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

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND TO STRIKE EQUAL PROTECTION AFFIRMATIVE DEFENSE

Dated: January 11, 2019

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INTRODUCTION

More than sixty years after the shots on Fort Sumter, Charlottesville erected statues of Robert E. Lee and Thomas J. Jackson in the center of the City, with Jackson's statue adjacent to the courthouse. By then, Jim Crow gripped the South, and it was clear that Appomattox and Reconstruction had not settled "the cultural and ideological struggle between slavery and freedom." James McPherson, *The War that Forged a Nation: Why the Civil War Still Matters* 175 (2015) (Ex. 1) (all Exhibits are to Decl. of W. O'Reilly). The fairest and most democratic presidential election in the South had occurred many years before, in 1872, after President Grant had dealt a fierce but temporary blow to the Ku Klux Klan. *Id.* at 183. "We are not free," Frederick Douglass wrote that same year. Frederick Douglass, Give Us the Freedom Intended for Us (Dec. 5, 1872), *in The Portable Frederick Douglass* 498, 499 (J. Stauffer & H.L. Gates, Jr., eds., 2016) (Ex. 2). Despite the Reconstruction Amendments, Douglass explained, "[t]he elective franchise without protection in its exercise amounts to almost nothing in the hands of a minority with a vast majority determined that no exercise of it shall be made by the minority." *Id.* Things were no better by the 1920s. African Americans were second-class citizens subjected to the indignities of segregation, de facto disenfranchisement, and the terrors of the Klan.

Though Charlottesville's statues depict Confederate generals, the statues were erected not as memorials to war veterans, but rather as instruments of the influential "Lost Cause" movement that drove out Reconstruction and replaced slavery with rigid racial hierarchy and segregation in Charlottesville. The Lost Cause narrative denied that slavery had caused the war, sought to delegitimize the Northern victory and the emancipation of slaves by portraying both sides' causes as morally equivalent, and resisted black suffrage and citizenship under the banner of white supremacy. Lee in particular became a central symbol of the Lost Cause in the years after his death, and both Lee and Jackson were icons of the defense of slavery and white power. The statues of

them were intended to, and did, send messages of intimidation, exclusion, and hostility to African Americans in Charlottesville. The statues were part of a regime of City-sanctioned segregation that denied African Americans equal access to government and public spaces. The fact that certain Charlottesville residents are unaware of the statues' history does not change that history or the messages the statues send. Indeed, as the recent violence in Charlottesville illustrates, the statues still send potent messages of hostility and exclusion today.

The history of the Lee and Jackson statues and the messages they send have two legal consequences. *First*, they mean the statues are not memorials to veterans of the Civil War. The statues were erected in the 1920s, not to commemorate the veterans of a war—the relevant question under Virginia Code §§ 15.2-1812 and 15.2-1812.1—but rather to entrench the Lost Cause narrative and racial hierarchy. Plaintiffs' Motion for Partial Summary Judgment must be denied.

Second, because the statues send messages of hostility and exclusion to nonwhites, they violate the equal protection guarantees of the U.S. and Virginia Constitutions. Those constitutional provisions command the government to treat members of all races with an even hand. Hostile government speech directed at racial minorities violates that mandate, whether because it promotes the belief in racial hierarchy or because it denies individuals equal access to government or public facilities based on their skin color. The government cannot be equally receptive to all—let alone appear to do equal justice under law—when it embraces messages promoting racial hierarchy. Thus, Plaintiffs' Motion to Strike Equal Protection Affirmative Defense must likewise be denied.

Both the summary judgment and equal protection issues are inherently fact-intensive. For the convenience of the Court, Defendants discuss the relevant facts primarily in one place (in Part I.B addressing Plaintiffs' Motion for Partial Summary Judgment), but the same facts are relevant to the resolution of both motions.

ARGUMENT

I. Plaintiffs are not entitled to summary judgment because the record reveals a factual dispute over whether the Lee and Jackson statues are war memorials under Virginia Code § 15.2-1812 and § 15.2-1812.1

"Summary judgment is a drastic remedy which is available only where there is no material fact genuinely in dispute. ... It applies only to cases in which no trial is necessary because no evidence could affect the result." *Shevel's, Inc.-Chesterfield* v. *Se. Assocs., Inc.*, 228 Va. 175, 181 (1984). Despite this standard, Plaintiffs believe they are entitled to summary judgment because "Defendants admitted that Lee and Jackson were military officers in the War Between the States" and that "the statues depict Lee and Jackson," such that there is no genuine dispute that "the statues commemorate veterans of the War Between the States." Pls.' Mot. Partial Summ. J. ¶ 9. Not so.

Whether a statue is a "monument" or "memorial" under Virginia Code § 15.2-1812 turns on whether it was intended to commemorate, and actually commemorates, war veterans in their capacities as war veterans. In making that determination, courts must look to context—what message the government intended to send and what a reasonable observer would understand the government's message to be. While the parties agree that the statues depict Lee and Jackson, Defendants will offer extensive evidence, including testimony by several prominent experts, that the statues were not intended to commemorate, and do not in fact commemorate, veterans of the Civil War, the Civil War, or any engagement of that war. Instead, Defendants' voluminous evidence will show that the statues celebrate the Lost Cause, which creates a false moral equivalency between the Union and the Confederacy, promotes the fictional view that the Civil War was not fought over the institution of slavery, and celebrates white supremacy. Indeed, even Plaintiffs recognize that many understand the statues to send messages of white supremacy. And in considering Plaintiffs' motion for summary judgment, the Court "must adopt those inferences from the facts that are most favorable to [Defendants], unless the inferences are forced, strained,

or contrary to reason." *Dickerson* v. *Fatehi*, 253 Va. 324, 327 (1997). Defendants' evidence, as set forth in Part I.B below, amply establishes that a "material fact is genuinely in dispute" as to what the statues were intended to and do commemorate, Va. Sup. Ct. R. 3:20, and therefore requires denial of Plaintiffs' motion.

A. Virginia Code §§ 15.2-1812 and 15.2-1812.1 protect only those "monuments" and "memorials" that were erected to, and do, commemorate war veterans

Plaintiffs assume, without any analysis, that the identity of the person depicted is alone determinative of what a "monument" or "memorial" commemorates. They are wrong. Section 15.2-1812 protects only monuments and memorials that were erected to, and do, commemorate war veterans. Whether a statue fits that bill requires a fact-intensive analysis of whether the government intended to commemorate war veterans or had some other purpose; whether a reasonable observer, knowledgeable about the statue's history and context, would perceive such commemoration and intent to commemorate; and what message the statue conveys today.

1. Sections 15.2-1812 and 15.2-1812.1 protect only monuments or memorials intended to commemorate, and that do commemorate, the veterans of particular wars

Section 15.2-1812, entitled "Memorials for war veterans," authorizes a locality to "permit the erection of monuments or memorials for any war or conflict, or for any engagement of such war or conflict," and further authorizes appropriations "to complete or aid in the erection of monuments or memorials to the veterans of such wars." Section 15.2-1812.1, entitled "Action for damage to memorials for war veterans," in turn provides a cause of "action for the recovery of damages" for harm to "any monument, marker or memorial for war veterans as designated in" § 15.2-1812. Plaintiffs seek partial summary judgment on the question whether the Lee and Jackson statues are monuments or memorials to veterans of the Civil War.

Because neither statute defines "monuments or memorials to the veterans of such wars,"

the Court "must give the term[s] [their] ordinary meaning[s], taking into account the context in which" the statutes use the terms. *Am. Tradition Inst.* v. *Rector & Visitors of Univ. of Va.*, 287 Va. 330, 341 (2014); *see Prillaman* v. *Commonwealth*, 199 Va. 401, 405 (1957) (related "statutes may be considered as *in pari materia*"). Under that analysis, as Plaintiffs acknowledge, *see* Pls.' Mot. Partial Summ. J. ¶ 9, "monuments" or "memorials" can be understood only by reference to the objects they are intended to and do commemorate, and the statutes require those objects of commemoration to be war veterans. *See* Va. Code § 15.2-1812 (entitled "Memorials for war veterans" and referring to "memorials to the veterans of such wars"); *id.* § 15.2-1812.1 ("memorials for war veterans").[1] Thus, regardless of whether it depicts a veteran, a statue can be a monument or memorial to or for veterans only if it is intended to commemorate them. Further, a memorial cannot commemorate just a single veteran—the statutes make clear that "monuments or memorials" must be "to *the veterans* of such wars," *id.* § 15.2-1812 (emphasis added), and a cause of action for damages may be brought only for harm to a "monument, marker or memorial for war *veterans*," *id.* § 15.2-1812.1(A) (emphasis added). That a statue happens to depict a veteran does not make it a memorial to that veteran, let alone to all veterans (or even a class of veterans) of any particular conflict. For example, a bust of President Washington placed in the White House is not

[1] *See also, e.g.*, *American Heritage Dictionary* 785, 812 (2d Coll. Ed. 1982) (Ex. 3) (a "memorial" is "[s]omething, such as a monument or a holiday, designed or established to serve as a remembrance of a person or an event"; a "monument" is "[a] structure, such as a building or sculpture, erected as a memorial"); IX *The Oxford English Dictionary* 595, 1045 (2d ed. 1989) (Ex. 4) (a "memorial" is "[s]omething by which the memory of a person, thing, or event is preserved, as a monumental erection, a custom or an observance"; a "monument" is something "that by its survival commemorates a person, action, period, or event"); *Webster's Third New International Dictionary* 1409, 1466 (1976) (Ex. 5) (a "memorial" is "something that serves to preserve memory or knowledge of an individual or event," "something designed to commemorate or preserve the memory of a person or event"; a "monument" is "a structure (as a pillar, stone, or building) erected or maintained in memory of the dead or to preserve the remembrance of a person, event, or action").

a memorial to Washington *as a veteran*, let alone to all Revolutionary War veterans, because it would not be understood to commemorate him for his military service and the wars he fought.

2. A court must look to the government's intended message and the reasonable informed observer's understanding to determine what a memorial or monument was intended to and does commemorate

Limited precedent addresses how to determine whether a monument commemorates veterans within the scope of §§ 15.2-1812 and 15.2-1812.1.[2] Doctrine developed under the First Amendment to the U.S. Constitution, however, establishes three useful guideposts: (1) Did the government intend to commemorate war veterans, or did it have some other purpose? (2) Would a reasonable observer, familiar with a statue's history and context, perceive commemoration and an intent to commemorate war veterans, or would such an observer receive some other message? (3) Finally, what message does the statue send today?

The first two inquiries come from Establishment Clause cases: What did the government "intend[] to communicate," and "what message [did] the ... display actually convey[]"? *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *see Va. Coll. Bldg. Auth.* v. *Lynn*, 260 Va. 608, 639 (2000) (quoting *Mitchell* v. *Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring)). The court "inquire[s] as to the purpose of the government action" and also asks which message "it would be objectively reasonable for the government action to be construed as sending primarily," *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1107, 1109 (9th Cir. 2011).

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[2] Neither the Virginia Attorney General nor the Danville Circuit Court provided any substantial guidance on how to determine whether a monument commemorates veterans under §§ 15.2-1812 and 15.2-1812.1 when they determined that a historic building known as the Last Capitol of the Confederacy did not fall within the ambit of the statutes. *See* Letter from Mark R. Herring, Va. Att'y Gen., to W. Clarke Whitfield, Jr., Danville City Att'y, at *1 (Aug. 6, 2015), 2015 WL 4850422 (Ex. 6) ("§ 15.2-1812 applies to monuments commemorating certain wars and veterans of those wars, but not to monuments commemorating buildings"); *Heritage Pres. Ass'n, Inc.* v. *City of Danville*, No. CL15000500-00 (Dec. 7, 2015), *pet. for appeal refused*, No. 160310 (Va. June 17, 2016), *reh'g denied* (Va. Oct. 7, 2016).

An accurate understanding of history is crucial to the reasonable observer inquiry. That is because "the reasonable observer ... must be deemed aware of the history and context of the community and forum." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (quoting *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and in the judgment)). As Justice O'Connor explained, conducting the inquiry "from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share" does not "choose[] the perceptions of the majority over those of a reasonable" person who sees things differently. *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and in the judgment). Instead, the test "simply recognizes the fundamental difficulty inherent in focusing on actual people." *Id.* Such a hypothetical informed reasonable observer would understand, for instance, "that a cross erected by the Ku Klux Klan is ... a political act, not a Christian one," because "the Klan's main objective is to establish a racist white government in the United States," and "[i]n Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." *Id.* at 770 (Thomas, J., concurring).

The third guidepost—consideration of the message the statues send in present day—comes from *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 477 (2009), in the context of government speech. In *Summum*, the Court explained that "[t]he 'message' conveyed by a monument may change over time," and observed that "[a] study of war memorials found that 'people reinterpret' the meaning of these memorials as 'historical interpretations' and 'the society around them changes.'" *Id.* As an example of the changing meaning of a monument, the Court pointed to the Statue of Liberty, which was intended as an expression of "republican solidarity and friendship between" France and the United States, and only later "c[a]me to be viewed as a beacon welcoming

immigrants to a land of freedom." *Id.*

These considerations require assessment of not only government intent at the time a statue was erected, but also historical and contextual evidence that informs the reasonable observer's understanding of the government message from the time the statue was erected into the present day. If the government had or has some purpose other than commemorating war veterans, or a reasonable observer would perceive a different message, even if that intended or received message has changed over time, then the monument in question does not qualify as a monument to war veterans under §§ 15.2-1812 and 15.2-1812.1. That inquiry is fact-intensive by nature.

B. Defendants' evidence shows that the Lee and Jackson statues are not monuments or memorials to war veterans under §§ 15.2-1812 and 15.2-1812.1

The evidence will show that the Lee and Jackson statues do not commemorate war veterans under any of the three principles set out above. For example, as Dr. Sarah Beetham, a historian of American art and architecture and a leading expert on the history of Civil War memorials, will testify, "it is necessary to reference the social, political, and cultural context in which these statues at issue in this litigation were erected in order to understand the intention and motivation behind their creation." Beetham Desig. 2 (Ex. 7). Those contexts will demonstrate that the statues were intended to perpetuate a "Lost Cause" myth denying that slavery was the cause of the Civil War and dedicated to promoting the inferiority of African Americans. And reasonable observers, both today and at the time of erection of the statues, would perceive the statues to have exactly that effect. Indeed, the City Council that voted to remove the statues—that is, Charlottesville's government today—reasonably perceives the message conveyed by the statues as continuing to convey their original meaning of commemorating opposition to Reconstruction rather than commemorating war veterans.

Plaintiffs disagree about what the evidence will show. In their view, the Lee and Jackson

statues "have nothing to do with white supremacy, Jim Crow, or the Ku Klux Klan." Oct. 26, 2018, Hr'g Tr. 180:23–25 (Ex. 8). But they cannot carry their burden at the summary judgment stage of showing that their view of the evidence is the only reasonable one. To start, Plaintiffs' own expert wrote in post-litigation correspondence with the Virginia Department of Historic Resources that these very statues "almost certainly" represent "the City Beautiful Movement and Lost Cause" and "not the Civil War."[3] Moreover, this Court has emphasized the relevance of considering context and historical understanding in determining what a particular statue actually commemorates. *See*

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[3] On March 1, 2018, in an email exchange between Plaintiffs' expert Eleanor Gohdes-Baten and the Virginia Department of Historic Resources (the "DHR"), the DHR indicated that it had the following expectations for any nominations of the statues:

> We would be disingenuous, at best, to try to behave as if the events last August in Charlottesville are not going to affect how DHR will review any updates to the Jackson and Lee statues' nominations or any similar projects for other statues. ... Recent (within the past 20-30 years) historical scholarship has demonstrated that there was more to the Lost Cause than women mourning lost loved ones and veterans honoring fallen comrades (although of course both of these are extremely important to understand), and nowadays DHR expects that memorialization of Confederate figures will be examined through a lens that includes the abrupt end to Reconstruction, the delayed implications of the 13th, 14th, and 15th amendments to the Constitution, Jim Crow segregation, lynching, and the twentieth-century civil rights movement, all of which still leave room to acknowledge the very human tragedies that occurred during the Civil War itself.
>
> Thus, for example, I noticed in the nomination for the Jackson nomination that it was planned to be placed in an area with "eyesore" buildings and that the McKee property was proposed for purchase for a school for white children. Words such as "eyesore" were used in newspapers and by government officials from at least the late 19th century through the third quarter of the 20th century as code words for areas inhabited predominately by African Americans or other racial/ethnic minorities. Such words were used to justify condemnation of slum housing in the 1900s and wholesale destruction of historic neighborhoods for highway construction and "urban renewal" from the 1950s to mid-1970s. We would therefore expect to see discussion of the Jackson statue's site selection to include deeper research into the character of the area selected for its installation and, if indeed a small African American neighborhood was displaced to establish the park, that is germane to the statue's potential significance in the Area of Social History and/or Community Development and Planning, or potential Politics/Government.

Email 6 at 4–5 (Ex. 29).

Oct. 3, 2017, Letter Ruling 15 (explaining that "a statue of [Lee] in Lexington, Va., in civilian clothes, in his later years," among other examples, would not likely "show it was a memorial or monument to the Civil War or a veteran thereof").

The evidence in this case establishes a disputed question of material fact over whether the Lee and Jackson statues are war memorials under §§ 15.2-1812 and 15.2-1812.1. This is not a case, for example, where an object is indisputably a rifle but the parties disagree about what consequences or feelings follow from that undisputed fact. *See* Oct. 26, 2018, Hr'g Tr. 64:8–16 (Ex. 8). To the contrary, whether a statue is a memorial to war veterans turns on "what the effect of [it] is" and "how it affects people." *Id.* at 64:18–19; *cf. Pinette*, 515 U.S. at 777 (O'Connor, J., concurring in part and in the judgment) ("Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated ... because the State's own actions ... *actually convey* a message of endorsement." (citation omitted)). That the statues *depict* Lee and Jackson does not necessarily make them memorials commemorating Lee and Jackson as veterans, or memorials commemorating all veterans of the Civil War. As the Court earlier recognized, for example, there is a difference between a tank on the battlefield and a tank in a defiant neighborhood in the "former Soviet Bloc in Eastern Europe." Oct. 26, 2018, Hr'g Tr. 162:24–163:11 (Ex. 8).

Plaintiffs' apparent assumption that every statue of Lee or Jackson is a monument commemorating veterans of the Civil War ignores the text of §§ 15.2-1812 and 15.2-1812.1 and doctrinal guidance for interpreting government displays. Whatever may be said of other statues of Lee or Jackson, the vast body of evidence Defendants have gathered in this case shows the statues at issue to be monuments to the Lost Cause and white supremacy. *See infra* Part I.B. Specifically, the evidence will show that (1) the statues depict individuals who have long embodied the

Confederate cause; (2) the Confederate cause was slavery, and a core pillar of that system was the belief in the inferiority of African Americans; (3) Lee and Jackson believed that the institution of slavery and the inferiority of African Americans were ordained by God; (4) Lee and Jackson stood for those causes when their statues in Charlottesville were erected to promote the Lost Cause; and (5) a reasonable observer today would continue to view the statues as espousing Lost Cause and white supremacist ideology rather than memorializing Lee and Jackson as veterans of the Civil War. The very existence of this case shows a fundamental dispute over what these statues represent: The Defendant Councilors voted to remove the statues not because they commemorate veterans of the Civil War, but because they are divisive monuments to white supremacy. That factual disagreement precludes summary judgment.

1. The Lee and Jackson statues depict individuals who have long embodied the Confederate cause

Plaintiffs contend that Lee and Jackson "are Confederate heroes, emblematic of our Confederate heritage" and that the statues "serve as a tangible reminder of the past and a standing invitation and inspiration to all, to inquire into and understand the motives that animated the Southern Cause." Pls.' Objs. & Answers to Defs.' Fourth Set of Interrogs. to SCV & Monument Fund 3 (SCV response) (Ex. 17). Defendants agree that Lee and Jackson have embodied the Confederate cause—that is, the cause of preserving slavery, which both men believed was God-ordained. *Infra* Part I.B.4. Lee and Jackson also have long embodied a second struggle: to win the postwar peace by means of a false Lost Cause narrative that slavery did not cause the Civil War and that Confederates were heroic, blameless, and inspired by a noble cause. Varon Desig. 2 (Ex. 16). As Defendants' experts will establish, it was widely understood that Lee played an important role after the Civil War in creating and perpetuating the Lost Cause narrative and in opposing Reconstruction and black citizenship. *Id.*; *see also infra* Part I.B.4. For instance, according to those

who attended the 1924 unveiling of Charlottesville's Lee statue, "Lee believed in his cause" and conducted himself "with no halting hesitancy or troubled timidity." *Proceedings of the 37th Annual Reunion of the Virginia Division of the Grand Camp U.C.V. and of the 29th Reunion of the Sons of Confederate Veterans* 59 (John S. Patton ed., May 20, 21, 22, 1924) (statement of Rev. Dr. M. Ashby Jones), https://archive.org/details/ProceedingsOfTheThirty-seventhAnnualReunionOfTheVirginiaGrandCamp/page/n31 (Ex. 18).

2. The Confederate cause was slavery, and a core pillar of that system was the belief in the inferiority of African Americans

Slavery and the perceived inferiority of African Americans were the stated cause for secession. Mississippi, Texas, and Georgia, for example, were explicit in their declarations of secession.[4] Virginia's Secession Ordinance of April 28, 1861, https://www.nytimes.com/1861/04/28/archives/the-virginia-secession-ordinance-an-ordinance.html (Ex. 22), likewise complained of "the oppression of the Southern Slaveholding States," while the Virginia Secession Convention

[4] *See* Declaration of causes: A declaration of the causes which impel the State of Texas to secede from the Federal Union (Feb. 2, 1861), https://www.tsl.texas.gov/ref/abouttx/secession/2feb1861.html (Ex. 19) ("We hold as undeniable truths that the governments of the various States, and of the confederacy itself, were established exclusively by the white race, for themselves and their posterity; that the African race had no agency in their establishment; that they were rightfully held and regarded as an inferior and dependent race, and in that condition only could their existence in this country be rendered beneficial or tolerable. ... [D]estruction of the existing relations between the two races, as advocated by our sectional enemies, would bring inevitable calamities upon both and desolation upon the fifteen slave-holding States."); A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union (1861), https://archive.org/details/addresssettingfo01miss/page/n3 (Ex. 20) ("Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world"—and "a blow at slavery is a blow at commerce and civilization," such that "[t]here was no choice left us but submission to the mandates of abolition, or a dissolution of the Union." Northern hostility "advocates negro equality, socially and politically, and promotes insurrection and incendiarism in our midst," and "has made combinations and formed associations to carry out its schemes of emancipation."); Confederate States of America—Georgia Secession (Jan. 29, 1861), http://avalon.law.yale.edu/19th_century/csa_geosec.asp (Ex. 21) (cause of war "[t]he prohibition of slavery in the Territories, hostility to it everywhere, the equality of the black and white races," and fact that "[f]or twenty years past the abolitionists and their allies in the Northern States have been engaged in constant efforts to subvert our institutions").

records leave no doubt that Virginia seceded because of the same fear that slavery would be abolished and African Americans elevated. Indeed, just five days earlier, Alexander Stephens had declared before the convention that, "[a]s a race, the African is inferior to the white man. … He is not equal by nature, and cannot be made so by human laws or human institutions. … The great truth … upon which our system rests[] is the inferiority of the African." Records of Virginia Secession Convention 385–87 (Apr. 23 1861), https://secession.richmond.edu/documents/index.html?id=pb.4.397 (Ex. 23). Secession was necessary, he argued, because the North was "trying to make the black man a white man, or his equal," in violation of "the higher law" of "nature and of God," and "would upturn our society and lay waste our fair country" in pursuit of that cause. *Id.*

Slavery was also "the foundation of the war." *Slaughter-House Cases*, 83 U.S. 36, 68 (1872); *see id.* ("[T]he contests ... between those who desired [slavery's] curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery."); *see also McDonald* v. *City of Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and in the judgment) ("[T]he Nation was splintered by a civil war fought principally over the question of slavery."). And the war was slavery's demise. "When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel," and the victors "determined to place this main and most valuable result in the Constitution of the restored Union." *Slaughter-House Cases*, 83 U.S. at 68.

Eminent figures of the period provide further confirmation. *See, e.g.*, Frederick Douglass,

The Mission of the War, *in The Portable Frederick Douglass* 326, 328, 332, 337 (J. Stauffer & H.L. Gates, Jr., eds., 2016) (Ex. 2) ("The abolition of Slavery is the comprehensive and logical object of the war."); Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), https://cdn.loc.gov/service/mss/mal/ 436/4361300/4361300.pdf (Ex. 24) ("[S]laves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war."). Indeed, former Confederate Colonel John Mosby wrote that he "never heard of any other cause of quarrel than slavery." Letter to A. Monteiro (June 9, 1894), https://www.encyclopediavirginia.org/media_player?mets_filename=evm00003514mets.xml (Ex. 25). Confederate soldiers believed in the righteousness of slavery nearly unanimously. Sarah Denver Beetham, Sculpting the Citizen Soldier: Reproduction and National Memory, 1865–1917, at 107–08 (Spring 2014) (unpub. Ph.D. dissertation, Univ. of Del.) (Ex. 15).

Plaintiffs and their experts sometimes appear to claim that slavery was not the cause of the war. *E.g.*, S. Sylvia, J.S. Mosby Antiques and Artifacts (self-pub. Nov. 4, 2017) (Ex. 26) (slavery "was not the stated cause of the war"), *in* Sylvia Desig. Exs. One Plaintiff even expressed gratitude for the institution of slavery. *See* Phillips Dep. 66:15–17 (Ex. 13) ("[T]hank God that we had [slaves], because if you look in this country, the beauty of this country, slaves built a lot of it."). Those views demonstrate the enduring grip the Lost Cause narrative still exerts on the South—and in that sense, the Lee and Jackson statues have served their intended purpose. For the most part, however, Plaintiffs and their experts cannot deny that slavery was the cause of the war and that the Union opposed it. *E.g.*, O'Bryant Dep. 120–21 (Ex. 27); Weber Dep. 28:12–29:1 (Ex. 28). Indeed, Plaintiffs' recognition of slavery's centrality to the war seems to be the basis for their arguing that changing the name of Lee Park to Emancipation Park is a "Union marking" because "emancipation

of slaves" was a Union "war measure." Pls.' Objs. & Answers to Defs.' Fourth Set of Interrogs. to SCV & Monument Fund 6 (Ex. 17); Pls.' Objs. & Answers 5 (Ex. 11).

3. The belief in the inferiority of African Americans was the cause Lee and Jackson stood for in their own time

Although the war spelled the end of slavery, "the institution ... remained in the minds and hearts of many white men." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring). As white Southerners with deep-seated racist beliefs confronted military defeat and Reconstruction, the result was "a spectacle of slavery unwilling to die." *Id.* And as Defendants' experts will testify, Lee played a leading role in opposing Reconstruction and creating and perpetuating the Lost Cause narrative that slavery did not cause the war, that African Americans are inferior, and that Confederates and their cause were heroic and blameless. Varon Desig. 2 (Ex. 16). Southerners viewed Lee as a champion who stood against Reconstruction and black citizenship to become a symbol of the Confederacy and white supremacy. *Id.* Notably, Plaintiffs' own expert agrees that Lee "was the leading historical figure associated with [the Lost Cause]," O'Bryant Dep. 123:10–15 (Ex. 27), and that Jackson, too, was a symbol of the Lost Cause. *Id.* at 124:15–18.

History reveals why. Lee and Jackson believed in God-ordained slavery. They believed that African Americans were inferior and needed the guidance and structure of slavery. Lee wrote in 1856 that "[t]he blacks are immeasurably better off here than in Africa, morally, socially & physically," because "[t]he painful discipline they are undergoing, is necessary for their instruction as a race," and thought that "[h]ow long their subjugation may be necessary is Known & ordered by a wise & merciful Providence." Elizabeth B. Pryor, *Reading the Man: A Portrait of Robert E. Lee Through His Private Letters* 144–45 (2007) (Ex. 33). And in Jackson's view, according to one of Plaintiffs' own experts, "the Creator had sanctioned slavery, and man had no moral right to

challenge its existence." J.I. Robertson, Jr., *Stonewall Jackson* 191 (1997) (Ex. 31).

Lee and Jackson believed that it would disserve African Americans to liberate them. Lee wrote that "based on wisdom and Christian principles you do a gross wrong and injustice to the whole negro race in setting them free," and asserted that "it is only this consideration that has led the wisdom, intelligence and Christianity of the South to support and defend the institution" of slavery. A. Serwer, The Myth of the Kindly General Lee, *The Atlantic* (Jun 4, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-myth-of-the-kindly-general-lee/529038/ (Ex. 32); *see* Pryor, *supra*, at 149–53 (Ex. 33). To the extent Lee expressed any concerns about slavery, he believed it was a "greater evil to the white than to the black race." *Id.* at 145 (Ex. 33). And Jackson, for his part, thought the roles of "parents and masters" similar and often remarked that if slaves "were left to themselves they would be sure to go back to barbarism." *Life and Letters of General Thomas J. Jackson by His Wife Mary Anna Jackson* 118 (1892), https://archive.org/details/lifelettersofgen00jack/page/118 (Ex. 34).

Lee did not just fight to defend the barbarous institution of slavery; he participated in its worst aspects. *See generally* Pryor, *supra*, at 141–54 (Ex. 33). As executor of his father-in-law's estate, Lee reneged on the elder's promise to free his slaves and instead ripped many families apart and took legal action to keep those slaves in bondage. *Id.* at 260–75. When some of those slaves attempted to run away, he had them brutally whipped. *Id.* In the end, the court instructed Lee to liberate the slaves by January 1, 1863, *id.*—the day Lincoln issued the Emancipation Proclamation.

During the war, Lee refused to exchange black soldiers because "negroes belonging to our citizens are not considered subjects of exchange," and he permitted his army to enslave free blacks in Pennsylvania and bring them back the South as property. Serwer, *supra* (Ex. 32). And as late as 1865, he continued to assert that "the relation of master and slave … is the best that can exist

between the white & black races." Pryor, *supra*, at 151 (Ex. 33).

After the war, Lee opposed the Reconstruction project of enfranchising the newly freed slaves. He told a congressional subcommittee that he did "not think that [the black man] is as capable of acquiring knowledge as the white man is." Report of the Joint Committee on Reconstruction at the First Session Thirty-ninth Congress, pt. 2, 130 (Wash.: Gov't Printing Office, 1866) ("Lee Testimony), https://archive.org/details/jointreconstruct00congrich/page/n287 (Ex. 35). Granting African Americans suffrage, he testified, would "excite unfriendly feelings between the two races," and Virginia was unlikely to "admit these people to vote" unless it became "plain to her that [they] will vote properly and understandingly." *Id.* at 134. And "if the black people now were allowed to vote," Lee continued, then "intelligent people would not be elected," because, "at this time, they cannot vote intelligently." *Id.* Like the Lost Cause he empowered, Lee's view prevailed. The 1902 Virginia Constitution sought to disenfranchise African Americans by requiring them, among other things, to prove their intelligence, much along the lines Lee had suggested. *See, e.g.*, Encyclopedia Virginia, Virginia Constitutional Convention (1901–1902), https://www.encyclopediavirginia.org/Constitutional_Convention_Virginia_1901-1902 (visited Dec. 11, 2018) (Ex. 36). Lee further indicated that he believed that "the State of Virginia is absolutely injured and its future impaired by the presence of the black population," and that it would be "more attractive by the absence of the colored race." Lee Testimony 136 (Ex. 35). Lee was largely silent about postwar violence toward blacks. Jacey Fortin, What Robert E. Lee Wrote to The Times About Slavery in 1858, *N.Y. Times* (Aug. 18, 2017), https://www.nytimes.com/2017/08/18/us/robert-e-lee-slaves.html (explanation of historian Eric Foner) (Ex. 37).

4. The belief in the inferiority of African Americans was the cause Lee and Jackson represented when their statues in Charlottesville were erected to promote the Lost Cause

In the decades after the war, white Southerners entrenched "[a] segregated society" through

"a segregated historical memory" based on white supremacy. David Blight, *Race and Reunion* 361 (2001) (Ex. 38). "Southern victory over Reconstruction replaced Union victory in the war and Jim Crow laws replaced the Fourteenth Amendment in their places of honor in national memory." *Id.* And in 1915, amid a glut of films with images of happy, loyal slaves cheering for rebel soldiers going off to war, *Birth of a Nation* popularized the message that "Reconstruction in the South was directed by deranged radicals and sex-crazed blacks, especially those mulattos given unwarranted political power." *Id.* at 394–95. The film told Southern white men "to take law and history into their own hands" and helped to "transform[] emancipation, the potential second founding of the American nation, into a reign of racial terror and the necessity of a third creation by the heroic, hooded riders of the Ku Klux Klan." *Id.* at 395. Statues like those of Lee and Jackson played a pivotal part in this reimagining. As defense experts will testify, the contemporaneous record and modern historical scholarship confirm that the statues were erected as symbols of resistance to Reconstruction and black suffrage and citizenship, and to promote white supremacy and physical separation and segregation by race. *Id.*; Varon Desig. 2 (Ex. 16); Hale Desig. 2 (Ex. 14).

The Lee and Jackson statues were an integral part of segregation in Charlottesville. They were erected at the peak of Jim Crow and soon after the "Red Summer" of 1919, when African-American veterans returning from the war in Europe were treated with deep disrespect. Beetham Desig. 2 (Ex. 7). As Plaintiffs concede, "Charlottesville's governing authorities had created segregation ordinances," and "segregation was the consequence of custom, social more, habit, geographic circumstance, or private contracts such as deeds." Pls.' Objs. & Answers 17 (Ex. 11). Indeed, Exhibit A to Plaintiffs' Complaint refers to "the Segregation Ordinance," which the City Council had unanimously passed over the Mayor's veto on February 15, 1912, *see* Ex. 12. The erection of the Lee and Jackson statues was an intentional message, for which the City ultimately

bore responsibility, to help foster that segregation and to intimidate and disenfranchise blacks and keep them in their place. Varon Desig. 3 (Ex. 16); Nelson Desig. 2 (Ex. 40).

The sites for the statues were not selected at random: The Lee and Jackson statues were erected in and around the African-American neighborhoods of Vinegar Hill and McKee's Row. Varon Desig. 3 (Ex. 16); Nelson Desig. 2 (Ex. 40). McKee Row, a busy and residential commercial area adjacent to the courthouse with many black families, was demolished, originally to make space for a school for white children. Blue Ribbon Commission on Race, Memorials, and Public Spaces, *Report to City Council* 11 (Dec. 19, 2016), http://www.charlottesville.org/home/showdocument?id=49037 (Ex. 41). Paul McIntire bought the land for use as Jackson Park, *BRC Report* 11, after "[t]he demolition of black residences on Court Square pushed black residents away from that locale and from their physical and social proximity to an important local seat of civic authority and political power." Daniel Bluestone, *Buildings, Landscapes, and Memory: Case Studies in Historic Preservation* 223 (2010) (Ex. 42); *see also supra* p. 9, n.3.

The statues were placed in the center of town, close to major civic institutions controlled by whites for their exclusive use—particularly the courthouse, public library, and white public high school. *See* Pls.' Objs. & Answers 21 (Ex. 11) (Jackson statue "was erected in 1921 near the west entrance of the historic courthouse"); Bluestone, *supra*, at 223 (Ex. 42) ("The pattern of racial separation in McIntire's provision of public parks, and the fact that his public library served white patrons only, lends some additional credence to the idea that improvements on Court Square supported white ideals of racial separation in the structure and embellishment of the civic landscape."). At the unveiling of the Jackson statue, white schoolchildren formed a living representation of the Confederate Battle Flag "in Midway Plaza, which crowned the north slope of the city's largest African American neighborhood, Vinegar Hill." Nelson, *supra*, at 5 (Ex. 40).

In addition, the Ku Klux Klan was strongly associated with the erection of the statues. KKK and other white supremacist activity peaked around the time the statues were erected. Carter G. Woodson Inst. for Afr.-Am. & Afr. Stud. U. Va., *The Illusion of Progress: Charlottesville's Roots in White Supremacy*, Ch. 4 (2017), http://illusion.woodson.as.virginia.edu/index.html (Ex. 43). In April 1917, for example, a hooded, torch-lit mob gathered outside the jail in Charlottesville's courthouse square to threaten two black men with lynching. Nelson, *supra*, at 1, 3 (Ex. 40); *see also The Daily Progress* (Apr. 17, 1917) (Ex. 44). In July 1921, the KKK placed a "warning" on bulletin boards throughout Charlottesville, instructing "undesirables" to "leave town." *The Daily Progress* (July 19, 1921) (Ex. 45). The group also issued an invitation to "only native-born, white Americans" to join the group and fight for "white supremacy." *Id.* On August 23, 1922, the Grand Dragon of the KKK visited Charlottesville. *The Daily Progress* (Aug. 23, 1922) (Ex. 46). And the Klan's parade down Main Street in Charlottesville "four days before the unveiling of the Lee statue" brought out a crowd of thousands that "equaled those usually seen here to witness the parade of the large circuses." Pls.' Objs. & Answers 20 (Ex. 11); *see also* Nelson, *supra*, at 13–14 (Ex. 40). The parade was "one of the most impressive ever witnessed." John Hammond Moore, Albemarle: Jefferson's County 1727–1976 at 368–69 (Ex. 47). And in an apparent "intimidation tactic," the white-robed figures marched into "one of Charlottesville's black communities." *Illusion of Progress*, *supra*, Ch. 1 (Ex. 43); *see also The Daily Progress* (May 19, 1924) (Ex. 48). The KKK also hosted visiting speakers, visited local churches, *id.* at 3, and "appears to have had a special relationship with Memorial Gym" at the University of Virginia, where "a grand Confederate Ball" was held, Nelson, *supra*, at 13–14 (Ex. 40). A month after the Lee statue was unveiled, the KKK set off explosives and burned a cross in the yard of an African-American church. *Id.* at 15; *see Daily Progress*, June 23, 1924 (Ex. 30).

The location of the statues and the events celebrating their erection made clear that the statues and their messages were endorsed by the government and that African Americans were second-class citizens unwelcome in civic institutions. *Id.*; Nelson Desig. 2–3 (Ex. 40). And the message was received: "[M]embers of today's African-American community have reported to the Blue Ribbon Commission that they understood in years past that they were not to use Lee and Jackson Parks." Charlottesville's Blue Ribbon Commission reached a similar conclusion:

> The Lee and Jackson statues embodied the Lost Cause interpretation of the Civil War, which romanticized the Confederate past and suppressed the horrors of slavery and slavery's role as the fundamental cause of the war while affirming the enduring role of white supremacy. The Lost Cause interpretation was a key element in the ideological justification of the disenfranchisement of African American voters and the segregation of African Americans in virtually all walks of life, including employment, education, housing, healthcare, and public accommodations. ... Although a public park, the landscape surrounding the Lee sculpture retained a reputation as a segregated "whites only" space for decades, consistent with McIntire's terms of deed for other racially segregated parks he donated to the city.

Ex. 41 at 7; O'Bryant Dep. 114:1–5 (Ex. 27) (conceding that BRC linked Lee statue to Jim Crow).

5. A reasonable observer today would likewise conclude that the Lee and Jackson statues commemorate the Lost Cause and its narrative of racial separation, exclusion, and oppression

A reasonable observer—especially one with an accurate understanding of history—would comprehend that the statues commemorate the Lost Cause rather than veterans of the Civil War. As set out above, defense experts will testify that Lee has long been associated with the Lost Cause and white supremacy. That association remains strong today. Indeed, area residents and individual Defendant City Councilors also perceive the messages of exclusion and segregation the statues convey. Individuals expressed those views at City Council meetings.[5] Citizens also sent messages

[5] *See, e.g.*, Apr. 18, 2016, Council Minutes 4 (Ex. 50) ("The history of Union fights and African American soldiers is ... not visible. This monument was erected to affirm white Supremacy during the Jim Crow era."); *id.* at 8 ("[I]t is an injustice for Confederate monuments to dominate public spaces. ... [O]ver half of Charlottesville's residents were enslaved during the Civil War."); *id.* at 4 (the Lee "statue still functions as a locus of lost-cause grief" and "unsettles many residents, and

to that effect to Councilors. *E.g.* Ex. 51 (the statues "are a celebration of th[e] fact" that "500,000 people were sold at the slave auction in Charlottesville to be taken down to the deep south to be owned, beaten, raped and killed"); Ex. 52 ("The statues stand as a symbol of our City's past official sanctioning of white supremacy. And after Saturday, they stand as a symbol of our city's current sanctioning of white supremacy.").

The City Councilors recognized these views when they considered whether to remove or contextualize the statues and, in the wake of the violence on August 12, 2017, to cover them. For example, Councilor Bellamy agreed wholeheartedly that the statues convey a message of white supremacy. Ex. 52. Mayor Signer recognized the statues as a "twisted totem" for "the Nazis and the KKK." Ex. 53. And Councilor Galvin saw the statues as "present-day icons of white nationalism and supremacy ... that inspired multiple alt-right groups to inflict terror and perpetrate violent acts on our city." Ex. 54. Accordingly, the September 5, 2017, resolution to remove the statues recognized that the statues "were erected not as war memorials after the Civil War, but as 20th Century testaments to 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." Sept. 5, 2017, Council Minutes 16 (Ex. 55). The Council further noted, in the wake of the events of August 2017, that the statues "have become flashpoints for white supremacist violence." *Id.*; *see also* Ex. 56 (Nov. 6, 2017, resolution recognizing that that "the Ku Klux Klan rally at Justice Park (formerly

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it does not reflect current values"); *id.* at 7 ("a smaller statue should be put in front of the Lee statue saying racism is bad"); *id.* at 8 ("[T]he statue is offensive and should be removed. ... Black men and women have reason to find glorified Confederate images offensive."); *id.* (area resident "feels alienated by the Lee and Jackson statues" and noted that "[t]here were no people of color at the Tom Tom Festival in Lee Park"); Sept. 19, 2016, Council Minutes 3 (Ex. 49) (African-American resident said "[s]he does not feel comfortable in Lee Park because of the statue").

Jackson) on July 87, 2017 and the Unite the Right rally at Emancipation Park (formerly Lee) on August 12, 2017 and the ensuing violence perpetrated by white supremacist and neo-Nazi groups, served to amplify the original purpose of the Robert E. Lee and … Jackson statues as symbols of racial oppression, overwhelmingly directed towards African Americans, but now also immigrants, refugees, Hispanics, the LGBTQ community, and religious minorities like Jews and Muslims").

The Blue Ribbon Commission reached a similar conclusion. "As the statues now stand," the Report states, "there is nothing that indicates any challenge to the values of the Lost Cause and white supremacy that they represented when they were enacted and that they continue to represent to many people today." *BRC Report* 7 (Ex. 41). The Commission recognized that the Lee statue "has made many members of our community feel uncomfortable and unwelcome in the park," *id.* at 10, and concluded that "the Lee and Jackson statues belong in no public space unless their history as symbols of white supremacy is revealed and their respective parks transformed in ways that promote freedom and equity in our community," *id.* at 7.

Even Plaintiffs, though they prefer a different narrative, recognize that many understand the statues to send messages of white supremacy. *See* Yellott Dep. 84:19–21, 90:3–8 (Ex. 57) (acknowledging that some people say they are "intimidated" by the statues); Fry Dep. 49:12–19 (Ex. 58) ("people are entitled to their opinion" that statues are symbols of racism and slavery); Phillips Dep. 65:15–16, 67:6–17 (Ex. 13) (other people view the statues differently); Earnest (SCV) Dep. 61:10–19 (Ex. 59) ("I believe some people feel" that the statues are symbols of slavery); Marshall Dep. 58:15–60:2 (Ex. 60) (acknowledging that some people "felt inferior and intimidated by the monuments" and saw them as memorials to slavery and white supremacy); *see also* The Monument Fund, Inc., https://www.themonumentfund.org/faq/ (last visited Nov. 21, 2018) (Ex. 61) ("If you are angry, looking for reasons to be angry, then you will see only those

who fought for slavery, and imagine a cheering crowd in KKK costumes."). So do Plaintiffs' experts. O'Bryant—after hearing from "several hundred people" about the Lee and Jackson statues through her participation on the Blue Ribbon Commission—acknowledged that "lifelong members of the community, some African-American and others not . . . [and] other people, who were very new to the community" continue to believe that the statues are connected to the Jim Crow era and are "painful reminders" of violence and injustice. *See* O'Bryant Dep. 105:1–12, 110–11, 117:3–22 (Ex. 27). She acknowledged that Jackson "became a symbol for Lost Cause" and, "for many people," agreeing that "[t]he presence of the Jackson sculpture has perpetuated a false Lost Cause historical narrative for Charlottesville and has made many members of our community feel uncomfortable or unwelcome in the park." *Id.* at 124:1–18; *see id.* at 123:7–9. And Gohdes-Baten has acknowledged that "the broad patterns of history the statues represent would almost certainly be the City Beautiful Movement and the 'Lost Cause' and not the Civil War." Email 6 (Ex. 29). She has also written that "these men fought to establish a slaveholding republic," that their statues "now evoke thoughts about a part of our history that is uncomfortable to many," and that "their defeat actually meant freedom for millions of people." Eleanor Gohdes-Baten, Letter to the Editor, Broader Historic Context Helps Explains [*sic*] Statues, *The Daily Progress*, Aug. 3, 2017 (Ex. 62). These concessions fatally undermine Plaintiffs' contention that there is no dispute of fact on the question whether the statues are memorials to war veterans rather than monuments to the Lost Cause and white supremacy.

C. The Court should deny summary judgment to avoid the equal protection issue

If the Court rejects Defendants' legal framework for determining whether the statues qualify as monuments or memorials to war veterans under §§ 15.2-1812 and 15.2-1812.1, it must confront the serious constitutional question whether the Lee and Jackson statues, and thus §§ 15.2-1812 and 15.2-1812.1 as applied to protect them, violate the equal protection guarantees of the

U.S. and Virginia Constitutions. *Infra* Part II. The Court's duty to avoid reaching that constitutional question should inform the Court's review of the summary judgment question, especially given the extensive factual record Defendants have compiled. *See generally Va. Marine Res. Comm'n* v. *Chincoteague Inn*, 287 Va. 371, 380 (2014) (court has "duty to construe a statute to avoid any conflict with the Constitution of Virginia and the United States Constitution" (brackets and quotation marks omitted)); *Commonwealth* v. *Doe*, 278 Va. 223, 229 (2009) ("whenever possible, we will interpret statutory language in a manner that avoids a constitutional question"). For the reasons explained below, the Lee and Jackson statues are unconstitutional because they convey government messages of hostility and exclusion to racial minorities.

II. Plaintiffs' Motion to Strike should be denied because Defendants' answer establishes violations of the equal protection guarantees of the U.S. and Virginia Constitutions

Plaintiffs move to strike Defendants' affirmative defense that Virginia Code §§ 15.2-1812 and 15.2-1812.1 are unconstitutional as applied in this case on the ground that it is insufficient as a matter of law because it states no facts. Not so. A motion to strike an affirmative defense may be granted only when the facts pleaded in a defendant's answer are insufficient to establish that defense. *Casilear* v. *Casilear*, 168 Va. 46, 52 (1937). But the facts set out in Defendants' answer establish violations of the equal protection guarantees of the U.S. and Virginia Constitutions.

Public statuary speaks for the government. And when the government speaks, no less than when it acts, it is bound by the constitutional command that it treat members of all races alike. Government messages of hostility or exclusion directed at racial minorities violate the command to govern with an even hand, whether because such messages imply racial inferiority, promote different classes of citizens based on race, or deny racial minorities access to government or public facilities on equal terms. Justice requires the appearance of justice, and the laws cannot be administered evenly by a government receptive to messages promoting racial hierarchy.

Those principles apply here. Lee and Jackson believed in, and fought for, God-ordained slavery. And after the Civil War, Lee opposed black suffrage as the South bitterly resisted Reconstruction and constitutional amendments designed to ensure racial equality. A major component of that resistance was the development of a fictional but eventually widespread "Lost Cause" narrative that mythologized the honor and glory of the rebel cause, denied that slavery had impelled the South to arms, and rejected African Americans' claims to citizenship and suffrage based on a vision of white supremacy and black inferiority. Statuary like Charlottesville's depictions of Lee and Jackson played a crucial role in entrenching the Lost Cause narrative.

The messages the Lee and Jackson statues send subvert equal access to government and violate the equal protection guarantees of the U.S. and Virginia Constitutions. The statues are symbols of slavery and white supremacy. They are symbols of the world Lee and Jackson sought to maintain, instruments to establish a segregated society in defiance of the outcome of the Civil War and the ratification of the Reconstruction Amendments. And they are beacons for racial violence today just as they were when they were erected ninety years ago. The statues do not belong on the public property of an inclusive democracy. And because Virginia Code §§ 15.2-1812 and 15.2-1812.1 are the only things keeping the statues in place, they, too, must fall away as applied to the Lee and Jackson statues in this case.

A. The Fourteenth Amendment's Equal Protection Clause forbids all race-based discrimination, including discriminatory government messaging

The Equal Protection Clause provides that "[n]o state shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. That broad guarantee of freedom from racial discrimination prohibits discriminatory race-based government messaging just as surely as it forbids government-mandated segregation. The Virginia Constitution provides the same guarantee. *See infra* Part II.E.

In cases "construing the Fourteenth Amendment ... shortly after its adoption, the [Supreme] Court interpreted [the Equal Protection Clause] as proscribing *all* state-imposed discriminations against [African Americans]." *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 490 (1954) (emphasis added). As Justice Harlan explained in his famous dissent in *Plessy* v. *Ferguson*, 163 U.S. 537, 555–56 (1896), the Reconstruction Amendments "removed the race line from our governmental systems" by declaring "that no discrimination shall be made against [African Americans] by law because of their color." "[T]here is in this country no superior, dominant, ruling class of citizens," he explained. *Id.* at 559. "Our Constitution ... neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful." *Id.* Because Louisiana's law requiring separate railway cars was "conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race," Justice Harlan instructed, it was unconstitutional. *Id.* at 563; *see also Romer* v. *Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

Justice Harlan also recognized that the Fourteenth Amendment commands that "the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). Racially discriminatory government speech is as much "a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution" as "[t]he arbitrary separation of citizens" into segregated railcars. *Id.* at 562.

B. A public statue violates the equal protection guarantee when it communicates a message of hostility or exclusion to racial minorities or promotes separation or classification based on race

Public statues speak for the government and therefore must, like anything else the government does, comport with the Constitution, including the equal protection guarantee. *See* U.S. Const. amend. XIV, § 1; Va. Const. art. I, § 11. When the government sends messages of

hostility or exclusion to racial minorities, it violates the fundamental promise of equality, whether because it denies racial minorities access to the government on equal terms, implies racial inferiority, or promotes different classes of citizens based on race. That is the case both when the government intends to communicate a race-based message of hostility or exclusion as well as when government speech, as understood by a hypothetical "reasonable observer ... aware of the history and context of the community and forum," "*actually convey[s]* [such] a message." *Pinette*, 515 U.S. at 777, 780 (O'Connor, J., concurring in part and in the judgment).

1. The equal protection guarantee reaches public statuary because such statues convey government speech

"Permanent monuments displayed on public property typically represent government speech." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 470 (2009). One of the government's responsibilities is ensuring that government speech, which can be (and has been) used to discriminate, complies with the equal protection guarantee, which forbids *all* types of discrimination. *See id.* at 482 (Stevens, J., joined by Ginsburg, J., concurring) ("[G]overnment speakers are bound by the Constitution's ... Equal Protection Clause[].").

The Supreme Court's interpretation of the Establishment Clause of the First Amendment is instructive. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Even though that clause does not expressly address government speech, the Supreme Court has held that government speech or displays endorsing religion may nonetheless violate the Establishment Clause. *See, e.g.*, *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 860, 881 (2005). The Equal Protection Clause uses parallel language. It states that "no State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. Just as government speech can unconstitutionally aid the "establishment of religion," so too can it unconstitutionally contribute

to the denial to racial minorities of "the equal protection of the laws."

2. Hostile messages directed at racial minorities unconstitutionally deny those individuals access to the government on equal terms

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 633. Government messaging that discriminates against particular groups of people based on their race is incompatible with that principle.

The case law dismantling segregation in public schools establishes that the government has a duty to "eliminate racial discrimination 'root and branch'" so as to make its services equally available to all. *Smith* v. *St. Tammany Parish Sch. Bd.*, 316 F. Supp. 1174, 1176 (E.D. La. 1970) (quoting *Green* v. *Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968)). In *Smith*, for example, the district court presiding over school desegregation proceedings issued an injunction ordering the removal of "[a]ll Confederate flags, banners, signs expressing the school board's or its employees' desire to maintain segregated schools, and all other symbols or indicia of racism." *Id.* at 1177. The court explained that the school board had a "constitutional duty to effectively establish a unitary school system" that must be racially non-discriminatory "in every respect," and that it could not fulfill that mandate while the high school principal "display[ed] a Confederate flag in his office." *Id.* at 1176. The court reasoned that "[t]he Confederate battle flag … has become a symbol of resistance to school integration and, to some, a symbol of white racism in general," such that "the display of that flag is an affront to every Negro student in the school." *Id.* The Fifth Circuit affirmed, holding that the district court's injunction was "fully warranted." 448 F.2d 414, 415 (1971).

Similarly, it goes without saying that segregation of public parks is unconstitutional because it deprives individuals of equal access to government facilities on the basis of race. *E.g.*, *Watson* v. *City of Memphis*, 373 U.S. 526, 534–35 (1963). Although the Supreme Court had

ordered that schools be desegregated "with all deliberate speed," rather than immediately, to account for "the unusual and particular problems inhering in desegregating large numbers of schools throughout the country," *id.* at 531, it found no reason to countenance any delay whatsoever in desegregating parks, *see id.* at 531–32. Accordingly, and without delay, "city owned and operated parks and other recreational facilities" *must*, under the Constitution, "be open to [African Americans'] enjoyment *on equal terms* with white persons." *Id.* at 533 (emphasis added).

Like state-sponsored segregation, government messages of hostility or exclusion to certain racial groups violate the commands of the Fourteenth Amendment. Like segregation, government speech can deprive individuals of equal access to the government and its services. The stigmatic harm alone is significant. *See infra* Part II.B.3. But discriminatory government speech also contributes to the appearance of injustice, *see supra* Part I.B.4, *infra* Part II.C, if not injustice itself. When individuals feel unwelcome approaching or entering government facilities or other public spaces because of hostile or intimidating government speech, the government must be held accountable. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer*, 517 U.S. at 634 (quoting *Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973)).

3. Government speech violates the equal protection guarantee when it implies racial inferiority

The Supreme Court has long recognized the incompatibility of government messaging of racial inferiority and the Constitution's equal protection guarantee. In *Strauder* v. *West Virginia*, 100 U.S. 303, 307–10 (1879), for instance, the Supreme Court struck down a West Virginia law excluding African Americans from jury service. The Court explained that "[t]he words of the [Fourteenth] amendment … contain a necessary implication of a positive immunity" recognized

to be very valuable to African Americans—"the right to exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Id.* at 307–08. And in *Brown*, the Court explained that segregation in schools "generates a feeling of inferiority ... that may affect [children's] hearts and minds in a way unlikely ever to be undone. The effect of this separation," the Court said, is "to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system." 347 U.S. at 494 (brackets omitted).

Elsewhere, too, the Court and other legendary jurists have observed that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion). Indeed, "stigmatizing injury ... is one of the most serious consequences of discriminatory government action." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984). For that same reason, "measures designed to maintain White Supremacy" are incompatible with the equal protection guarantee. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *see id.* at 8–12 (rejecting Virginia's argument that laws were constitutional because they "punish[ed] equally both the white and the Negro participants in an interracial marriage"). For these reasons, "the Wartime Amendments created an affirmative duty that the States eradicate all relics, 'badges and indicia of slavery' lest Negroes as a race sink back into 'second-class' citizenship." *United States* v. *Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966) (John Minor Wisdom, J.), *on reh'g*, 380 F.2d 385 (5th Cir. 1967) (per curiam).

4. Government speech violates the equal protection guarantee when it promotes different classes of citizens based on race

The Supreme Court has rejected government classifications based on race in large part

because of the message those classifications send. Thus, the government may not express messages of hostility to members of certain races on the basis that it otherwise *treats* all individuals the same way regardless of their race. That argument is no different, at bottom, from "the now thoroughly discredited doctrine of 'separate but equal.'" *Watson*, 373 U.S. at 538. Supposed equality of "physical facilities and other 'tangible' factors" could not save segregation in *Brown*, 347 U.S. at 493, and it cannot save discriminatory government speech here. "The sufficiency of [the treatment] is beside the point; it is the segregation by race that is unconstitutional." *Id.*[6]

In *Shaw* v. *Reno*, 509 U.S. 630, 637, 658 (1993), for example, the Supreme Court held that white voters stated an equal protection claim when they challenged North Carolina's creation of two districts in which, they alleged, "a majority of black voters was concentrated arbitrarily." Central to that holding was the Court's recognition that "[r]acial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *id.* at 657, and they "bear[]

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[6] Plaintiffs cite three cases that they claim reject equal protection challenges to discriminatory government messaging. *See* Pls.' Mem. Law Equal Prot. Affirmative Defense 1–2 (Dec. 11, 2018). But for two reasons, those cases do not help them. *First*, those courts did not determine the bounds of the equal protection guarantee; instead, they determined that specific plaintiffs lacked standing because they did not allege tangible harm, and that the stigmatic injury of discrimination "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (quotation marks omitted); *see New Doe Child #1* v. *Congress*, 891 F.3d 578, 594–95 (6th Cir. 2018); *Moore* v. *Bryant*, 853 F.3d 245, 249 (5th Cir.), *cert. denied*, 138 S. Ct. 468 (2017); *Douglas* v. *Daviess Co. Fiscal Ct.*, No. 17-cv-108, 2018 WL 1863656, at *3–4 (W.D. Ky. Apr. 18, 2018). Even assuming, for sake of argument, that those decisions were correct regarding the effect of "differential governmental messaging" on any given individual, *Moore*, 853 F.3d at 250, there is no standing problem here: To the extent that § 15.2-1812 prohibits the City and Council from disposing of City property as they see fit (and it does not, *see* Defs.' Br. Support Demurrer to Pls.' Second Amended Compl. 2–12), that prohibition is a tangible restriction on property rights. *Second*, to the extent Plaintiffs' cases *do* stand for the proposition that the Equal Protection Clause imposes no substantive constraint on government messaging, standing requirements aside, those cases are wrong for all the reasons set forth in this brief. *See also Summum*, 555 U.S. at 482 (Stevens, J., joined by Ginsburg, J., concurring) ("[G]overnment speakers are bound by the Constitution's … Equal Protection Clause[].").

an uncomfortable resemblance to political apartheid," *id.* at 647. Further, the Court reasoned that such districting sends the "equally pernicious" message to elected representatives that "their primary obligation is to represent only the members of that [one] group, rather than their constituency as a whole." *Id.* at 648. That message "is altogether antithetical to our system of representative democracy." *Id.*; *see also Bush* v. *Vera*, 517 U.S. 952, 980 (1996) (plurality opinion) ("Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.").

The recognition that divisive messaging based on race raises constitutional problems is not limited to the electoral districting context. In *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion), for example, a four-member plurality of the Court explained that "[g]overnment action dividing us by race is inherently suspect because such classifications promote notions of racial inferiority and lead to a politics of racial hostility, reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin, and endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." Agreeing on this point, Justice Kennedy explained that "[g]overnmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness" and "lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process." *Id.* at 797 (Kennedy, J., concurring in part and in the judgment). He concluded that "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation." *Parents*

Involved, 551 U.S. at 797.

5. Government messaging that race is a relevant consideration in access to government is a most odious form of racial discrimination

The Supreme Court's decision in *Anderson* v. *Martin*, 375 U.S. 399 (1964), makes clear that the government may not send messages that race matters—especially when those messages may affect individuals' access to government. Consistent with the principles set forth above, the Court held that a Louisiana statute requiring ballots to designate the race of candidates for elective office violated the Equal Protection Clause. *Id.* at 402. The statute, the Court explained, "plac[ed] the power of the State behind a racial classification that induces racial prejudice at the polls." *Id.* The Court reasoned that requiring ballots to designate the race of candidates "indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice," and that the state had no right "to require or encourage its voters to discriminate upon the grounds of race." *Id.*

A recent decision by Judge Martin F. Clark, Jr., of the Patrick County, Virginia, Circuit Court, is also instructive. Judge Clark "personally removed General J.E.B. Stuart's portrait" from the courtroom. Sept. 1, 2015, Order & Mem. 1 (Ex. 9). Judge Clark explained that it was his "duty as a judge ... to provide a trial setting that is perceived by all participants as fair, neutral, and without so much as a hint of prejudice." *Id.* But "Confederate symbols," he explained, "are, simply put, offensive to African Americans, and this reaction is based on fact and clear, straightforward history," because "[b]igotry saturates the Confederacy's founding principles, its racial aspirations and its public pronouncements." *Id.* "From the creation of the Confederacy straight through until today, from Alexander Stephens to Harry Byrd to George Wallace to David Duke," he continued, Confederate emblems "have always been imbued with the conviction of black inferiority." *Id.* at 2. Such symbols are thus incompatible with a courtroom "every litigant and spectator finds fair

and utterly neutral." *Id.*

Judge Clark recognized and directed his ruling at the harmful discrimination caused by *government* speech. He acknowledged *the public's* "right to speak"—private individuals, he found, may "dress[] as Confederate soldiers waving a Civil War battle flag" in "[a] public space." *Id.* at 3. But the "legal system and ... commonwealth cannot and should not sponsor or endorse what private individuals wish to say." *Id.* Thus, in addition to removing the portrait from the courthouse, he ordered a "prohibition against running any iteration of a Confederate flag up the courthouse pole" and a "ban on Confederate articles and memorials after a group has left the square." *Id.*

That government messages of hostility and exclusion to racial minorities are unconstitutional is the logical consequence of *Brown* itself. The Court there recognized that the promise of equal treatment was illusory given forced separation by race. 347 U.S. at 493. In reaching that conclusion, the Court "resorted to intangible considerations." *Id.* A primary consideration, the Court reasoned, was that the "sense of inferiority" caused by segregation "affects the motivation of a child to learn." *Id.* at 494. In relevant respects, discriminatory government messaging is no different: It may affect the motivation of citizens to access their government, its facilities, and their representatives, thereby fostering the conditions for the "political apartheid" the Court decried in *Shaw*, 509 U.S. at 647.

C. The Lee and Jackson statues violate the equal protection guarantee because they convey hostile messages of exclusion and inferiority to racial minorities

Charlottesville's depictions of Lee and Jackson are the statuary equivalents of "whites only" signs. As public statues in public parks, they represent government speech. *See Summum*, 555 U.S. at 470.[7] And, as explained above, *supra* Part I.B.1–5, the statues convey a message of

[7] McIntire donated the statues to the City in 1921 and 1924, and they were erected on land that McIntire had earlier donated to the City and that remains City park land today. History and Gardens of Market Street Park, City of Charlottesville Va., http://www.charlottesville.org/

exclusion and hostility to racial minorities. They depict Confederate figures who played an crucial role in the creation and perpetuation of the Lost Cause myth. *Supra* Part I.B.1. That narrative falsely denied that slavery was the cause of the Civil War, *supra* Part I.B.2, and promoted deeply held views of white supremacy and proper race relations, *supra* Part I.B.4. Lee and Jackson were fitting symbols because they believed in God-ordained slavery and the inferiority of African Americans and fought to maintain the barbaric institution. *Supra* Part I.B.3. The statues, which dominated the City's civic center, were an integral part of segregation. *Supra* Part I.B.4. Associated with the Klan, they told African Americans that they were second-class citizens who were not welcome downtown and who could not expect equal treatment from the government. *Id.*

Plaintiffs may suggest that McIntire or others harbored no animosity toward blacks, and that segregation was simply "the prevailing custom," "allowed by the law[] of the time in which he lived." Pls.' Objs. & Answers 17 (Ex. 11). But McIntire—like Charlottesville and many of its residents—intended segregation. And segregation and the messages the Lee and Jackson statues sent were as unconstitutional then as they are today, regardless of whether they were socially acceptable at the time. *See, e.g.*, *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 863 (1992) (O'Connor, Kennedy, and Souter, JJ.) ("*Plessy* was wrong the day it was decided").

Moreover, a reasonable observer—especially one with an accurate understanding of

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departments-and-services/departments-h-z/parks-recreation/parks-trails/city-parks/emancipation-park-formerly-known-as-lee-park/history-and-gardens-of-emancipation-park (last visited Dec. 11, 2018) (Ex. 10). The City accepted the statues at ceremonies attended by "City ... authorities[] and a large body of citizens of Charlottesville." Pls.' Objs. & Answers 2 (Lee) (Ex. 11); *see id.* at 3 (Jackson). Indeed, defense experts will opine that, when they were erected, the statues would have been understood to convey official representations of the City with respect to white supremacy and segregation. *E.g.*, Hale Designation 3 (Ex. 14); Beetham, *supra*, at 152 (Ex. 15) (The statues' placement in the center of town and the Jackson statue's placement in the park adjacent to the courthouse "give[them] strong associations with Southern civic life, with both the legal machinations of government and the extra-legal practice of lynching."); Varon Designation 3 (Ex. 16) (statues were tools of City-sanctioned segregation).

history—would comprehend that the statues convey messages of exclusion and hostility to racial minorities. Indeed, the statues' placement in the civic center sends the message that the City is not wholly committed to equal justice under law. And the City Councilors, along with area residents and the Blue Ribbon Commission, have understood this message loud and clear. *Supra* Part I.B.5.

More generally, jurists have recognized that Confederate symbols are racially oppressive and "take[] no back seat to the Nazi Swastika in this regard." *Daniels* v. *Harrison Cty. Bd. of Supervisors*, 722 So. 2d 136, 140–41 (Miss. 1998) (Banks, J., specially concurring); *id.* ("[T]he bottom line is that the Confederate battle flag conjures up images of and is popularly used to symbolize slavery, white supremacy, racism and oppression."). To "many Americans, of all races," "the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation." *United States* v. *Blanding*, 250 F.3d 858, 861 (4th Cir. 2001) (Luttig, J.). Thus, it is reasonable to infer that those who "display[] confederate [emblems] may harbor racial bias against African-Americans." *Id.* [8]

The Supreme Court has long recognized that "justice must satisfy the appearance of justice," *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (citation omitted), and that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979). While "public perception of judicial integrity is a state interest of the highest order," *Williams-Yulee* v. *Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (quotation marks omitted), race-based decisionmaking "destroys the

[8] Thus, for example, in *B.W.A.* v. *Farmington R-7 School District*, 508 F. Supp. 2d 740, 749 (E.D. Mo. 2007), *aff'd*, 554 F.3d 734 (8th Cir. 2009), the court held that a public school could prohibit students from wearing Confederate symbols, and that the student's "interpretation of the Confederate flag's meaning is largely irrelevant because courts recognize that it is racially divisive in nature." *Id.* (citing cases).

appearance of justice and thereby casts doubt on the integrity of the judicial process," *Rose*, 443 U.S. at 555–56 (context of selection of members of grand jury). Messages of racial bias subvert the Constitution's promise to apply the laws with an even hand.

The Lee and Jackson statues erode the appearance of justice in Charlottesville. Located at the civic center of Charlottesville, the statues are close to important government and civic buildings "frequented by all our citizens." Amiss Dep. 13: 17–25 (Ex. 63); *see id.* at 12:16–24 (she was taught that "Lee Park would be the center" of the city, "our civic center"). Dominant and easily visible, O'Bryant Dep. 117:17–22 (Ex. 27), they are of "size and proportions … designed to force [individuals] to look up" in "reverence and awe, even if [they] don't feel it." Ex. 64. And the Jackson statue looms near both the City and County Circuit Courthouses, "where citizens go for equal justice according to the U.S. Constitution." Ex. 39. There can be no appearance of equal justice under law so long as the statues remain as monuments to white supremacy, slavery, and those who, to preserve it, "would rend the Union even by war." Abraham Lincoln, Second Inaugural Address, *supra* (Ex. 24).

The Lee and Jackson statues were associated with racial supremacy and violence when they were erected. *See supra* Part I.B.4. In the wake of August 2017, they are again indelibly associated with racial violence today. It is one thing to recognize that individuals may promote their views of racial hierarchy. *See supra* Part II.B.5 (Judge Clark's removal of Confederate portraits); *Kessler* v. *City of Charlottesville*, No. 3:17-cv-56, 2017 WL 3474071, at *3 (W.D. Va. Aug. 11, 2017) (enjoining City from revoking permit to conduct demonstration at Emancipation Park). But it is another thing entirely to assert that the government, bound to administer the law with an even hand, can promote or invite such views and participate in the creation of very real danger to its citizens. As long as the Lee and Jackson statues remain in the public square, they

continue to send the constitutionally impermissible message that the government is not equally open to all, or committed to equal justice, because it is receptive to a belief in white supremacy and black inferiority.

D. Virginia Code §§ 15.2-1812 and 15.2-1812.1 violate the equal protection guarantee to the extent that they prevent or impose damages for the removal of the Lee and Jackson statues

Because the government messages conveyed by the Lee and Jackson statues violate the equal protection guarantees of the U.S. and Virginia Constitutions, Virginia Code §§ 15.2-1812 and 15.2-1812.1 likewise violate those guarantees to the extent the Court applies those statutes to the statues. Virginia may not frustrate the guarantees of the U.S. Constitution, *see* U.S. Const. art. VI, cl. 2 (Supremacy Clause), and the Virginia Constitution likewise displaces any conflicting Virginia statutory provisions, *see e.g.*, *Commonwealth* v. *Doe*, 278 Va. 223, 229–30 (2009).

Of course, the Court only need address this serious constitutional question if it disagrees with the two logically prior reasons that Plaintiffs' case cannot go forward. The first, as explained in detail in Defendants' Demurrer to Plaintiffs' Second Amended Complaint (filed Dec. 20, 2018), is that §§ 15.2-1812 and 15.2-1812.1 do not apply to statues erected by cities before the 1997 amendment to § 15.2-1812. That textualist reading of § 15.2-1812 is amply supported by legislative history and Virginia Supreme Court case law, and it best respects the separation of powers by reading the General Assembly's statutes as they were written rather than extending them to pursue a purported purpose at all costs. The second reason, as discussed above, *see supra* Part I.B, is that the Lee and Jackson statues are monuments to the Lost Cause rather than to the veterans of the Civil War for purposes of §§ 15.2-1812 and 15.2-1812.1.

E. This Court could decide the question under the Virginia Constitution alone

The Virginia Constitution provides its own equal protection guarantee in Article I, § 11: "[T]he right to be free from any governmental discrimination upon the basis of religious

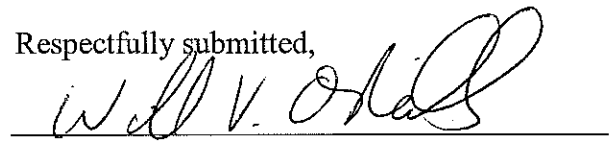
conviction, race, color, sex, or national origin shall not be abridged." Although that guarantee is generally "congruent with the federal equal protection clause," *Wilkins* v. *West*, 264 Va. 447, 467 (2002), the two may vary slightly in coverage, *see Willis* v. *Mullett*, 263 Va. 653, 662 n.5 (2002) (analyzing a statute under the federal Equal Protection Clause but holding that "Article I, Section 11 of the Constitution of Virginia, the anti-discrimination clause, does not apply to [it] because its classification is based solely on the type of tort claim made by an infant, not his 'religious conviction, race, color, sex, or national origin,' as proscribed in this constitutional provision"). For present purposes, the Virginia provision is arguably *broader* in that it applies to "any governmental discrimination," Va. Const. art. I, § 11, and speech can clearly discriminate. Thus, as discussed above, this Court may find that the Lee and Jackson statues (and Virginia Code §§ 15.2-1812 and 15.2-1812.1) violate Virginia's equal protection guarantee without reaching the federal question.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment and Motion to Strike Equal Protection Affirmative Defense should be denied.

Dated: January 11, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify pursuant to Rule 1:12 of the Rules of the Supreme Court of Virginia, that on January 11, 2019, the foregoing document was hand-delivered to Ralph E. Main, Jr., was sent by U.S. mail, first-class, postage prepaid to S. Braxton Puryear, Kevin Walsh and Richard Milnor, and was also sent via electronic mail to all of the following counsel of record, at the addresses given below:

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