain action was neither administrative nor ministerial. *Id.* at 1126. To the contrary, the decision "was undoubtedly an exercise of discretion regarding a matter of public policy that would impact the functioning of public services for years to come," and there was no "question about the formalities of legislative action" given the "formal votes." *Id.*

- And in *Craig v. Police Jury Grant Parish*, 265 F. App'x 185, 186–87 (5th Cir. 2008) (per curiam), the court held that legislative immunity applied to a parish council's vote "to pass an ordinance abandoning maintenance of [1.3 miles of] road." The court reasoned that the parish council's "decision to close the road was at least in part related to the allocation of [the] Parish's limited resources," *id.* at 191, and the decision was made by passage of an ordinance, *id.* at 192.

d. Under these well-established principles, decision-making very similar to what Plaintiffs challenge here has been held to be legislative. *See Suhre v. Board of Commissioners*,

894 F. Supp. 927, 931–32 (W.D.N.C. 1995), *aff'd in relevant part*, No. 95-2474 (4th Cir. Dec. 28, 1995), *as stated in Suhre v. Haywood County*, 55 F. Supp. 2d 384, 386 (W.D.N.C. 1999), *rev'd on other grounds sub nom. Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997). In *Suhre*, "behind the bench at which the presiding judge holds court[was] a bas-relief of 'Lady Justice,'" holding "abridged versions of the Ten Commandments" with "clearly visible" wording. *Id.* at 929. The plaintiff, an atheist offended by the presence of the Ten Commandments in the courtroom, brought a First Amendment suit against the board of county commissioners after unsuccessfully seeking the Ten Commandments' removal during a public session of the board. *Id.* at 930. The board had unanimously decided that the Ten Commandments should remain on the courtroom wall, and the council minutes reflected that "numerous ... citizens expressed their support" for retaining the Ten Commandments and that "[t]he board expressed their opinion that this country was founded on the principles of the Ten Commandments." *Id.* at 930–31.

The court had no trouble finding that decision legislative. The court reasoned that "making a statement which represents a policy decision to do that which is in the best interests of the citizens is a legislative act." *Id.* at 931. And the court rejected the argument, much like the one Plaintiffs here assert, that the decision was analogous to "administering the upkeep and maintenance of the courthouse itself." *Id.* Far from being "commensurate with housekeeping duties," the action was clearly a "prospective ... policy making decision on behalf of the [county's] citizens." *Id.* at 931–32. Because the vote was a legislative act for which the commissioners were "absolutely immune not just from liability but from defense of th[e] suit," the court dismissed the commissioners as defendants. *Id.* at 932–33. The Fourth Circuit affirmed that ruling. *See* 55 F. Supp. 2d at 386.

B. The Councilors' votes in this case were legislative, not administrative, because they reflect discretionary policymaking choices with significant budgetary and prospective impact

At argument, Plaintiffs essentially asked the Court to ignore the context of the votes and

find that they were a mere effort to dispose of City property. But the challenged actions cannot be viewed in a vacuum. Indeed, this very lawsuit and the controversial nature of the Council's votes in this case indicate that those votes implicated policy and budgetary priorities not comparable to deciding "the way the benches are set up and things like that." Tr. 267:12–13.

1. Charlottesville possesses general legislative police powers

By charter, the City of Charlottesville has powers "which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof." Va. Code § 15.2-1102; *see also* Charlottesville Charter § 5(b) (1946) ("All corporate powers, legislative and executive authority vested in the City of Charlottesville by law shall be and are hereby vested in a council of five members ...."), https://law.lis.virginia.gov/charters/charlottesville/ *and see* Va. Code §15.2-1401. The exercise of general police powers is indisputably legislative, as the Virginia Supreme Court recognized in *Noglec* when referring to the analogous grant of power to counties. *See* 281 Va. at 154 ("general police power" under Virginia Code § 15.2-1200 is "legislative in nature"); Va. Code. § 15.2-1200 (county "may adopt such measures as it deems expedient to secure and promote the health, safety and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth"). The vesting of those powers in the Councilors gave them authority to take legislative acts, which were no less legislative even if they exceeded the bounds of Virginia Code § 15.2-1812 (and these legislative acts did not).

2. The Councilors' votes were legislative in form

The votes to remove the statues, as Plaintiffs recognize, were *votes*, and thus "quintessentially legislative." *Bogan*, 523 U.S. at 55. Votes are significant regardless of what form they ultimately take, because even when votes are "irregular and inappropriate"—and the votes

here were not—they are "still legislative in nature," and thus covered by legislative immunity. *Bryan v. City of Madison*, 213 F.3d 267, 274 (5th Cir. 2000); *accord, e.g.*, *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880) (immunity extends to "everything said or done ... as a representative, ... without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules" (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808))).

3. The Councilors' votes reflected discretionary policymaking choices and budgetary priorities, and they have significant prospective implications

Plaintiffs' assertion that the votes in this case were simple "order[s] to dispose of, to do something to the city's property," Tr. 260:10–12, ignores reality. The Councilors' decisions to remove the statues are discretionary policymaking choices with broad implications.

a. The councilors' votes placed at issue in this litigation are not remotely comparable to decisions about the layout of park benches. *See* Tr. 267:12–13. To the contrary, as this Court recognized, the statues present "a global concern. Everybody's going to have their opinion," Tr. 168:20–21, and the issues are controversial. Just as "a tank in the neighborhood" in "the former Soviet Bloc" sends messages of oppression, Tr. 162:25–163:9, the statues send certain messages to residents across the region. The complex assessment of how to respond to or alter those messages is a discretionary policymaking choice with broad implications.

The motion to remove Robert E. Lee Statue and Re-name Lee Park, presented to the Council on February 6, 2017, began by setting out the recommendations of the Blue Ribbon Commission on Race, Memorials and Public Spaces (BRC). The BRC set out "a broad and inclusive vision of Charlottesville's history." Mot. 1. And on February 6, 2017, as part of addressing the statues, the Council voted "[t]o transform the City of Charlottesville's core public spaces in keeping with the recommendations of the [BRC] such that a more complete history of race is told and the City's commitment to truth, freedom and equity is affirmed." Minutes 11. That

same concern with "the visual message that Charlottesville supports the cause for which these generals fought" is reflected in the language of the September 5, 2017, resolution—which in any event was contingent on the outcome of this litigation. Sept. 5, 2017, Minutes 16–17. A September 5 resolution, which followed the August 21, 2017 riots in Charlottesville further noted that the statues have become "flashpoints for white supremacist violence," and that their "continued presence ... constitute[s] a clear and continuing threat to public safety." *Id.* The Councilors' votes, which responded to these problems with discretionary policy solutions, were clearly an exercise of the Councilors' police powers—not at all like the supervision of flood repairs at issue in *Nogiec.*

The motions and resolutions referenced in the Plaintiffs' Complaint, as amended, do not embody actions that can be fairly described as "administrative" or "ministerial" (i.e., routine maintenance of a street, or discipline of a specific employee); they are inherently discretionary, in that they deliver an opinion and public position of city council on a matter of public concern, and take action in furtherance of that opinion, *see, e.g., Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, --, 129 S. Ct. 1125, 1131-1133 (2009)

> A government entity has a right to speak for itself....it is entitled to say what it wishes...and to select the views that it wants to express....**It is the very business of government to favor and disfavor points of view**....Governments have long used monuments to speak to the public...rulers have erected statues of themselves to remind their subjects of their authority and power....Government decision makers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history and local culture.

Delivering an opinion on a matter of public concern, and taking action to decide what statues they do, or do not, currently view as being appropriate for the two parks at issue in this case, is in fact one form of legislative action. *See, e.g., Fields v. Office of Johnson,* 459 F.3d 1, 10-11 (D.C. Cir. 2006), *cited in Bd. Of Sup'rs v. Davenport & Co.,* 285 Va. 580, 742 S.E.2d 59 (2013)

(legislative actions include, but are not limited to: delivering an opinion, a speech, haranguing in debate, proposing legislation, etc.).

b. <u>The votes were discretionary</u>. The Council did not have to take any action on the Lee or Jackson statues. In that respect, the situation in no way resembled the necessity of repairing a county building from storm damage, as in *Nogiec*. Instead, as the Minutes reflect, the votes addressed decisions at the Councilors' discretion.

At the Council's March 21, 2016, meeting, Councilor Bellamy asked to begin "a discussion of the confederate statues in Charlottesville" beginning on April 18, 2016. Mar. 21, 2016, Minutes 11. That request was an invitation to begin debate, clearly a legislative action. *Davenport*, 285 Va. at 589. Mr. Signer then read a statement supporting the creation of the BRC to work on "engagement with the community," "[e]valuating and advising on the full range of options, including moving the memorials to a museum," "[f]ully explaining the policy behind the effort," and "[a]ssessing the costs involved." Mar. 21, 2016, Minutes 11. And the authorization to conduct that work—unlike the supervision of museum repairs—was a quintessential part of the legislative processes of "authorizing investigations" and "making, publishing, presenting, and using legislative reports." *Davenport*, 285 Va. at 589. But none of those decisions was required. Indeed, consistent with everything that led up to the votes, the February 6, 2017, motion on which the Council voted explicitly stated that "Council could choose not to vote on the resolution." Mot. 2.

c. <u>The votes reflected budgetary priorities</u>. The Councilors had to choose how to spend limited City resources based on diverse input from area residents. At the April 18, 2016, Council meeting, for instance, members of the public suggested a variety of approaches for dealing with the City's Confederate statues—everything from putting up "a monument reflecting African American history" to removing the statues because they do not reflect "our values today" to

spending the money instead on "public housing or homelessness." Apr. 18, 2016, Minutes 7–9.

On December 19, 2016, the Council received the BRC Report with the goal of "us[ing] it to inform deeper deliberation." Dec. 19, 2016, Minutes 12. The Council "flagged $500,000 from the capital budget towards th[e] initiative" begun with the work of the BRC. *Id.* at 3–4, 12. On February 6, 2017, the first challenged vote occurred. The motion showed a "[b]udgetary [i]mpact" of $500,000, Mot. 2. And the removal vote was part of a larger plan approved to redesign the City's public spaces. *See* Feb. 6, 2017, Minutes 11–13. For those overall efforts, the Council established "a total project budget not to exceed $1,000,000.00," *id.* at 12, knowing that it "would have to come back and vote on the appropriation of funds for this project," *id.* at 13.

4. The votes were not administrative just because they were targeted

Plaintiffs argue that the challenged votes did "not set[] a general public policy," because they did "not say[] there shall be no Confederate monuments in the City of Charlottesville." Rather, in Plaintiffs' view, the votes "sa[id], here, this is our property, and we're going to move it." Tr. 260:13–17. That characterization is wrong as a matter of law and fact.

The cases discussed above demonstrate that targeted action is legislative if it makes policy or has budgetary or prospective implications. *Supra* Part A.2. Like the decision in *Suhre* not to remove the Ten Commandments from the courtroom, the Councilors' votes here were not an exercise of mere "housekeeping duties." Instead, the votes enacted City policy to address the City's vision of messaging inclusion and "the full story of race." Feb. 6, 2017, Minutes 11. The votes were part and parcel of a long "discussion of the confederate statues in Charlottesville," Mar. 21, 2016, Minutes 11, and they were the result of balancing a number of competing proposals. *See generally* BRC Report 7-19, http://www.charlottesville.org/home/showdocument?id=49037. Such "haranguing in debate" and "proposing legislation" are quintessentially legislative, *Davenport*, 285 Va. at 589, and the result—a decision to cover and remove the statues—would have far-

reaching, prospective implications, *see Bogan*, 523 U.S. at 55–56, and *Summum*, 129 S. Ct. 1125, 1131-1133. In fact, **Plaintiffs and Defendants agree the Councilors' votes affect the entire Charlottesville community. And that is precisely the point, because "[a]cts affecting the entire community tend to be substantively legislative."** *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 172 (3d Cir. 2006).

Moreover, Plaintiffs' argument disregards the fundamental principle that legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955). Here, the City Council identified a problem of great public interest: the presence in the City of two statues of civil war generals and the controversial messages they convey. In voting to remove the Lee statue, or to cover the Lee and Jackson statues with tarps, the Council may have taken incremental steps, but those steps were unmistakably legislative, for legislation does not cease to be legislative simply because it does not address all perceived problems "at the same time or in the same way." *Semler v. Or. State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935). To the contrary, "a legislature may implement [its] program step by step, ... adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (citation and quotation marks omitted).

5. The tarp vote was not materially different in nature from the removal votes

Perhaps recognizing these difficulties, Plaintiffs focused their argument on the August 21, 2017, vote to cover the statues with tarps. *See* Tr. 263:25–264:6, 264:13–16.† But as the Councilors

† Defendants note their continuing objection to Plaintiffs' continuing efforts to bring into the pending litigation matters, such as the tarps, which are not placed at issue by the operative Complaint as of the date of this filing, (i.e., the Amended Complaint); however, for the sake of time, and in light of the Court's verbal indication that

explained in their reconsideration motion, the vote to put up tarps was part of a "move to explore policies that can limit demonstrations" in light of the violence that had just occurred on August 12 [2017], and to begin "a longer ... community engagement process about what appropriate memorials are not only to Ms. Heyer, but to all the victims of white supremacy in Charlottesville over the last several centuries." Aug. 21, 2017, Minutes 3. The vote plainly bore the hallmarks of both policymaking and the legislative police power.

Plaintiffs nonetheless contended at argument that when this Court ordered the tarps removed, the city manager "didn't have to go back to the city council" for permission to comply with the Court's order. Tr. 264:13–16. That is true, and it supports *the Councilors'* argument: the **Court's order enjoined the City from *implementing* the votes.** For separation-of-powers reasons, the order did not enjoin the actual votes themselves. Directing the City to undo an executive action (implementation) does not rob the Councilors of their immunity for the *legislative* act of voting. In claiming otherwise, Plaintiffs ignore a central teaching of *Kilbourn*, 103 U.S. 168, which "allowed a judgment against the Sergeant-at-Arms" for *executing* an unlawful congressional arrest order, but "found that one could not be entered against the defendant members of the House," who were exercising a *legislative* function. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

6. Legislative immunity is a legal question the Court should decide now

Immunity is a purely legal question. *See, e.g.*, *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 476 (9th Cir. 1998) ("question of law reviewed de novo"); *Carver v. Foerster*, 102 F.3d 96, 99 (3d Cir. 1996) ("a purely legal question"); *Hansen v. Bennett*, 948 F.2d 397, 400 (7th Cir. 1991) ("a question of law"). *Cf. City of Chesapeake v. Cunningham*, 604 S.E.2d 420 (Va.

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it will likely grant Plaintiffs' request to add additional claims into a Second Amended Complaint, reference to the tarps is addressed in this Brief without waiving Defendants' objections.

2004), *citing Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002) (the existence of [sovereign] immunity is a question of law). At argument, Plaintiffs suggested that discovery is necessary to determine whether any non-legislative acts occurred. *See* Tr. 221:15–24. But Plaintiffs' Amended Complaint references no actions other than votes by the individual Councilors, and Plaintiffs' proposed Second Amended Complaint pleads only three acts by the individual Councilors—all *votes* respecting the statues. This Court has all the information it needs to determine whether those votes were legislative.

C. The Councilors' common law legislative immunity has not been abrogated

At argument, Plaintiffs contended that Virginia Code §§ 15.2-1405, 15.2-1812, and 15.2-1812.1 abrogate the Councilors' common law absolute legislative immunity. As the Councilors explained in their motion and at argument, that argument fails because those statutes contain nothing near the express language required to abrogate the common law.

1. Abrogation of the common law requires express language

Statutes cannot abrogate the common law absent "express language" or "necessary implication that the purpose of the statute was to change the common law," and even when statutes *do* abrogate the common law, abrogation is "strictly construed" as limited to the statute's "express terms." *Jenkins v. Mehra*, 281 Va. 37, 44–45 (2011). The case law is replete with examples.

In *University of Virginia Health Services Foundation v. Morris ex rel. Morris*, 275 Va. 319 (2008), for example, the statute explicitly stated that "[n]o hospital, as defined in this section, shall be immune from liability" in certain circumstances. *Id.* at 332. The Virginia Supreme Court explained that the statute was "in derogation of the common law of charitable immunity and must be strictly construed and not … enlarged in [its] operation by construction beyond [its] express terms." *Id.* (citation and quotation marks omitted). Under that approach, the Court held that the Health Services Foundation, though a healthcare provider, was not a "hospital" within the meaning

of the statute. *Id.* at 324–25, 332–33.

Similarly, in *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 435, 455 (2005), the Court held that the Commonwealth was protected by sovereign immunity from a Tribe's claims under a treaty that they had rights to fish, hunt, and gather. The Court explained that "[t]he General Assembly has not waived the Commonwealth's immunity from suits of this nature and, in the absence of such an express waiver"—because one "will not be implied from general statutory language but must be explicitly and expressly stated in the statute"—"the Commonwealth cannot be held liable." *Id.* at 455. This holding contrasted with the Court's ruling that the Commonwealth *had* waived its sovereign immunity with respect to the Tribe's challenge to the issuance of a water permit, because the relevant provisions of Virginia law "specifically address appeals of final decisions of the Board" with respect to permits. *Id.* at 440–41.

And in *Brown ex rel. Brown v. Cuffee*, 49 Va. Cir. 31, 35–37 (1999), the court addressed the question whether the immunity of a school board's bus driver was abrogated by statute. The statute provided that in case of a vehicle accident, "the locality or school board shall be subject to action up to, but not beyond, the limits of valid and collectible insurance ... and the defense of governmental immunity shall not be a bar to action or recovery." *Id.* at 35. The court observed that the statute "clearly abrogates the School Board's immunity in explicit terms." But even though the statute said that "[t]he locality or school board may be sued alone or jointly with the driver," *id.* at 35, the court concluded, under the express language and strict construction rules, that the statute did not abrogate the driver's common law immunity, *id.* at 36 –37. "Not only does the language of the statute abrogate immunity to the extent of insurance for the locality or school board only and not for its drivers, but that difference[] in treatment by the General Assembly[] is also bolstered by the general philosophical distinction between the type of immunity afforded the state and that

afforded its employees." *Id.* at 36. The Virginia Supreme Court subsequently reached the same result in *Linhart v. Lawson*, 261 Va. 30, 35–36 (2001), where the Court went so far as to say that while "[a]n affirmative statement of immunity"—as used in the Virginia Tort Claims Act—"reinforces a legislative intent not to abrogate such immunity," it is not necessary given the clear statement rule.

The examples could go on. All make clear that absent express language targeting the immunity or liability to suit of the particular entity or individual in question, and *in the particular circumstances at issue*, common law immunity is not abrogated. *See also, e.g., Doud v. Commonwealth*, 282 Va. 317, 321–22 (2011) (Virginia Tort Claims Act ("VTCA") did not waive immunity of sheriff or his deputies or jailors in waiving immunity for "any employee" of the Commonwealth, because sheriffs are "constitutional officers" and the VCTA must be construed narrowly because it is in derogation of the common law); *Rector & Visitors of Univ. of Va. v. Carter*, 267 Va. 242, 244–45 (2004) (VTCA's waiver of sovereign immunity as to "the Commonwealth" was in derogation of common law of sovereign immunity and must be strictly construed not to waive sovereign immunity of agencies of the Commonwealth).

2. The statutes here at issue, Virginia Code §§ 15.2-1405, 15.2-1812, and 15.2-1812.1, do not contain the requisite clear statements

Application of the foregoing principles is straightforward here. None of the statutes in question says anything whatsoever about immunity. None says anything about legislators or legislative capacity. Thus, plaintiffs are wrong that the General Assembly has "been very specific" about common law legislative immunity. Tr. 269:2–3. The question is not whether the legislature has the *power* to abrogate common law legislative immunity (it does), but whether it has done so (it has not).

Plaintiffs repeatedly suggested that, rather than employing the doctrinal clear statement

rule, the court should consider the fact that the statutes in question "specifically ... referred to members of governing local bodies." Tr. 228:18–195; *see* Tr. 268:10–16. And it is true, as a general matter, that "[w]hen one statute addresses a subject in a general manner and another addresses a part of the same subject in a more specific manner, the two statutes should be harmonized, if possible, and when they conflict, the more specific statute prevails." *Alliance to Save the Mattaponi*, 270 Va. at 439–40.

But in the context of abrogation of the common law, statutes cannot extend beyond their express terms, no matter how specific they are. And none of the statutes here in question mentions *legislative* action, which is *more specific* than all the actions the City Council or any other local governing bodies are empowered to take—which also, as Plaintiffs repeatedly pointed out, include supervisory or administrative authorities. As Plaintiffs repeatedly observed, the City Council is empowered to take a wide variety of actions, many of them supervisory and administrative. Section 15.2-1405, by its own terms, governs "the immunity granted by this section"—not all immunities. That language indicates that the statute confers an additional, positive immunity; it does not displace any extant common law immunity, including common law legislative immunity. And "when an enactment does not encompass the entire subject covered by the common law"—and § 15.2-1405 does not—then "it abrogates the common law rule only to the extent that its terms are directly and irreconcilably opposed to the rule." *Jenkins*, 281 Va. at 45 (brackets and citation omitted).

Sections 15.2-1812 and 15.2-1812.1 are no more explicit. The reference in § 15.2-1812 to "authorities of the locality," without more, does not reach *legislative* conduct when local authorities also wear supervisory and administrative hats. Moreover, it is far from clear that "authorities" must refer to the Councilors in their individual legislative capacities, rather than the

City Council as a whole. *See* Charlottesville Charter § 5(a) ("The municipal authorities of the said city shall consist of *a council* of five members, ... a clerk of the corporation court, a Commonwealth's attorney, a treasurer, a sheriff and a commissioner of revenue ... ." (emphasis added)). That lack of clarity reinforces the statutes' failure to meet the demanding standard for abrogation.

Examples can be found of enactments that clearly abrogate common law legislative immunity. Florida law provides, for instance, that if "[a]ny person ... *enact[s]* or caus[es] to be enforced any local ordinance or administrative rule or regulation" in the field of firearms, he faces "a civil fine of up to $5,000" if he is a responsible "elected or appointed local government official." Fla. Stat. § 790.33(3)(a), (c) (emphasis added). Nothing remotely comparable exists in this case.

Finally, recognizing the Councilors' immunity would not gut Virginia Code § 15.2-1405, § 15.2-1812, or § 15.2-1812.1. Those statutes cover local officials acting in any capacity *other* than the legislative capacities, if any, in which they may be empowered to act. And any action to *implement* legislation will, by definition, be executive or administrative, and therefore subject to the statutes and not protected by common law legislative immunity.

D. City Council respects the judicial and legal process

On the question of the Court's contempt authority, two points are worth underscoring. *First*, the Councilors' actions demonstrate their desire to resolve these matters consistent with the rulings of the court system. *See* Sept. 5, 2017, Minutes 15 (statutes to be moved "pending successful resolution of the current court case"); *id.* at 15–17 (same, repeatedly). *Second*, the principles inherent in the legislative immunity doctrine mean that the mechanism for protecting a court's prerogatives is to enjoin and sanction (if at all) the *implementation or execution* of a legislative decision, not the legislators themselves. *See also Spallone v. United States*, 493 U.S. 265, 280 (1990) (given "'extraordinary' nature of the imposition of sanctions against the individual

councilmembers," district court "should have proceeded with such contempt sanctions first against the city alone in order to secure compliance with the remedial order," before even *considering* "the question of imposing contempt sanctions against" the councilmembers); *Gravel v. United States*, 408 U.S. 606, 621 (1972) (legislators immune for legislative acts, but would not be immune "if they ***executed*** an invalid resolution"). The ultimate issue to be decided in this case is whether, or not, any of the actions taken by the City Council, to date, are invalid.

CONCLUSION

Defendants respectfully request that the Councilors' August 27, 2018, Motion for Reconsideration of Denial of Legislative Immunity be granted and that all five Councilor Defendants be dismissed from the case.

Dated: November 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2018, , I served a true copy of the foregoing document by electronic mail to counsel of record, and by U.S. Mail, first-class, postage pre-paid, as follows:

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