VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

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

INDIVIDUAL COUNCILOR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON STATUTORY IMMUNITY GROUNDS

Individual Councilor Defendants Wesley J. Bellamy, Kathleen M. Galvin, A. Michael Signer, and Kristin L. Szakos (the "Councilors") respectfully move this Court to enter summary judgment in their favor on all the claims against them because, on the undisputed facts, they are immune as a matter of law under Virginia Code § 15.2-1405. All of the Councilors' challenged conduct constituted "exercise[s of] their discretionary or governmental authority as members of the governing body" of the City of Charlottesville. Va. Code § 15.2-1405. Neither of the statute's exceptions (for "unauthorized appropriation or misappropriation of funds" or "intentional or willful misconduct or gross negligence") applies. Accordingly, the Councilors are immune from this lawsuit and are entitled to summary judgment.

Dated: February 27, 2019

Respectfully submitted,

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BRIEF IN SUPPORT OF INDIVIDUAL COUNCILOR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON STATUTORY IMMUNITY GROUNDS

Dated: February 27, 2019

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INTRODUCTION

The only conduct by Defendants Wesley J. Bellamy, Kathleen M. Galvin, A. Michael Signer, and Kristin L. Szakos (the "Councilors") that Plaintiffs challenge is their votes. As this Court has recognized, in casting those votes, the Councilors exercised "their discretionary or governmental authority as members of the governing body" of the City of Charlottesville. *See* Jan. 22, 2019, Letter Ruling 11. The Councilors are therefore covered by the statutory immunity set forth in Virginia Code § 15.2-1405. Because the indisputable record evidence makes clear that neither of the two exceptions to statutory immunity under § 15.2-1405 applies, the Councilors are entitled to judgment as a matter of law.

First, nothing the Councilors did "involve[d] the unauthorized appropriation or misappropriation of funds." Va. Code § 15.2-1405. "Appropriation" is a term of art; it means a formal set-aside of money for a specific use. City Council records indisputably demonstrate that the Councilors made no appropriations to remove or cover Charlottesville's Lee and Jackson statues. And there is no plausible argument (or allegation in Plaintiffs' Second Amended Complaint) that the Councilors "misappropriat[ed] funds"—*i.e.*, embezzled moneys or diverted them for their own personal benefit.

Second, the existing record, including publicly available City Council documents, precludes as a matter of law any finding of "conduct constituting intentional or willful misconduct or gross negligence." *Id.* When the Councilors voted to remove the Lee and Jackson statues and cover them, they were voting as representatives of all of Charlottesville's citizens, after many hours of public debate and hearings by a specially created commission, and balancing all of the interests at stake. At the times of the votes, the only judicial ruling to address the issue definitively had concluded that Virginia Code § 15.2-1812 could not apply to monuments erected by cities before 1997. *Heritage Pres. Ass'n, Inc.* v. *City of Danville*, No. CL15000500-00 (Va. Cir. Dec. 7,

2015), *pet. for appeal refused*, No. 160310 (Va. June 17, 2016), *reh'g denied* (Oct. 7, 2016). And the Virginia Supreme Court found "no reversible error" in that ruling. Ex. 19 to Decl. of William V. O'Reilly in Support of Individual Councilor Defts.' Mot. Summ. J.[1] Moreover, before any of the challenged votes, the City Attorney's Office wrote a letter to the Blue Ribbon Commission created by the City Council citing the *Danville* ruling (while explaining that it was not binding authority in Charlottesville). That letter was shared with the Councilors. This Court or the Virginia Supreme Court might or might not ultimately agree with the reasoning of the *Danville* court (and the subsequent legal opinions of the Virginia Attorney General). But the existence of the *Danville* opinion and lack of any contrary authority firmly establish that it was not grossly negligent to vote to remove or cover the Lee and Jackson statues. In addition, as a matter of law, a showing of gross negligence, like any form of negligence, requires proof of damage, but Plaintiffs here have neither alleged nor shown any damages occasioned by the challenged votes. Accordingly, the Councilors are entitled to statutory immunity and the Court should grant summary judgment in their favor.

BACKGROUND

The three votes Plaintiffs challenge in this litigation are the result of almost a year of careful deliberation and community engagement by the Councilors about how to address Charlottesville's Lee and Jackson statues. That deliberative process began on March 21, 2016, when "Mr. Bellamy asked Council to add a discussion of the confederate statues in Charlottesville to Council's April 18 agenda." Mar. 21, 2016, Council Minutes 11, *available at* http://www.charlottesville.org/home/showdocument?id=41660 (Ex. 1). Then-Mayor Signer proposed "creating a Blue Ribbon Commission" (the "BRC" or "Commission") that would engage with the community, "evaluat[e] and advis[e] on the full range of options," and "[f]ully explain[] the policy behind the effort." *Id.*

[1] All exhibits cited in this brief are to the supporting Declaration of William V. O'Reilly.

At its April 18 meeting, the Council held a public hearing on the proposal to create a Blue Ribbon Commission, and Mr. Signer introduced a draft resolution to be voted on at the Council's next meeting. Apr. 18, 2016, Council Minutes 7–10, *available at* http://www.charlottesville.org/home/showdocument?id=41664 (Ex. 2). The Councilors heard from members of the public, who suggested a wide variety of approaches to address the statues. *Id.* at 7–9. The Councilors recognized the magnitude of the deliberative task they faced. Councilor Szakos proposed allocating additional time "for consideration of race and public space within the City," *id.* at 10, and "Mr. Signer said this is a very time-consuming issue, and a commission can dedicate the necessary time to come up with options and recommendations," *id.* at 12.

At the Council's next meeting, on May 2, 2016, the Councilors voted unanimously to create the BRC. May 2, 2016, Council Minutes 8–9, *available at* http://www.charlottesville.org/home/showdocument?id=41666 (Ex. 3). The resolution charged the Commission with, among other things, "providing options to Council for specific ways in which our public spaces are used, or could be used, to address race, including … [r]elocating, or adding context to, existing Confederate statues," and "[c]oordinat[ing] with the City Attorney's office to provide full legal review of options." Resolution: Blue Ribbon Commission on Race, Memorials and Public Spaces (May 2, 2016), *available at* http://charlottesville.granicus.com/DocumentViewer.php?file=charlottesville_e0429b1bf12bc0c607c9edb0c1109495.pdf (Ex. 4).

In the following months, the Councilors appointed members of the BRC, *see* June 6, 2016, Council Minutes 2, *available at* http://www.charlottesville.org/home/showdocument?id=44364 (Ex. 5); Aug. 15, 2016, Council Minutes 4, *available at* http://www.charlottesville.org/home/showdocument?id=47351 (Ex. 6), and received an interim report from the Commission, *see* Sept. 19, 2016 Council Minutes 14–15, *available at* http://www.charlottesville.org/home/

showdocument?id=47355 (Ex. 7). When the Commission presented an interim report on September 19, 2016, it included an item regarding "the legal issues raised by the 2016 Virginia Assembly bill HB587, the Governor's subsequent veto of the bill, and the related court case in Danville that resulted in the removal of a Confederate flag from a monument on the grounds of the Sutherlin Mansion." Sept. 19, 2016, City Council Agenda 2, *available at* http://charlottesville.granicus.com/DocumentViewer.php?file=charlottesville_6cbc242b34ec25f996a339a7749f45bb.pdf (Ex. 8). The City Attorney's Office also offered its opinion in writing, citing the *Danville* opinion while acknowledging that it would not be binding in a court challenge in Charlottesville. *See* Mem. from Lisa Robertson, Chief Deputy City Att'y, to Charlene Green (Sept. 2, 2016) ("We cannot say with any certainty whether or not the provisions of the [war memorials statutes] govern what City Council can or cannot do relative to moving the Statues, or either of them."), in Blue Ribbon Commission on Race, Memorials, and Public Spaces, *Report to City Council* (Dec. 19, 2016), App. G, *available at* http://www.charlottesville.org/home/showdocument?id=49037 (Ex. 9); *Report to City Council* 22 (noting "Legal Review"). The City Attorney's Office did not conclude that moving, removing, or covering the statues was unlawful. A local attorney also wrote the Commission and the Council a memorandum concluding that "by its plain language § 15.2-1812 only applies to memorials erected after the statute become effective in 1998." Email & Memo from Pamela Starsia to BRC & Charlottesville City Council 1, 2–3 (Nov. 27, 2016) (Payne-Individual Councilor-000002139 through Payne-Individual Councilor-000002153) (Ex. 10).

On January 17, 2017, the Council received the BRC's full report, which contained the September 2, 2016, legal opinion from the City Attorney's Office. *See* Jan. 17, 2017, Council Minutes 8–12, *available at* http://www.charlottesville.org/home/showdocument?id=53259 (Ex. 11). The Councilors carefully considered the issues raised in the report and continued deliberations

regarding the City's Lee and Jackson statues. *See id.*

On February 6, 2017, after again hearing from the public about the statues, Feb. 6, 2017, Council Minutes 4–5, *available at* http://www.charlottesville.org/home/showdocument?id=52745 (Ex. 12), Councilors Szakos, Bellamy, and Fenwick voted to remove the Lee statue, *id.* at 10. The Council did not vote to appropriate or to authorize any appropriation of funds to remove the statue. Councilors Galvin and Signer voted against removing the statue. *Id.* Plaintiffs sued on March 20, 2017, and on June 6, 2017, this Court granted a temporary injunction against removing the Lee statue. Feb. 23, 2018, Letter Ruling 2.

In August 2017, the statues became the locus of "'rallies' or demonstrations by KKK and 'alt right' groups and individuals." *Id.* The ensuing violence "resulted in the death of Heather Heyer and, indirectly, the deaths of two Virginia State Police Officers (Lt. Jay Cullen and Pilot Berke Bates)." *Id.* On August 21, 2017, the Councilors voted by consensus to cover the statues as "a drape of mourning" and as part of "explor[ing] policies that can limit demonstrations." Aug. 21, 2017, Council Minutes 3 (statement of Councilor Szakos), *available at* http://www.charlottesville.org/home/showdocument?id=56212 (Ex. 13). "Since the cloth does not damage the statue in any way," Councilor Szakos stated, "it would not be in violation of [this Court's] injunction" against removing the Lee statue. *Id.* The Council did not vote to appropriate or to authorize any appropriation of funds to cover the statues.

On September 5, 2017, the Councilors voted unanimously to remove the Jackson statue but only "upon the successful resolution of the current court case in favor of the City." Sept. 5, 2017, Council Minutes 17, *available at* http://www.charlottesville.org/home/showdocument?id=59995 (Ex. 14). The vote indicated that "*both statues* will be moved" only "upon the successful resolution of the current court case." *Id.* (emphasis added). The Council did not vote to appropriate or to

authorize any appropriation of funds for the contingent removal of the Jackson statue (or the Lee statue).

ARGUMENT

A. Summary judgment is warranted where there is no dispute of material fact

Summary judgment is appropriate if no "material fact is genuinely in dispute." Va. Sup. Ct. R. 3:20. On a motion for summary judgment, the court "view[s] the evidence in the light most favorable to … the non-moving party." *Elliott* v. *Carter*, 292 Va. 618, 623 (2016). Summary judgment in the defendant's favor is appropriate if "the undisputed material facts" support it. *Id.*

B. Statutory immunity shields members of local governing bodies from liability so long as they do not engage in the unauthorized appropriation or misappropriation of funds or conduct constituting intentional or willful misconduct or gross negligence

Virginia law extends immunity from suit to a number of local officials. The statute that applies here provides:

> The members of the governing bodies of any locality or political subdivision and the members of boards, commissions, agencies and authorities thereof and other governing bodies of any local governmental entity, whether compensated or not, shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body, board, commission, agency or authority which does not involve the unauthorized appropriation or misappropriation of funds. However, the immunity granted by this section shall not apply to conduct constituting intentional or willful misconduct or gross negligence.

Va. Code § 15.2-1405.

1. The statutory immunity rule

The statute protects a number of officials, including city councilors. By its terms, the statute applies to the "exercise [of] discretionary or governmental authority" by "members of the governing bodies of any locality." *Id.* Localities include cities. *See id.* § 15.2-102 ("As used in this title," "'Locality' … shall be construed to mean a county, city, or town as the context may require.").

2. Exceptions from the statutory immunity rule

Immunity is not conferred, however, if "the exercise or failure to exercise … discretionary or governmental authority" either **(a)** "involve[s] the unauthorized appropriation or misappropriation of funds," or **(b)** "constitut[es] intentional or willful misconduct or gross negligence." *Id.* § 15.2-1405.

a. Unauthorized appropriation: "[A]ppropriation" is a term of art. It does *not* mean any expenditure of funds. Instead, "[g]iving the words their commonly accepted meaning, 'to appropriate to' means 'to appropriate for the benefit of' a specific purpose, and none other." *Almond* v. *Day*, 197 Va. 419, 426 (1955). Thus, the Virginia Supreme Court has held that an appropriation is "[m]oney set apart by formal action to a specific use." *Id.* (quoting *Webster's New International Dictionary* (2d ed.)). The "particular purpose or use" for which the money is set aside is "in exclusion of all others." *Id.* (quoting *Webster's New International Dictionary* (2d ed.)).[2]

b. Gross negligence: Gross negligence is an exacting standard that entails "the absence of slight diligence, or the want of even scant care." *Frazier* v. *City of Norfolk*, 234 Va. 388, 393 (1987). A defendant who has "exercised some degree of care" cannot be found grossly negligent. *Elliott*, 292 Va. at 622; *accord Commonwealth* v. *Giddens*, 295 Va. 607, 614 (2018); *Colby* v. *Boyden*, 241 Va. 125, 133 (1991) (plaintiff failed to establish prima facie case of gross negligence as a matter of law where evidence showed that defendant "did exercise some degree of diligence and due care"). Put another way, gross negligence requires "an utter disregard of prudence, amounting to … heedless and reckless disregard of … rights as to be shocking to reasonable men." *Kennedy* v. *McElroy*, 195 Va. 1078, 1081 (1954); *accord Town of Big Stone Gap* v. *Johnson*, 184

[2] Immunity is also withheld in the case of a "misappropriation"—meaning, essentially, embezzlement—but no such conduct is alleged here. *See* Jan. 22, 2019, Letter Ruling 6; June 13, 2018, Letter Ruling 3 & n.3.

Va. 375, 378–79 (1945) (gross negligence is "a heedless and palpable violation of legal duty respecting the rights of others," such that "[t]he element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence").[3]

The heightened requirements for gross negligence aside, a plaintiff seeking to establish *any* form of "actionable negligence … [has] the burden to show the existence of a legal duty, a breach of the duty, and proximate causation *resulting in damage*." *Atrium Unit Owners Ass'n* v. *King*, 266 Va. 288, 293 (2003) (emphasis added); *see Fox* v. *Custis*, 236 Va. 69, 73 (1988) ("There can be no actionable negligence unless there is a legal duty, a violation of the duty, and consequent damage."). Further, damages must be concrete and tangible, not merely nominal. *See Gilliam* v. *Immel*, 293 Va. 18, 27 n.6 (2017) ("Damages are not presumed in a negligence action. 'Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.'" (quoting William L. Prosser, *The Law of Torts* 143 (4th ed. 1971))). Accordingly, a plaintiff cannot recover for conduct constituting gross negligence without first proving that the conduct proximately caused actual damage. *See McGuire* v. *Hodges*, 273 Va. 199, 206 (2007).

[3] This exception also applies in instances of "willful misconduct"—a "third level" of misconduct beyond, and more shocking than, negligence and gross negligence (the first and second levels). *Cowan* v. *Hospice Support Care, Inc.*, 268 Va. 482, 487 (2004). Willful misconduct means "acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." *Id.* at 486–87 (quoting *Etherton* v. *Doe*, 268 Va. 209, 213–14 (2004)). If conduct cannot constitute gross negligence as a matter of law, it certainly cannot qualify as willful misconduct.

C. The Councilors are entitled to statutory immunity as a matter of law

The Councilors are entitled to statutory immunity as a matter of law because all of their challenged conduct constituted "the exercise [of] their discretionary or governmental authority as members" of the Charlottesville City Council, Va. Code § 15.2-1405, and neither of the statute's exceptions applies. *First*, an "appropriation" is a set-aside of money for a particular purpose, and the publicly available records of the City Council make clear beyond dispute that the Councilors never appropriated funds for a purpose that would violate Virginia Code § 15.2-1812 or § 15.2-1812.1. *Second*, the Councilors voted to remove the Lee and Jackson statues and cover them only after the City had devoted months to careful deliberation and consideration of the presence of the statues and their effect on the City, and after a weekend of deadly violence. At the time of the votes, the only judicial ruling to address the issue had concluded that Virginia Code § 15.2-1812 could not apply to monuments erected by cities before 1997. Furthermore, the votes were cast after the Councilors had received guidance that at best the war memorials statutes did not cover the Lee and Jackson statues and at worst the law was unsettled. *Third*, there can be no negligence, let alone gross negligence, because none of the Councilors' challenged votes caused any damages. Because no dispute of material fact can exist on these points, the Court should enter judgment in the Councilors' favor on grounds of statutory immunity.

1. Each instance of challenged conduct was an "exercise [of] discretionary or governmental authority" under Virginia Code § 15.2-1405

The Councilors' challenged conduct was "taken in the councilors' official capacity, with the exercise of discretion and expression of a policy position." Jan. 22, 2019, Letter Ruling 11. Thus, there is no dispute of material fact as to whether the challenged conduct falls within the general coverage of Virginia Code § 15.2-1405 as "the exercise [of] discretionary or governmental authority [by] members" of the Charlottesville City Council.

2. The Councilors made no "unauthorized appropriation … of funds"

To fall outside the protection of the statutory immunity conferred by § 15.2-1405, the Councilors themselves would have had to set aside a particular sum of money for a purpose that violated Virginia Code § 15.2-1812 or § 15.2-1812.1. But no such set-aside ever occurred, whether during the challenged votes (February 6, August 21, and September 5, 2017) or on any other occasion. Because no appropriations related to the contested votes, the exception for unauthorized appropriations cannot apply.

a. February 6, 2017, vote: No money was set aside on February 6, 2017, for moving or removing the Lee or Jackson statue. No such appropriations are listed in the official Council certifications. *See* Feb. 6, 2017, Certifications, *available at* http://weblink.charlottesville.org/public/0/edoc/734677/20170206Feb06.pdf (Ex. 15). Moreover, at the February 6, 2017, Council meeting, City Manager Maurice Jones explained that the Council's vote regarding the Lee and Jackson statues (and parks) was not "an allocation of funds" and that the "Council would have to come back and vote on the appropriation of funds" before any work got underway. Feb. 6, 2017, Council Minutes 13. Indeed, although the exception in the immunity statute requires an actual appropriation and not mere spending, there is no evidence that any funds were expended for the purpose of moving or removing either statue—let alone that any money was appropriated.

b. August 21, 2017, vote: No money was set aside on August 21, 2017, for covering the Lee or Jackson statue. No such appropriations are listed in the official Council certifications. *See* Aug. 21, 2017, Certifications, *available at* http://weblink.charlottesville.org/public/0/edoc/759705/20170821Aug21.pdf (Ex. 16). Whether or not City officials—rather than the Councilors—spent time or City money putting up tarps, the Councilors indisputably did not "appropriat[e]" money for that purpose.

c. September 5, 2017, vote: No money was set aside on September 5, 2017, for moving

or removing the Lee or Jackson statue. No such appropriations are listed in the official Council certifications. *See* Sept. 5, 2017, Certifications, *available at* http://weblink.charlottesville.org/public/0/edoc/738999/20170905Sep05.pdf (Ex. 17). That is unsurprising because the September 5 vote, as Plaintiffs recognize, was expressly contingent on the outcome of this litigation. *See* Sept. 5, 2017, Council Minutes 17 ("[U]pon the successful resolution of the current court case in favor of the City and until successful bids are accepted, pending successful resolution of the current court case, both statues will be moved to a storage location pending final disposition … ."); Second Amended Compl. ¶ 30 D (acknowledging that the September 5, 2017, vote was contingent on "the successful resolution of the current court case in favor of the City").

d. No other relevant votes: Nor does any other certification from 2016 or 2017 list any appropriation that would violate Virginia Code § 15.2-1812 or § 15.2-1812.1.

In sum, there is no evidence that the Councilors engaged in any "appropriation" of funds to move, remove, or cover the Lee or Jackson statue. Regardless of whether money would ultimately need to be spent to move or remove the statues, and regardless of whether a City employee spent time or money covering the statues, the Councilors themselves never appropriated funds for any purpose that would violate Virginia Code § 15.2-1812 or § 15.2-1812.1. Simply put, the Councilors never "set apart [money] by formal action to [the] specific use," *Almond*, 197 Va. at 426, of removing or covering the statues. Consequently, the "unauthorized appropriation … of funds" exception does not apply.

3. As a matter of law, the Councilors could not have been grossly negligent

For two independent reasons, the Councilors could not have been grossly negligent as a matter of law. *First*, gross negligence requires shocking conduct that utterly disregards prudence and reflects the absence of any care whatsoever. *Supra* pp. 7–8. But here, the undisputed factual record establishes that the Councilors acted with extraordinary diligence and care in considering

the effect of the statues on the City and in voting to remove and cover the statues, whatever this Court or the Virginia Supreme Court may ultimately conclude regarding the applicability of Virginia Code §§ 15.2-1812 and 15.2-1812.1. Further, the only definitive judicial ruling had held that those laws do *not* apply to pre-1997 statuary in cities. *Second*, because the Councilors' challenged votes caused no damage to the statues, the votes, as a matter of law, could not have "constitut[ed] … gross negligence."

a. The Councilors could not have been grossly negligent because the undisputed record establishes that they acted with diligence and care in assessing the statues at a time when the only definitive judicial guidance held that § 15.2-1812 did not apply in similar circumstances. When the Councilors cast the challenged votes, only one judicial opinion definitively addressed whether § 15.2-1812 could apply to any statuary erected in a city before 1997. In that case the court rejected the very argument Plaintiffs have advanced here. *See Heritage Pres. Ass'n, Inc.* v. *City of Danville*, No. CL15000500-00 (Va. Cir. Dec. 7, 2015) (Ex. 18) ("As a matter of law, Virginia Code § 15.2-1812 does not apply retroactively … ."), *pet. for appeal refused*, No. 160310 (Va. June 17, 2016), *reh'g denied* (Oct. 7, 2016) (Ex. 19). And although the circuit court in *Danville* rejected the claims on two grounds, it is not insignificant that the Virginia Supreme Court, in denying the appeal petition, found "no reversible error." Ex. 19. Since then, the Virginia Attorney General has twice opined that the war memorials statutes do not apply to memorials erected by cities before 1997. *See* Letter from Att'y Gen. Mark R. Herring to Julie Langan, Dir., Va. Dep't of Historic Res. (Aug. 25, 2017), Op. No. 17-032, 2017 WL 3901711, *available at* https://www.oag.state.va.us/files/Opinions/2017/17-032-Langan---Monuments---Issued.pdf (Ex. 20); Letter from Att'y Gen. Mark R. Herring to Stephen W. Mullins, Dickensen Cty. Att'y (Sept. 28, 2018), Op. No. 17-047, 2018 WL 4945133, *available at*

https://www.oag.state.va.us/files/opinions/2018/17-047-Mullins-issued.pdf (Ex. 21).

What is more, following *Danville* but before the Councilors' challenged votes, the Governor vetoed a bill that would have amended § 15.2-1812 to make the statute's prohibitions "apply to all such monuments and memorials, regardless of when erected." H.B. 587 (2016 Sess.), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+HB587ER (Ex. 22); *see* Governor's Veto, H.B. 587 (2016 Sess.), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?161+amd+HB587AG (Ex. 23). The failure to enact that bill further supports the view that §§ 15.2-1812 and 15.2-1812.1 do not apply to statuary erected by cities before 1997. *See* Brief in Support of Demurrer to Plaintiffs' Second Amended Complaint 9 ("Demurrer Brief"). Indeed, for the reasons set forth in those authorities and in the Councilors' Demurrer Brief (at 2–12), those statutes, correctly read, do not apply to Charlottesville's Lee and Jackson statues. Because that interpretation of the statutes is and was reasonable (even if this Court and the Virginia Supreme Court disagree with that interpretation), the Councilors could not have failed to "exercise[] some degree of care" in acting consistent with it. *Elliott*, 292 Va. at 622.

This reasonable construction of the statutes precludes a finding of gross negligence because it means the votes could not have been cast without "some degree of care." Four indisputable pieces of evidence make that conclusion inescapable. *First*, before voting to remove the Lee and Jackson statues or cover them, the Councilors established the Blue Ribbon Commission by resolution on May 2, 2016, to recommend how to address the statues. *See* May 2, 2016, Council Minutes 8–9. The resolution creating the BRC specifically tasked the Commission with "[c]oordinat[ing] with the City Attorney's office to provide full legal review of options." Resolution: Blue Ribbon Commission on Race, Memorials and Public Spaces (May 2, 2016). The Council's creation of the BRC was part of a careful and considered deliberative process that

stretched for nearly a year and that forecloses the possibility of gross negligence.

Second, the Commission asked for an opinion from the Charlottesville City Attorney's Office on the legality of moving the Lee and Jackson statues. *See* Mem. from Lisa Robertson, Chief Deputy City Att'y, to Charlene Green (Sept. 2, 2016); *Report to City Council* 22 (noting "Legal Review"). The City Attorney's Office cited the *Danville* decision while acknowledging that "[w]e cannot say with any certainty whether or not the provisions of the [war memorials statutes] govern what City Council can or cannot do relative to moving the Statues, or either of them." *Id.* The letter further noted that, beyond the legal question addressed by the *Danville* opinion, it was unclear "whether either of the Statues would be regarded by a court as one of the types of monuments or memorials that a locality is prohibited from disturbing." *Id.* The letter concluded that "Virginia law remains unsettled, and even if it were not, each case presents a different, unique set of factual circumstances to which the law would need to be applied." *Id.* The City Attorney's Office did *not* conclude that moving, removing, or covering the statues was unlawful.

Third, after the City Attorney's Office issued its opinion that the legal issue was "unsettled," a local attorney sent the Commission and the Council a detailed memorandum concluding that, "by its plain language, § 15.2-1812 only applies to memorials erected after the statute become effective in 1998." Email & Memo from Pamela Starsia to BRC & Charlottesville City Council 2–3. The attorney noted the *Danville* opinion, the fact that the Virginia Supreme Court twice denied review in *Danville*, and the significance of the failure of the General Assembly to pass H.B. 587. *Id.* at 3.

Fourth, the Council received the BRC's full report—containing the legal opinion from the City Attorney's Office—on January 17, 2017. *See* Jan. 17, 2017, Council Minutes 8–12. The

agenda for February 6, 2017, incorporated the report. *See* Feb. 6, 2017, City Council Agenda, *available at* http://charlottesville.granicus.com/DocumentViewer.php?file=charlottesville_4cd48dddc50f07764354e3ef2358f96a.pdf (Ex. 24).

Given these facts, set against the backdrop of a long, careful, and inclusive deliberative process, nothing the Councilors did could be described as unreasonable, much less—as required for gross negligence—"shocking to reasonable men," *Kennedy*, 195 Va. at 1081, or characterized as actions "ris[ing] to that degree of egregious conduct which can be classified as a heedless, palpable violation of rights showing an utter disregard of prudence," *Frazier*, 234 Va. at 393. Regardless of what the Councilors personally believed, their votes could not have constituted gross negligence. The Councilors cast those votes in their role as representatives of all of Charlottesville's citizens after a request for the BRC to review the legality of the options and, in two cases, amid extreme threats of violence. At a minimum, the Councilors took "some degree of care"—and that is all that is required.[4]

b. As a matter of law, the Councilors' votes could not have "constitut[ed] … gross negligence" because the votes caused no damage. All species of negligence claims, ordinary and gross, require more than a breach of duty. Any type of negligence is actionable only if the plaintiff can prove damage, in addition to duty, breach, and causation. *See Atrium*, 266 Va. at 293; *supra* p. 8. But here Plaintiffs have produced no evidence of any damages at all. To the contrary, Plaintiffs have not even *alleged* any damages in their Second Amended Complaint. That failure of pleading is fatal—Plaintiffs should not be permitted to further amend their complaint at this juncture, and the Court cannot infer or impute damages that have not been alleged. For that reason

[4] Councilors Signer and Galvin voted against removing the Lee and Jackson statues on February 6, 2017, *see* Feb. 6, 2017, Council Minutes 10, so they cannot be liable for those votes.

alone, summary judgment must be entered in the Councilors' favor, because damages are a necessary component of gross negligence. Any effort to amend the complaint would be futile anyway, because, as the Councilors explained in their Demurrer Brief (at 13–14), it is undisputed that there has been no physical damage to either statue and that the tarps have been removed. *See* Nov. 17, 2018, Letter Ruling 4; June 13, 2018, Letter Ruling 8. Because there have been no damages against which §§ 15.2-1812 and 15.2-1812.1 purportedly guard, there likewise can be no actionable negligence, and so the gross negligence exception to § 15.2-1405 cannot apply.

* * *

Far from causing any damage, the challenged votes addressed real injuries. The Councilors were duty-bound to protect and respect all their constituents, including against the very real harms that materialized in August 2017 and the risk that the statues would once again serve as a flashpoint for violence. The Councilors' responsibility to their community demanded attention to those risks. Allowing this lawsuit to proceed, despite the Councilors' extended and careful attention to public comment in the face of threats of violence and the lack of any clear indication that § 15.2-1812 or § 15.2-1812.1 applies to the statues, is likely to send a chilling message to local legislators that they are powerless to do anything to address the difficult issues of the day. It is one thing to find personal liability where the conduct in question disregards a clear legal duty and results in harm. It is another thing entirely to permit the specter of personal liability for "acts, which [judges] alone finally determine, when the judges of the courts … themselves often disagree as to what is [lawful] and what is not." *Klauder* v. *Cox*, 145 A. 290, 291–92 (1929) (Pa. 1929). [5]

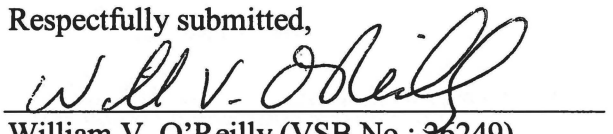
[5] The Councilors reserve the right to demonstrate reasons (*e.g.*, equal protection) they reasonably believed that the war memorials statutes do not cover the Lee and Jackson statues, and to seek summary judgment on additional grounds not raised in this motion following resolution of their demurrer and other pending legal issues.

CONCLUSION

The Councilors respectfully ask the Court to find them immune from this lawsuit under Virginia Code § 15.2-1405 and grant summary judgment in their favor.

Dated: February 27, 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 February 27, 2019, the foregoing document was hand-delivered in paper copy Ralph E. Main, Jr. and Richard H. 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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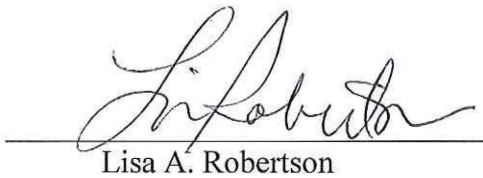

Lisa A. Robertson