VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

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

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

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INTRODUCTION

Defendants A. Michael Signer, Wesley J. Bellamy, Kathleen M. Galvin, and Kristin L. Szakos respectfully ask this Court to reconsider its ruling of June 13, 2018, that common law legislative immunity does not apply to their challenged actions. Case law dating back centuries has provided absolute immunity to legislators—from members of Congress to local city councils—so long as their conduct is legislative in nature. Holding the councilors immune here would simply be to faithfully apply this time-honored rule. And applying the rule would have little practical effect on the outcome of this litigation, because the case would still proceed against the City.

Allowing the suit to proceed against the councilors, by contrast, would upend a doctrine as old as the Republic, designed to protect and promote representative government. And it would do so in a case at the core of the immunity's traditional operation: Legislators' voting their conscience, even though a court might subsequently find that legislation invalid or unenforceable. The ramifications of denying legislative immunity in such circumstances are difficult to overstate. Members of Congress or of state or local legislatures might be sued personally for allegedly unconstitutional or improper legislation—even for simply voting their conscience in an attempt to do what is best for their constituents. The ensuing litigation, not to mention the chill on legislators' willingness to legislate zealously on behalf of their constituents, would grind government to a halt.

Moreover, recognizing the councilors' absolute common law immunity here would not disregard or render superfluous the statutory immunity under Virginia Code § 15.2-1405. As this Court noted (Ruling 4), the common law and statutory immunities present two separate, but easily reconciled, inquiries. The statute simply provides that certain public officials are not immune for certain administrative or executive actions that violate the law. It does nothing to abrogate common law immunity for functions that are clearly legislative. The latter analysis governs here.

Thus, the councilors respectfully ask the Court to reconsider its June 13 ruling and hold them absolutely immune for their legislative acts, rather than subjecting them to a suit that would chill their vital participation in representative government and run contrary to longstanding common law immunity doctrine. Resolution of this important question should not wait until final judgment and appeal, because the purpose of immunity is protection from suit altogether.

ARGUMENT

I. Common law legislative immunity shields legislative acts

The Court correctly determined that the councilors' votes to remove the Lee statue were "legislative in nature and function." Ruling 5. But it erred in holding that those legislative acts are not protected because they allegedly conflict with substantive law. The common law has long protected legislators against claims that their legislative acts exceeded their authority. In following this rule, Virginia law protects and promotes interests fundamental to representative government.

A. Common law legislative immunity protects the exercise of legislative functions

Several strands of immunity, protecting various kinds of officials in a number of circumstances, exist under the common law. This case implicates only one of those doctrines: the absolute immunity that covers legislative functions at all levels of government: "[L]ocal legislators are protected under common law legislative immunity to the same extent as legislators protected under Constitutional legislative immunity provisions because '[t]he rationales for according absolute legislative immunity to federal, state, and regional legislators apply [to local legislators] with equal force.'" *Bd. of Supervisors of Fluvanna Cty.* v. *Davenport & Co. LLC*, 285 Va. 580, 588 (2013) (quoting *Bogan* v. *Scott-Harris*, 523 U.S. 44, 52 (1998)).

The Virginia Supreme Court has distinguished between that *absolute* common law immunity for *legislators*, on the one hand, and *qualified* immunity for *lower-level government employees*, on the other. In *Messina* v. *Burden*, the Court explained: "Governors, judges, members

of state *and local legislative bodies*, and other high level governmental officials have generally been accorded absolute immunity." 228 Va. 301, 309 (1984) (emphasis added; citing W. Prosser, Handbook of the Law of Torts § 132 at 987–88 (4th ed. 1971)); *see Cunningham* v. *Rossman*, 80 Va. Cir. 543, 548–50 (2010). Where absolute immunity for high-level officials applies, "no other factors need to be considered." 80 Va. Cir. at 549 (citing *Messina*, 228 Va. at 309).

"[O]ther government employees and officials," by contrast, "have *qualified*," as opposed to absolute, immunity that "depend[s] on the function they perform and the manner of performance," and the court must evaluate several factors to make that qualified immunity determination. *Id.* (emphasis added); *see, e.g.*, *McBride* v. *Bennett*, 288 Va. 450, 454–55 (2014) ("Where a municipal employee is charged with simple negligence, this Court has established a four factor test for determining whether sovereign immunity applies."). Those lower-level employees lose their immunity when, among other things, "they act beyond the scope of their employment, exceeding their authority and discretion." *Cunningham*, 80 Va. Cir. at 549. But the councilors are aware of no case in which a Virginia court has applied such a rule to legislators acting in their legislative capacity. In *Cunningham*, the allegation was that a police officer negligently injured the plaintiff in a motor vehicle accident. 80 Va. at 549. And in *Messina*, the plaintiffs claimed that the defendant officials' supervisory negligence resulted in plaintiffs' trip-and-fall injuries, 228 Va. at 305–06. Those scenarios do not resemble councilors' legislative actions. In short, the applicable rule in this case is common-law absolute legislative immunity, not another form of qualified immunity that applies to different types of public employees.

B. Common law legislative immunity extends to acts that are unconstitutional, unlawful, or otherwise in excess of authority

As this Court recognized (*see* Ruling 5), "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting

Tenney v. *Brandhove*, 341 U.S. 367, 376 (1951)); *accord Davenport*, 285 Va. at 589. But the Supreme Court's shorthand does not mean that legislative immunity applies only when the challenged legislative actions were lawful or within the legislators' substantive authority. Rather, the Court has made abundantly clear that legislative immunity is *absolute*. It shields legislators, regardless of whether their actions were lawful, so long as their actions were legislative in nature.

1. The common law—just like the Speech or Debate Clause in the U.S. Constitution—has long provided immunity for actions expressly recognized to be unlawful. As the Virginia high court explained in *Davenport*, common law legislative immunity extends to local legislators "to the same extent as legislators protected under Constitutional legislative immunity provisions." 285 Va. at 588; *see id.* at 587–88 (discussing U.S. Const., art. I, § 6 and Va. Const., art. IV, § 9). And courts have long held that the federal Speech or Debate Clause and the common law protect legislators even where their actions are alleged or later found to be unlawful or without authority.

The seminal case is *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880). There, a congressional committee ordered a witness imprisoned for refusing to testify. *Id.* at 196. The Court first expressly held that "the committee ... had no lawful authority to require [the witness] to testify," such that "the warrant ... under which [the witness] was imprisoned" was "void for want of jurisdiction" and "his imprisonment was without any lawful authority." *Id.* Nonetheless, the Court held that the legislators were immune from suit, *id.* at 202–04, because legislative immunity extends to "everything said or done ... as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules," *id.* at 203 (quoting *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808)).

The Supreme Court has never wavered from this settled rule that legislators and their aides "are immune from liability for their actions within the 'legislative sphere,' even though their

conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 510 (1975) (citations and internal quotation marks omitted). In *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951), for instance, the plaintiff alleged that he was summoned to appear before a California Senate committee under circumstances that violated his constitutional rights, and the federal appeals court held that he had stated a claim against the committee members. *Id.* at 371. The Supreme Court reversed. *Id.* at 379. Even though the committee's investigative actions may have been "unconstitutional and void," *see id.* at 380 (Black, J., concurring), the committee members were entitled to absolute immunity, because investigative actions "are an established part of representative government," *id.* at 377 (majority opinion)—that is, legislative conduct. "To find that a committee's investigation has exceeded the bounds of legislative power," the Court instructed, "it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive," *id.* at 378—*not* that the legislators simply acted unlawfully or outside their authority. Concurring, Justice Black explained that "the validity of legislative action" is not "coextensive with the personal immunity of the legislators. That is to say, the holding that the chairman and the other members of his Committee cannot be sued in this case is not a holding that their alleged persecution of [the plaintiff] is legal conduct." *Id.* at 379 (Black, J., concurring).

In short, the Supreme Court has "rejected time and again" the argument that "defendants' conduct cannot be 'legislative' because it [is] *illegal*." *Rangel* v. *Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015). "Such is the nature of absolute immunity, which is—in a word—absolute." *Rangel*, 785 F.3d at 24 (citations omitted); *see Allen* v. *Cooper*, 895 F.3d 337, 345, 357–58 (4th Cir. 2018).

2. The test for legislative immunity is whether the challenged act is legislative in nature, not whether it is lawful or within the scope of the legislature's authority. Recent cases

have reinforced the rule that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" or its alleged invalidity. *Bogan*, 523 U.S. at 54. "Legislative immunity is a shield that protects despicable motives as much as it protects pure ones." *McCray* v. *Md. Dep't of Transp.*, 741 F.3d 480, 485 (4th Cir. 2014).

The leading case—the Supreme Court's decision in *Bogan*—is dispositive. There, the city council and mayor adopted a budget that eliminated a city administrator's position. 523 U.S. at 47. The city administrator sued, alleging that the new budget was unconstitutionally "motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights." *Id.* The appeals court affirmed a jury finding in her favor. *Id.* at 47–48. Reversing, the Supreme Court explained that, under the common law, "local legislators [are] absolutely immune for their legislative, as distinct from ministerial, duties." *Id.* at 51. And "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it"—even if that motive would otherwise render the act unconstitutional (and thus outside the officials' authority). *Id.* at 54. The Court observed that the defendants' "acts of voting for an ordinance were, in form, quintessentially legislative," as were the "introduction of a budget and signing into law an ordinance." *Id.* at 55. To the extent the "*substance*" of the actions mattered (an issue the Court did not decide), the defendants' actions "bore all the hallmarks of traditional legislation" because "[t]he ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents." *Id.* at 55–56.

Bogan's instruction that municipal legislators possess the same common law immunity as "legislators at other levels of government," 523 U.S. at 49, did not plow new ground. As the Ohio Supreme Court explained in 1921, "[t]he exercise of discretion by a village councilman in voting for a resolution or an ordinance void by reason of a statutory limitation upon the power of the

council is no different from the exercise of discretion by a member of the General Assembly in voting for a statute void by reason of a constitutional limitation upon the power of the General Assembly." *Incorporated Village of Hicksville* v. *Blakeslee*, 134 N.E. 445, 448–49 (Ohio 1921). "[Y]et no one would claim that a legislator would be liable either in his official or in his individual capacity for the exercise of his judgment and discretion in voting for such void statute." *Id.*[1]

3. The inquiry is whether actions are executive or administrative, not whether they are unlawful. Not every action a legislator takes is legislative in nature; some conduct may instead be executive or judicial. *See, e.g.*, *Davenport*, 285 Va. at 590 (participating in judicial proceedings is not a legislative function). For instance, while "enacting a budget is a legislative act," *McCray*, 741 F.3d at 485 (quoting *Kensington Volunteer Fire Dep't, Inc.* v. *Montgomery County*, 684 F.3d 462, 471 (4th Cir. 2012)), administering a municipal contract "would generally seem to be an executive function," *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984). Other actions might better be characterized as administrative: A legislator might fire an employee rather than eliminate her position by legislation. *See Kensington Volunteer Fire Dep't*, 684 F.3d at 468 (contrasting legislative elimination of positions with terminations by executive action); *Harhay* v. *Town of Ellington Bd. of Educ.*, 323 F.3d 206, 210–11 (2d Cir. 2003) ("Discretionary personnel decisions, even if undertaken by public officials who otherwise are entitled to immunity, do not

[1] The Dillon Rule plays no role here. Even where, under the Dillon Rule, local legislators "d[o] not have the power" in question, they "still enjoy legislative immunity ... for their legislative actions, sound or unsound," and "may not be sued as individuals for money damages or declaratory or injunctive relief." *Smith* v. *Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 218–19 (6th Cir. 2011). "Legislative immunity exists so that individuals can feel more comfortable volunteering to perform public-service functions," *id.* at 219, and, as the Supreme Court recognized in *Bogan*, may apply with special force to local government service, *see* 523 U.S. at 52; *infra* p. 12. Indeed, though county boards of supervisors are subject to the Dillon Rule principle, *Advanced Towing Co., LLC* v. *Fairfax Cty. Bd. of Supervisors*, 280 Va. 187, 193 (2010), the Virginia high court unambiguously held in *Davenport* that their members are protected by legislative immunity, *supra* pp. 3–4.

give rise to immunity because such decisionmaking is no different in substance from that which is enjoyed by other actors."). Similarly, while establishing zoning policies or ordinances is legislative, reviewing a specific permit is usually administrative. *E.g.*, *Scott* v. *Greenville County*, 716 F.2d 1409, 1422–23 (4th Cir. 1983); *Bryan* v. *City of Madison*, 213 F.3d 267, 273–74 (5th Cir. 2000); *Kaahumanu* v. *County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003). Such characterization issues occur at the municipal level because councilors might function as both legislators and executives. *E.g.*, *Youngblood* v. *DeWeese*, 352 F.3d 836, 841 n.4 (3d Cir. 2003), *as amended* (Feb. 11, 2004); *cf. Isle of Wight County* v. *Nogiec*, 281 Va. 140, 154 (2011) (legislative privilege applies "when the legislative body is acting in its legislative capacity—i.e., when it is creating legislation—rather than in its supervisory or administrative capacity").

To determine whether particular actions are legislative, courts ask whether they "bear the outward marks of public decisionmaking, including the observance of formal legislative procedures," and whether they "involve the adoption of prospective, legislative-type rules, rules that establish a general policy affecting the larger population." *Kensington Volunteer Fire Dep't*, 684 F.3d at 470–71 (quoting *EEOC* v. *Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 184 (4th Cir. 2011)). Municipal actions that are administrative include, for instance, "legislators' employment and personnel decisions ... because they most often affect specific individuals rather than formulate broad public policy." *Id.* But even a targeted or narrow decision may be legislative if made to further the city's policy. *E.g.*, *Arabbo* v. *City of Burton*, 689 F. App'x 418, 421 (6th Cir. 2017) ("The 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.").

If a councilor's actions are legislative in nature, the councilor is entitled to absolute immunity, and the inquiry is at an end. That remains true even if the acts themselves may have

been unlawful. *Supra* pp. 3–7; *e.g.*, *R.S.W.W., Inc.* v. *City of Keego Harbor*, 397 F.3d 427, 431, 438 (6th Cir. 2005) (affirming "dismissal of the individual city council members as parties" because they were entitled to immunity against claim that "[t]he passage of the Sign Ordinance," "a purely legislative act," violated the First Amendment); *Shoultes* v. *Laidlaw*, 886 F.2d 114, 117–18 (6th Cir. 1989) (mayor and city council immune when "acting in their legislative capacities in passing" a zoning ordinance, even though "the ordinance subsequently was held invalid").

4. Absolute legislative immunity is not a warrant to act unlawfully. Notably, the doctrine of legislative immunity does not give city councilors a blank check. If a councilor assaults his neighbor, for instance, that act is clearly not legislative, so no immunity attaches. Nor could councilors claim immunity, as this Court recognized, "if they decided to redo the computer system of the City so that it would secretly set aside some money for somebody." Apr. 11, 2018 Tr. 35:25–36:2. The secret diversion of funds there would bear none of the hallmarks of legislative activity; it would instead be embezzlement by people who happened to be legislators, no different than if a specialist computer programmer rewrote code to siphon money to himself. *See Bruce* v. *Riddle*, 631 F.2d 272, 279–80 (4th Cir. 1980) ("Illegal acts such as bribery *are obviously not in aid of legislative activity* and legislators can claim no immunity for illegal acts." (emphasis added)).

C. Virginia follows the common law rule for legislative immunity

Virginia adheres to these settled principles of common-law legislative immunity. In explaining as much, the Virginia Supreme Court in *Davenport* cited *Bogan* and other decisions of the U.S. Supreme Court, the Fourth Circuit, and other state courts. 285 Va. at 588–89. Consistent with those authorities, the Virginia high court defined legislative actions by their type and form, not by their substantive validity: "Legislative actions include, but are not limited to, delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and

issuing subpoenas; and holding hearings and introducing material at Committee hearings." *Davenport*, 285 Va. at 589 (citation omitted); *see supra* Part I.B.

Davenport confirmed this long tradition of common law legislative immunity. *See also Edwards* v. *Vesilind*, 292 Va. 510, 523 (2016) (legislative immunity "appear[s] historically in [English] statutes dating as far back as 1512"); *Blankenship* v. *City of Richmond*, 188 Va. 97, 103 (1948) ("[A] member of the legislative branch [performing] a purely legislative duty ... is answerable to the electors from whom he derived his official position and not to the courts which have no power to inquire into the motives which prompted his action on a purely legislative matter."); *Covel* v. *Town of Vienna*, 78 Va. Cir. 190, 203 (2009) ("these long-recognized common law and constitutional privileges" shield town councilors), *aff'd*, 280 Va. 151 (2010). Years before *Davenport*, the *Messina* Court observed that "[t]here is very little debate" regarding the protection for "members of ... local legislative bodies." 228 Va. at 309 (citing Prosser, *supra*, § 132 at 987–88). Prosser, in turn, explained that "[p]ublic servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended ... *to those who act improperly, or exceed the authority given.*" § 132 at 987 (emphasis added). Thus, Prosser continued, "judges always have been accorded complete immunity for their judicial acts within the jurisdiction of courts of justice, even when their conduct is corrupt, or malicious and intended to do injury." *Id.* (footnotes omitted); *see Stump* v. *Sparkman*, 435 U.S. 349, 356–57 (1978). That "same absolute protection extends to members of the state and national legislatures, as well as inferior legislative bodies, such as municipal councils." Prosser, *supra*, § 132 at 988 (footnotes omitted).[2]

[2] Among the cases Prosser cited, *see* § 132 at 988 n.80, is *Jones* v. *Loving*, 55 Miss. 109, 111 (1877), where the Mississippi Supreme Court explained that municipal legislators "hold and exercise [their powers] for the public good, and are clothed with all the immunities of government,

D. Absolute legislative immunity is fundamental to representative government

1. Time and again, courts have recognized the importance of protecting legislators from suit, even when they may have acted unlawfully. As the Virginia Supreme Court explained in *Davenport*, legislative immunity, by shielding lawmakers from the burden of defending themselves in litigation over their legislative actions, protects the independence of the legislature and the integrity of the legislative process. 285 Va. at 588–89; *see Edwards*, 292 Va. at 525–27.

In articulating the doctrine, courts have long been aware that "the broad protection granted by [legislative immunity] creates a potential for abuse." *Eastland*, 421 U.S. at 510. Nonetheless, absolute immunity was the judgment of the common law, *see Kilbourn*, 103 U.S. at 202, and "the conscious choice of the Framers buttressed and justified by history," *Eastland*, 421 U.S. at 510 (internal quotation marks omitted). Legislative immunity protects legislators "not for their private indulgence but for the public good," *Tenney*, 341 U.S. at 377, "to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal," *Coffin*, 4 Mass. at 27.

"Legislative immunity's practical import is difficult to overstate. As members of the most representative branch, legislators bear significant responsibility for many of our toughest decisions," and legislative immunity gives them "the breathing room necessary to make these choices in the public's interest." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. Legislative

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and are exempt from all liability for their mistaken use." *Jones*, 55 Miss. at 111. A court thus cannot "award[] damages against the individuals voting for the ordinance," even if they "exceed[] the measure of their authority in passing th[at] ordinance." *Id.* at 111–12; *see also Bogan*, 523 U.S. at 50 (discussing *Jones*). Following *Jones*, the Ohio Supreme Court explained that the principle "[t]hat legislative officers are not liable personally for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared." *Hicksville*, 134 N.E. at 448. That is so, the court noted, even where a councilor "votes for an unauthorized and therefore void and illegal resolution or ordinance." *Id.*; *see also supra* pp. 6–7. Other jurisdictions are in accord. *See, e.g.*, *Klauder* v. *Cox*, 145 A. 290, 292 (Pa. 1929); *Bricker* v. *Sims*, 259 S.W.2d 661, 664 (Tenn. 1953).

immunity "shields [legislators] from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *Id.* And legislative immunity is particularly important in the municipal context, where "the threat of liability may significantly deter service" because "prestige and pecuniary rewards may pale in comparison to the threat of civil liability." *Bogan*, 523 U.S. at 52; *see also, e.g.*, *Sable* v. *Myers*, 563 F.3d 1120, 1127 (10th Cir. 2009). Indeed, "[t]he importance of the ability of such legislators to remain focused on the ongoing business of their constituents is particularly important here in Virginia where many legislators work only on a part-time basis and are required to secure other employment to supplement any income they earn as legislators." *Covel*, 78 Va. Cir. at 202. In sum, legislative immunity helps to foster, especially at the local level, the debate and decisionmaking necessary for "representative democracy." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181.

None of this means that unlawful government action is unredressable. For one, "[m]unicipalities themselves can be held liable." *Bogan*, 523 U.S. at 53; *supra* Part II.B. Moreover, "the ultimate check on legislative abuse—the electoral process—applies with equal force at the local level, where legislators are often more closely responsible to the electorate," *Bogan*, 523 U.S. at 53—with impeachment or indictment available in extreme cases, *see, e.g.*, *id.* at 50.

2. Requiring legislative acts to be lawful would eviscerate the purpose of legislative immunity—to protect legislators from litigation altogether in order to promote important democratic values. Legislative immunity is not a proxy inquiry into whether legislative acts are valid. The very purpose of legislative immunity is to shield legislators "'from *the burden of defending* themselves' in court." *Allen*, 895 F.3d at 357 (quoting *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 732 (1980)). As the Supreme Court explained in *Bogan*, "[t]he privilege of absolute immunity would be of little value if legislators could be subjected to the cost

and inconvenience and distractions of a trial upon a conclusion of the pleader" that their acts were unlawful. 523 U.S. at 54–55 (quoting *Tenney*, 341 U.S. at 377; brackets and internal quotation marks omitted). Immunity's purpose is "thwarted when an official must expend 'time and energy ... to defend against a lawsuit' arising from his legislative acts." *Allen*, 895 F.3d at 357 (quoting *Bogan*, 523 U.S. at 52). Indeed, subjecting legislators to suit for their judicial acts "is no more representative government than it would be judicial process for judges to be subject to cross-examination by legislative committees about their state of mind in deciding cases." *County of Los Angeles* v. *Superior Court*, 532 P.2d 495, 502 (Cal. 1975) (citation omitted).

II. The councilors here are entitled to absolute immunity

As this Court correctly recognized in its June 13 ruling (at 5), the actions challenged here are "legislative in nature and function." Consequently, the councilors are entitled to immunity from suit. And a holding to that effect would not predetermine the outcome of the case on the merits or undermine the operation of the war memorials statutes.

A. The councilors took only legislative acts, for which they are absolutely immune

Plaintiffs' Second Amended Complaint (SAC) identifies several actions for which they claim the councilors are liable in their individual capacities.[3] SAC ¶¶ 28–30. By plaintiffs' own description, however, those actions were clearly legislative:

- *First*, plaintiffs point to three resolutions passed on February 6, 2017: a "Resolution that the City remove the statue of Robert E. Lee from the park currently known as Lee Park," SAC ¶ 28, "a Resolution that the park known as Lee Park ... be renamed," SAC ¶ 29, and "a Resolution ... to redesign and transform Jackson Park, to add a new memorial to Jackson Park, redesign Lee Park, and to support a renaming of Jackson Park," SAC ¶ 30.

- *Second*, plaintiffs allege that on August 21, 2017, the councilors, "during a City Council meeting lasting until after midnight, voted on a motion to conceal both the Lee and Jackson Monuments under covers." SAC ¶ 30B. "City employees" then

[3] The councilors do not consent to plaintiffs' filing their Second Amended Complaint, but they nonetheless respond to all the allegations therein in the event the Court grants plaintiffs leave.

covered the statues. SAC ¶ 30C.

- *Third*, plaintiffs allege that "at the City Council meeting [on] September 5, 2017, the City Council ... passed a Resolution ordering 'the removal of the [Jackson] statue ... from Justice Park as soon as possible, pending following [*sic*] the successful resolution of the current court case in favor of the City.'" SAC ¶ 30D (quoting City Council Minutes 15 (Sept. 5, 2017)).[4]

- *Fourth*, plaintiffs allege that on September 18, 2017, and after the Court temporarily enjoined removal of the Lee statue, SAC ¶ 30A, defendant Signer "asked that options for more permanent concealment of the statue be presented." SAC ¶ 30F (quoting City Council Minutes 18 (Sept. 18, 2017)). And on November 6, 2017, after this Court declined to order the covers removed, SAC ¶ 30G, the City Council "passed a Resolution for a two-phase Request of Proposals [*sic*] ... for transforming downtown parks ... which stated and confirmed the Defendants' ongoing purpose of permanently 'screening' the Monuments from view." SAC ¶ 30H. The November 6 resolution included funding for "screening." *Id.* (The tarps were removed in February 2018 after this Court found them unlawful. SAC ¶¶ 30I, 30J.)

1. Those actions are legislative in form. By plaintiffs' own account, almost all of those actions were formal resolutions—an ordinary legislative mechanism. As the Supreme Court explained in *Bogan*, "acts of voting for an ordinance [are], in form, quintessentially legislative." 523 U.S. at 55. And the non-voting actions easily fit within the non-exhaustive list the Virginia Supreme Court quoted in *Davenport*, 285 Va. at 589. *Supra* Part I.C. In short, the councilors' actions "bear the outward marks of public decisionmaking, including the observance of formal legislative procedures." *Kensington Volunteer Fire Dep't*, 684 F.3d at 470–71 (citation omitted).

Plaintiffs allege that on August 21, "Defendants[] act[ed] without advance notice to the public." SAC ¶ 30B. But even assuming that fact to be true, it is beside the point. "Unlike preparing legislation or voting on legislation, the acts of providing notice of a legislative meeting to interested parties and providing those parties with an opportunity to be heard do not implicate the legislative

[4] There is nothing unlawful about the September 5 vote to remove the Jackson statue pending "the successful resolution of the current court case in favor of the City." SAC ¶ 30D (quoting City Council Minutes 15 (Sept. 5, 2017)). By its very terms, that resolution is contingent on a judicial ruling that removing the statue is lawful.

function." *Borde* v. *Bd. of Cty. Comm'rs*, 423 F. App'x 798, 802 (10th Cir. 2011). The councilors' vote to cover the Lee and Jackson statues was, for purposes of the legislative-action test, a vote like any other. And even if the August 21 vote *were* "irregular and inappropriate," it was "still legislative in nature." *Bryan*, 213 F.3d at 274; *see also Kilbourn*, 103 U.S. at 203.

2. The substance inquiry compels the same conclusion. As this Court put it, "the choice by City Council to attempt to move or remove the statues is in the legislative realm or function," because "[i]t is a matter of policy about which [the councilors] had discretion or choice, and were not required to act." Ruling 4. That reasoning tracks *Bogan*'s observation that actions are legislative when they "reflect[] a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents." 523 U.S. at 55–56. The councilors' decisions here—as plaintiffs' own pleadings make clear—were prospective, formulated broad public policy, and affected (and continue to affect) large groups of people who live in the City and use the parks. *See, e.g.*, *Kensington Volunteer Fire Dep't*, 684 F.3d at 470–71; *Arabbo*, 689 F. App'x at 421. "Only were [the Court] to ignore everything leading up to the dispute"—and what has come after—"could [it] conclude that [the votes] affected merely a few people." *Cmty. House, Inc.* v. *City of Boise*, 623 F.3d 945, 960–61 (9th Cir. 2010).

The City Council's minutes ("Minutes") confirm these points.[5] Those minutes reveal that:

- On February 6, the Council voted on a resolution to remove the Lee statue and rename Lee Park. Feb. 6, 2017, Minutes 9. The motion offered the recommendations of the Blue Ribbon Commission, which set out "a broad and inclusive vision of Charlottesville's history," in line with "the City's vision to be a 'Community of Mutual Respect'" that "nourish[es] diversity." Mot. 1–2.

[5] Plaintiffs introduced parts of the minutes from February 6, 2017, as Exhibits F through H of their original complaint. In addition, the Court can consider the City Council's minutes (http://www.charlottesville.org/departments-and-services/departments-a-g/city-council/council-records/council-minutes/2017-council-minutes) because they are public legislative records. *E.g.*, *Resk* v. *Roanoke County*, 73 Va. Cir. 272, 274, 276 (2007).

- On August 21, Szakos "moved to explore policies that can limit demonstrations," in light of the violence that had occurred on August 12. Aug. 21, 2017, Minutes 3. She also said "[t]here will be 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." *Id.* It was in this context that she suggested covering the statues and Galvin recommended "mak[ing] it explicitly clear that both statues would be removed." *Id.*; *see id.* at 3–4.

- On September 5, councilors stated the policy reasons for removing the statues: "[T]hese statues belong in a museum"; they "present a clear and present danger," and they "became magnets of evil." Sept. 15, 2017, Minutes 15. The council declared by resolution that the statues present "a fictionalized, glorified narrative of the rightness of the Southern cause in that war, when the actual cause was an insurrection against the United States of America promoting the right of southern states to perpetuate the institution of slavery"; that "the continued presence of these monuments conveys the visual message that Charlottesville supports the cause for which these generals fought"; that the statues "have become flashpoints for white supremacist violence throughout the summer of 2017"; and that the statues "constitute a clear and continuing threat to public safety." *Id.* at 16–17.

- On September 18, Signer asked for concealment options as part of a request to revisit the approach to the parks and a larger budget. Sept. 18, 2017, Minutes.

Plaintiffs may disagree with the councilors' policy judgments. But the councilors' actions were just that—policy judgments made in legislative session, and thus entitled to immunity.

3. It is irrelevant that the councilors' exercise of their legislative judgment might have been unlawful. They are entitled to immunity all the same. *See supra* Part I. Nor is this the rare situation in which legislators' "immunity for 'legislative' acts dissipates because [they are] no longer operating as a legislature." *Bryan*, 213 F.3d at 274. Even if the councilors lacked authority to remove the statues in light of the narrow operation of the war memorials statutes, the councilors had broad authorities "to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, [and good order] ... of the municipality and [its] inhabitants," Va. Code § 15.2-1102, and to "provide for the protection of [the City's] inhabitants and property and for the preservation of peace and good order therein," *id.* § 15.2-1700—not to mention their authorities over city parks and property, *id.* §§ 15.2-951, -1800, -1806. Those powers

demonstrate that the councilors were acting as legislators, even if their judgment was ultimately mistaken. They are accordingly entitled to absolute immunity from suit and should be dismissed.[6]

B. Failing to accord the councilors legislative immunity would not comport with their clear legislative privilege

Virginia courts have recognized that absolute legislative immunity also confers an evidentiary privilege on legislators with respect to their legislative acts. In *Covel*, for instance, the court quashed subpoenas issued to town councilmembers. 78 Va. Cir. at 201–04. Citing numerous U.S. Supreme Court cases, the Virginia court explained that the subpoenas impermissibly asked the "legislators to appear ... 'to be questioned' about what they thought and meant during the 'speech or debate' surrounding ... specific legislative acts." *Id.* at 203; *see also Edwards*, 292 Va. at 523–36 (holding that circuit court abused its discretion in finding documents subpoenaed from Virginia Senators not protected by legislative privilege under related Speech or Debate Clause of Virginia Constitution). Neither *Covel* nor *Edwards* gives any hint that application of the privilege turned on the lawfulness of the councilmembers' related legislative acts. To the contrary, the *Edwards* Court reiterated *Davenport*'s functional list of "legislative activit[ies]," 292 Va. at 528 (quoting 285 Va. at 589), and the court in *Covel* instructed that "alleged improper motives of legislators [do not] provide a basis for finding a waiver of the power to invoke this privilege," 78 Va. Cir. at 203. These cases provide further support for the proposition that common law immunity

[6] Plaintiffs seek damages from the councilors in their individual capacities. SAC, Prayer for Relief ¶ 3. For the reasons stated above, legislative immunity shields the councilors in their personal capacities. *Supra* Part I. Accordingly, even if the Court keeps the councilors in the case to enjoin them from taking any further action to remove the statues—and it should not, because legislative immunity protects them from suit altogether, *supra* Part I.D—it should nonetheless make clear that the councilors are immune from damages claims for their prior, legislative actions. Unlike "[p]ersonal-capacity suits," "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity"—"the real party in interest"—and "a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Kentucky* v. *Graham*, 473 U.S. 159, 165–66 (1985).

cannot turn on the lawfulness of legislators' legislative acts, because plaintiffs have no right to demand any evidence from legislators regarding those acts. Indeed, it is hard to see how a suit against the councilors could even proceed in view of this privilege.

C. A ruling holding the councilors immune for their legislative acts would be narrow, and would not trigger the concerns raised in the June 13 ruling

1. Legislative immunity would not limit the ultimate merits outcomes possible here. The councilors seek legislative immunity only for themselves, not for the City. And the City is not immune from liability just because the councilors are. *See, e.g.*, *State Emps. Bargaining Agent Coal.* v. *Rowland*, 494 F.3d 71, 86 (2d Cir. 2007) ("legislative immunity is available to local officials who are sued in their individual capacities," but "[local] governments (or 'municipal corporations') are not entitled to the benefit of any [such] immunities" (citations omitted)); *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. Thus, for example, if City employees carried out the councilors' resolutions to remove the Lee or Jackson statues, then the City might be liable. *See Front Royal & Warren Cty. Indus. Park Corp.* v. *Town of Front Royal*, 29 Va. Cir. 226, 234 (1992) ("[A] municipal corporation is liable for acts of its employees or officials if the acts were done in the exercise of a ministerial act."); *supra* p. 12. So 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).

2. Holding the councilors immune would not "make [the war memorials statutes] meaningless as to local authorities." Ruling 6. Even if it is "unlawful for the authorities of the locality ... to disturb or interfere with any monuments or memorials so erected," Va. Code § 15.2-1812, that statutory prohibition does not run against purely legislative acts—which, without further administrative or executive acts to implement them, cannot actually "disturb or interfere with any monuments." And as noted above, courts have the power to enjoin and award damages for such non-legislative acts, and can award that relief against municipalities. For these reasons, there is no

tension between the war memorials statues and common-law legislative immunity.

Plaintiffs' position, in contrast, needlessly pits legislative immunity and the war memorials statutes against each other. But there is nothing in either § 1812 or § 1812.1 that supports a reading that those statutes were intended to strip legislative immunity from state or local legislators acting in a legislative capacity. Plaintiffs' argument is at odds with the fundamental principle "that the common law is not to be considered as altered or changed by statute unless the legislative intent be plainly manifested." *Norfolk & W. Ry. Co.* v. *Virginian Ry. Co.*, 110 Va. 631, 66 S.E. 863, 868 (1910); *accord, e.g.*, *Doud* v. *Commonwealth*, 282 Va. 317, 320–21 (2011). "[E]ven where a statute's purpose *is* to abrogate the common law, such statute is to be strictly construed and not to be enlarged in its operation by construction beyond its express terms." *Jenkins* v. *Mehra*, 281 Va. 37, 45 (2011) (emphasis added; brackets and internal quotation marks omitted); *accord, e.g.*, *Hyman* v. *Glover*, 232 Va. 140, 143 (1986). Thus, unless it is crystal clear that the statute, by its express terms, waives a common law immunity, the common law immunity remains intact. *See Univ. of Va. Health Servs. Found.* v. *Morris ex rel. Morris*, 275 Va. 319, 332 (2008) (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" (citation and alterations omitted)). Here, the war memorials statutes say nothing about—and so cannot possibly abrogate—legislators' longstanding common law immunity for acts within their legislative capacities.

3. For these same reasons, common law legislative immunity does not render superfluous the statutory immunity conveyed by Virginia Code § 15.2-1405. That statute applies to "[t]he members of the governing bodies of any locality" and to "the members of boards, commissions, agencies and authorities thereof and other governing bodies of any local governmental entity." Those bodies—especially the latter group—may act in administrative or

supervisory capacities, in which case they cannot claim legislative immunity. Thus, § 15.2-1405 is easily harmonized with the common law by recognizing that it governs where the acts in question are not legislative. Moreover, the statute governs "the immunity *granted by this section*"—not *all* immunity. That language indicates that the statute confers a 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 certainly 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). Here, for the reasons just stated, § 15.2-1405 and common law legislative immunity are not "directly and irreconcilably opposed," and so the common law must continue to govern. Consistent with these observations, the Virginia Supreme Court in *Davenport* continued to apply common-law legislative immunity well after § 15.2-1405 was on the books. *See supra* Part I.C.

CONCLUSION

The councilors respectfully ask this Court to reconsider its June 13 ruling, hold them immune for their legislative acts, and dismiss them from suit. Alternatively, the councilors ask the Court to hold that they cannot be held personally liable for any damages, attorney's fees, or costs.

Dated: August 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, pursuant to Rule 1:12 of the Rules of the Supreme Court of Virginia, I served a true copy of the foregoing document by electronic mail to counsel of record, as follows:

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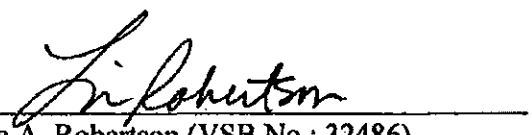

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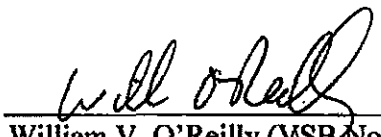

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