

VIRGINIA :

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

WILLIAM C. GREGORY,)	
)	
Plaintiff,)	
)	
v.)	Case No. CL20-2441-00
)	
GOVERNOR RALPH S. NORTHAM, et al.)	
)	
Defendants.)	

MOTION TO CONDUCT ALL PROCEEDINGS ON THE RECORD

Defendants Governor Ralph S. Northam and Director of the Department of General Services Joseph F. Damico (together, Defendants) hereby move this Court to conduct all future proceedings in this matter of utmost public importance on the record with a court reporter present. A proposed Order is attached.

BACKGROUND

On Thursday, June 4, Governor Northam announced his decision, as the duly elected Chief Executive Officer of the Commonwealth of Virginia, to relocate a piece of state property from one area of Commonwealth ownership and control to another. That property—a massive statue of Robert E. Lee in full Confederate regalia—glorifies one of the darkest periods in our Commonwealth’s and our Nation’s history and stands as a daily reminder that Virginia has not lived up to our ideals that all people are created equal. Symbols matter, and the Virginia of today can no longer honor a racist system that enslaved millions of people. Installing a massive monument to the Lost Cause was wrong in 1890 and demanding that it stay up (much less until the end of time) is wrong now. Accordingly, the Governor directed the Department of General

Services to remove the statue from Monument Avenue as soon as possible. See Compl. ¶ 15.

On Monday, June 8—four days after the Governor publicly announced his intentions—Plaintiff sought a temporary injunction prohibiting Defendants from carrying out their official duties and forcing a symbol of exclusion and injustice to remain in place. Despite filing suit within blocks of the office of Attorney General Mark R. Herring, Plaintiff failed to provide the Attorney General or the Defendants any notice whatsoever of this action or his request for emergency injunctive relief. Instead, Plaintiff scheduled an *ex parte* hearing at which he sought and was granted a temporary injunction before Defendants had even been notified that the suit was filed. It was not until the next day (Tuesday, June 9) that Plaintiff provided Defendants with formal notice of the Complaint and the injunction order that had been entered, only after both documents had been released to the media.

On Wednesday, June 10—the day after receiving notice of this suit from Plaintiff—Defendants filed a notice of appearance objecting to the relief Plaintiff seeks as well as the *ex parte* proceedings and temporary injunction order. In that notice, Defendants specifically requested that they be provided with the transcript and any filings from the *ex parte* hearing conducted on June 8, so that they could attempt to understand what representations were made to the Court, under oath or otherwise. Two days later, no such materials have been provided.

On June 11—yesterday—counsel for Plaintiff called counsel for Defendants, stating that counsel for Plaintiff intended to immediately contact the Court to request an enlargement of the *ex parte* temporary injunction. Counsel for Plaintiff then, within minutes, called counsel for Defendants back, this time with the Court on the call. No court reporter was present, and counsel for Defendants objected to having an extemporaneous hearing without proper notice or a court reporter.

DISCUSSION

At least two proceedings have been conducted in this case without any transcript or record being made. Defendants were excluded from the first proceeding and were given no opportunity to secure a court reporter for the second. Given the immense importance of this matter—and the need for transparency in connection with it—Defendants specifically request meaningful notice and the opportunity to arrange for a court reporter to transcribe all future proceedings.

Because “notice and an opportunity to be heard” are “[f]undamental to any legal proceeding,” *Pappas v. Virginia State Bar*, 271 Va. 580, 587 (2006), it is black-letter law that “the cases are rare indeed which justify the awarding of a [temporary] injunction without notice to those affected thereby.” *Cohen v. Rosen*, 157 Va. 71, 76 (1931); accord *Corinthian Mortg. Corp. v. Summit Fin., LLC*, No. 187513, 2003 WL 23272422, at *1 (Fairfax Cir. Ct. Dec. 22, 2003) (“*Ex parte* injunctions are not favored.”). The lack of transcripts for the two proceedings that have already been held—much less the prospect of any more such proceedings—will also hinder the task of any reviewing court, which cannot “effectively . . . fulfill [its] function of appellate review” without “an accurate transcript or written statement of the testimony and incidents of trial.” *Lamb v. Commonwealth*, 222 Va. 161, 164 (1981); see. Rule 5:17A (petition for review pursuant to Va. Code § 8.01-626 must include “a copy of the pertinent portions of the record of the lower tribunal(s), including the relevant portions of any transcripts”); Rule 5:10 (“record on appeal from the trial court” includes “the transcript of any proceeding or a written statement of facts, testimony, and other incidents of the case when made a part of the record as provided in Rule 5:11”). Defendants cannot provide “an accurate transcript or written statement of the testimony” (*Lamb*, 222 Va. at 164) for the June 8 hearing from which they were excluded,

nor has Plaintiff provided one. And given the nature of yesterday's telephone call—of which Defendants had no advance notice and included only one participant for Defendants—it may well be difficult for the parties to reconstruct and reach agreement about precisely what was said and by whom.

Given the significance of this matter to our Commonwealth's history, the parties, the public, and any reviewing courts are entitled to a clear record of the proceedings. Accordingly, this Court should direct the parties to confer at least 12 hours before any further hearings, conferences, or other proceedings with this Court so that either side may make arrangements for a court reporter.

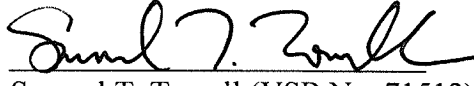
CONCLUSION

Defendants respectfully request their motion to conduct all future proceedings on the record be granted, and this Court order the parties to confer at least 12 hours in advance of any conference, hearing, or other proceeding before this Court to allow arrangements to be made for a court reporter to be present. A proposed Order to this effect is attached for the Court's review.

Dated: June 12, 2020

Respectfully submitted,

RALPH S. NORTHAM
JOSEPH F. DAMICO

By: 
Samuel T. Towell (VSB No. 71512)
Counsel for Defendants

Mark R. Herring
Attorney General

Toby J. Heytens (VSB No. 90788)
Solicitor General

Erin B. Ashwell (VSB No. 79538)
Chief Deputy Attorney General

Martine E. Cicconi (VSB No. 94542)
Deputy Solicitor General

Victoria N. Pearson (VSB No. 48648)
Samuel T. Towell (VSB No. 71512)
Deputy Attorneys General

Marshall H. Ross (VSB No. 29674)
Senior Assistant Attorney General

Jacqueline C. Hedblom (VSB No. 68234)
Erin R. McNeill (VSB No. 78816)
Assistant Attorneys General

Jessica Merry Samuels (VSB No. 89537)
Assistant Solicitor General


Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-6731 – Telephone
(804) 371-2087 – Facsimile
SolicitorGeneral@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, a true and accurate copy of the foregoing Motion will be transmitted by first-class mail and email to:

Joseph E. Blackburn, Jr., Esq.
BLACKBURN CONTE SCHILLING & CLICK, P.C.
300 West Main Street
Richmond, Virginia 23220
JoeBlackburn@BlackburnConte.com

Counsel for Plaintiffs



Samuel T. Towell

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ORDER

Having considered Defendants’ Motion to Conduct All Proceedings on the Record, and for good cause shown, it is hereby ORDERED that:

1. Defendants’ Motion to Conduct All Proceedings on the Record is hereby GRANTED.
2. The parties are hereby ORDERED to confer at least 12 hours in advance of any future hearings, conferences, or other proceedings before this Court, to allow one or both sides to make appropriate arrangements to have a court reporter present.
3. Each party shall bear their own costs related to the appearance of any court reporter and the ordering of any transcripts, in the absence of a written agreement to the contrary.

SO ORDERED.

Entered this ___ day of _____, 2020.

Judge

We ask for this:

Samuel T. Zornell

Toby J. Heytens (VSB No. 90788)
Samuel T. Towell (VSB No. 71512)
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-9532 – Telephone
(804) 371-2087 – Facsimile
SolicitorGeneral@oag.state.va.us

Counsel for Defendants