**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE**

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

**BRIEF OF AMICUS CURIAE INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION IN SUPPORT OF DEFENDANTS**

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## IDENTITY AND INTEREST OF AMICUS CURIAE

The Institute for Constitutional Advocacy and Protection is a public-interest law group based at Georgetown University Law Center. The Institute's mission is to use the power of the courts to defend American constitutional rights and values. The Institute has extensive experience litigating First Amendment issues, including the application of government-speech doctrine in previously undecided contexts. The Institute is therefore well positioned to identify the appropriate legal framework for resolving Plaintiffs' Motion for Partial Summary Judgment, and to highlight why the statute at issue in this case, Va. Code § 15.2-1812, should be narrowly construed to avoid the harms to local governance that could result from commanding cities to express certain messages in perpetuity.

## INTRODUCTION

Statues of two Confederate generals, Robert E. Lee and Thomas "Stonewall" Jackson, occupy prominent places in Charlottesville's downtown public parks. In 2017, the City Council voted to remove these statues after carefully examining the work of a Blue Ribbon Commission on Race, Memorials, and Public Spaces. That months-long factfinding process revealed that both structures are widely understood to memorialize something other than military history. Even so, the City and its Councilors were sued under a state law forbidding the removal of any "monuments or memorials for any war or conflict." Va. Code § 15.2-1812. Plaintiffs have moved for summary judgment on this issue, arguing that the Lee and Jackson statues indisputably fall within the scope of § 15.2-1812.

The Court should deny Plaintiffs' motion. As the record demonstrates, a factual dispute exists over what the Lee and Jackson statues commemorate—what they are monuments *for*. Summary judgment is strongly disfavored in Virginia, and it should be employed even more cautiously in applying a law so problematic as § 15.2-1812. That provision not only frustrates

the proper functioning of government-speech doctrine; it invites local legislatures to bind their successors in perpetuity on matters of land use and governmental messaging. With these foundational democratic concerns at stake, the Court should interpret Virginia's monuments law as narrowly as its imprecise text allows—that is, to apply only to structures (unlike the Lee and Jackson statues) that indisputably serve as war memorials.

## ARGUMENT

### I. Disputed Factual Issues Preclude the Entry of Summary Judgment for Plaintiffs

#### A. What the Lee and Jackson Statues Commemorate Is a Disputed Factual Question

By their very nature, monuments are a type of "expressive conduct" that are erected in order to "convey some thought or instill some feeling in those who see the structure." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 470 (2009). Section 15.2-1812 thus regulates one form of cities' expressive conduct by prohibiting all cities in Virginia, permanently, from removing any "monuments or memorials for any war or conflict." By its own terms, § 15.2-1812 requires an assessment of what a particular structure is a monument or memorial "for." That is simply another way of asking what the structure commemorates—i.e., what message the monument or memorial principally conveys.

But a monument's meaning will rarely be perceived uniformly. Most monuments—like most poems, paintings, and plays—will "evoke different thoughts and sentiments in the minds of different observers." *Summum*, 555 U.S. at 475; *see also id.* at 474 ("The meaning conveyed by a monument is generally not a simple one . . . ."). So to know whether § 15.2-1812's prohibition applies, an adjudicator must determine what message a monument or memorial expresses to the surrounding community. This is an irreducibly factual question that is often subject to reasonable contestation. *See* 555 U.S. at 474 (recognizing that most monuments can be

"interpreted by different observers . . . in a variety of ways"). As a result, summary judgment will generally be improper in a challenge brought under § 15.2-1812.

This presumption can be overcome, of course; sometimes a monument and its surrounding context will clearly convey the meaning specified in § 15.2-1812. Consider the Colonel George W. Gowen Monument located at the site of a Civil War battlefield in Petersburg, Virginia. This structure contains the following inscription: "[D]edicated to the Memory of the Dead of the 48th Regiment Pennsylvania Volunteers." The plaque continues: "Col. George W. Gowen, Killed in Action in Front of Fort Mahone, April 2nd, 1865, Aged 45 Years." "Col. George W. Gowen Monument," The Historical Marker Database, https://perma.cc/K5HR-Q687. Consider, too, the Jubal Early Monument, a stone obelisk situated where Union and Confederate troops clashed in Lynchburg, Virginia. That monument presents itself as a

> Memorial to Jubal Anderson Early, Lieutenant General C.S.A., and to the Brave Confederate Soldiers Under Him Who Came to the Rescue of Lynchburg When It Was Threatened by an Invasion of Federal Forces and Erected These Earthworks Behind Which They [E]ntrenched Themselves in Their Defense of the City on June 18, 1864.

"Fort Early and Jubal Early Monument – Lynchburg, Virginia," Waymarking, https://perma.cc/LSW4-WN8B. Because the Gowen and Early Monuments unmistakably function as tributes to fallen soldiers—and are located where those soldiers lost their lives—there can be no genuine dispute about whether those structures are "monuments . . . for any war." Va. Code § 15.2-1812.

But not all statues speak so unequivocally. The monument of Pancho Villa on horseback located in Tucson, Arizona, illustrates this uncertainty. That monument offers a scant description of what it depicts: "Mexican Revolutionary Figure General Francisco Villa, 1877–1923." "Pancho Villa – Tucson," Waymarking, https://perma.cc/K8HX-C7ZP. No surrounding text invites the observer to praise or condemn Pancho Villa or underscores any aspect of his

historical legacy. The Supreme Court noted—unsurprisingly—that this monument conveys no definitive message. It could fairly be understood to commemorate either a "revolutionary leader who advocated for agrarian reform and the poor" or "a violent bandit." *Summum*, 555 U.S. at 476. So if a lawsuit were to hinge upon whether the Pancho Villa monument constitutes a "memorial for a champion of the poor," granting summary judgment on that factual issue would be manifestly improper.

Similar examples abound. Would a statue dedicated to "President Abraham Lincoln, 1809–1865," necessarily be a "monument to emancipation"? Should the statue of Arthur Ashe on Richmond's Monument Avenue be regarded as a "monument to athletic achievement"? Is Chief Justice John Marshall's gravestone a "monument to judicial review"? These are inescapably factual inquiries, dependent on artistic elements, surrounding context, intent, and the perception of observers. It would be inappropriate to resolve such questions through summary judgment.

Likewise, a genuine dispute exists between the parties here about what messages the Lee and Jackson statues convey—what they are monuments *for*, in the words of § 15.2-1812. These statues were not installed on military battlefields; they were erected near Charlottesville's key civic institutions. And unlike the Gowen and Early Monuments, the statues at issue in this case contain almost no verbiage. The Lee statue, for instance, simply identifies its subject as "Robert Edward Lee, 1807–1870." *See Summum*, 555 U.S. at 475 ("[T]he effect of monuments that do not contain text is likely to be even more variable."). The General Assembly could have drafted § 15.2-1812 with enough precision to render summary judgment appropriate here. It could have, for example, outlawed the removal of "monuments that depict veterans of any war or conflict." But the General Assembly did not do that. Instead, it chose broader language—"monuments . . .

for any war or conflict"—whose application will often be disputed when a single historical figure is depicted with little accompanying text.

Because the Lee and Jackson statues are not indisputably monuments "for" any war—and because interpreting § 15.2-1812 in this context entails complex factual judgments—the Defendants are entitled to a jury determination on this issue.

B. The Conclusions of the City's Factfinding Process Further Establish that Summary Judgment Should Not Be Granted for Plaintiffs

The Plaintiffs' Motion for Partial Summary Judgment is misconceived for a second reason: It wrongly discounts the City's exhaustive inquiry into the content of its own expression. The City Council's resulting factual determination, informed by the work of a Blue Ribbon Commission, confirms that a genuine dispute exists over whether the Lee and Jackson statues commemorate the subjects covered by § 15.2-1812.

By "placing [a monument] on city property," the Supreme Court has explained, "a city engages in expressive conduct." *Summum*, 555 U.S. at 476. And a city continues to project a "message . . . by allowing a monument to remain on its property." *Id.* at 477. Because of the Lee and Jackson statues' close association with the City, the City Council understandably sought greater insight into how each structure's "message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). And because these questions are thoroughly factual in nature, the Council enlisted the expertise of a special factfinding body: a "Blue Ribbon Commission on Race, Memorials, and Public Spaces." City Council Resolution of May 2, 2016, at 1, *available at* http://perma.cc/FU9G-M7NS. The Commission's nine members were charged with remaining "[o]pen-minded[]" while "[a]mply engag[ing] with the Charlottesville/Ablemarle community through public hearings, forums, etc." *Id.*

In its Report to City Council, the Commission concluded that the Lee and Jackson statues

were not originally erected to commemorate any aspect of American military history. Blue Ribbon Commission on Race, Memorials, and Public Spaces, *Report to City Council* 7 (Dec. 19, 2016), http://perma.cc/S6WK-E6WW. And after considering months of oral and written testimony from community members, the Commission found that both statues "ma[k]e many members of our community feel uncomfortable and unwelcome" because of what they *are* widely understood to commemorate. *Id.* at 10, 12. The Council accepted these factual findings in determining that the statues were not properly regarded as "war memorials." Sept. 5, 2017, Council Minutes 16, Ex. 55 to Defs.' Br. in Opp'n to Pls.' Mot. for Partial Summ. J. and to Strike Equal Protection Defense ("Defs.' Br. Opp'n Summ. J."). The Councilors themselves had received input directly from community members throughout this period. *See* Defs.' Br. Opp'n Summ. J. 21–22. In deeming § 18.2-1512 inapplicable, therefore, the Council considered extensive evidence of what Charlottesville residents believed the memorials to be "for." The Council's diligence demonstrated that the Lee and Jackson statues can be reasonably understood not to function as war memorials. *See Summum*, 555 U.S. at 476 n.5 (asking what message an expressive object would be "perceived as conveying"). Plaintiffs' Motion wrongly asks this Court to disregard the Council's careful effort to ascertain the facts most relevant to determining § 15.2-1812's applicability.

The Supreme Court of Virginia has "repeatedly held that summary judgment is a drastic remedy," and that "if reasonable persons may draw different conclusions from the evidence, summary judgment is not appropriate." *Fultz v. Delhaize Am., Inc.*, 677 S.E.2d 272, 274 (Va. 2009). For the reasons explained above, a genuine dispute exists over whether the Lee and Jackson statues are, in fact, war memorials. This dispute should be reserved for the judicial system's designated factfinder.

## II. Virginia's Monuments Law Distorts Fundamental Democratic Principles

### A. Section 15.2-1812 Erodes the Political Accountability at the Heart of Government-Speech Doctrine

Government is generally forbidden from "regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)). But "[w]hen government speaks" for itself, the First Amendment does not constrain "the content of what it says." *Walker v. Sons of Confederate Veterans*, 135 S. Ct. 2239, 2245 (2015). Government-speech doctrine thus represents a departure from First Amendment principles "designed to protect the marketplace of ideas." *Id.* at 2246.

Governments may place a thumb on the scale in this way because they are "accountable to the electorate and the political process for [their] advocacy." *Summum*, 555 U.S. at 468 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)); *see also Sons of Confederate Veterans*, 135 S. Ct. at 2245 ("[I]t is the democratic electoral process that first and foremost provides a check on government speech."). Every government that espouses a position is understood to "represent[] its citizens" in doing so. *Sons of Confederate Veterans*, 135 S. Ct. at 2246. So if constituents are unhappy with their government's messaging, they are entitled to reshape it by manifesting their displeasure at the ballot box.

Monuments in public parks are an important mode of government speech. As explained in *Summum*, public parks are "closely identified in the public mind with the government unit that owns the land." 555 U.S. at 472. For that reason, a monument's presence in a municipal park "unmistakably signif[ies] to all Park visitors that the City intends the monument to speak on its behalf." *Id.* at 474. Such monuments are "linked to the City's identity," *id.*, and contribute to the image "that a city projects to its own residents and to the outside world," *id.* at 472.

Observers are therefore entitled to assume that a city deliberately conveys a "message . . . by allowing a monument to remain on its property."[1] *Id.* at 477; *see also id.* at 481 (Stevens, J., concurring) ("Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views it endorses or expresses through this means.").

Section 15.2-1812 dismantles the basis for the assumption that monuments in a municipal park embody the city's own speech, thereby severing the essential connection between government speech and democratic accountability. Under § 15.2-1812, once a locality has conveyed certain messages in physical space, it must continue expressing them in perpetuity, even if they no longer represent "the image . . . that [the city] wishes to project." *Summum*, 555 U.S. at 473. In those circumstances, a local government no longer speaks for itself; it is forced to carry messages that its electorate cannot change. Yet because observers reasonably attribute these messages to the city itself, local officials may be unfairly chastised for expressing viewpoints that the state legislature compels them to embrace. And when this key attribution mechanism malfunctions, local voters—especially those not steeped in the Virginia Code—cannot know that the remedy for unwanted municipal speech lies with the General Assembly.

In an analogous context, the Supreme Court has adjudged this sort of breakdown in democratic accountability to be intolerable. The "anticommandeering" principle holds that Congress cannot require state and local officials to enact or administer federal regulatory programs. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1476–77 (2018). In language that could be applied equally to compelled intergovernmental speech, the Court explained that the

[1] *See* Sept. 5, 2017, Council Minutes 16, Ex. 55 to Defs.' Br Opp'n Summ. J ("WHEREAS the continued presence of these monuments conveys the visual message that Charlottesville supports the cause for which these generals fought . . . .").

anticommandeering rule

> promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.

*Id.* at 1477.

The Commonwealth has speech rights of its own, to be sure. It may "speak for itself" by staking out positions on any number of political, social, and historical issues. *Sons of Confederate Veterans*, 135 S. Ct. at 2246 (quoting *Southworth*, 529 U.S. at 229). For example, the Commonwealth may commemorate any part of its past that it wishes by erecting historical monuments of its own design. It may even "speak" by taking possession of city-owned monuments and displaying them in a manner attributable to the Commonwealth itself.

By definition, however, governments do not engage in "government speech" when they force others to carry their preferred messages. That is why laws compelling private individuals to "endorse ideas they find objectionable" are subject to First Amendment scrutiny. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018). Nor would a state be engaged in government speech if it unleashed a swarm of anonymous Twitter bots to shape public opinion on critical issues, for the state could not plausibly be understood as "speaking on its own behalf" in this situation. *Summum*, 555 U.S. at 470. Similarly, it would be a contortion of government-speech doctrine to regard the Commonwealth as having spoken *for itself* by engaging in intergovernmental puppetry. Section 15.2-1812 is not a form of self-expression; it is a mechanism for asserting regulatory control over others' expression.

By forcing localities to continue engaging in unwanted messaging—and in a way that obscures the Commonwealth's own responsibility—§ 15.2-1812 corrodes the political checks that are the linchpin of any workable government-speech doctrine.

B. The Principles Underlying § 15.2-1812 Would Severely Undermine Local Self-Government

It is bad enough that § 15.2-1812 blurs the ordinary chains of political accountability. But that law also exemplifies two additional principles whose broader replication would be ruinous for local democracy.

1. Permanently Freezing the Status Quo

First, § 15.2-1812 relies on an indefensible one-way-ratchet theory of governance. Under that philosophy, a locality would not be required to speak or act on a certain subject matter, nor would it be precluded from doing so. But if a local government did choose to espouse or implement a particular policy, it would be forever barred from reversing course. No amount of learning, growth, and democratic engagement at the local level could ever change this fact. It would be irrelevant that later generations might deem an earlier policy morally repulsive, that a policy reversal might be necessary to protect residents' health and safety,[2] or that a city might feel compelled to change course in order to comply with the Constitution.

As one manifestation of this phenomenon, § 15.2-1812 enables one set of local officials to bind their successors in perpetuity—precluding them from seeking higher, better uses of municipal property, or from muting certain messages expressed through public statuary. This bizarre feature appears to be unique within the Virginia Code. In fact, outside of the monument context, our Institute is unaware of any other provision of federal or state law whereby a legislative body may permanently disable itself or another governmental body from speaking or acting differently than it first did. *See Otey v. Common Council of City of Milwaukee*, 281 F.

[2] In its September 5, 2017, resolution to remove the Lee and Jackson statues, the City Council found that both monuments "constitute a clear and continuing threat to public safety." Sept. 5, 2017, Council Minutes 16, Ex. 55 to Defs.' Br Opp'n Summ. J. The Lee statue, in particular, had served as a catalyst for the violent and deadly Unite the Right rally of August 2017. *See* Hunton & Williams, *Final Report: Independent Review of the 2017 Protest Events in Charlottesville, Virginia*, at 4, Dec. 1, 2017, *available at* https://perma.cc/Q5WS-HKEA.

Supp. 264, 274 n.17 (E.D. Wis. 1968) (deeming it "axiomatic" that "a legislature cannot irrevocably bind its successors"); *Terry v. Bishop*, 158 P.3d 1067, 1071 (Okla. 2007) (citing "the fundamental constitutional principle that a legislative body may not irrevocably bind its successors"). Section 15.2-1812's theory of self-entrenchment recalls the proposed Corwin Amendment of 1861, which would have amended the U.S. Constitution to prohibit future constitutional amendments authorizing Congress to interfere with slavery in the states. *See generally* A. Christopher Bryant, *Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment*, 26 Harv. J.L. & Pub. Pol'y 501 (2003).

There is a reason why local legislatures (like all legislatures) should not be able to enact unrepealable laws: a status quo frozen in amber would thwart the policy experimentation necessary to a healthy federal system. Local governments exist so that the needs and problems of diverse communities can be addressed at the most democratically responsive level. Local policy successes can then be exported to other jurisdictions, and any failures can be studied as object lessons. Through it all, local residents are empowered to solve local problems, rather than being forced to seek imperfectly tailored relief from more distant levels of government. *See Bond v. United States*, 564 U.S. 211, 221 (2011) (cataloguing these and other virtues of local policymaking). But perhaps most importantly, communities need the freedom to learn from their past actions. When governance choices are irreversible, officials may decline to implement solutions in the first place for fear of fettering later generations. Virginia's monuments law represents a troubling departure from the historic precept of statutory repealability.

2. Hijacking Local Expression

Second, there is no principled distinction between (1) requiring cities to continue expressing messages chosen by previous local officials and (2) forcing cities to say whatever the state directs them to say. As a result, the logic of § 15.2-1812 would allow states to exercise

unbridled control over local messaging. The implications of this theory are frightening, and it is important to confront them directly so that § 15.2-1812 may be understood in its full context.

If states may validly dictate municipal speech, then the General Assembly may require each local government to open its meetings by praising the incumbent Governor's initiatives. The Commonwealth may covertly exercise full editorial control over local governmental websites and social-media accounts. State actors may choke off electoral competition by scrubbing any mention of local officials from local governmental websites. Cities may be required to discourage parents from vaccinating their children. The majority party in the General Assembly may force "hostile" cities to adopt and display embarrassing mottoes. And to top it off, cities may be prohibited from engaging in counter-speech that disassociates them from any messages they have been commanded to proclaim.

These nightmarish scenarios proceed from the very principle embodied in § 15.2-1812: that states may assume plenary authority over any instrumentality of local messaging for any reason, and with no contextual safeguards to prevent misattribution. Were state control over local expression to become normalized, the American city would recede into a shadow of its former self. Section 15.2-1812 is a deeply aberrant statute that clashes with foundational assumptions of democratic rule in a nation with overlapping levels of government. It should be afforded no broader sweep than its language unquestionably requires.

## CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Motion for Partial Summary Judgment.

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Respectfully submitted,

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