VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

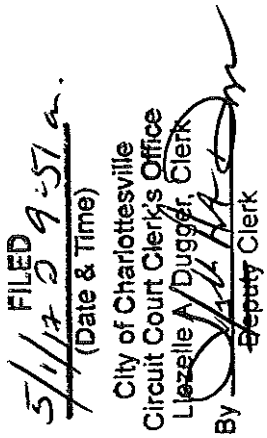
FREDERICK W. PAYNE , et al.

Plaintiffs,

v. Case No. CL 17 - 145

CITY OF CHARLOTTESVILLE, VIRGINIA, et al.

Defendants



Plaintiff's Brief: Summum

Summary

1) The issue is not before the court; addressing Summum would require a plea in bar.

2) Removing the Lee monument is proscribed viewpoint censorship.

3) Virginia localities are prohibited from such "speech" deriding veterans.

1) The issue is not before the court; addressing Summum would require a plea in bar.

Defendants filed an Answer to Plaintiff's Motion for Injunction and a Demurrer. Neither pleading made any mention of a "message" that would bring into consideration Pleasant Grove City v. Summum, 555 U.S. 460, 475-76 (2009)(holding Pleasant Grove City, Utah exercised government speech in rejecting a monument for its park) ("Summum"). The factual allegation appears for the first time in their brief on pg. 13, about defendants conveying "a message." What message, they do not say.

We object: Virginia law expressly prohibits discussion of grounds not raised in a demurrer: "[n]o grounds other than those stated specifically in the demurrer shall be considered by the court." Va. Code § 8.01-273. The court cannot consider it.

Addressing a "message" requires at the least a plea in bar stating what facts they rely on, giving notice to the Plaintiff, then proof of the supporting facts, and the opportunity for the Plaintiff to contest them. Tomlin v. McKenzie, 251 Va. 478, 468 S.E.2d 882, 885 (Va., 1996)(reversing trial court which should have "denied plea in bar because defense presented no evidence," and court should have accepted plaintiff's pleadings as true) ("Tomlin"). The court in Tomlin recited that the Defendant must plead a specific, and "distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." The moving party carries the burden of proof. Where no evidence is taken in support of the plea, the trial court, and the appellate court upon review, must rely solely upon the Plaintiff's pleadings in resolving the issue presented. Tomlin 68 S.E.2d at 883 [citations omitted].

Accordingly we object to any discussion of Summum or asserted "messages" at the hearing on a temporary injunction. We do not move to strike the entire Defendants' brief as it legitimately discusses other issues. But we do object to that last section, to arguing this complex question now, without a plea in bar having properly raised it.

2) Removing the Lee monument is proscribed viewpoint censorship

The Summum case involved adding a monument to a park; considered whether the city should be obliged to accept it because the park was a public forum. Summum, 555 U.S. at 464-465. Summum is a religious organization founded in 1975, that sought to erect a stone monument stating the "Seven Aphorisms of Summum" in a Pleasant Grove City park near another existing monument to the Ten Commandments. Summum, 555 U.S. at 464-465. The court decided accepting certain privately donated monuments, while rejecting others like the Aphorisms of Summum, is best viewed as a form of

government speech (rather than analyzed under the public forum doctrine). That is, the public forum doctrine did not require Pleasant Grove City to use its park to say what it did not wish to say. Summum, 555 U.S. at 481.

In contrast, here City Council proposes to remove an existing monument that has stood and if you will, "spoken," and been spoken about, for nearly a century. This is censorship; and viewpoint based censorship at that. According to the Defendants' brief (it is not in the record at this point, only in the brief) City Council or at least three of five Councillors, object to the Lee Monument because "so many find [it] offensive." The city cannot regulate what their citizens are allowed to see and talk about, enjoy or be offended by. See Rosenberger v. Rector & Visitors Univ. Va, 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)(citing with approval U Va's concession that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional").

Even prohibiting burning a cross would be proscribed content censorship. See Black v. Commonwealth, 553 S.E.2d 738, 262 Va. 764 (Va., 2001)(striking down crossing burning law as content regulation; though "neutrally expressed statutes prohibiting vandalism" are permitted). However pernicious the expression may be, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Black v. Com., 553 S.E.2d 738, 742 262 Va. 764 (Va., 2001) (citing Texas v. Johnson, 491 U.S. 397, 414, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)).

Any question about the constitutional infirmity of such selective proscription of speech was resolved by the U. S. Supreme Court in the case R.A.V. v. City of St. Paul, 505 U.S.

377, 12 S.Ct. 2538, 120 L Ed 305 (1992) (striking down an ordinance prohibiting speech that "arouses anger, alarm or resentment in others") ("R.A.V."). In that case it was a burning cross; in this case a monument to a Confederate veteran. R.A.V. 505 U.S. at 391. The Defendants' brief asserts that "many find offensive" the Lee monument (though they have the grace to admit others do not) (Defendants' brief at 14). Speech the city deems offensive is exactly what the R.A.V. decision was about. R.A.V. 505 U.S. at 396. Even if we assume (as the Defendants wrongly do) that the Lee statue conveys a message of "virulent notions of racial supremacy" — they cannot censor it. R.A.V. 505 U.S. at 392 (holding "virulent notions of racial supremacy" must be answered, rather than censored);[1] see also Rosenberger 515 U.S. at 828 (saying "it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys" citing Police Dept. of Chicago v. Mosley, 408 U. S. 92, 96 (1972)).

The bottom line: the remedy for offensive speech is to answer it, not to suppress it. R.A.V. 505 U.S. at 391.

The federal courts very recently reminded the City of Charlotesville that the Constitution forbids the city from regulating the content of citizens' public speech — even homeless citizens. Albert Clatterbuck, et al v. City of Charlottesville, Civil Action No. 3:11-cv-00043, Memorandum Opinion, Moon, J. (February 15, 2015)(pg. 1)(holding on remand that Charlottesville cannot forbid panhandling; they failed to show "content-neutrality). The city brazenly admits their purpose in removing the Lee Monument is exactly the content censorship the court just two years ago told them is

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[1] Justice Scalia concluded his opinion with: "[l]et there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." R.A.V. 505 U.S. at 396.

prohibited. See Clatterbuck v. City of Charlottesville, 708 F.3d 549, 556 & 560 (4th Cir. 2013) (remanding to determine "censorial purpose in violation of the First Amendment.")("Clatterbuck").

Then only six months ago on November 16, 2016, federal District Court Judge Moon again reminded the city that "no official high or low, can prescribe what is orthodox;" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." [citations omitted] Joseph Draego v. City of Charlottesville, Memorandum Opinion, Va. Case No. 3:16-CV-00057, Moon, J. pp. 17 & 18 (2016) (issuing an injunction against city public hearing rules prohibiting "group defamation.") ("Draego") The Court found the city improperly "silenced [Draego] because of his message's offensiveness and disagreeableness to the Council." Draego at p. 32. And Judge Moon reminded them cases uniformly hold "[g]overnment discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology . . . is a 'more blatant' and 'egregious form of content discrimination." Draego at p. 19 Yet here we find City Council doing just exactly that. Again.

The Defendants' brief acknowledges there are "wildly divergent" opinions about the Lee monument. There are citizens who cherish the Lee monument, its artistic merit, its history; tourists on the Civil War trail who contemplate it, read the descriptive sign, take photos; students, teachers, historians who use it to talk about slavery, the Civil War, and Jim Crow — they have rights of free speech too, rights that City Council is infringing. A myopic City Council hopes to blind everybody by removing what it prefers not to see. They cannot regulate discourse, enforce citywide one ideological "message" for us all. There is irony perhaps, but no merit, in claiming a public interest

in constitutionally forbidden viewpoint censorship in a quintessential public forum, Lee Park. Clatterbuck, 708 F.3d 549, 555 (holding Downtown Mall a "a quintessential public forum over which the First Amendment's shield is strongest").

Once the Defendants file their plea in bar we will know what offensive message they wish to censor — or whether they even agree on what the Lee monument "says" or "means." Is this a form of government speech consistent with Summum? Or is it viewpoint suppression R.A.V. and Clatterbuck prohibit? There may be a tension between these two lines of precedents.

Furthermore, when the factual issue has been defined and proven, attention may turn to a fundamental infirmity afflicting what Justices Stevens' and Ginburg's' concurring opinions call Summum's "recently minted" government speech doctrine. Summum 555 US at 481. That is, freedom of speech was always envisioned as a check on government, a citizen tool to use against government. The US Constitution's First Amendment, and Virginia Constitution's free speech rights originated in a reaction against an overbearing colonial government's proclivity to suppress dissent with accusations of "seditious libel." That is, the royal government would prosecute criticism of its officials — and truth was not a defense. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 359, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)(Thomas, J concurring) (discussing 1735 trial of John Peter Zenger prosecuted for seditious libel, as the "earliest and most famous experience of America with freedom of the press"); United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir., 1969)(discussing Zenger seditious libel trial as instance of freedom of speech preserved by jury nullification). Summum would seem to turn the purpose of free speech upside down.

Governmental speech as the Defendants use it, lets the city dictate and dominate the conversation — exactly what James Madison warned against in discussing the proclivity of an ideological majority to oppress the minority. Madison, Federalist 10 (warning that in the frenzy of the "spirit of faction" [today called party politics] a majority would "sacrifice to its ruling passion or interest both the public good and the rights of other citizens"); Federalist 51 (cautioning about "the stronger faction uniting to oppress the weaker). Government speech was also exactly the tool of thought control and social order Joseph Goebbels celebrated in his 1928 speech on propaganda: "[a]t the moment a movement or party wins control of the state, its worldview becomes the state and its party becomes the nation." Joseph Goebels, speech before "Hochschule für Politik," a series of training talks for party members in Berlin, 9 January 1928, found at http://research.calvin.edu/german-propaganda-archive/goeb54.htm[2] Government outshouting its citizens, speaking over them, aims to control even how they think.

We raise these points only to say the court during a short hearing on a temporary injunction cannot hope to resolve them. The Plaintiffs request an injunction to preserve the status quo while the facts of the city's "message" are properly pleaded, proof offered, the plaintiffs given the chance to contest it, complex constitutional arguments developed, then decided, then presumably appealed — and (if ever they can be, which is doubtful) resolved.

3) The Dillon Rule prohibits Virginia localities from deriding veterans

Utah, where the Summum case originated, is no longer a Dillon Rule state. See State v. Hutchinson, 624 P.2d 1116, 1118;1126 (Utah, 1980)(declaring court would no longer

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[2] The source is given as "Erkenntnis und Propaganda," Signale der neuen Zeit. 25 ausgewählte Reden von Dr. Joseph Goebbels (Munich: Zentralverlag der NSDAP., 1934), pp. 28-52.

follow Dillon Rule in Utah). The Summum case does not offer guidance on what a Virginia city council subject to the Dillon rule as ours is, can and cannot do or "say."

In contrast Virginia does follow the Dillon Rule (as stated in Plaintiff's Brief on the Monument Protection Law and the Dillon Rule, here incorporated by reference). Concisely reiterated, localities have only those powers and rights the General Assembly explicitly grants them. Sinclair v. New Cingular Wireless PCS, LLC, 727 SE2d 40, 44 283 Va. 567 (describing Dillon rule; holding Albemarle County slope ordinance waiver void for exceeding delegated authority). The General Assembly explicitly forbids localities the authority to remove, or otherwise desecrate memorials to war veterans, in Va Code §15.2-1812 et seq. If removing a monument is speech, it is derisory speech the legislature explicitly denied to the City of Charlottesville.

Virginia's Constitution guarantees freedom of speech to its citizens, not to local governments. Va. Const. Art. I, Section 12 (guaranteeing "any citizen may freely speak, write, and publish his sentiments on all subjects . . . "). Our Declaration of Rights is not free speech enabling legislation for city council; it is the opposite, meant to keep government from governing citizen discourse. See generally Lamar Co. LLC v City of Richmond, 756 SE 2d 444, 446, 287 Va 348 (2014)(discussing difference under Dillon Rule between enabling legislation and restrictions; restrictive language a proscription on local governments). Charlottesville lacks the authority to speak in the way Defendants would have it.

Removing or desecrating monuments to war veterans is proscribed not only under Virginia's civil law, but defined as criminal vandalism as well. See Va Code §18.2-137 (proscribing injuring any monument, including those described in §15.2-1812). It is an

especially egregious form of vandalism because of the preservation and protection of veterans monuments that the community owes our veterans, as Virginia's Attorney General Mark Herring opined in August of 2015:

> [T]he importance of honoring all our veterans, especially those that have given their lives and paid the ultimate sacrifice for us, our country and our freedoms, cannot be overstated. These brave men and women deserve our full support, and the General Assembly has chosen to extend certain protections to monuments honoring their service. . . . Opinion 15-050 __ Op. Va. Att'y Gen.__(2015)(online http://ag.virginia.gov/files/Opinions/2015/15-050_Whitfield.pdf).

That Attorney General opinion confirms removing a monument described in Va. Code §15.2-1812 is a crime punishable under Va Code § 18.2-137. Charlottesville officials in removing Lee will commit a crime; in attempting to remove Lee they (may) already have committed one. Attempting a felony is punished under Va Code § 18.2-26. Intentionally removing a monument valued at greater than $1000 is a Class 6 felony. Va Code §18.2-137(B).

While even odious remarks are protected speech — a crime is not. In Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (overturning conviction stemming from assembly and speeches at KKK rally attacking African- Americans and Jewish people) the Supreme Court held that "inciting or producing imminent lawless action" that which is "likely to incite or produce such action" is not protected speech. Brandenburg v. Ohio, 395 U.S. at 447. City Council cannot engage in lawless conduct and call that a "message" which shields it behind constitutional speech jurisprudence.

Conclusion

The Plaintiff respectfully requests the court to put aside the Summum issue for now, and to proceed with granting the temporary injunction.

Respectfully submitted:

_____ (date) May 1, 2017

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CERTIFICATE OF SERVICE

I certify that I had the foregoing Plaintiff's Brief: Summum, hand delivered to the offices of Craig Brown, Esq., attorney for the City of Charlottesville and for the individual Defendants, on May 1, 2017.

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