V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

WILLIAM C. GREGORY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL20-2441
	)	
GOVERNOR RALPH S. NORTHAM, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEMURRER AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

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INTRODUCTION

The assertion at the heart of this case is staggering. Plaintiff insists that a single person—who claims, at most, an undefined fractional interest in property conveyed to the Commonwealth 130 years ago—may *indefinitely veto* a popularly elected Governor's decision to relocate a massive, government-owned statue of Robert E. Lee from one area of Commonwealth ownership and control to another. According to plaintiff, no matter how tenuous his case to relief is and no matter how much pain that statue inflicts—especially on the descendants of people Lee fought to keep in bondage—plaintiff's preference that the statue remain where it now stands must prevail over the will of Virginians as expressed through their duly elected Governor.

Plaintiff's claims are antithetical to foundational principles of democratic governance, and those principles should begin and end this case. It is well-settled that government-owned monuments on government-owned property are core government speech that inevitably convey messages about what a political community believes and values. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). And under our democratic system, no one—including a purported heir of long-dead grantors—may force a sovereign Commonwealth to forever continue broadcasting a message with which it profoundly disagrees or to display and maintain on government-owned property a massive statue of a person symbolic of a time it no longer wishes to glorify. So the question here is not *whether* the Commonwealth of Virginia may grant its duly elected chief executive the authority to remove a piece of government-owned property that is drenched in white supremacy. It can and it has. The only question is whether a single plaintiff, offering nothing more than 130-year-old documents and unarticulated and inapplicable doctrines of the law of real property, may call upon the equitable powers of this Court to exercise a heckler's veto over the Governor's decision. He cannot.

RELEVANT BACKGROUND[1]

A. Proposing and building the Lee Monument

1. Robert Edward Lee was one of the most prominent leaders of an armed rebellion against the United States Government that was fought to perpetuate the enslavement of millions of people of African descent. By 1865, Lee was the General-in-Chief of the Confederate Army, and it was his defeat and surrender to the United States Army under General Ulysses S. Grant's forces at Appomattox Court House that effectively ended that bitter conflict.

2. After the war ended, biographers, writers, and various societies embarked on a propaganda campaign to recast the object of the war away from the preservation of slavery.[2] As part of this campaign, Lee and other Confederate leaders were lionized as icons of the Lost Cause who represented "the ultimate demonstration of the superiority of [Southern] civilization,"[3] a euphemism belying the cause for which they fought. Less than two weeks after Lee's death in 1870, former Confederate General Jubal Early—"the prototypical unreconstructed Rebel"[4]—called on surviving Confederate veterans to join him in Richmond to organize their efforts to build a "suitable and lasting memorial" that would honor their "immortal Chief" and

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[1] The facts in this brief that fall outside the allegations in plaintiff's complaint are neither necessary nor relied on to support defendants' demurrer but are presented to provide relevant context in opposition to plaintiff's request for a continued injunction and declaratory judgment.

[2] Numerous contemporaneous sources explain the reason for secession. On March 21, 1861, for example, the Vice-President of the Confederacy made clear that the new government's "corner-stone rests . . . upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition." Address of Alexander H. Stephens (Mar. 21, 1861), https://www.battlefields.org/learn/primary-sources/cornerstone-speech.

[3] Thomas Lawrence Connelly, *The Marble Man: Robert E. Lee and His Image in American Society* 3 (1977).

[4] Gaines M. Foster, *Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South* 55 (1987).

"manifest to the world" that they "[were] not now ashamed of the principles for which Lee fought and Jackson died" in the Civil War.[5] The next month, the first meeting of the Lee Monument Association (LMA) was held, with Early serving as president and former President of the Confederacy Jefferson Davis delivering an address in Lee's honor. *Id.* at 12–17, 38.

3. In 1886, the LMA was reorganized and led by the Governor of Virginia.[6] By the late 1880s, enough money had been raised to build a monument and the LMA selected an undeveloped plot of land that was then in Henrico County.[7] One reason for choosing that particular location was because it stood on higher ground than Capitol Square, meaning Lee's statue would overshadow the equestrian statue of George Washington that already stood (and still stands) at the other end of Franklin Street.[8]

4. The land on which the Lee Monument sits came to be owned by the Commonwealth through two separate transactions that occurred almost three years apart. When the location was selected in 1886, both the land underlying the Lee Monument and much of the surrounding property were owned jointly by the children of William C. Allen, who had inherited it upon their father's death in 1874. *History and Architecture* at 29. Led by Otway Allen (one of William's sons), the heirs agreed to donate land for the Monument to the LMA—so long as they could develop and market the surrounding land for upscale suburban residences. *Id.* at 13–14, 29,

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[5] *Organization of the Lee Monument Association and the Association of the Army of Northern Virginia, Richmond, Va., November 3d and 4th, 1870* 5 (1871) (reprinting "address" that "appeared in the public prints" on October 25, 1870).

[6] *The Robert E. Lee Monument. Consolidation of the Two Associations Effected*, Columbus Daily Enquirer, vol. XXVIII, no. 132 (June 2, 1886) (noting that "[t]he new board" included "the governor"); see also Ch. 368, 1887 Acts of Assembly, Va. Gen. Assemb. (May 21, 1887).

[7] *Virginia Affairs. A Site for the Lee Statue*. The Sun, vol. XCIX, no. 33 (June 23, 1886).

[8] Kathy Edwards, Esme Howard & Toni Prawl, *Monument Avenue: History and Architecture* 15 (1992) (*History and Architecture*).

58–59. And so, in July 1887, the Allen heirs conveyed the circle of land on which the Lee Monument now sits to the LMA. See Am. Compl. Ex. B (1887 Deed).[9]

The next step was transferring ownership from the LMA to the Commonwealth. In 1889, the General Assembly adopted a joint resolution "authoriz[ing] and request[ing]" the Governor to accept the statue, pedestal, and land for the Monument from the LMA "in the name and in behalf of the commonwealth." Ch. 24, Joint Res., 1889 Acts of Assembly, Va. Gen. Assemb. (Dec. 19, 1889) (Joint Resolution) (Am. Compl. Ex. C). Consistent with that request, in March 1890—with the "approval and consent" of the Allen heirs who had already conveyed the land to the LMA—the LMA conveyed the statue, pedestal, and land to what the deed calls "the State of Virginia." Am. Compl. Ex. A, pp. 1 & 5 (1890 Deed).[10] The same person (P.W. McKinney) executed the 1890 Deed for both sides of the transaction: as President of the LMA and as Governor of Virginia. *Id.* at 368.

5. On May 29, 1890, the Lee Monument was dedicated and unveiled in a public celebration attended by as many as 150,000 people—more than the entire population of Richmond at the time.[11] A parade wound through the city with Confederate flags on full display, including a "mammoth Confederate flag" draped over the full length of City Hall.[12] The procession was led by Fitzhugh Lee, who marched with 50 former Confederate Generals and

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[9] Attached as Exhibit 1 is a typewritten transcription of the 1887 Deed obtained from the Library of Virginia. Unless otherwise specified, this brief cites the typewritten version and the corresponding typewritten page numbers printed at the top of the transcription.

[10] The quoted language in the original handwritten deed is contained in the first page of Exhibit A to the Amended Complaint, and a typewritten version appears on the fifth page (which also has the number "367" in its upper left corner). Unless otherwise specified, this brief cites the typewritten version using "1890 Deed" and the typewritten page number at the top.

[11] David W. Blight, *Race and Reunion: The Civil War in American Memory* 267 (2001).

[12] *The Lee Monument Unveiling*, The Richmond Planet, vol. VII, no. 24 (May 31, 1890).

15,000 uniformed Confederate veterans. *History and Architecture* at 16. Several Governors from other former Confederate States were also in attendance.[13] By one account, the gathering was the largest in Richmond's history, *id.* at 263, with *Harper's Weekly* describing it as "a mighty tribute to the central figure of a lost cause," *History and Architecture* at 16.

Even in 1890, not everyone in Richmond felt pride in the unveiling of the Lee Monument. The African-American-owned newspaper *The Richmond Planet*, edited by prominent businessman and politician John Mitchell, Jr., criticized the public spectacle as "handing down . . . a legacy of treason and blood."[14] Mitchell's paper reported that many of the spectators at the unveiling carried "emblems of the 'Lost Cause'" with an "enthusiasm" that was "astound[ing]."[15] By "rever[ing] the memory of its chieftains" in this way, the paper argued that the South's "celebration . . . forges heavier chains with which to be bound." *Id.*

B. Entrenching white supremacy

With the Lee Monument in place, the plan to develop the surrounding area into an elite and fashionable suburban neighborhood gained momentum. Real estate companies drew on the Monument's symbolism to attract affluent white residents, advertising race-based restrictions under which "[n]o lots can ever be sold or rented in Monument Avenue Park to any person of African descent."[16]

The deliberate creation of a prestigious neighborhood just outside the capital city was meant not only to honor Lee as a Confederate hero, but also to help usher in a new era where the

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[13] *Southern Historical Society Papers* (R.A. Brock, ed.), vol. XVII at 293 (1889).

[14] *What It Means*, The Richmond Planet, vol. VII, no. 24 (May 31, 1890).

[15] *Lee Monument Unveiling*, *supra* note 12.

[16] "Monument Avenue Park Lots" Advertisement, Richmond Times-Dispatch (Apr. 17, 1913), at 11. Such restrictions are unenforceable today. See Va. Code Ann. § 36-96.6.

rules and power structures of slavery would persist in practice, if not in name. In 1892—two years after the Lee Monument was dedicated—the area surrounding it was annexed by the City of Richmond.[17] In 1902—12 years after the Lee Monument was unveiled and just one year after the first house was completed on Monument Avenue—Virginia's new Constitution mandated racial segregation in schools. See Va. Const. art. IX, § 140 (1902) ("White and colored children shall not be taught in the same school."). In 1911, Richmond adopted a residential segregation ordinance—later upheld by the Virginia Supreme Court—restricting African American residents to city blocks where they already constituted a majority. See *Hopkins v. City of Richmond*, 117 Va. 692, 694 (1915). In 1924, with *de jure* segregation fully codified, the General Assembly enacted Virginia's infamous Racial Integrity Act, which prohibited interracial marriage and defined as "white" a person "who has no trace whatsoever of any blood other than Caucasian." Ch. 371, 1924 Acts of Assembly, Va. Gen. Assemb. (Mar. 20, 1924).

In no uncertain terms, the segregation and inequality enshrined in law continued the legacy of the Monument built to valorize both Lee and the Lost Cause. The year after *Brown v. Board of Education*, 347 U.S. 483 (1954), an African-American man named Robert Leon Bacon wrote the then-Governor to describe the hardships and indignities facing his community. Bacon explained that he could not "go on Monument Ave[nue] and visit a white girl from fear of being 'lynched' or beaten up or arrested or electrocuted."[18] "Virginia is no place for a colored citizen like me to live in," Bacon explained, because "[i]t is the home of white supremacy." *Id.*

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[17] Va. Dep't of Pub. Works, *Map Showing Territorial Growth of Richmond*, Library of Va. (1923), http://www.virginiamemory.com/online-exhibitions/exhibits/show/mapping-inequality/item/14.

[18] Letter from Robert Leon Bacon to Gov. Thomas B. Stanley (Dec. 2, 1955), https://edu.lva.virginia.gov/docs/12-02-1955_trans.pdf.

C. Governor Northam announces the Lee statue will be moved

1. During the past several years, the Lee Monument and others like it have again become hotbeds for controversy. In May 2017, an avowed white supremacist led a torch-lit rally to protest the City of Charlottesville's decision to remove a different statue of Lee.[19] On July 8, 2017, a Ku Klux Klan chapter held a rally in downtown Charlottesville to show support for the Lee statue. *Review* at 4. The next month, white nationalist groups descended on the same City for the "Unite the Right" rally, which also opposed Charlottesville's proposed removal of the Lee statue. *Id.* at 4–5. The protestors waved Confederate flags and chanted white supremacist slogans as they marched through educational facilities and residential neighborhoods.[20] Three people died, dozens were injured, and countless more were traumatized. *Review* at 2, 11.

In recent months, the killing of George Floyd by a police officer in Minneapolis sparked massive protests against police brutality and systemic racism throughout the Nation, including in Virginia. Once again, the Commonwealth's many Confederate monuments have become centers of activity, as protestors have flocked to the statues, eager to vent their frustration and rage at symbols of entrenched racism. In some cases, protestors have attempted (without professional assistance and sometimes successfully) to topple massive stone and metal figures.[21]

2. On June 4, 2020, Governor Ralph S. Northam announced that he would exercise his authority as the Commonwealth's chief executive to relocate "the statue of Robert E. Lee"—

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[19] *Virginia's Response to the Unite the Right Rally: After-Action Review* 4 (Dec. 2017) (*Review*), https://www.pshs.virginia.gov/media/governorvirginiagov/secretary-of-public-safety-and-homeland-security/pdf/iacp-after-action-review.pdf.

[20] *Deconstructing the Symbols and Slogans Spotted in Charlottesville*, Wash. Post (Aug. 18, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-videos/.

[21] See, *e.g.*, Mallika Kallingal & Rebekah Riess, *Man Injured As Protesters Partially Dismantle Confederate Monument In Virginia*, CNN (June 11, 2020), https://www.cnn.com/2020/06/11/us/man-injured-as-portsmouth-confederate-monument-dismantled/index.html.

a piece of state-owned property—from one area of Commonwealth control to another.[22] "[G]enerations ago," the Governor explained, "Virginia made the decision not to celebrate unity, but to honor the cause of division." *Id.* Constructing a massive monument in Virginia's capital city to glorify a legacy of secession and racial oppression "was wrong then, and it is wrong now." *Id.* Accordingly, the Governor directed that the statue be removed as soon as possible and placed in storage while its future is determined. *Id.*

Pursuant to the Governor's directive, the Department of General Services (DGS) developed a plan to remove the Lee statue. Based on "recent on-site observation" and "written accounts" from 1890, the conservation firm engaged by DGS proposed "separat[ing]" the sculpture "into three sections" for transport and storage.[23] That process will "will allow for proper reassembly[] in the future." *Id.*

DGS submitted its plan to the Virginia Department of Historic Resources (DHR) for consultation, and DHR concurred with the proposed removal process. On July 10, the Art and Architectural Review Board (Board) unanimously agreed with DGS's proposal. As one Board member noted, the Lee statue needs to "be removed and given a new context" because it perpetuates "a false history" that is "very different than what we recognize today as the truth."[24]

PROCEDURAL HISTORY

On Monday, June 8—four days after the Governor's announcement—plaintiff filed a complaint seeking to prohibit the Governor and the Director of DGS from removing the Lee

[22] Virginia Governor Northam News Conference, CSPAN (June 4, 2020), https://tinyurl.com/y6ayrdpu.

[23] Letter and Attachment from Joseph F. Damico to Julie Langan (July 2, 2020), https://tinyurl.com/y3xk87nj.

[24] Michael Martz, *State Board Backs Plan for Removing Lee Monument by Cutting it in Three Sections*, Richmond Times-Dispatch (July 10, 2020), https://tinyurl.com/yyaoxy66.

statue from its current location. Asserting that he is the great-grandson and "an heir at law" to two of the six people who gave the land to the LMA (which then gave it to the Commonwealth), plaintiff insisted that the Lee statue has "international artistic, cultural, and historical significance" and that its removal would cause him "irreparable harm" because "[h]is family has taken pride for 130 years in this statue resting upon land belonging to his family and transferred to the Commonwealth." Compl. ¶¶ 4, 13, 17 (Exhibit 2). That same day, plaintiff scheduled an *ex parte* hearing at which he sought and was granted a temporary injunction (see Temporary Injunction Order, pp. 2–3 (Exhibit 3)) before Attorney General Mark R. Herring or defendants had even been notified that suit had been filed, much less that a hearing scheduled and held.

On Friday, June 12, plaintiff filed a one-sentence motion for "a permanent injunction . . ., or in the alternative, to enlarge the existing injunction," and noticed a hearing for Thursday, June 18, 2020—six days later. Exhibit 4. Attorney General Herring filed a demurrer on behalf of the defendants, arguing that plaintiff lacked standing to sue, among other failings. On June 18, the Court heard oral argument and sustained the demurrer based on the plaintiff's lack of standing, but nonetheless ordered that the temporary injunction would remain in place until dissolved or made permanent. Hr'g Tr. at 34 (Exhibit 5); Order, June 23, 2020 (Exhibit 6). The Court gave plaintiff 21 days file an amended complaint. *Id.* Before the June 18 hearing ended, counsel for plaintiff advised the Court that he would be adding a plaintiff in the amended complaint and would be moving for that plaintiff to proceed anonymously. Hr'g Tr. at 44.

On July 8, 2020, plaintiff filed an amended complaint. Contrary to plaintiff's counsel's representations at the June 18 hearing, see Hr'g Tr. at 44, the amended complaint did not add any new plaintiffs and included only the sole plaintiff who was previously found to lack standing. On July 14, plaintiff sought permanent injunctive relief by filing another one-sentence motion.

ARGUMENT

Plaintiff's amended complaint fails to remedy the flaws that led the Court to sustain defendants' first demurrer more than a month ago. As before, plaintiff identifies no enforceable property right permitting him to enjoin removal of the Lee statue. The property interest plaintiff claims he inherited—a right to control the Commonwealth's use of the land *in perpetuity*—was not recognized in the law at the time the land was transferred and remains unenforceable as the law has evolved in modern times. See Part I, *infra*. And plaintiff's new allegation that the Governor's plan to remove the statue violates a provision of Virginia law—now Code § 2.2-2402(B)—fares no better than his first claimed statutory violation.[25] Once again, plaintiff lacks standing to sue over the alleged violation, the provision on which he relies confers no private right of action, defendants are shielded by sovereign immunity, and plaintiff's claim fails on the merits in any event. See Part II, *infra*.

I. Plaintiff possesses no enforceable real property right

A. Plaintiff holds no inherited interest entitling him to enforce restrictions on the Commonwealth's use of its land

According to plaintiff, as an heir of two of the original donors of the land, he is entitled to enforce the rights of his ancestors "as covenantees of the 1887 and 1890 deeds." Am. Compl. ¶ 16. Because plaintiff does not claim title to a property neighboring the Lee statue—and thus makes no claim to ownership of a dominant estate—the only property right plaintiff could conceivably claim would be an easement in gross. See *Virginia Elec. & Power Co. v. Northern*

[25] The amended complaint does not renew plaintiff's previous (and previously abandoned) assertion that removal of the statue would violate the 1889 Joint Resolution. See Am. Compl. ¶¶ 8–23; accord Hr'g Tr. at 24 (plaintiff's counsel stating: "We're not here relying on the resolution"). Even if it did, that claim would fail for the same reasons as plaintiff's current statutory claim—no standing, no private right of action, and sovereign immunity. See Defs.' Mem. in Opp. to Mot. for Perm. Inj., pp. 13–16 (Exhibit 7) (discussing 1889 Joint Resolution).

Va. Regional Park Auth., 270 Va. 309, 316 (2005) ("An easement in gross is an easement with a servient estate but no dominant estate." (quotation omitted)).[26] And because plaintiff asserts a "legal right to object to a use of the servient tract by its owner," the property interest he asserts is a "negative easement." *United States v. Blackman*, 270 Va. 68, 76 (2005); see also *id.* ("[N]egative easements have been described as consisting solely of a veto power."). But such property rights are rarely created or enforced, and plaintiff's claim to one fails for numerous reasons.

First, any language purporting to restrict the Commonwealth's use of the land is merely descriptive and creates no legally enforceable obligation. "[C]ovenants restricting the free use of land . . . are not favored and must be strictly construed." *Waynesboro Village, LLC v. BMC Properties*, 255 Va. 75, 80 (1998) (quotation omitted). Such agreements will be enforced only if their words "carry a certain meaning by definite and necessary implication." *Shepherd v. Conde*, 293 Va. 274, 288 (2017). Likewise, "a provision in an instrument claimed to create an easement must be strictly construed, with any doubt being resolved against the establishment of the easement." *Chesapeake & Potomac Tel. Co. of Va. v. Properties One, Inc.*, 247 Va. 136, 139 (1994).

The language of the deed conveying the land to the Commonwealth states that it will be kept "perpetually sacred to the Monumental purpose to which [it] ha[s] been devoted" and that the Commonwealth "will faithfully guard it and affectionately protect it." Am. Compl. Ex. A at

[26] At the June 18 hearing, plaintiff specifically disavowed any claim to a reversionary interest in the land conveyed by his ancestors (among others) to the LMA. See Hr'g Tr. at 27 ("[W]e agree, there is no reverter. That's not our theory or anything. There is no reverter theory here."). And because plaintiff asserts no ownership interest in a dominant estate, he would lack standing to assert any other claim based on the law of real property. See Part II(A), *infra*.

368.[27] To state a valid claim, therefore, plaintiff would have to demonstrate that those precatory (and inherently ambiguous) words *necessarily* bind the Commonwealth to approved uses of the land and perpetually foreclose the statue's removal. Because they do not, plaintiff's claim fails.

Second, even assuming that the 1890 deed could be read to restrict the Commonwealth's use of the land, neither that document nor the 1887 deed conveying the land to the LMA can be read to create an easement in gross—*i.e.*, one that is personal to and enforceable by the original donors of the land. "At common law, easements in gross were strongly disfavored . . . [and] the common law rule of long standing is that an easement is never presumed to be in gross when it [can] fairly be construed to be appurtenant to land." *Blackman*, 270 Va. at 77. For that reason, "[f]or an easement to be treated as being in gross, the deed or other instrument granting the easement must plainly manifest that the parties so intended." *Id.*

Neither deed comes close to "plainly manifest[ing]" the parties' intent to create an easement in gross. That phrase is not used in either deed, nor do those documents suggest an agreement that was personal in nature, rather than one affixed to the land. Compare *Blackman*, 270 Va. at 74 (recognizing an easement in gross where deed stated that grantors "hereby grant and convey to the Grantee . . . an easement in gross restricting in perpetuity . . . the use of the following described tracts of land"); *Piedmont Environmental Council v. Malawer*, 80 Va. Cir. 116, at *2 (Fauquier Cir. Ct. 2010) (finding easement in gross where "[t]he Deed . . . goes into great detail, over three and a half pages long, setting forth this very intention"); *Tardy v. Creasy*, 81 Va. 553, 565 (1886) (finding covenants "purely personal—not touching the land" where covenantor agreed not to use his land to conduct particular businesses that would compete with

[27] Although plaintiff contends that the Commonwealth is bound by both the 1887 and 1890 deeds (Am. Compl. ¶¶ 20, 21), the original donors' acquiescence in the 1890 deed means that the language of that document superseded any possible restriction contained in the1887 deed.

the owner of the dominant estate). The fact that accepting plaintiff's claim would require interpreting the deeds as affording *all six* of the original donors *and their heirs* a permanent veto over any non-approved use of the land provides even greater reason for doubt. Given the impossibility of determining how the long-dead original donors would feel about the Lee Monument were they alive today—and the very real potential for disagreement within such a sprawling (and ever-expanding) group of heirs—that would be an odd choice, to say the least. And, unsurprisingly, the deeds are devoid of evidence of intent to create that sort of extraordinary restriction on government-owned property.

Third, even if either deed could be interpreted as creating a valid easement in gross, plaintiff would not have inherited that interest. Although "[e]asements in gross . . . are *now* recognized interests in real property" that may be conveyed or inherited, that was not always the case. *Blackman*, 270 Va. at 78 (emphasis added). Rather, "[b]ecause easements in gross were disfavored by the common law, they could neither be transferred by the original grantee nor pass by inheritance." *Id.* Following the Supreme Court's decision in *Coal Corp. v. Lester*, 203 Va. 93, 97 (1961), which stated that "an easement [in gross] cannot be transferred by the individual to whom it is originally given, nor can it pass by inheritance," the Code of Virginia was amended in 1962 to clarify that easements in gross could be conveyed by deed or will. See *Corbett v. Ruben*, 223 Va. 468, 470 & n.2 (1982) ("After our decision in *Coal Corporation*, the General Assembly amended Code § 55-6 (which provides what property interests may be 'disposed of by deed or will') to include 'easements in gross.'"). As the Supreme Court emphasized in *Blackman*, that amendment "materially changed the common law." 270 Va. at 80.[28]

[28] In 1918, the Supreme Court held that an *affirmative* easement in gross was an interest in land that may be disposed of by deed or will based on a prior version of the Code. See *City of*

The deeds at issue here were executed more than seventy years before the Code of Virginia was amended to render easements in gross inheritable interests in property. And in September 1887—*less than two months* after the land was conveyed to the LMA—the Supreme Court of Virginia specifically stated that "a right in gross . . . that [is] a right exclusively personal to [the grantee] . . . [is] not transmissible by descent or purchase." *French v. Williams*, 82 Va. 462, 466 (1887); see also *Tardy*, 81 Va. at 564–65 (1886 decision holding that "covenants [that] are . . . purely personal" cannot "be invested with the capacity of assignment or transfer"). Accordingly, under the law existing at the time, any easement in gross enforceable by the original land donors would have been "exclusively personal to [them]" and would not have transferred to their heirs by will or otherwise. For that reason too, plaintiff—whose complaint asserts that he was not even born until more than 60 years after the 1890 Deed, see Am. Comp. ¶ 12—has no enforceable real property interest permitting him to enjoin the statue's removal.

B. A perpetual restriction on the Commonwealth's use of Commonwealth-owned land would be unenforceable

Plaintiff's property claim fails for another reason: any deed provision purporting to create a legally enforceable obligation for the Commonwealth to retain the Lee statue in its current location in perpetuity would be invalid as a matter of law.

The Virginia Supreme Court has emphasized that a covenant will not be enforced if restrictions on "the use of property [are] contrary to public policy," *Hercules Powder Co. v. Continental Can Co*., 196 Va. 935, 939 (1955), or if "[c]onditions . . . have changed so substantially that the essential purpose of the covenant is defeated," *Barner v. Chappell*, 266 Va.

Richmond v. Richmond Sand & Gravel Co., 123 Va. 1, 9 (1918); see also *Blackman*, 270 Va. at 78 (describing *City of Richmond* as addressing an affirmative easement in gross). Because plaintiff claims a *negative* easement, *City of Richmond* does not establish abrogation of the common law as to negative easements until the post-*Lester* amendments in 1962.

277, 285 (2003). As far back as 1886, the Court invalidated an agreement purporting to restrict uses of land in perpetuity, finding the instrument "void as in general restraint of trade" and "against public policy and not such as the law will recognize or enforce." *Tardy*, 81 Va. at 565. The same logic applies here, and the same result should follow.

Most fundamentally, any requirement that the Commonwealth maintain *in perpetuity* a massive monument to Robert E. Lee (or anyone else) would be void as "against public policy." *Tardy*, 81 Va. at 565. It is axiomatic that "[a] government entity has the right to speak for itself" and "say what it wishes," *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); indeed, "[i]t is the very business of government to favor and disfavor points of view." *National Endowment for Arts v. Finle*y, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). Like millions of others, the popularly elected Governor of Virginia "disfavor[s]" the glorification of the Lost Cause and the minimization of the horrors of slavery—precisely the "point of view" expressed by the continued presence of the Lee statue. *Id.* No individual Virginian—whether living or long dead—may force the Commonwealth of 2020 to continue to broadcast a message with which it disagrees and does not wish to be associated. Accord *United States v. Winstar Corp*., 518 U.S. 839, 888 (1996) (plurality opinion) (noting that "a state government may not contract away an essential attribute of its sovereignty"). By removing the Lee statue, the Commonwealth is acknowledging that celebration of the Confederate cause is (and always was) wrong and that state-sponsored displays of racial subjugation and injustice will no longer be countenanced. Plaintiff has no legally enforceable right—as a "citizen," an "heir," or anything else—to prevent the Commonwealth from doing so.

In addition, the "conditions" underlying the restriction plaintiff contends was imposed on the land have also "changed . . . substantially." *Barner*, 266 Va. at 285. When the statue,

pedestal, and real property were conveyed to the Commonwealth, Reconstruction had recently ended and the overwhelming view of those who held political power in Virginia (as opposed to the then-hundreds of thousands of Black Virginians who were being rapidly disenfranchised) was that Lee was a "heroic figure" to be celebrated and that the failure of his cause was a tragedy to be mourned. Today, Lee and other Confederate leaders are widely regarded as symbols of racism, injustice, and oppression, and the cause for which they fought a shameful blight on our Nation's history. The statue has become an ever-more-painful wound and a focus of the anger and frustration felt by many who continue to suffer the effects of the disgraceful institution Lee fought to protect. Cf. *Pleasant Grove*, 555 U.S. at 477 (noting that "[t]he 'message' conveyed by a monument may change over time"). Across the country, Confederate symbols are being taken down—with and without government action—as more and more Americans awaken to the notion that such relics of the past cannot co-exist with the future they envision. Right here in Virginia, the General Assembly recently voted to eliminate a state holiday "honor[ing] Robert Edward Lee,"[29] and all of the other monuments to Confederate figures that once adorned Monument Avenue have been removed.[30] For all of those reasons, the "purpose" of any covenant requiring perpetual maintenance of the Lee statue has been "defeated." *Barner*, 266 Va. at 285.

II. Plaintiff's statutory claim fails as a matter of law

Plaintiff also alleges that the Lee statue's removal would violate Code § 2.2-2402(B). Like plaintiff's deed-based arguments, that claim is without merit.

A. Plaintiff lacks standing to assert a violation of Code § 2.2-2402(B)

Attempting to cure the lack of standing for which the Court rejected plaintiff's original

[29] Ch. 418, 2020 Acts of Assembly, Va. Gen. Assemb. (Mar. 23, 2020).

[30] Laura Vozzella, *'Miss Confederacy' Statue Removed as Workers Rid Richmond of Confederate Icons*, Wash. Post (July 8, 2020), https://tinyurl.com/yyqrd3td.

complaint, plaintiff alleges that: (1) his "father would walk him around the [Lee] statue discussing its history as related to his family"; (2) "as a student at the University of Richmond, [he] would ride around the statue with friends and tell them of his family's connection"; (3) he "has a large framed old plat of the subdivision in which the Lee Circle is located displayed prominently on [his] living room wall"; and (4) "the possibility of the Lee statue being removed [is] especially emotionally distressing to [plaintiff] because of his family connection to the Lee monument." Am. Compl. ¶¶ 13–15.

Those allegations fall far short of establishing "a justiciable interest in the subject matter of the proceeding." *Lafferty v. School Bd. of Fairfax Cty.*, 293 Va. 354, 360 (2017) (quotation omitted). Neither "history with" nor "zealous interest in [a] topic" is "sufficient to create standing." *Id.* at 364. Indeed, in *Lafferty*, the Supreme Court of Virginia held that parents of a *current public-school student* lacked standing to challenge a school board's expansion of an anti-discrimination and anti-harassment policy. *Id.* at 365. Those holdings are consistent with the long-established requirement that plaintiffs must demonstrate an "individual injury [that is] separate from the public at large." *Id.* at 363.

Any Virginian who prefers that the Lee statue remain where it currently stands may feel "emotionally distress[ed]" by the Commonwealth's plan to remove it, or regret that they will no longer be able to see it when "walk[ing]" or "rid[ing] around" the circle. Am. Compl. ¶¶ 13, 15. Accordingly, none of plaintiff's alleged injuries are "unique . . . compared to . . . the general public." *Lafferty*, 283 Va. at 364. Nor does plaintiff's "difference of opinion" with the Governor's policy decision rise to the level of an "actual controversy." *Id.*

B. Code § 2.2-2402(B) does not create a private right of action

Separate and apart from standing, which asks whether "the plaintiff has a personal stake in the outcome of the controversy," a plaintiff seeking judicial relief based on an alleged

violation of a statute must "possess the 'legal right' to bring the action." *Cherie v. Virginia Health Servs.*, 292 Va. 309, 315 (2016). A court should "never infer a 'private right of action' based solely on a bare allegation of a statutory violation." *Id.* at 315–16. Rather, for an act of the General Assembly to provide a private right to sue, it must do so expressly or through "demonstrable evidence . . . necessarily imply[ing]" the legislature's intent. *Id.* at 315. Indeed, the Supreme Court of Virginia recently emphasized "that when a statute . . . is silent on the matter of a private right of action, one will not be inferred unless the General Assembly's intent to authorize such a right of action is palpable and shown by demonstrable evidence." *Fernandez v. Commissioner of Highways*, 842 S.E.2d 200, 202 (Va. 2020) (quotation omitted).

Plaintiff comes nowhere close to meeting that standard. The statute plaintiff claims would be violated by the removal of the Lee statue—Code § 2.2-2402(B)—neither "expressly" states that private parties may bring suit to enforce its terms, nor contains "palpable" or "demonstrable" evidence of any such intent. *Cherie*, 292 Va. at 315; *Fernandez*, 842 S.E.2d at 202–03. Indeed, Code § 2.2-2402(B) does not refer to private parties *at all*—it simply refers to the authority of the Governor and other state agencies. Nor can plaintiff rely on the Declaratory Judgment Act as an avenue through which to challenge any alleged violation of Code § 2.2-2402(B), see Am. Compl. ¶ 1, because the Virginia Supreme Court has already held that that Act "does not create a right of action or, for that matter, any substantive rights at all." *Cherie*, 292 Va. at 318.[31]

[31] Plaintiff's reference to Article V, § 7 of the Virginia Constitution, see Am. Compl. ¶ 20, also misses the mark because that constitutional provision does not create a private right of action for alleged violations of *statutory* obligations. As the Virginia Supreme Court explained in a similar context, if an alleged violation of Article V, § 7 were sufficient, "[t]he very concept of statutory standing . . . would no longer exist [because] any aggrieved claimant, by virtue of claiming that his grievance involves a . . . violation [of Article V] would have standing to assert a private right of action." *Cherie*, 293 Va. at 317.

C. Plaintiff's claim under Code § 2.2-2402(B) is barred by sovereign immunity

"As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action." *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 455 (2005) (*Mattaponi*). Sovereign immunity extends beyond the Commonwealth itself "to those who operate at the highest levels of the three branches of government," including "[g]overnors . . . and other high level governmental officials." *Messina v. Burden*, 228 Va. 301, 309 (1984). "Only the General Assembly . . . can abrogate the Commonwealth's sovereign immunity," and it must do so "explicitly and expressly." *Mattaponi*, 270 Va. at 455. And even where sovereign immunity has been waived as to certain *claims* within a complaint, sovereign immunity will still bar *other* claims for which no waiver exists. See, *e.g.*, *DiGiacinto v. Board of Rectors & Visitors of George Mason Univ.*, 281 Va. 127, 138 n.2 (2011) (finding waiver of sovereign immunity as to constitutional claims but noting that "sovereign immunity has not been waived to the extent that [the] proceeding is premised on statutory and non-constitutional claims"). Because Code § 2.2-2402(B) contains no indication that the General Assembly waived the Commonwealth's sovereign immunity—much less "explicitly or expressly," *Mattaponi*, 270 Va. at 455—plaintiff's statutory claim is barred.

D. Plaintiff's claim under Code § 2.2-2402(B) fails as a matter of law

Even if plaintiff's statutory claim did not fail at the outset for lack of standing, the absence of a private right of action, *and* sovereign immunity, it also fails on its merits.

To begin, plaintiff cites the wrong provision of Code § 2.2-2402. Paragraph A (not paragraph B) provides the pertinent authority: "No existing work of art owned by the Commonwealth shall be removed, relocated or altered in any way without submission to the Governor." Va. Code Ann. § 2.2-2402(A). In other words, the Governor has the exclusive authority to "remove[]" an "existing work of art" like the Lee statue. See Va. Code Ann. § 2.2-

2401(B) ("'work of art' means all . . . statues, . . . monuments, . . . or other structure of a permanent character intended for ornament or commemoration").

Beyond citing the wrong subsection, plaintiff omits material language from the paragraph on which he relies. See Am. Compl. ¶ 19. As relevant here, subsection B states:

> [No] bridge, arch, gate, fence, or other structure or fixture intended primarily for ornamental or memorial purposes, *and which is to be paid for, either wholly or in part by appropriation from the state treasury*, . . . shall be removed . . . *without submission to the Governor* and the artistic character of the proposed new structure approved in writing by him acting with the advice and counsel of the [Art and Architectural Review] Board.

Va. Code § 2.2-2402(B) (emphasis added). As the text makes clear, the limitations in subsection B apply *only* to "structure[s] . . . paid for . . . by appropriations from the state treasury," which plaintiff does not allege. See Am. Compl. ¶ 19. Moreover, even that subsection specifically authorizes the Governor to approve removal of any "structure" in consultation with the Art and Architecture Review Board. And to the extent plaintiff contends that he may block removal of the Lee statue because the Governor failed to consult with the Board, ¶ 22, that argument fails because the Board has unanimously endorsed the Governor's plan. See p.8, *supra*

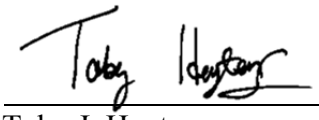
CONCLUSION

Plaintiff's request for a permanent injunction and a declaratory judgment should be denied, the amended complaint should be dismissed with prejudice, and the existing temporary injunction should be finally dissolved.

Dated: July 20, 2020

Respectfully submitted,

RALPH S. NORTHAM
JOSEPH F. DAMICO

By: 

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CERTIFICATE OF SERVICE

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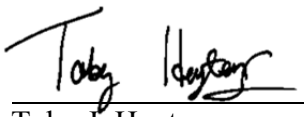

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