

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.)	

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PERMANENT INJUNCTION OR, IN THE ALTERNATIVE,
TO ENLARGE EXISTING TEMPORARY INJUNCTION**

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INTRODUCTION

“A monument, by definition, is a structure that is designed as a means of expression,” *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009), and that expression is often the celebration of a depicted figure and the actions or causes with which that figure is associated. This case involves just such a monument: a 12-ton, 21-foot equestrian statue of Robert E. Lee, General-in-Chief of the Confederate Army. That statue, in turn, stands atop a 60-foot stone pedestal in the middle of a plot of state-owned land near the center of the City of Richmond.

The Lee Monument is a daily reminder of one of the darkest periods in our Nation’s history. The Monument does not seek to explain or attempt reconciliation for that past: it seeks to glorify it. It is a piece of government-owned and government-displayed property freighted with exclusionary meaning to huge swaths of that same government’s people, and its continued presence is divisive, destructive, and dangerous. For that reason, it is hardly surprising that Virginia’s democratically elected Governor has decided to remove the Lee statue from its place of prominence and exaltation near the heart of the Commonwealth’s capital city.

We start with first principles. Government-owned monuments on government-owned property are core government speech that inevitably convey messages about what a political community believes and values. And under our democratic system, no one—neither long-dead private grantors nor previous government officials—may obligate a sovereign Commonwealth to continue broadcasting a message with which it profoundly disagrees or to forever display and maintain on its own property a massive statue of a person symbolic of a time it no longer wishes to glorify. See, e.g., *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 n.20 (1977) (“[A] State is without power to enter into binding contracts not to exercise its police power in the future.”). So the question here is not *whether* the Commonwealth of Virginia may grant its popularly elected chief executive the authority to relocate a government-owned statue that is

drenched in the sins of the past and white supremacy. It clearly can. The only question is whether a single plaintiff may call upon the equitable powers of this Court and use 130-year-old documents and inapplicable doctrines of property law to countermand the Governor's decision. He cannot.

This Court should deny plaintiff's motion for a permanent injunction and decline to expand the temporary injunction that was previously entered without notice to defendants.

STATEMENT

A. Proposing and building the Lee Monument

1. Robert Edward Lee was one of the most prominent leaders of a four-year, armed rebellion against the United States Government 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, magazine writers, and local societies embarked on a propaganda campaign to recast the object of the war away from its true and stated purpose.¹ 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]

¹ There are numerous contemporaneous sources about the reason for secession. On March 21, 1861, for example, Vice-President of the Confederacy Alexander H. Stephens gave a public speech stating 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" and that it was "the first, in the history of the world, based upon this great physical, philosophical, and moral truth." Address of Alexander H. Stephens, The Cornerstone Speech (March 21, 1861), available at <https://www.battlefields.org/learn/primary-sources/cornerstone-speech>.

civilization,”² a euphemism that belied the cause for which they fought. Plans to enshrine Lee’s memory and the Confederate cause with which he is indelibly associated began less than two weeks after Lee’s death in 1870. Former Confederate General Jubal Early—“the prototypical unreconstructed Rebel”³—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 “manifest to the world” that they “[were] not now ashamed of the principles for which Lee fought and Jackson died” in the Civil War.⁴ 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.⁵

3. Over the next several years, efforts to memorialize Lee faced financial and organizational difficulties. 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. Several sites were proposed, and, in 1886, 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 that Lee’s statue would overshadow the equestrian statue

² Thomas Lawrence Connelly, *The Marble Man: Robert E. Lee and His Image in American Society* 3 (1977).

³ Gaines M. Foster, *Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South* 55 (1987).

⁴ *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).

⁵ *Id.* at 12–17, 38.

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) (“ratify[ing] and validat[ing]” consolidation of LMA with another association and noting participation by “[t]he governor”).

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

of George Washington that already stood (and still stands) on 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, 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 Exhibit 1 (1887 Deed).⁹

Having secured the land from the Allen heirs, the LMA laid the cornerstone of the Lee Monument in October 1887.¹⁰ Former Confederate General and then-Virginia Governor Fitzhugh Lee “called the vast crowd to order” in his capacity as the president of the LMA. *Southern Historical Society Papers* at 204.

The next step was to transfer 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

⁸ Kathy Edwards, Esme Howard & Toni Prawl, *Monument Avenue: History and Architecture* 15 (1992) (*History and Architecture*); see also *Southern Historical Society Papers* (R.A. Brock, ed.), vol. XVII at 203 (1889) (*Southern Historical Society Papers*) (“[I]t was the desire of the [LMA] to have the statue of Lee as large as the equestrian statue of Washington.”).

⁹ Attached as Exhibit 1 is a copy of a handwritten Henrico County deed dated July 15, 1887, as well as a typewritten transcription, both of which were obtained from the Library of Virginia. Unless otherwise specified, this brief cites the typewritten version using “1887 Deed” and the corresponding typewritten page numbers printed at the top of the transcription.

¹⁰ W. Stuart Towns, *Enduring Legacy: Rhetoric and Ritual of the Lost Cause* 75 (2012) (*Enduring Legacy*).

behalf of the commonwealth.” Ch. 24, Joint Res., 1889 Acts of Assembly, Va. Gen. Assemb. (Dec. 19, 1889) (Joint Resolution) (Compl. Ex. B).¹¹ Consistent with that request, in March 1890—with the “approval and consent” of the Allen heirs who had previously transferred the land—the LMA executed a new deed conveying the statue, pedestal, and land to what the deed calls “the State of Virginia”. Compl. Ex. A, pp. 1 & 5 (1890 Deed).¹² The same person (P.W. McKinney) executed the 1890 Deed for both sides of the transaction: on March 17, as President of the LMA; and on March 27, as Governor of Virginia. *Id.* at 368–69.

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.¹³ A grand parade wound through the city with Confederate flags on full display, including a “mammoth Confederate flag” draped over City Hall that “extended the whole length of the building.”¹⁴ The procession was led by Fitzhugh Lee, who marched with 50 former Confederate Generals and 15,000 uniformed Confederate veterans. *History and Architecture* at 16. Several Governors from other former Confederate States were also in attendance. *Southern Historical Society Papers* at 293. By one account, the gathering was the largest in Richmond’s history,¹⁵ with *Harper’s Weekly* describing it as “a mighty tribute to the central figure of a lost cause.” *History and Architecture* at 16. The Monument was unveiled to

¹¹ Future citations to the Joint Resolution will be to the page numbers at the top of the relevant pages near the words “Acts of Assembly.”

¹² The quoted language in the original handwritten deed is contained in the first page of Exhibit A, and a typewritten version appears on the fifth page of Exhibit A (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.

¹³ David W. Blight, *Race and Reunion: The Civil War in American Memory* 267 (2001).

¹⁴ *The Lee Monument Unveiling*, *The Richmond Planet*, vol. VII, no. 24 (May 31, 1890).

¹⁵ *Southern Historical Society Papers* at 263 (describing visitors who had traveled to the city “by rail, boat, horseback, and in vehicles drawn by horses and mules” for the occasion).

“cheers,” the “roar” of cannons, and the “thunder” of muskets. *Enduring Legacy* at 78. A souvenir from the dedication ceremony shows Lee’s face surrounded by Confederate war memorabilia, including a hoisted Confederate flag and a soldier’s pack labeled “C.S.A.”¹⁶

Even in 1890, not everyone in Richmond felt the 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 “hand[ing] down a legacy of treason and blood.”¹⁷ 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].”¹⁸ 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.”¹⁹

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 racially restrictive covenants under which “no lots can ever be sold or rented in Monument Avenue Park to any person of African descent.”²⁰

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

¹⁶ Lee Monument Ass’n, *Official Souvenir of the Dedication of the Monument to General Robert E. Lee* (1890).

¹⁷ *What It Means*, *The Richmond Planet*, vol. VII, no. 24 (May 31, 1890).

¹⁸ *Lee Monument Unveiling*, *supra* note 14.

¹⁹ *Id.*

²⁰ “Monument Avenue Park Lots” Advertisement, *Richmond Times Dispatch* (Apr. 17, 1913), at 11. Such covenants are unenforceable today. See Va. Code Ann. § 36-96.6 (declaring such covenants “void and contrary to the public policy of the Commonwealth”).

rules and power structures of slavery could 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.²¹ 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 that had been erected specifically 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 had been denied enlistment in the Virginia National Guard on account of his skin color and 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

²¹ 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>.

electrocuted.”²² “Virginia is no place for a colored citizen like me to live in,” Bacon explained, because “[i]t is the home of white supremacy.”²³

C. Governor Northam announces the Lee statue will be moved

During the past several years, the Lee Monument and others like it have once again become hotbeds for controversy. In May 2017, avowed white supremacist Richard Spencer led a torch-lit nighttime rally to protest the City of Charlottesville’s decision to remove a different statue of Lee.²⁴ On July 8, 2017, a Ku Klux Klan chapter held a rally in downtown Charlottesville to show its support for the Lee statue. *Review* at 4. The next month, white nationalist groups descended on Charlottesville for the “Unite the Right” rally, which also opposed the City’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.²⁵ Three people died, dozens were injured, and countless more were traumatized. *Review* at 2, 11.

In recent weeks, 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, protests have turned dangerous, as protestors have

²² Letter from Robert Leon Bacon to Gov. Thomas B. Stanley (Dec. 2, 1955), https://edu.lva.virginia.gov/docs/12-02-1955_trans.pdf.

²³ *Id.*

²⁴ *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>.

²⁵ *Deconstructing the Symbols and Slogans Spotted in Charlottesville*, Wash. Post (Aug. 18, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-videos/>.

attempted (sometimes successfully) to topple massive stone and metal figures. In Portsmouth, for example, a man suffered life-threatening injuries when part of a statue of a Confederate soldier fell on him as protestors attempted to knock it down.²⁶

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"—a piece of state property—from one area of state control to another.²⁷ "[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 the community helps determine its future. *Id.*

D. This lawsuit

On June 8—four days after the Governor's public announcement—plaintiff filed a Complaint for Declaratory Judgment and Injunctive Relief seeking to prohibit the Governor and the Director of the Department General Services from removing the Lee statue from its current location. Asserting that he is the great-grandson and "an heir at law" to two of the people who gave the land to the LMA (which then gave it to the Commonwealth), plaintiff insists that the Lee Monument 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

²⁶ 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>.

²⁷ Virginia Governor Northam News Conference, CSPAN (June 4, 2020), <https://www.c-span.org/video/?472767-1/virginia-governor-orders-removal-robert-e-lee-confederate-monument-richmond>.

in this statue resting upon land belonging to his family and transferred to the Commonwealth.” Compl. ¶¶ 4, 13, 17. That same day, plaintiff scheduled an *ex parte* hearing at which he sought and was granted a temporary injunction before Attorney General Mark R. Herring or defendants had even been notified that suit had been filed, much less that a hearing would be conducted. See Temporary Injunction Order, pp. 2–3 (TIO).

On Friday, June 12, plaintiff filed a one-sentence motion for “a permanent injunction . . . , or in the alternative, to enlarge the existing injunction until such time as a full hearing may be had on the issues herein,” and noticed a hearing for 10:00 a.m. six days later. For the reasons explained below, defendants strenuously oppose both forms of relief requested by plaintiff because plaintiff has come nowhere close to meeting the burden he takes up in seeking them.²⁸

LEGAL STANDARD

“The granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case.” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008).

Although “[n]o Virginia Supreme Court case has definitively set out standards to be applied in granting or denying a [temporary] injunction,” Virginia courts generally “follow[] [the] standards delineated in the four-part test used by the federal courts.” *School Bd. of Richmond v. Wilder*, 73 Va. Cir. 251, at *2 (Richmond Cir. Ct. 2007). Under those standards, a temporary “injunction is . . . never awarded as of right,” and a party seeking one “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20, 24 (2008). “The plaintiff

²⁸ Defendants are also filing a demurrer to plaintiff’s complaint and ask to be heard on that demurrer at the same time as this Court entertains plaintiff’s current motion.

must clearly show all four factors.” *Richmond for All v. Virginia. Dept. of Elections*, Case No. CL20-2432, at *3 (Richmond Cir. Ct. June 9, 2020) (attached as Exhibit 2).

ARGUMENT

Plaintiff’s six-page complaint and one-sentence motion offer no legal argument in support of his plea for equitable relief preventing the Commonwealth’s elected chief executive from removing a state-owned statue commemorating racial oppression and disunity from the heart of Virginia’s capital city. For that reason alone, plaintiff has failed to meet his “evidentiary burden” to justify the “extraordinary remedy” he seeks. *Levisa Coal Co.*, 276 Va. at 55, 60.

Plaintiff’s request for an injunction also fails as a matter of law. Neither plaintiff’s status as “a citizen of the Commonwealth,” TIO, p. 2, nor his bare allegation that he “is the grandson and an heir at law” to two people who were among those who donated the underlying real property to the LMA through the 1887 Deed, see Compl. ¶ 4, gives plaintiff standing to seek an injunction against the removal of a statue that was donated to the Commonwealth by the LMA through a separate deed executed nearly three years later.

Nor can plaintiff succeed on the merits. The 1889 Joint Resolution on which plaintiff relies did not impose any legal obligations on the Commonwealth beyond those imposed by the 1890 Deed. Even if it did, plaintiff would not be entitled to relief because: (1) plaintiff has no concrete interest in any controversy over the Joint Resolution (as opposed to the 1890 Deed); (2) plaintiff has no private right of action through which to seek relief; and (3) sovereign immunity would bar this Court from granting plaintiff an injunction based on any purported violation of the Joint Resolution in any event.

Plaintiff’s reliance on the 1890 Deed is similarly flawed. That deed includes no language establishing a reversionary interest in anyone (much less the descendants of the original landowners), and any such interest would constitute an invalid restraint on alienation. Plaintiff

does not assert that the 1890 Deed's precatory language that the Commonwealth would hold the Lee statue, its pedestal, and the underlying land "perpetually sacred to the Monumental purpose to which they have been devoted" (1890 Deed at 368) is sufficient to establish a restrictive covenant. And, even if plaintiff did so contend, any restrictive covenant claim would fail for (at least) two independent reasons: (1) no covenant enforceable by plaintiff was ever established; and (2) a covenant requiring a sovereign State to forever publicly celebrate anyone—let alone a leader of an armed rebellion against our Nation—would be defeated by changed circumstances and void as against public policy.

Finally, plaintiff also fails to demonstrate he will experience any legally cognizable irreparable injury if the Governor removes the statue, or that the public interest or balance-of-equities weigh in his favor. For all of these reasons, plaintiff is not entitled to the exercise of this Court's equitable power—temporary or otherwise—to prevent the Governor's removal of the Lee statue from its current location on Monument Avenue.

I. Plaintiff cannot succeed on the merits

Plaintiff does not deny that the Commonwealth owns both the Lee statue and the land on which it is located. Compl. ¶ 1. Nor does plaintiff assert that Governor Northam generally lacks the authority to relocate Commonwealth-owned statues and other works of art from one place to another—presumably because the Code of Virginia acknowledges the Governor's exclusive authority to do so. See Va. Code Ann. § 2.2-2402 ("No existing work of art owned by the Commonwealth shall be removed, relocated or altered in any way without submission to the Governor."). Instead, plaintiff contends that two other documents—the 1889 joint resolution of the General Assembly endorsing the Commonwealth's acceptance of the Monument and the 1890 Deed transferring the statue, pedestal, and land from the LMA to the Commonwealth—override the Governor's otherwise-lawful exercise of authority. Neither claim has merit.

A. The Joint Resolution does not prevent the Governor from removing the Lee statue and does not entitle plaintiff to equitable relief

Plaintiff insists that Chapter 24 of the Acts of Assembly of 1889 created a legally enforceable obligation for the Governor to “assure that the Lee monument is preserved and protected.” Compl. ¶ 9. But the Joint Resolution imposed no such obligation and, even if it had, plaintiff would not be entitled to injunctive relief for any alleged violation of its terms.

1. The Joint Resolution created no independent legal obligations

The Joint Resolution did not, in its own right, impose any legal obligations on the Governor or the Commonwealth. The Joint Resolution “authorize[ed]” and “request[ed]” (but did not “direct” or “require”) the Governor to take two actions: (1) “accept” the Lee monument from the LMA; and (2) “execute any appropriate conveyance” for the transfer. Joint Resolution 32. With respect to the latter, the Joint Resolution also described the instrument it envisioned, explaining that it should be “in token of” the Commonwealth’s acceptance of the monument and “of the guarantee of the state that” the “statue,” “pedestal,” and “ground” would be held “perpetually sacred to the monumental purpose to which they have been devoted.” *Id.*

But there is a world of difference between encouraging action and mandating it. And even putting aside the fact that the Joint Resolution did not actually require the Governor (or the Commonwealth) to do *anything*, its description of the anticipated contents of a yet-to-be issued deed cannot impose any legally enforceable obligations apart from or in addition to the document itself. The General Assembly could have enacted—but did not enact—a law accepting the Lee Monument and providing that the Commonwealth *shall* “hold said statue and pedestal and ground perpetually sacred to the monumental purpose to which they have been devoted.” Nor did the General Assembly direct the then-Governor (much less all of his successors) to comply with

any obligations created by an instrument that would not even be executed for another three months. Instead, the General Assembly simply declared its expectation of what that future instrument would say. Such a declaration, even when made by a legislative body, has no independent force or effect.

2. Plaintiff is not entitled to an injunction based on an alleged violation of the Joint Resolution

Even assuming that the Joint Resolution imposed independent legal obligations on the Commonwealth—and further assuming that removal of the statue would violate those obligations—plaintiff would not be entitled to injunctive relief on any such theory for at least three separate reasons.

First, plaintiff has identified *no legally cognizable interest* permitting him to secure an injunction based on an alleged violation of the Joint Resolution. As the Virginia Supreme Court has repeatedly emphasized, a plaintiff attempting to forestall action by the Commonwealth must allege “a direct interest . . . in the outcome of the controversy that is separate and distinct from the interest of the public at large.” *Goldman v. Landsidle*, 262 Va. 364, 373 (2001); see also *Bono Film & Video, Inc. v. Arlington Human Rights Comm’n*, 72 Va. Cir. 256, at *3 (Arlington Cir. Ct. 2006) (applying *Goldman* to motion for injunctive relief). To the extent plaintiff has any interest sufficient to avail himself of any exercise of this Court’s equitable powers, that interest derives from his asserted relationship to the people who granted the land to the LMA via the 1887 Deed and then offered their “approval and consent” to the LMA’s transfer of that land to the Commonwealth via the 1890 Deed. 1890 Deed at 367. When it comes to the Joint Resolution, in contrast, plaintiff is no different from—and thus no more entitled to seek an injunction than—any other citizen of Virginia.

Second, plaintiff lacks any *private right of action* through which to challenge an alleged

violation of the Joint Resolution. “In Virginia, substantive law . . . includ[ing] the Constitution of Virginia, laws enacted by the General Assembly, and historic common-law principles recognized by our courts” “determines whether a private claimant has a right to bring a judicial action.” *Cherie v. Virginia Health Servs.*, 292 Va. 309, 314 (2016). For an act of the General Assembly to provide the requisite right to sue, it must do so expressly or through “demonstrable evidence . . . necessarily impl[y]ing” the legislature’s intent. *Cherie*, 292 Va. at 315; see also *Fernandez v. Commissioner of Highways*, 842 S.E.2d 200, 202 (Va. 2020) (“This Court has made abundantly clear 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.”) (quotation omitted).

Plaintiff cites no “substantive law” affording him the right to bring a lawsuit challenging any alleged violation of the Joint Resolution. The Joint Resolution itself included no express language or necessary implication that the General Assembly intended to afford private parties a right to sue to enforce its terms. Accord *Fernandez*, 842 S.E.2d at 203. Any “historic common-law principles,” *Cherie*, 292 Va. at 314—that is, the common law of property—that may provide a right of action to enforce any rights plaintiff claims to have based on the 1890 Deed do not cover plaintiff’s separate claim based on (alleged) violations of the Joint Resolution, nor does any other source of substantive law permit plaintiff to seek relief on such a claim. Plaintiff makes no allegation that the Governor’s action violates his rights under the Virginia Constitution, and the Virginia Supreme Court has already held that the Declaratory Judgment Act “does not create a right of action or, for that matter, any substantive rights at all.” *Cherie*, 292 Va. at 318.

Finally, plaintiff’s request to enjoin the Governor’s actions on the theory that they violate the Joint Resolution is also *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” for the waiver to be recognized in court. *Mattaponi*, 270 Va. at 455.

Because “the doctrine of sovereign immunity has no application in actions based upon valid contracts entered into by duly authorized agents of the government,” *Wiecking v. Allied Med. Supply Corp.*, 239 Va. 548, 553 (1990), it may be that sovereign immunity does not bar plaintiff’s claim based on violation of the 1890 Deed. But plaintiff’s claim based on violation of the Joint Resolution is different. That claim does not sound in contract or common-law principles of property; instead, plaintiff’s claim is just like any other suit seeking injunctive relief against the Commonwealth for an alleged violation of statutory law. And because the Joint Resolution contains no indication that the General Assembly intended to waive the Commonwealth’s sovereign immunity—much less “explicitly and expressly,” *Mattaponi*, 270 Va. at 455—plaintiff is not entitled to any injunction based on alleged violations of its terms.

B. The 1890 Deed does not prevent the Governor from removing the Lee statue and does not entitle plaintiff to injunctive relief

Because the Joint Resolution imposed no independent legal obligations, plaintiff’s claim rises and falls on the language in the 1890 Deed purporting to “guarantee that [the Commonwealth] will hold [the Lee] Statue and pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted.” 1890 Deed at 368. Although

plaintiff does not identify any particular doctrine of property law he believes entitles him to an injunction preventing the Lee statue's removal from its current location, plaintiff could be suggesting one of two things: either (1) that the original grantors of the land retained a *reversionary interest* that is triggered by the Commonwealth's failure to maintain the Monument, which plaintiff may assert as an (alleged) heir to two of those original grantors; or (2) that the 1890 Deed created a *restrictive covenant* obligating the Commonwealth to leave the Lee statue in its current location, and that covenant can be enforced in perpetuity through an injunction. Both theories fail for lack of proof and as a matter of law.

1. The 1890 Deed did not create a valid reversionary interest and any such interest would not be enforceable by plaintiff through an injunction

For numerous independent reasons, plaintiff is not entitled to injunctive relief against the removal of the Lee statue based on the theory that the original grantors of the land to the LMA retained a contingent reversionary interest in the land when it was conveyed by the LMA to the Commonwealth. ***First***, the 1890 Deed lacks any "express terms or clear implication" that the signatories to the deed intended to create such an interest. *Hamm v. Hazelwood*, 292 Va. 153, 157 (2016). ***Second***, even if the 1890 Deed contained such language, the consequence of triggering any contingent reverter would be forfeiture of the Commonwealth's title in the underlying real property (a remedy that plaintiff does not seek), not an injunction compelling compliance with the language of the deed (which plaintiff requests here). ***Third***, even if the 1890 Deed created a reversionary interest in someone, it would have been the LMA, not plaintiff. And ***finally***, even if all of that were wrong, a condition requiring the Commonwealth to maintain the Lee Monument and underlying land in its original form in perpetuity would be an unreasonable restraint on alienation and would therefore be unenforceable.

- a. "The first premise of property law is that a lawful owner, as a general rule, has the

power to convey his real property to whomever he wishes under whatever conditions they agree to.” *Hamm*, 292 Va. at 157. “At common law, a lawful owner’s right to property ‘consists in the free *use*, enjoyment, *and disposal of* all his acquisitions, without any control or diminution, save only by the laws of the land.’” *Id.* at 158 (quoting 1 William Blackstone, *Commentaries*) (emphasis added). Although a grantor may sometimes maintain a legally enforceable interest in property conveyed to another by, for example, “express[ly] reserv[ing] . . . a contingent reversionary interest” triggered by the occurrence of a future event, “[t]he grantor’s right to impose such a condition . . . is not absolute.” *Id.* Rather, “[c]enturies of common-law jurisprudence have marked off the legal boundaries of this presumptive right,” “the best-known boundary [of which] is the historic maxim against unreasonable restraints on alienation.” *Id.*

To be sure, it is not the case that “all lesser forms of restraint—no matter their scope or duration—are *per se* repugnant.” *Hamm*, 292 Va. at 159. For example, “courts generally uphold conditions that affect later alienation rights if, under all the circumstances . . . , the restraint is found to be reasonable.” *Id.* (quotation omitted). “The power of alienation, as a general rule, ‘may be restricted to a limited extent; for instance, as to certain designated persons, or . . . for a reasonable time.’” *Id.* at 159–60 (quoting *Camp v. Cleary*, 76 Va. 140, 143 (1882)). Because reversionary “conditions” placed on continued title are “not favored” given their capacity to “destroy estates,” however, such restrictions “must have been created by express terms or clear implication” in order to effectively “work a forfeiture of title.” *Id.* at 163.

b. Any argument that the 1890 Deed conveying the ground underlying the Lee Monument to the Commonwealth creates a reversionary interest that may be enforced by plaintiff through the exercise of this Court’s equitable powers fails as a matter of fact and law.

First, to start with the most obvious problem: The 1890 Deed included no “express terms

or clear implication,” *Hamm*, 292 Va. at 163, that the Commonwealth’s title to the land would be forfeited if it failed to “hold [the] statue and pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they [were] devoted,” 1890 Deed at 368. That should be the end of the matter. Compare *Hamm*, 292 Va. at 163 (holding reverter created where deed stated “that the fee conveyed ‘shall AUTOMATICALLY REVERT’ to the grantor if [descendent], among other things, ‘ever acquire[d] any interest’ in the property”).

Second, even if the 1890 Deed created a reversionary interest, that interest would not be enforceable by the remedy plaintiff is seeking. As the term “reversionary interest” suggests, the consequence of triggering the stated condition is the return of title to the original grantor (or her heir), not the issuance of an injunction compelling a current owner to refrain from triggering that condition. See *Hamm*, 292 Va. at 164. For that reason, even if plaintiff were able to establish that he is the heir to a contingent reversionary interest triggered by the Commonwealth’s failure to maintain the Lee Monument in its original condition, plaintiff’s remedy would be to obtain possession of title to whatever (presumably miniscule) portion of the underlying real estate his asserted status as one of the “heir[s] at law” to two of the original grantors of the land to the LMA (Comp. ¶ 4) would afford him—a remedy plaintiff nowhere seeks.

But *third*, even if the 1890 Deed created a legally enforceable reversionary interest in someone, it would not be plaintiff. There are two deeds that matter here, not one. As plaintiff indicates, see Compl. ¶ 4, the 1890 Deed that transferred the Lee statue, its pedestal, and the underlying real property to the Commonwealth describes plaintiff’s ancestors (and two other couples) as “parties of the second part” and states that they “approv[ed] and consent[ed]” to the transfer. 1890 Deed at 367. But those couples had *already* transferred their ownership interest in the land to the LMA three years earlier. See 1887 Deed. Indeed, the 1890 Deed reflects this fact

by describing the couples as “the *original* grantors of the Monument Site” rather than its current owners and making clear that it was the LMA—not the couples—that was actually “grant[ing], transfer[ring], and convey[ing]” the land, statue, and pedestal to the Commonwealth. 1890 Deed at 367 (emphasis added). So if anyone acquired a valid and enforceable reversionary interest as a result of the language in the 1890 Deed, it would have been the LMA, not “the original grantors” through whom plaintiff would necessarily derive any possible rights he could have. *Id.* ²⁹

Finally, even if the 1890 Deed could somehow be understood as granting plaintiff a contingent reversionary interest that would be triggered by the Governor’s decision to move the Lee statue from its current location or an alleged failure to “guard and protect” it, Compl., p. 6, any such interest would be an unreasonable (and thus unenforceable) restraint on alienation.³⁰ Unlike valid reversionary interests, the 1890 Deed does not simply identify “certain designated persons” to which title may not be transferred. *Camp*, 76 Va. at 143; accord *Hamm*, 292 Va. at 163 (approving providing for reverter if grantee permitted a single identified person to acquire interest in property). Rather, as plaintiff understands the 1890 Deed, the Commonwealth may not sell or transfer the land, pedestal, or statue to *anyone*. See Compl. ¶ 8 (asserting that “*the Commonwealth*” is required “to hold . . . the statue, pedestal and ground on which they rest” (emphasis added)); accord TIO, pp. 2–3 (prohibiting defendants “from . . . selling the statue of

²⁹ Plaintiff does not claim to represent the LMA in this matter.

³⁰ It also would violate the rule against perpetuities. The Supreme Court of Virginia has specifically stated that a possibility of reverter—the only type of reversionary interest that could be at issue here—“is not a vested interest in real property” but rather “a future interest that is always contingent and corresponds to” the potential occurrence of uncertain future events. *Hamm*, 292 Va. at 162–63 (internal quotation marks and citations omitted). And, under Virginia law, “[a] nonvested property interest is invalid unless” either one of two requirements is satisfied: (1) the interest was, when created, “certain to vest or terminate no later than 21 years after the death of an individual then alive”; or (2) the interest, in fact, “either vests or terminated within 90 years of its creation.” Va. Code Ann. § 55.1-124(A)(1)–(2). Neither is true here.

Robert E. Lee”). The restriction is also not limited in time. See Compl. ¶¶ 8, 10 (describing the 1890 Deed’s language—including the words “*perpetually* sacred”—as “binding on Defendants” (emphasis added)). So, in plaintiff’s view, the signature of a long-dead Governor (who also signed the 1890 Deed on behalf of the other directly interested party to the transaction, the LMA) requires that a circle of Commonwealth-owned land in the middle of a major city be maintained in its current form until the Commonwealth of Virginia ceases to exist or we reach the end of time. Such a restraint—unlimited in scope or duration—is at odds with fundamental principles of property law, including the rights of “a lawful owner” to “the free use, enjoyment, and disposal of all [of its] acquisitions.” *Hamm*, 292 Va. at 157 (quoting 1 William Blackstone, Commentaries).³¹

2. Any restrictive-covenant theory would likewise fail as a matter of law.

Plaintiff is no more likely to succeed on the theory that the 1890 Deed imposes a covenant restricting the Commonwealth’s own use of the property. Any such claim would fail at the threshold because the circumstances of the land transfer are inconsistent with the creation of a restrictive covenant and plaintiff’s alleged status as an heir to the original donors would not make him a successor-in-interest to any beneficiary of the alleged promise. And even if that were not the case, the purported restrictive covenant would be unenforceable because of changed circumstances and invalid as against public policy.

³¹ Even if plaintiff does not—contrary to the language of his complaint—necessarily understand the 1890 Deed as precluding the Commonwealth from disposing of the real property on which the Lee Monument currently rests, it is clear plaintiff believes that the Commonwealth may not do so unless the buyer or grantee agrees to keep the monument *exactly* as it stood when built for all time. Such a limitation would drastically limit the class of persons or entities to which the Commonwealth could dispose of the property and eviscerate its commercial value. So interpreted, the 1890 Deed would be no less an unreasonable restraint on alienation than if it precluded the sale or disposal of the real estate altogether.

a. “[C]ovenants restricting the free use of land . . . are not favored and must be strictly construed and the burden is on the party seeking to enforce them to demonstrate that they are applicable to the acts of which he complains.” *Waynesboro Village, LLC v. BMC Properties*, 255 Va. 75, 80 (1998) (quotation omitted). “Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property.” *Id.* (quotation omitted). To “enforce a covenant running with the land,” “[a] landowner [must] establish[]: (1) privity between original parties; (2) privity between original parties and their successors; (3) an intent that the restriction will run with the land; and (4) that the covenant touches and concerns the land. Additionally, the conveyance must be in writing.” *Sloan v. Johnson*, 254 Va. 271, 276 (1997) (quotation and citations omitted). And even where “a restrictive covenant has been established,” it will not be enforceable if “[c]onditions . . . have changed so substantially that the essential purpose of the covenant is defeated,” *Barner v. Chappell*, 266 Va. 277, 285 (2003), or where restrictions on “the use of property [are] contrary to public policy,” *Hercules Powder Co. v. Continental Can Co.*, 196 Va. 935, 939 (1955). Put differently, where “radical change . . . render[s] . . . enforcement [of a restriction] inequitable and oppressive, equity will not compel observance . . . by injunction.” *Ault v. Shipley*, 189 Va. 69, 77 (1949) (quotation omitted).

b. Neither plaintiff’s complaint nor his one-sentence motion attempts to satisfy any of the requirements for proving an enforceable restrictive covenant. For example, plaintiff nowhere attempts to show why the “perpetually sacred to the Monumental purpose” language in the 1890 Deed on which he relies is more than precatory—a standard that could only be met by demonstrating that those flowery (and inherently ambiguous) words “carry a certain meaning by definite and necessary implication.” *Shepherd v. Conde*, 293 Va. 274, 288 (2017). Accordingly, any such claim fails as a matter of law and cannot support the grant of a temporary or permanent

injunction. Even if plaintiff had attempted to satisfy the relevant standard, moreover, any such effort would fail as a matter of law for at least two independent reasons.

First, the circumstances surrounding the 1890 Deed are inconsistent with the creation of a restrictive covenant, let alone one that could be enforced by plaintiff. Restrictive covenants involve a benefitted property and a burdened property and, consistent with the notion of a covenant that “runs with the land,” the right to enforce them passes (if at all) to the *succeeding owners* of the *benefitted* property—not the *descendants* of the original owners of the *burdened* property. That is why, for example, the right to enforce a (hypothetical) restrictive covenant barring property owners in a given cul-de-sac from having outdoor fire pits is enforceable by the *current* owners of the neighboring properties, not the children or grandchildren of the people who drafted the original covenant. Accord *Barner*, 266 Va. at 284 (stating that “vertical privity requires that the benefit of a restrictive covenant extends only to one who succeeds to some interest of the beneficiary *in the land* respecting the use of which the promise was made”) (emphasis added).

Viewing the complaint in the light most favorable to plaintiff, he is *one* of the “heir[s] at law” to *some* of the people who were the original grantors of the real property on which the Lee Monument sits. Compl. ¶ 4. As explained above, that land was conveyed to the Lee Monument Association in 1887, nearly three years *before* the LMA granted it to the Commonwealth in the 1890 Deed that would have to be the source of any conceivable restrictive covenant that would be enforceable against the Commonwealth.

But even if the land had been conveyed directly to the Commonwealth from plaintiff’s great-grandparents through the 1890 Deed, that would not mean that the deed created a restrictive covenant or that plaintiff has the legal right to enforce it. As explained above,

restrictive covenants typically involve a benefitted property and a burdened property. Here, the burdened property is the circle of Commonwealth-owned land containing the monument. Because plaintiff acknowledges—indeed, it is the premise of his argument—that his ancestors and the other owners *conveyed* that property to the Commonwealth (by way of the LMA), there is no remaining property to be “benefitted” by the agreement that could possibly have passed to plaintiff. Said differently, plaintiff is not a “successor-in-interest” to any beneficiary of an alleged covenant, because no such “beneficiary” ever existed. Plaintiff’s claim to be an heir to two of the original grantors is thus immaterial because one cannot inherit what one’s ancestors did not possess.³²

Second, any restrictive-covenant theory also would fail as a matter of law because an agreement purporting to prohibit the Commonwealth from *ever* removing the Lee statue would be unenforceable as against public policy.

To say that circumstances have changed drastically in the more than 130 years since March of 1890 (when the only possible source of such a covenant was executed) is a profound understatement. 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

³² It appears that plaintiff’s great-great grandfather also owned much of the land surrounding the area that now contains the Lee Monument and that he passed that interest onto his heirs (which may have included plaintiff’s great grandparents). See p. 4, *supra*. But plaintiff does not make any assertions or argument suggesting that his claims are based on an agreement intended to protect the use and enjoyment of other properties around the Monument, nor does he claim an ownership interest that would permit him to enforce any such covenant.

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. See *Pleasant Grove*, 555 U.S. at 477 (emphasizing that “[t]he ‘message’ conveyed by a monument may change over time”). Across the country, monuments to figures like Lee 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. In short, the “essential purpose of [any possible] covenant”—the celebration and glorification of a commander of the Army of the Confederacy—“has been defeated,” *Barner*, 266 Va. at 285, and enforcement of its terms would be “contrary to public policy.” *Hercules*, 196 Va. at 939.

The reasons just recited would have significant force with respect to a covenant purporting to require *any* landowner to maintain a Confederate monument in perpetuity. But where the landowner in question is a sovereign State, their power becomes overwhelming.

It is axiomatic that “[a] government entity has the right to speak for itself” and “say what it wishes.” *Pleasant Grove*, 555 U.S. at 467. Indeed, “[i]t is the very business of government to favor and disfavor points of view.” *National Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). Like millions of others, the popularly elected Governor of the Commonwealth 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 Monument. *Id.* Neither the lawmakers nor the landowners of 1890 may force the Commonwealth of 2020 to continue—much less in perpetuity—to convey a message with which it profoundly disagrees and does not wish to be associated. Accord *United*

States v. Winstar Corp., 518 U.S. 839, 888 (1996) (plurality opinion) (noting that, under “the reserved powers doctrine,” “a state government may not contract away an essential attribute of its sovereignty”). Nor may a single individual with—at absolute most—a contingent fractional interest in the underlying real property on which the statue sits assert a heckler’s veto over a decision by a Governor who was elected by more than 1.4 million of his fellow citizens. The Governor has chosen to acknowledge 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 right—whether as a “citizen,” an “heir,” or anything else—to prevent the Governor from doing so.

II. Plaintiff has not shown that he will suffer irreparable harm if the statue is removed

The burden of establishing a right to injunctive relief is always on the party seeking that “extraordinary remedy.” See *Winter*, 555 U.S. at 20. And when it comes to describing his own harm—an essential prerequisite for injunctive relief—plaintiff offers only the bald assertion that “[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. ¶ 17.

That statement falls woefully short of establishing plaintiff’s standing to sue, much less irreparable harm. As described above, a citizen challenging an action of the Commonwealth must establish “a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large.” *Goldman*, 262 Va. at 373. Plaintiff’s claimed loss of “pride” boils down to an assertion that he would prefer the Lee statue to remain where it stands today. But no matter how strong that preference may be, it does not give plaintiff—who does not even assert that he lives in Richmond—a direct interest in this matter or show that he will experience any legally cognizable irreparable harm absent an injunction.

III. The balance-of-equities and public interest factors foreclose equitable relief

The “pride” plaintiff asserts that he and other unidentified members of his family have felt “for 130 years” when pondering the statue of Lee towering over Richmond and the plurality of its population Lee fought to keep enslaved is not shared by all. For many Virginians, the Lee Monument is a reminder of a past that should be shunned or atoned for, not celebrated. This is especially true of the descendants of people whose ancestors were held in bondage because of the color of their skin.³³ It is a symbol of racism and oppression at a time when we strive towards a future marked by equality and inclusion. Each day it stands cuts a deeper wound into the hearts and minds of those who have endured the pain of systemic racism and injustice for far too long and creates the risk that its presence will trigger extralegal efforts to remove or “defend” it—both of which could easily result in violence, injury, or death.³⁴

The public interest demands that state-sponsored displays of racism be removed. The balance of equities demands that a popularly elected Governor’s expression of the will of the many not be countermanded by the judicially sanctioned veto of one. Accordingly, both factors weigh against granting plaintiff the extraordinary remedy he seeks.

CONCLUSION

The motion for a permanent injunction or, in the alternative, to expand the temporary injunction should be denied.

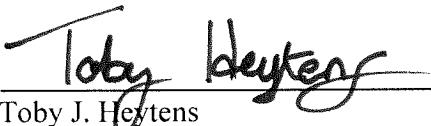
³³ It is also true of some of Lee’s own family members. See *supra* note 27 (including remarks of Rev. Robert E. Lee IV).

³⁴ See, e.g., Katie Shepherd, *Police Detain Armed Militia Members After Man Is Shot at Albuquerque Protest*, Wash. Post (June 16, 2020), <https://www.washingtonpost.com/nation/2020/06/16/albuquerque-militia-shooting-protest/>.

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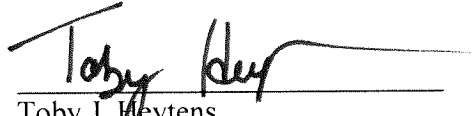

Toby J. Heytens
Counsel for Defendants

Exhibit 1

not wish to retract it.

Given under my hand this ninth day of July, 1887

W. S. Richardson Notary Public

City of Richmond, to wit;

In the office of the Court of Chancery for the said City the 16th day of July 1887. This deed was presented, and with the certificates annexed, admitted to record at half past eleven O'clock A.M.

Teste:

Benj. H. Berry Clerk

This Deed was presented in the Clerk's Office of Henrico County Court on the 18th day of July 1887, and with the certificates annexed, admitted to record at a quarter to ten O'clock A.M.

Teste:

Samuel P. Waddell C. C.

Examined

Allen & Whereas, the Lee Monument Association, in pursuance to & Deed of the power vested in it by the General Assembly of Virginia, Lee Monument and in consideration of the original advantages of the location, and especially of the very desirable plan and arrangements original delivered of the surroundings offered by the grantors, and their dedication to Robt. S. Lee Esq. of the broad avenues hereinafter more fully set forth, has, by resolution adopted the 14th day of July 1887, selected and determined on the property hereinafter conveyed, as the site for the Monument to be erected, to General Robert E. Lee; - And whereas the grantors, who, as devisees of the late Wm. L. Allen and purchase of the interest of Wm. L. Sheppard Jr. and wife, sold the complete title to the property hereinafter conveyed and dedicated, in consideration of the selection of said site by said Association, have determined to make the arrangements of the surroundings and dedication of the avenues above referred to; - And whereas it is desired by both parties that the contract and arrangements between them should be finally consummated, so that the Monument Association may begin its work, which it is considered impracticable to deed the avenues aforesaid, directly to the City of Richmond, inasmuch as they are, for the most part, outside the present limits of the City; Now therefore this deed, made this 16th day of July 1887, between Oliver S. Allen, Roger Gregory and Betty F. Gregory his wife, who was Betty F. Allen, and Nell Wilson and Martha A. Wilson her wife, who was Martha Allen, parties of the first part, and the Lee Monument Association, a corporation chartered

by the State of Virginia, parties of the second part, Witnesseth, that the parties of the first part, in consideration of the premises, do grant unto the party of the second part, with special warranty, the following real estate, to wit; that piece or parcel of land lying and being in the County of Henrico, just beyond the present western confines of the City of Richmond, contained within a circle whose radius is One Hundred (100) feet, and whose centre is situated on the prolongation of the centre or middle line of Franklin Street, west of Lombardy Street, and distant 88 (eight hundred and ninety) feet from the east line of Lombardy Street. Said property is indicated on the plot hereinafter mentioned, by the figure and the word "Circle". To have and to hold the said property or "Circle", to the following use and purposes and none other, to wit; as a site for the Monument to General Robert E. Lee, which it is the end and object of the Monument Association to erect.

And said Association also executes this conveyance, in testimony of its approval thereof, its recognition of the use and purpose to which the said piece of land is to be held, and its agreement and covenant to carry out the said purpose, and to hold the said property only for the said use.

And this deed Further Witnesseth, that the parties of the first part, as an integral part of the general design and transaction and as indissolubly connected with the conveyance above made of the Monument site, do hereby dedicate and set apart to the public, the following piece and parcel of real estate, to be used as avenue of the length, width, description and designation hereinafter set forth, leading to and intersecting at said Monument, site or "Circle" and an open area or place, about said circle, of the boundaries, description and designation hereinafter set forth, viz;

1st - "Monument Avenue", being that portion of land, lying west of Lombardy Street, with a centre or middle line coinciding with the prolongation of the centre line of Franklin Street, and of a width of 140 (one hundred and forty) feet, being a width of 70 (seventy) feet on each side of the above mentioned centre line, and extending westward from the western line of Lombardy Street to the western terminus of the Allen estate.

2nd - "Allen Avenue", being that portion of land lying between Broad Street and Park Avenue, of a width of 140 (one hundred and forty) feet, being a width of 70 (seventy) feet on each side of a centre or middle line passing through the centre of the "Circle" above conveyed, at right angles to the centre line of Monument Avenue.

3rd - "Lee Place", being that portion of land at the intersection of Allen and Monument Avenues, bounded on the inside by the circumference of the "Circle" above conveyed, and on the outside by four quadrant arcs whose radii are each 160 (One Hundred and sixty) feet, and whose centres are situated on the

four corners of a square, the sides of which are 260 (Two hundred and sixty) feet in length, and respectively parallel to Allen and Monument Avenues, and the centre of which coincides with the centre of the "Circle" above conveyed, - said arcs terminating where each is tangent to the limiting sides of the two avenues.

No portion of either of the quadrants bounded by said arcs is to be considered as part of "Lee Place" nor as embraced within any of the clauses or provisions of this deed; nor is the area contained within the "Circle" above conveyed, to be considered as part of either "Allen" or "Monument Avenues" or "Lee Place", but "Lee Place" is to be considered and used as a continuation and connection between the two parts into which, strictly speaking, it divides each of said avenues, which may be regarded as broken when the quadrant arcs aforesaid are tangent to its sides.

It was originally agreed upon as a feature of the plan of the surroundings, and as an inducement to the selection of this location for the Monument, and it is therefore hereby expressly provided, so far as the same may be legally and permanently fixed by this deed, - that no trees or other object of sufficient size to interfere with the view of the Monument, shall ever be planted, or located, or allowed, to be, upon or about the centre line of either of the Avenues aforesaid, or within 35 (thirty five) feet thereof, except by the consent of the Lee Monument Association - The object being to provide and secure an unobstructed view and vista along the centre or middle portion of both said avenues.

Reference is hereby made to the plot above referred to, and to be recorded, herewith as a part hereof, for a simpler and less technical identification and description of the property hereby intended to be conveyed and dedicated.

Witness the following signatures and seals.

Pittsburgh, Lee
Pres't.



Attest
Attest
Rich Lee.

Oliver S. Allen

Roger Gregory

Bettie F. Gregory

Will Wilson

Martha Allen Wilson

Seal
Seal
Seal
Seal
Seal

State of Virginia

City of Richmond, to wit:

I, J. L. Apperson, a Notary Public for the City of Richmond in the State of Virginia, do certify that Oliver S. Allen, Roger Gregory and M. M. Wilson whose names are signed to the writing hereto annexed, bearing date on the fifteenth day of July 1887, have acknowledged the same before me in my City aforesaid.

And I do further certify that Bettie F. Gregory the wife of Roger Gregory, and Martha Allen Wilson the wife of Will Wilson

wherein ^{she} signed to said writing, personally appeared before me in the City aforesaid, and being examined by me privately and apart from their husbands, and having the writing aforesaid fully explained to each of them, she, the said Betsey F. Gregory, and she, the said Martha Allen Wilson, each acknowledged the said writing to be her act, and each declared that she had willingly executed the same, and does not wish to retract it. Given under my hand this 15th day of July 1887.


J. C. Stephenson N.P.

State of Virginia
City of Richmond, Va.

I, C. Lee Moore as Notary Public for the City of Richmond, in the State of Virginia, do certify that Fitzhugh L. Lee President of the Lee Monument Association, whose name is signed to the above instrument, bearing date the 15th day of July 1887, personally appeared before me in my City aforesaid, and acknowledged the same to be his act and deed of the said Association, and that he executed the same and affixed thereto the common seal of said Association, in testimony thereof by virtue of his authority as President, and also by the special authorization and direction of the Board of Managers of the said Association.

Given under my hand this 16th day of July 1887.

C. Lee Moore
Notary Public


Whereas the Lee Monument Association, in pursuance of the power vested in it by the General Assembly of Virginia, and in consideration of the original advantages of the location, and especially of the very desirable plan and arrangement of the surroundings offered by the grantors, and their dedication of the broad avenues hereinafter more fully set forth, has, by resolution adopted the 14th day of July 1887, selected and determined on the property hereinafter conveyed, as the site for the Monument to be erected to General Robert E. Lee;:-

And whereas the grantors, who, as devisees of the late Wm. C. Allen and purchasers of the interest of Wm. Y. Sheppard Jr. and wife, hold the complete title to the property hereinafter conveyed and dedicated, in consideration of the selection of said site by said Association, have determined to make the arrangement of the surroundings and dedication of the avenues above referred to;:-

And whereas it is desired by both parties that the contract and arrangement between them should be finally consummated, so that the Monument Association may begin its work, while it is considered impracticable to deed the avenues aforesaid directly to the City of Richmond, inasmuch as they are, for the most part, outside the present limits of the City:

Now therefore this deed, made this 15th day of July 1887, between Otway S. Allen, Roger Gregory and Betty F. Gregory his wife, who was Betty F. Allen, and N.M. Wilson and Martha A. Wilson his wife, who was Martha Allen, parties of the first part, and the Lee Monument Association, a corporation chartered by the State of Virginia, party of the second part, Witnesseth, that the parties of the first part, in consideration of the premises, do grant unto the party of the second part, with special warranty, the following real estate to wit, -- that piece or parcel of land, lying and being in the County of Henrico

ANKI

just beyond the present western confines of the City of Richmond, contained within a circle whose radius is 100 (one hundred) feet, and whose centre is situated on the prolongation of the centre or middle line of Franklin Street west of Lombardy Street, and distant 890 (eight hundred and ninety) feet from the eastern line of Lombardy street. Said property is indicated on the plot hereinafter mentioned, by the figure and the word "Circle." To have and to hold the said property or "Circle", to the following uses and purposes and none other, to wit, as a site for the Monument to General Robert E. Lee which it is the end and object of the Monument Association to erect.-

And said Association also executes this conveyance, in testimony of its approval thereof, its recognition of the use and purpose to which the said piece of land is to be held, and its agreement and covenant to carry out the said purpose, and to hold the said property only for the said use.

And this deed further Witnesseth, that the parties of the first part, as an integral part of the general design and transaction, and as indissolubly connected with the conveyance above made of the Monument site, do hereby dedicate and set apart, to the public, the following pieces and parcels of real estate, to be used as avenues of the length, width, description and designation hereinafter set forth, leading to and intersecting at said Monument site or "Circle", and an open area or "Place", about said circle, of the boundaries, description and designation hereinafter set forth, - viz;

- 1st. "Monument Avenue", being that portion of land, lying west of Lombardy street, with a centre or middle line coinciding with the prolongation of the centre line of Franklin street, and of a width of 140 (one hundred and forty) feet-- being a width of 70 (seventy) feet on each side of the above

mentioned centre line, and extending westward from the western line of Lombardy street to the western terminus of the Allen Estate.

2nd. "Allen Avenue", being that portion of land lying between Broad street and Park avenue, of a width of 140 (one hundred and forty) feet, being a width of 70 (seventy) feet on each side of a centre or middle line passing through the centre of the "Circle" above conveyed, at right angles to the centre line of Monument avenue.

3rd. "Lee Place" being that portion of land at the intersection of Allen and Monument avenues, bounded on the inside by the circumference of the "Circle" above conveyed, and on the outside by four quadrant arcs whose radii are each 160 (one hundred and sixty) feet, and whose centres are situated on the four corners of a square, the sides of which are 460 (four hundred and sixty) feet in length, and respectively parallel to Allen and Monument Avenues, and the centre of which coincides with the centre of the "Circle" above conveyed, - said arcs terminating where each is tangent to the limiting sides of the two avenues.

No portion of either of the quadrants bounded by said arcs is to be considered as part of "Lee Place", nor as embraced within any of the clauses or provisions of this deed; - nor is the area contained within the "Circle" above conveyed, to be considered a part of either "Allen" or "Monument Avenues" or of "Lee Place"; - but "Lee Place" is to be considered and used as a continuation and connection between the two parts into which, strictly speaking, it divides each of said avenues, which may be regarded as broken where the quadrant arcs aforesaid are tangent to its sides.

It was originally agreed upon as a feature of the plan of the surroundings, and as an inducement to the selection of the

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A

location for the Monument, and it is therefore hereby expressly provided, so far as the same may be legally and permanently fixed by this deed - that no tree or other object of sufficient size to interfere with the view of the Monument, shall ever be planted or located, or allowed to be, upon or above the centre line of either of the Avenues aforesaid, or within 35 (thirty five) feet thereof, except by the consent of the Lee Monument Association - the object being to provide and secure an unobstructed view and vista along the centre or middle portions of both said avenues.

hereby
Reference is made to the plot above referred to, and to be recorded herewith as a part hereof, for a simpler and less technical identification and description of the property hereby intended to be conveyed and dedicated.

Witness the following signatures and seals.

Fitzhugh Lee
Pres.

Olway S. Allen Seal

Roger Gregory Seal

Bettie F. Gregory Seal

N. M. Wilson Seal

Attest
W. H. Hamman
Chk Sec *Martha Allen Wilson* Seal

State of Virginia

City of Richmond to wit.

I, J. S. Apperson a Notary Public for the City of Richmond in the State of Virginia, do certify that Olway S. Allen, Roger Gregory and N. M. Wilson whose names are signed to the writing hereto annexed, bearing date on the Fifteenth day of July 1887 have acknowledged the same before me in my City aforesaid: And I do further certify that Bettie F. Gregory the wife of Roger Gregory and Martha Allen Wilson the wife of N. M. Wilson whose names are also signed to said writing personally appeared before me

in the City aforesaid, and being examined by me privily
and apart from their husbands, and having the writing
aforesaid fully explained to each of them, Sh^e, the said
Bettie F. Gregory and Sh^e, the said Martha Ellen Wilson
each acknowledged the said writing to be her act, and
each declared that she had willingly executed the same,
and does not wish to retract it. Given under my hand
this 15th July 1887 J. L. Apperson J. P.

State of Virginia:

City of Richmond, to-wit:

I, L. Lee Moore, a Notary Public for
the City of Richmond, in the State of Virginia,
do certify that Fitzhugh Lee, President of
The Lee Monument Association whose name is
signed to the above instrument bearing
date the 15th day of July 1887, person-
ally appeared before me in my City
aforesaid, and acknowledged the
same to be the act and deed of
the said Association; and that he
executed the same, and affixed
thereto the common seal of said
Association in the testimony thereof
by virtue of his authority as Notary Public
and also by the special authorization
and direction of the Board of Managers
of the said Association. Given under my hand this
16th day of July 1887.

L. Lee Moore
Notary Public.

Map showing the
location of the Circle
and the intersecting AVENUES
with the length of their
connecting radii, being the
land deeded to the Public
and to the
LEE MONUMENT ASSOCIATION
by the
Heirs of W. C. ALLEN Esq.

Surveyed by C. P. E. Burgwyn.
June 1887.

CIRCLE COLORED YELLOW
LEEPIACE " RED
AVENUES " BLUE

PARK AVE.

MONUMENT AVE.

ALLEN AVE

CITY LIMITS

LOMBARDY St.

Plot referred to in accom-
panying deed and made a
part thereof.

FRANKLIN S²

Exhibit 2

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

RICHMOND FOR ALL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No.: CL20-2432
)	
)	
VIRGINIA DEPARTMENT OF)	
ELECTIONS, et al.,)	
)	
Defendants.)	

ORDER

On June 9, 2020, came the parties telephonically, by counsel, to be heard on Plaintiff's Motion for Preliminary Injunction. Plaintiffs filed their Motion on June 8, 2020. The parties resolved the matters of injunctive relief regarding Plaintiffs Allan-Charles Chipman and Kenya Gibson pursuant to the consent order also entered by this Court on this day. The Court took the matter of injunctive relief regarding Plaintiffs Richmond for All, the Richmond Crusade for Voters, and the Virginia Justice Democrats (collectively "the Organization Plaintiffs") under advisement. The Defendants, represented by the Attorney General, in oral argument took no position with respect to the injunction sought by the Organization Plaintiffs and stated that they did not have enough information. Therefore, they submitted the issue to the Court to decide.

Now, upon consideration of the limited pleadings and argument of counsel, the Court hereby rules as follows:

Plaintiffs filed their Verified Complaint on June 8, 2020, seeking declaratory judgment and permanent, preliminary, and emergency injunctive relief against Defendants. Specifically, the Verified Complaint asks this Court to declare Virginia Code Title 24.2, Chapter 5, Articles 1 and 2 unconstitutional as applied to local candidates in the pending November 2020 election; to enjoin all Defendants from enforcing the same code provisions against all local candidates; to order that the number of required signatures for all local candidates be reduced by 60%; and to order that the deadline for submission of all paperwork and signatures be moved to a later date. In essence, they seek a statewide injunction against the State Board of Elections seeking a blanket order reducing the number of required signatures and extending the deadline for submission of all paperwork for all candidates in all local elections in the Commonwealth. The Organization Plaintiffs argue that they are entitled to the relief requested because the COVID-19 pandemic prevents them from canvassing or gathering signatures for candidates that they endorse to gain access to the election ballot.

The Virginia Supreme Court has consistently stated “the granting of an injunction is an extraordinary remedy.” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). Although there are no Virginia Supreme Court cases directly setting forth the standard for an injunction, the United States Supreme Court articulated what factors must be shown in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008). The test established in *Winter* requires the plaintiff to show (1)

he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) a balance of the equities tips in his favor; and (4) an injunction is in the public interest. *Id.* at 20. The plaintiff must clearly show all four factors. *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009).

The Organization Plaintiffs have not made a clear showing on all four factors. First, the Organization Plaintiffs have not shown that they are likely to succeed on the merits. This Court's power to issue a declaratory judgment is limited to "cases of actual controversy." Va. Code Ann. § 8.01-184. The actual controversy must be "one that is justiciable, that is, where specific adverse claims based upon present rather than future or speculative facts, are ripe for judicial adjustment." *Bd. of Supervisors of James City County v. Rowe*, 216 Va. 128, 132 (1975).

The Organization Plaintiffs do not plead an actual controversy, but instead present speculative facts. The Organization Plaintiffs allege that due to the pandemic, they are unable to canvass or obtain signatures for candidates in time to comply with Virginia Code §§ 24.2-506; 24.2-507. However, their purported candidate members are unknown. The Organization Plaintiffs do not seek signatures or operate under these code sections for themselves. The Organization Plaintiffs operate on behalf of candidates, but admit that the specific candidates are unknown. The purported candidates may or may not exist, and the pandemic may or may not have hindered their activities related to the pending November 2020 election. The Court finds these facts speculative and insufficient to create an actual controversy. Therefore, the Organization Plaintiffs are unlikely to succeed on the merits of their declaratory judgment action.

Second, the Organization Plaintiffs are not likely to suffer irreparable harm in the absence of preliminary relief. As discussed, the Organization Plaintiffs themselves are not directly harmed by the effects of the pandemic on individual candidates attempting to gather signatures in accordance with Virginia Code §§ 24.2-506; 24.2-507. The Organization Plaintiffs argue that their purpose is to ensure that candidates aligning with the organizations' political goals earn places on the ballot. Therefore, the Organization Plaintiffs argue that their purpose is frustrated when member candidates are unable to earn places on the ballot. However, no evidence was presented that candidates endorsed by the organizations were struggling or unable to meet the requirements of Virginia Code §§ 24.2-506; 24.2-507. Presumably, there are differing ballot requirements and differing pandemic restrictions issued by the Governor for the localities. Therefore, it is impossible for this Court to find irreparable harm without knowing the specific circumstances in each locality.

Moreover, the Organization Plaintiffs waited months after the Governor of Virginia declared a State of Emergency and issued a "Statewide Stay at Home Order" before bringing this action. It is because of this delay that the Court heard this case on the day of the June 9, 2020 deadline for filing declarations and petitions of candidacy. *See* Va. Code Ann. § 24.2-507.

Third, the Organization Plaintiffs are unable to show that a balance of the equities weighs in their favor. As discussed, the Organization Plaintiffs have not presented any evidence that they will actually suffer any harm in the absence of court action. The Court cannot analyze the balance of the equities without knowing who would be harmed.

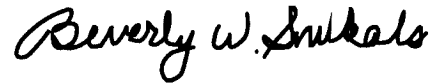
Finally, the Organization Plaintiffs have not met their burden to prove an injunction is in the public interest. There have been a number of cases around the state over the preceding months where candidates have sought relief from the courts, and if any candidate thought that there was a significant public interest in seeking such relief he or she could have participated in any of the prior cases or initiated his or her own. It is beyond this Court's jurisdiction to issue a blanket order over all potentially aggrieved parties within the Commonwealth.

Since the Organization Plaintiffs have not made a clear showing on all four factors under *Winter*, the Court **DENIES** the Organization Plaintiffs' Motion for Preliminary Injunction.

Pursuant to Rule 1:13, the Court dispenses with the Parties' endorsement of this Order.

The Clerk is directed to forward a copy of this Order to all Parties.

ENTER: 6. 9. 2020



Judge