V I R G I N I A :

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

HELEN MARIE TAYLOR, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CL20003339-00
	)	
GOVERNOR RALPH S. NORTHAM, et al.,	)	
	)	
Defendants.	)	

DEMURRER

Plaintiffs' complaint fails to state a claim on which relief may be granted. Plaintiffs fail to identify any enforceable property right and are not entitled to declaratory relief based on alleged statutory or constitutional violations.

LEGAL STANDARD

A court "ruling on a demurrer . . . accepts all facts properly pled and any reasonable inferences from those facts as true and decides whether the allegations present a valid cause of action." *EMAC, L.L.C. v. Cty. of Hanover*, 291 Va. 13, 20 (2016).

ARGUMENT

I. Plaintiffs fail to identify an enforceable property right

Plaintiffs' claims based on the 1887 and 1890 deeds (also incorporated into the complaint) can be rejected as a matter of law, without need for additional evidence.

1. "English common law recognized very few restrictive covenants running with the land." *Tvardek v. Powhatan Village Homeowners Ass'n, Inc.*, 291 Va. 269, 275(2016). "Those traditionally receiving judicial approval appeared to be limited to easements appurtenant 'created

to protect the flow of air, light, and artificial streams of water, and to ensure the subjacent and lateral support of buildings or land.'" *Id.* (quoting *United States v. Blackman*, 270 Va. 68, 77 (2005)). "Over a century ago, [the Virginia Supreme Court] noted that 'attempts have been made to establish other easements, which the [historic common] law does not recognize, and to annex them to land; but the law will not permit a land-owner to create easements of every novel character and attach them to the soil.'" *Id.* (quoting *Tardy v. Creasy*, 81 Va. 553, 557 (1886)). "Since then, in keeping with . . . common-law traditions, Virginia courts have consistently applied the principle of strict construction to restrictive covenants." *Id.* Such agreements will only be enforced if their words "carry a certain meaning by definite and necessary implication." *Shepherd v. Conde*, 293 Va. 274, 288 (2017) (quoting *Scott v. Walker,* 274 Va. 209, 213 (2007)).[1]

2. The language of the 1890 deed conveying the land to the Commonwealth states that the "[c]ircle of ground" will be kept "perpetually sacred to the Monumental purpose to which [it] ha[s] been devoted" and that the Commonwealth "will faithfully guard it and affectionately protect it." Compl. for Decl. and Inj. Relief (Compl.), Ex. B at 368.[2] For plaintiffs to prevail, they would have to demonstrate that those precatory (and inherently ambiguous) words *necessarily* bind the Commonwealth to specifically approved uses of the land and *perpetually* foreclose the statue's removal, all for the benefit of the immediately surrounding

[1] The Virginia Supreme Court has likewise admonished that "[s]tatutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Tvardek*, 291 Va. at 284 n.4 (quotation and citation omitted). "'Abrogation of the common law requires that the General Assembly plainly manifest an intent to do so.'" *Id.* (quoting *Linhart v. Lawson*, 261 Va. 30, 35 (2001)). "[Courts] do not casually presume this intent." *Id.*

[2] Although plaintiffs contend that the Commonwealth is bound by both the 1887 and 1890 deeds (Compl. ¶ 26), the original donors' acquiescence in the 1890 deed means that the language of that document superseded any possible restriction contained in the1887 deed.

subdivision. That, they cannot do.

The problem is not just that the language is "flowery." See Pls.' Mem. in Supp. of Mot. for Temporary Inj. 12 (Pls.' Br.). The problem is that *nothing* about the transactions through which the land came to be owned by the Commonwealth suggests a restrictive covenant. "[T]raditionally," covenants "to protect the flow of air, light, and artificial streams of water, and to ensure the subjacent and lateral support of buildings or land," *Tvardek*, 291 Va. at 275, were created to preserve the use and enjoyment of neighboring properties. But here, plaintiffs' properties can be used and enjoyed regardless of *what* stands in the middle of Lee Circle. Moreover, rather than *maintaining* the land underlying the monument for the benefit of the planned development, the original owners *donated* the land to the Lee Monument Association, and then acceded to its conveyance to the Commonwealth—all years before the first house in the Allen Addition was built. Had the original owners intended to create a covenant benefitting the neighboring properties, it would have been much simpler to retain the land and promise each owner of a subdivided parcel that the plot would remain undeveloped, or would provide a site for a monument, in perpetuity. Cf. *Barner v. Chappell*, 266 Va. 277 (2003). The odd, multi-layered, multi-party conveyance of the land with a vague and undefined "guarantee" that the Commonwealth will hold the statue and land "perpetually sacred" and "faithfully guard it and affectionately protect it," Ex. B at 368, cannot be found to establish a restrictive covenant, particularly given "the principle of strict construction" against such instruments, *Tvardek,* 291 Va. at 275.

3. Even if the language of the 1890 deed did create a restrictive covenant, that covenant would be unenforceable. The Virginia Supreme Court has emphasized that a covenant will not be enforced if restrictions on "the use of property . . . [are] contrary to public policy,"

Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 939 (1955), or if "[c]onditions . . . have changed so substantially that the essential purpose of the covenant is defeated," *Barner*, 266 Va. at 285. As far back as 1886, the Court invalidated an agreement purporting to restrict uses of land in perpetuity, finding the instrument "void as in general restraint of trade" and "against public policy and not such as the law will recognize or enforce." *Tardy*, 81 Va. at 565. The same logic applies here, and the same result should follow.

a. Most fundamentally, any requirement that the Commonwealth maintain in perpetuity a massive monument to *anyone* would be void as "against public policy." *Tardy*, 81 Va. at 565; accord *Hercules*, 196 Va. at 939. It is axiomatic that "[a] government entity has the right to speak for itself" and "say what it wishes," *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (internal quotations and citations omitted); 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). And it is equally well-settled that government-owned monuments on government-owned property are core government speech that inevitably convey messages about what a political community believes and values. *Pleasant Grove City*, 555 U.S. at 470–71. No individual Virginian—whether a living resident of Monument Avenue or a long dead predecessor in title—may force the Commonwealth of 2020 to continue to broadcast a message with which it disagrees and does not wish to be associated. Accord *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (plurality opinion) (noting that "a state government may not contract away an essential attribute of its sovereignty") (internal quotations and citations omitted).

Plaintiffs misapprehend this argument, suggesting that, because not *everyone* regards the Lee statue as a symbol of slavery or white supremacy, it is not against public policy to force the

Commonwealth to maintain the statue in perpetuity. See Pls.' Br. 18 n.4. As explained previously and in the next section, plaintiffs are wrong about the message the statue conveys. But, for purposes of this argument, a monument's specific meaning—or whether it means different things to different people—simply does not matter. Cf. *Pleasant Grove*, 555 U.S. at 474 (noting that, given "the way monuments convey meaning," they may be interpreted in different ways by different observers). Instead, the threshold question is whether it is against public policy to legally *require* a sovereign Commonwealth to forever continue to engage in expression with which it disagrees. As just explained, the *fact* of a compulsory message violates public policy, regardless of its content.[3]

b. i. Even if the question were whether the continued presence of the Lee statue in particular violates public policy, the answer would be yes. When the statue, pedestal, and real property were conveyed to the Commonwealth, Reconstruction had recently ended and the overwhelming view of those who held political power in Virginia (as opposed to the then-hundreds of thousands of Black Virginians who were being rapidly disenfranchised) was that Lee was a heroic figure to be celebrated and that the failure of his cause was a tragedy to be mourned. Today, Lee and other Confederate leaders are widely regarded as symbols of racism, injustice, and oppression, and the cause for which they fought a shameful blight on our Nation's history. The statue has become an ever-more-painful wound and a focus of the anger and frustration felt by many who continue to suffer the effects of the disgraceful institution the

[3] Because the public-policy violation is requiring the Commonwealth to continue saying *anything*, plaintiffs' suggestion that the Governor has no role in setting public policy fails for that reason. But plaintiffs' argument is also plainly incorrect. While *passing legislation* is the purview of the General Assembly, the public policy of the Commonwealth extends beyond the laws of the Code of Virginia to the many official acts of the Governor and the Executive Branch. Just as President of the United States plays a substantial role in setting the public policy of the Nation, the Governor of Virginia plays a substantial role in setting the public policy of the Commonwealth.

Confederacy fought to protect. Cf. *Pleasant Grove*, 555 U.S. at 477 (noting that "[t]he 'message' conveyed by a monument may change over time"). Across the country, Confederate symbols are being taken down—with and without government action—as more and more Americans agree that such relics of the past cannot co-exist with the future they envision.

Right here in Virginia, the General Assembly has voted to eliminate a state holiday "honor[ing] Robert Edward Lee"[4] and to specifically permit localities to remove Confederate monuments—including statues of Lee.[5] Just last week, the House of Delegates removed statues of Lee and other Confederates from the Capitol's Old House Chamber,[6] and the Virginia Commission for Historical Statues in the United States Capitol voted unanimously to replace the statue of Lee currently standing as one of two Virginia representatives in the Statuary Hall collection.[7]

ii. Plaintiffs dismiss these developments and the changing sentiments they reflect as irrelevant to the legal questions before this Court. See, *e.g.*, Pls.' Br. 3–4. But as already described, the Virginia Supreme Court has repeatedly emphasized that a restrictive covenant is unenforceable if it is against public policy, *Tardy*, 81 Va. at 565, or if "[c]onditions . . . have changed so substantially" as to defeat its purpose, *Barner*, 266 Va. at 285. That is precisely what these developments show, and plaintiffs' insistence that the Court decide this case with blinders

[4] Ch. 418, 2020 Acts of Assembly, Va. Gen. Assemb. (Mar. 23, 2020) (amending and reenacting Code § 2.2-3300)

[5] Ch. 1100, 2020 Acts of Assembly, Va. Gen. Assemb. (Apr. 10, 2020) (modifying Code §§ 15.2-1812, 15.2-1812.1, and 18.2-137).

[6] Gregory S. Schneider, *Confederate Memorials Quietly Removed From Virginia Capitol Overnight*, Wash. Post (July 24, 2020), https://www.washingtonpost.com/local/virginia-politics/confederate-memorials-quietly-removed-from-virginia-capitol-overnight/2020/07/24/8d2a0dee-cced-11ea-bc6a-6841b28d9093_story.html.

[7] AP News, *Virginia Panel Recommends Lee Statue Removal at U.S. Capitol* (July 25, 2020), https://apnews.com/0a33ad58bbf98d0938192d915e60b108.

on runs afoul of those long-established precedents. Indeed, if plaintiffs were correct, it would not matter if the statue that had been donated plainly depicted the most disparaging racial, ethnic, or religious stereotype imaginable—so far as plaintiffs are concerned, the Commonwealth of Virginia would be forced to maintain such a statue, and to endure an association with its hateful message, until the end of time or the Commonwealth itself ceased to exist. That result is not only incompatible with "moral authority" (Pls.' Br. 3), it cannot be reconciled with the centuries-old *legal* doctrines that control here.

II. Plaintiffs are not entitled to a declaratory judgment based on alleged statutory or constitutional violations

Plaintiffs also allege that the Lee statue's removal would violate a Joint Resolution from 1889, Code § 2.2-2402(B), and several provisions of the Constitution of Virginia. Like plaintiffs' deed-based arguments, their statutory and constitutional claims are without merit.

A. Plaintiffs' statutory and constitutional claims fail for lack of standing

1. "A plaintiff has standing to institute a declaratory judgment proceeding if it has a 'justiciable interest' in the subject matter of the proceeding." *Lafferty v. School Board of Fairfax County*, 293 Va. 354, 360 (2017) (quotation and citation omitted). "[T]o have a 'justiciable interest' in a proceeding, the plaintiff must demonstrate an actual controversy between the plaintiff and the defendant." *Id.* That, in turn, requires 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 v. Landsidle*, 262 Va. 364, 373 (2001). Moreover, the injury must be "based on present rather than future or speculative facts." *Lafferty*, 293 Va. at 361 (quotation omitted); see also *Marrs v. Northam et al.*, Record No. 200573, at 4 (Va. June 17, 2020).

2. Plaintiffs allege an emotional injury associated with removal of the Lee statue. See Compl. ¶ 12 ("Plaintiffs will also suffer injury as a result of the loss of a priceless work of

art from their neighborhood and the degradation of the internationally recognized avenue on which they reside."). But any Virginian who prefers that the statue remains where it stands may consider the statue's relocation a "loss" to the neighborhood. *Id*. And neither plaintiffs' "history" with the statue nor their "zealous interest" in its maintenance affords them "unique injuries compared to that of the general public." *Lafferty*, 293 Va. at 364. Plaintiffs' mere disagreement with the Governor's policy choices—however strongly felt—likewise does not afford them standing to challenge his decision. *Id* at 364-65.

3. In an effort to allege a pecuniary interest sufficient to confer standing, plaintiffs contend that "[r]emoval of the Lee Monument or any significant alteration of it . . . could result in the loss of National Historic Landmark designation of the [Monument Avenue Historic District], which will have a substantial adverse impact on Plaintiffs, including the loss of favorable tax treatment and reduction in property values." Compl. ¶ 12. But any change in the status of the District—and any corresponding reduction in property value—is purely "speculative." *Lafferty*, 293 Va. at 361.

Under federal law, "National Historic Landmarks will be considered for withdrawal of designation *only* at the request of the owner or upon the initiative of the Secretary [of the Interior]." 36 C.F.R. § 65.9(a) (emphasis added). And should the Secretary elect to reconsider a designation, regulations contemplate that the Secretary will initiate a "restudy" of the landmark and that a "proposal for withdrawal of the landmark designation" will be made. *Id.* § 65.9(e) (emphasis added). Any dedesignation that is not based on a procedural error includes a review and recommendation by the National Park System Advisory Board, which in turn requires notice to interested parties and an opportunity for comment. *Id.* § 65.9(e); see also § 65.5(d), (e).

Despite filing their complaint more than six weeks after Governor Northam announced

plans to remove the Lee statue, plaintiffs have not alleged that any relevant "owner" has or is likely to seek to remove the District's designation as a National Historic Landmark, nor have they alleged that the Secretary has indicated his intent to *consider* the issue, much less that any proposal to dedesignate the District would be *approved.* And contrary to plaintiffs' contention, it is not "beyond dispute that the removal of the separately listed Lee Monument from the listed Monument Avenue Historic District would result in delisting of . . . the District." Pls' Reply to Defs' Bench Mem. in Opp. to Mot. for Temporary Inj. 2 (Pls.' Reply). The District has 257 "contributing resources," and the significance of the architecture and design of the houses and the Avenue itself were discussed in detail in its nomination, separate and apart from any of the Confederate statues.[8] Because the dedesignation of the District is far from a foregone conclusion, plaintiffs' alleged pecuniary injury rests on "speculative facts" and is insufficient to confer standing. *Lafferty*, 293 Va. at 361 (quotation and citation omitted).

B. Neither the 1889 Joint Resolution nor Code § 2.2-2402(B) creates a private right of action

Even if plaintiffs could establish general standing, they cannot obtain a declaratory judgment based on an alleged violation of the Joint Resolution or Code § 2.2-2402(B). In addition to the standing requirement, which asks whether "the plaintiff has a personal stake in the outcome of the controversy," a plaintiff seeking judicial relief based on an alleged violation of a statute must "possess the 'legal right' to bring the action." *Cherie v. Virginia Health Servs.*, 292 Va. 309, 315 (2016) (quotations and citations omitted). A court should "never infer a 'private right of action' based solely on a bare allegation of a statutory violation." *Id.* at 315–16 (quotation omitted). Rather, for an act of the General Assembly to provide a private right to sue,

[8] Sarah S. Driggs, Monument Avenue Historic District, National Historic Landmark Nomination at 1, 4-5 (June 27, 1997), https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174_Monument_Avenue_HD_1997_Nomination_NHL-4.pdf.

it must do so expressly or through "demonstrable evidence . . . necessarily imply[ing]" the legislature's intent. *Id.* at 315. Indeed, the Supreme Court of Virginia recently emphasized that "when a statute . . . is silent on the matter of a private right of action, one will not be inferred unless the General Assembly's intent to authorize such a right of action is palpable and shown by demonstrable evidence." *Fernandez v. Commissioner of Highways*, 842 S.E.2d 200, 202 (Va. 2020) (quotation omitted).[9]

Plaintiffs do not come close to meeting that standard. The Acts of the General Assembly plaintiffs claim would be violated by the removal of the Lee statue—the 1889 Joint Resolution and Code § 2.2-2402(B)—neither "expressly" state that private parties may bring suit to enforce their terms, nor contain "palpable" or "demonstrable" evidence of any such intent. *Cherie*, 292 Va. at 315; *Fernandez*, 842 S.E.2d at 202–03. Indeed—unlike the law at issue in *Fernandez*—neither piece of legislation refers to individual private parties *at all*. Instead, the Joint Resolution speaks of the Governor and the Lee Monument Association, and Code § 2.2-2402(B) refers to the authority of the Governor and other state entities.

Nor can plaintiffs rely on the Declaratory Judgment Act as an avenue through which to challenge the Governor's action, see Compl. ¶ 1, because the Virginia Supreme Court has already held that the Act "does not *create* a right of action or, for that matter, any substantive rights at all." *Cherie*, 292 Va. at 318. For the same reason, plaintiffs' allegation that removal of the Lee statue would contravene the constitutional separation-of-powers provisions, see Compl. ¶¶ 22–24, does not afford them a right to sue for any alleged *statutory* violation. If it did, "[t]he

[9] Notably, in *Fernandez*, there was no question that the plaintiff—who had been displaced as a result of the Commonwealth's exercise of eminent domain and was entitled to relocation payment assistance—had standing to sue. See 842 S.E.2d 200. But the plaintiff's undisputed injury did not afford him a *legal right* to pursue a statutory challenge because the Code section at issue did not provide a private right of action. *Id.*

very concept of statutory standing . . . would no longer exist" because the Constitution "would operate as a roving statutory private right of action for anyone claiming to be injured by someone else's violation of any statute." *Cherie*, 292 Va. at 317. The Supreme Court has already rejected that argument in the context of the Declaratory Judgment Act, see *id.*, and its reasoning is dispositive of plaintiffs' claims.

C. Plaintiffs' claims about the Joint Resolution and Code § 2.2-2402(B) are 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.

Neither the Joint Resolution nor Code § 2.2-2402(B) contains any indication that the General Assembly intended to waive the Commonwealth's sovereign immunity—much less "explicitly or expressly," *Mattaponi*, 270 Va. at 455. Nor is it relevant whether sovereign immunity bars plaintiffs' property-based or constitutional claims. The Supreme Court has been clear that the fact that *one* claim is not barred by sovereign immunity does not afford a plaintiff the right to proceed on *all* claims. See *DiGiacinto v. Bd. of Rectors & Visitors of George Mason Univ.*, 281 Va. 127, 138 n.2 (2011) (finding waiver of sovereign immunity as to constitutional claims but noting that "sovereign immunity has not been waived to the extent that [plaintiff's] declaratory judgment proceeding is premised on statutory and non-constitutional claims" and

recognizing that trial court dismissed those claims based on sovereign immunity).

D. Plaintiffs' statutory and constitutional claims fail as a matter of law

Even if plaintiffs' statutory and constitutional claims did not suffer from various threshold defects, each would fail as a matter of law.

1. Removal of the Lee statue would not violate the 1889 Joint Resolution

Plaintiffs insist that Chapter 24 of the Acts of Assembly of 1889 created a legally enforceable obligation for the Governor to "assure that the Lee statue is preserved and protected," and that the Governor's plan to remove the statue would contravene that obligation. Compl. ¶ 9. That simply isn't so.

The Joint Resolution did not, in its own right, impose any legal obligations on the Governor or the Commonwealth. The Joint Resolution "authorized" and "requested" (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. Compl. Ex. A. 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. 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 was not executed for another three months. Instead, the General Assembly simply declared its expectation of what "any" future instrument would say. Compl. Ex. A. Such a declaration, even when made by a legislative body, has no independent force or effect.[10]

2. Removal of the Lee statue would not violate Code § 2.2-2402(B)

Plaintiffs also contend that removal of the Lee statue would violate Code § 2.2-2402(B), which reads in relevant part:

> No construction or erection of any building or any appurtenant structure of any nature . . . and no construction or erection of any bridge, arch, gate, fence, or other structure or fixture intended primarily for ornamental or memorial purposes, and which is to be paid for, either wholly or in part by appropriation from the state treasury . . . shall be begun unless the design and proposed location thereof have been submitted to the Governor and its artistic character approved in writing by him acting with the advice and counsel of the [Art and Architectural Review] Board . . . . No existing structure of the kinds described in this subsection, owned by the Commonwealth, shall be removed, remodeled or added to, nor shall any appurtenant structure be attached without submission to the Governor and the artistic character of the proposed new structure approved in writing by him acting with the advice and counsel of the Board.

According to plaintiffs, the second sentence of subsection B precludes the Governor from removing the Lee statue, with or without the advice and counsel of the Board, because the last clause of the sentence does not apply to anything but appurtenant structures. That is incorrect for multiple reasons.

[10] Plaintiffs' insistence that the Attorney General has a "duty to defend" the Joint Resolution, see Pls.' Br. 10, misses the mark. Neither the Governor nor the Attorney General is arguing that the Joint Resolution is unconstitutional or otherwise invalid—only that it creates no binding obligations.

First, plaintiffs' insistence that the Lee statue is governed *only* by subsection B fails on its own terms. Subsection (A) of Code § 2.2-2402 affords the Governor discretion to approve the "remov[al]" or "relocat[ion]" of a "work of art," which the Code defines as any "sculpture[]," "monument[]," or "other structure of a permanent character intended for ornament or commemoration." Code § 2.2-2401(B); accord Compl. ¶ 12 (referring to the Lee statue as a "priceless work of art"). Plaintiffs do not explain why the Lee statue does not fit the statutory definition of a "work of art" but *is* properly viewed as "structure or fixture intended primarily for ornamental or memorial purposes." Code § 2.2-2402(B); cf. Merriam-Webster Dictionary (July 2010), https://www.merriam-webster.com/dictionary/memorial (defining "memorial" to mean "commemorative").

In contrast, under defendants' reading, the statue can be *both* a "work for art" and a "structure . . . intended primarily for ornamental or memorial purposes" because, whether governed by subsection (A) or (B) of Code § 2.2-2402, the statue may be removed by the Governor. The same cannot be said for plaintiffs' reading. On plaintiffs' view, if the statue is a "sculpture[]," "monument," or "other structure . . . intended for ornament or commemoration" governed by subsection (A), it can be removed at the Governor's sole discretion. But if it is a "structure intended primarily for ornamental or memorial purposes" governed by subsection (B), it can never be removed at all. The General Assembly could not have intended that bizarre result.

Second, even if plaintiffs were correct to focus only on subsection B, as the text makes clear, the limitations in that subsection apply *only* to "structure[s] . . . paid for . . . by appropriation from the state treasury," which plaintiffs do not allege. See Compl. ¶¶ 24–25.

Third, the first clause of subsection (B)'s second sentence indisputably covers things "added to" an existing structure. See Va. Code Ann. § 2.2-2402(B). Accordingly, under

plaintiffs' reading, the General Assembly *prohibited* any existing structure from being "added to" while simultaneously requiring approval of the new artistic character of an existing structure following the attachment of an "appurtenant" structure. That cannot be right.

Finally, plaintiffs' reading is implausible given the statute as a whole. With limited exceptions, subsections (A) and (C) of Code § 2.2-2402 both *grant* authority to the Governor to approve changes to art and structures owned by the Commonwealth, as does the first sentence of subsection (B) and the last clause of the second sentence. In plaintiffs' view, however, the General Assembly clawed back a substantial portion of that authority in a single clause buried in the middle of a lengthy paragraph, because, according to plaintiffs, the first clause of the second sentence of subsection (B) precludes the Governor from removing "any building . . . bridge, arch, gate, fence, or other structure or fixture intended primarily for ornamental or memorial purposes" *in perpetuity*. Va. Code Ann. § 2.2-2402(B). As the United States Supreme Court has said, courts should not presume that the legislature "hide[s] elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

3. Removal of the Lee statue would not violate the Virginia Constitution

Plaintiffs' claim that the Governor's plan to remove the statue violates Article I, § 5, Article III, § 1, and Article IV, § 1 of the Virginia Constitution fares no better.

The constitutional provisions plaintiffs cite provide that "the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct," Va. Const. art. 1, § 5, that "[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others," Va. Const. art. III, § 1, and that "[t]he legislative power of the Commonwealth shall be vested in a General Assembly," Va. Const. art. IV, § 1. According to plaintiffs, "Governor Northam's order to remove the Lee

monument is an exercise of the legislative power," Compl. ¶ 24, and therefore violates those power-separating provisions.

Plaintiffs' bare statement does not establish that removal of any statue, including the Lee statue, rests exclusively in the control of the Legislature. Indeed, plaintiffs' argument on this point ignores Code § 2.2-2402, which specifically vests authority in the Governor to remove unwanted "works of art"—including "sculptures", "monuments", and other "structure[s] . . . intended for ornament or commemoration" (§ 2.2-2401(B))—and to take various other actions with respect to other structures. Even if plaintiffs are correct that paragraph B bars removal of any "structure . . . intended primarily for . . . memorial purposes," that would not establish that removal of the statue would violate *the Constitution*—only that the Code of Virginia does not *expressly authorize* the Governor to the remove the statue. Plaintiffs cite no authority for the far-fetched proposition that statue removal is a quintessentially legislative act. Because it is not, plaintiffs' constitutional claims fail.

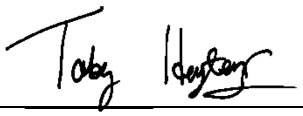
CONCLUSION

The demurrer should be sustained and the complaint should be dismissed with prejudice.

Dated: July 30, 2020

Respectfully submitted,

RALPH S. NORTHAM;
DIRECTOR, VIRGINIA DEPARTMENT OF GENERAL SERVICES; and
DIRECTOR, VIRGINIA DIVISION OF ENGINEERING & BUILDING

By: 

Toby J. Heytens
Counsel for Defendants

Mark R. Herring
Attorney General

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

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

Martine E. Cicconi (VSB No. 94542)*
Michelle S. Kallen (VSB No. 93286)
Deputy Solicitors General

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

Zachary R. Glubiak (VSB No. 93984)
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
solicitorgeneral@oag.state.va.us

***Counsel of Record for Defendants**

CERTIFICATE OF SERVICE

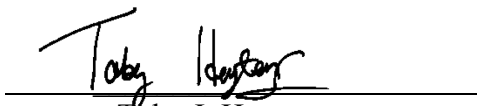
I hereby certify that on July 30, 2020, a true and accurate copy of the foregoing Demurrer was transmitted by both first-class mail and email to:

Patrick M. McSweeney
3358 John Tree Hill Road
Powhatan, Virginia 23139
pmcsweeney.esq@gmail.com

Fred D. Taylor
Bush & Taylor, P.C.
4445 Corporation Lane
Virginia Beach, Virginia 23462

fred@bushtaylor.com

Counsel for Plaintiffs



Toby J. Heytens