

IN THE SUPREME COURT OF VIRGINIA

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Record No. 201307

WILLIAM C. GREGORY,  
Appellant,

v.

RALPH S. NORTHAM, *et al.*,  
Appellees.

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Record No. 210113

HELEN MARIE TAYLOR, *et al.*,  
Appellants,

v.

RALPH S. NORTHAM, *et al.*,  
Appellees.

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Brief of *Amicus Curiae* Circle Neighbors

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## **INTRODUCTION**

These appeals are about the authority of Governor Ralph Northam to remove a divisive Confederate monument in the city of Richmond, Virginia. The Governor's decision was correct as a matter of law and is consistent with the Commonwealth's policy in favor of historic preservation. There is no law, and indeed Appellants cite none, that requires a state or local government to forever retain Confederate monuments on publicly owned land. Historic preservation policy does not support the retention of monuments that convey a false historical narrative that thwarts social progress and creates a persistent threat to public safety.

## **STATEMENT OF THE CASE**

Circle Neighbors adopts the Commonwealth of Virginia's Statement of the Case as if set forth verbatim.

## **STATEMENT OF FACTS**

Circle Neighbors adopts the Commonwealth of Virginia's Statement of Facts as if set forth verbatim.

Circle Neighbors is a group of more than fifty (50) Richmond residents who own approximately 95% of all occupied non-rental homes within direct lines of sight to the Robert E. Lee Monument ("Lee

Monument”) in the circle at Monument and Allen Avenues.<sup>1</sup> They strongly urge the removal of the monument, including the statue and base, to a location that provides for full contextualization.

Circle Neighbors members support immediate removal for some or all the following reasons—that the Lee Monument:

- celebrates values that contradict the values of the neighborhood and community;
- conveys a false and harmful historical narrative;
- can only be appropriately contextualized in a different setting; and
- threatens public safety and the enjoyment and value of neighboring properties.

Circle Neighbors has enlisted as *pro bono* counsel Cultural Heritage Partners, PLLC, a global law firm based in Richmond, Virginia, focused exclusively on cases and controversies involving historic preservation and cultural heritage law, as well as public policy supporting historic preservation and the treatment of cultural heritage,

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<sup>1</sup> Declarations of Coleen Butler Rodriguez and Alice Massie, App. A.



including art, artifacts, architecture, monuments, landscapes, and practices.

## ARGUMENT

Governor Ralph Northam acted appropriately and within his legal authority when he ordered the Lee Monument removed from Richmond's Monument Avenue to a location where it can be properly contextualized. This brief contains three arguments:

1. This Court should dismiss Appellants' appeals for lack of standing, consistent with every court that has decided a Confederate monument removal controversy, except for the two courts that reached the merits and decided in favor of removal. Appellants' argument that removing the Lee Monument will hurt their feelings of pride in the values it conveys alleges insufficient injury to provide standing.
2. If the Court nonetheless concludes that Appellants have standing, the Court should take note of this *amicus curiae* brief by Circle Neighbors who strongly support removing the Lee Monument and have interests far exceeding those of the Appellants.

3. Appellants' argument that removing Confederate monuments violates the Commonwealth's public policy in favor of historic preservation is without merit; to the contrary, forcing a community to continue to abide an object designed to promote a false and harmful historical narrative, and which has become a nuisance and threat to public safety, is inconsistent with historic preservation policy.

This *amicus curiae* brief discusses the Appellants' lack of cognizable injury and provides additional case law not heretofore briefed demonstrating the appropriateness of this Court dismissing the appeals for lack of standing, and, alternatively, affirming the Governor's decision on the merits.

*I. Appellants Lack Standing.*

The Court should dismiss the appeals for lack of standing. Appellants' briefs declare that the issue of standing has been finally decided (Gregory Br. at 6; Taylor Br. at 33, 36-37), but lack of subject matter jurisdiction may be raised at any time, even by the court *sua sponte*. *E.g., Morrison v. Bestler*, 239 Va. 166, 169-70, 387 S.E.2d 753, 755 (Va. 1990) (citations omitted) (subject matter jurisdiction cannot be

waived or conferred by agreement of the parties). To have standing, the Appellants must show they have suffered an injury that is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Wilkins v. West*, 264 Va. 447, 459, 571 S.E.2d 100 (Va. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Appellants’ claimed injuries are not concrete, particularized, or actual, and are in fact conjectural and hypothetical. As discussed below, using this same standard, the courts have found inadequate the same types of sentimental injuries claimed by Appellants.

***A. Hurt feelings are insufficient to show injury as required by law.***

Injuries alleged in the instant matter by the Gregory and Taylor Appellants—their hurt feelings given their emotional attachment and distant family connections to the Lee Monument—do not rise to the level of injury required to provide subject matter jurisdiction in this or any Court. *Id.* As demonstrated below, sentimental injuries as alleged by Appellants are simply too conjectural and indefinite to provide standing to challenge removal of the Lee Monument.

Appellants’ allegations closely mirror alleged injuries that state and federal courts have consistently rejected as insufficient to provide

standing to plaintiffs seeking to prevent removal of Confederate monuments by state or local governments. *Compare McMahon v. Fenves*, 946 F.3d 266, 270-71 (5th Cir. 2020) (rejecting strong feelings and family connections to Confederate monuments as insufficient injuries for purposes of standing) *with* Gregory Br. at 3-4 (describing emotional distress, the “irreparable harm” to his “pride in the Lee Monument and his family’s [great-grandfather’s] role,” and memories of driving around the Lee Monument as a university student and telling friends about his ties) *and* Taylor Br. at 35-38 (alleging sentimental injuries). Because Appellants cannot show an injury rising to the level required for standing, the Court should dismiss the appeals.

**a) U.S. courts have almost unanimously dismissed similar cases for lack of standing.**

Nearly all federal and state courts considering lawsuits to prevent governments from removing Confederate monuments have dismissed on the grounds that plaintiffs lack standing. The two courts that have reached the merits of such cases are this Court and the U.S. Court of Appeals for the Eleventh Circuit, both of which found in favor of removal.

Excepting only this Court's reaching of the merits in *City of Charlottesville v. Payne*, 2021 WL 1220822, \_\_\_ S.E.2d \_\_\_ (Va. 2021), state courts have uniformly dismissed challenges to monument removal based on lack of standing. *See, e.g., United Daughters of the Confederacy v. City of Winston-Salem*, 853 S.E.2d 216 (N.C. Ct. App. 2020) (dismissing for lack of standing a lawsuit brought by a heritage association against city and county governments involving the removal for public safety reasons of a Confederate statue listed in the National Register of Historic Places); *Hist. Preservation Action Comm., Inc. v. City of Reidsville, N.C.*, 753 S.E.2d 400 (N.C. Ct. App. 2013) (unpublished) (dismissing plaintiffs' claims for lack of standing to challenge a city's decision to remove a damaged Confederate monument, finding no economic injury, improper disposition of public property, or aesthetic harm); *Miss. Div. of Sons of Confederate Veterans v. University of Miss.*, 269 So.3d 1235 (Miss. Ct. App. 2018) (affirming trial court's decision to allow a state university to move, rename, and recontextualize Confederate monuments, street names, and building names on campus and finding no private right of action); *Return Lee to Lee Park v. Rawlings*, No. 05-19-00456-CV, 2020 WL 7693112 (Tex. Ct.

App. Dec. 28, 2020) (dismissing as moot and for lack of standing plaintiffs’ challenge to the city of Dallas’s decision to remove a statue of Robert E. Lee and the Confederate Monument located in public parks); *Sons of Confederate Veterans v. City of Memphis*, No. M2018-01096-COA-R3-CV, 2019 WL 2355332 (Tenn. Ct. App. Feb. 26, 2019), *appeal denied* (Oct. 14, 2019) (dismissing plaintiffs’ claims for lack of standing where city officials transferred ownership of Confederate monuments to a nonprofit entity that removed them).

Likewise, federal courts, excepting one case that reached the merits, have uniformly dismissed cases challenging the removal of Confederate monuments for lack of standing. For example, in *McMahon v. Fenves*, the court held that descendants of Confederate veterans lacked standing to enjoin the University of Texas from removing statues of Confederate officers and officials, after determining that Confederate monuments have become “symbols of modern white supremacy and neo-Nazism.” 323 F. Supp.3d 874, 879-80 (W.D. Tex. 2018), *aff’d*, 946 F.3d 266 (5th Cir. 2020). The court reasoned that “[s]ubjective ideological interests—no matter how deeply felt—are not enough to confer

standing.” *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 729-35 (1972)).

The U.S. Court of Appeals for the Fifth Circuit expanded on the district court’s reasoning and explained why the plaintiffs could not meet constitutionally sufficient injury requirements:

Plaintiffs state several reasons why they are particularly invested in these monuments. They feel strongly about the message these monuments supposedly convey about the Confederacy and the Civil War. They claim to be descendants of Confederate veterans, including one of the donors. They claim that these monuments were public charitable gifts and that Plaintiffs are among the intended beneficiaries . . . . Plaintiffs . . . care deeply about preserving monuments that convey a viewpoint that they support and that, they believe, their ancestors donated for their benefit. And Plaintiffs believe that these ties give them unique reasons for caring about these monuments, which means that their allegedly unconstitutional removal caused Plaintiffs a particularized injury—it is particular to them because only they have these alleged ties. But that is not how particularity works. Plaintiffs confuse having particular reasons for caring about these monuments with having a particularized injury.

*McMahon*, 946 F.3d at 270-71. See also *Shreveport Chapter #237 of United Daughters of the Confederacy v. Caddo Par. Comm’n*, No. 17-1346, 2018 WL 566512 (W.D. La. Jan. 26, 2018), *aff’d*, 756 Fed. Appx. 460 (Mem.) (5th Cir. 2019) (affirming trial court’s refusal to grant preliminary injunction against local government’s removal of a

Confederate monument that had become a “painful reminder of racial inequities locally and nationally.”).

The U.S. Court of Appeals for the Eleventh Circuit likewise dismissed Confederate monument challenges in the city of Lakeland, Florida for lack of standing. In *Gardner v. Mutz*, the court rejected claims by Confederate heritage associations and their allies to relocate a privately-funded Confederate monument from one public park to another public park, on the basis that one’s inability to “preserve the history of the south,” “express their free speech,” “vindicate the cause’ for which the Confederate Veteran fought,” and “protect and preserve Memorials to American veterans” does not give rise to the type of injury needed to show standing. 962 F.3d 1329, 1341 (11th Cir. 2020). See also *Ladies Memorial Ass’n, Inc. v. City of Pensacola, Fla.*, No. 3:20cv5681-MCR-EMT, 2020 WL 5237742 (N.D. Fla. Sept. 2, 2020) (dismissing breach of public trust and First Amendment claims for lack of standing by Confederate monument supporters seeking to enjoin the city of Pensacola’s removal of a Confederate cenotaph and renaming a public space from Lee Square to Florida Square; standing allegations related alleged familial relationships to a Confederate soldier).



Similarly, the U.S. District Court in *Patterson v. Rawlings* dismissed a case for lack of standing involving a plaintiffs' First Amendment challenge to stop the city of Dallas from removing a statue of Robert E. Lee and other Confederate statues from city property. Plaintiffs sued the city following its decision to remove and store the statues until a task force could make recommendations concerning their disposition. 287 F. Supp.3d 632 (N.D. Tex. 2018) (rejecting claims by a city resident and the Sons of Confederate Veterans, Inc. that they had standing based on alleged copyright claims, reversionary deed rights, and infringement of political viewpoints). And see *Callan v. Fischer*, No. 3:16-CV-734-TBR, 2017 WL 4273106 (W.D. Ky. Sept. 26, 2017) (dismissing for lack of standing a lawsuit involving removal of a Confederate monument in the City of Louisville, Ky., where plaintiff claimed he had standing due to his distant genealogical relationships to various Confederate military and political leaders and where standing allegations related to third parties, such as veterans, deceased soldiers, and alleged mourners).

**b) Cases decided on the merits found in favor of removal of Confederate statues.**

The Virginia Supreme Court is the only state court to have reached the merits of a legal challenge to the removal of a Confederate monument in its *Payne* decision. In *Payne*, plaintiffs challenged the city of Charlottesville’s decision to remove two Confederate monuments and to rename and redesign the parks in which they are located. *Payne*, \_\_\_ S.E.2d at \*1. This Court found that the plain meaning of Virginia Code §§ 15.2-1812, a statute, since amended, that addresses the power of local governments to “disturb or interfere with” Confederate monuments or memorials, did not apply retroactively, ultimately rejecting the plaintiffs’ claims based on alleged interference with their property rights. *Id.* at \*7-9 (holding that under the plain language of the statute the General Assembly did not intend the statute to apply retroactively to monuments erected prior to the statute’s passage).

The U.S. Court of Appeals for the Eleventh Circuit is the only federal court to have reached the merits of a legal challenge to the removal of Confederate monuments. The New Orleans City Council voted to remove three Confederate statues and another statue commemorating a deadly uprising of the paramilitary White League against the city’s Reconstruction government because of its integrated

police force in 1874. *See, e.g.*, Richard Faucett, *Tempers Flare Over Removal of Confederate Statues in New Orleans*, N.Y. TIMES (May 7, 2017); Kevin Litten, *Efforts to remove Confederate monuments in New Orleans go back decades*, TIMES-PICAYUNE (Mar. 14, 2017). In one of the most widely reported Confederate monument removal cases, the Eleventh Circuit upheld the district court's decision that removal did not violate federal historic preservation laws, including Section 106 of the National Historic Preservation Act and Section 4(f) of the Department of Transportation Act. *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp.3d 494 (E.D. La. 2017), *aff'd sub nom. Monumental Task Comm., Inc. v. Chao*, 678 Fed. Appx. 250 (5th Cir. 2017) (unpublished) (holding that removal of Confederate-era public monuments from city property did not violate federal historic preservation laws). This Court may note that one of the city council's reasons for removing the monuments was that the monuments had become a nuisance and threat to public safety. *Id.* at 498.

The overwhelming weight of decisions in cases in which private individuals or groups seek to stop governments from removing Confederate monuments is to dismiss for lack of standing. In the only

two cases where courts have reached the merits, their decisions supported removal.

***B. Appellants' allegations of "invalidation" of their property rights are unsupported by evidence.***

To the extent Appellants claim that removing the Lee Monument goes beyond emotional harm and "invalidat[es] a valuable property right," that claim is wholly unsupported by evidence. Taylor Br. at 31. Appellants may not assert an injury as a basis for standing if that injury does not exist. Appellants do not own the Lee Monument, and have not shown proof of diminished property rights in property they do own. As discussed below, Appellants cannot claim in good faith that the Governor's decision "invalidated" their property rights.

***II. To the extent the Court finds the Appellants have standing, Circle Neighbors has present and potential injury greater than Appellants.***

To the extent that Appellants' feelings and purported injuries to private property rights are given any weight in blocking the Commonwealth from removing the Lee Monument, *amicus curiae* Circle Neighbors encourages the Court to take judicial notice of their countervailing perspectives and far greater private property interests.

*A. The Lee Monument is an affront to the values of the neighborhood and City.*

Circle Neighbors exists for the express purpose of making clear that Appellants' insistence on permanency for the Lee Monument represents a distinct and shrinking minority of neighborhood and city residents. Circle Neighbors includes more than fifty (50) persons (approximately 95% of homeowners) whose properties are within line of sight of the Lee Monument. By contrast, Appellants include two owners of one residence similarly situated. A third Appellant is recently deceased. The remaining two Appellants reside four and six blocks away, respectively, from the Lee Monument. *See App. A.*

Circle Neighbors embraces the evolution of the neighborhood, just as Richmond and the nation are evolving with respect to issues of racial justice. All Circle Neighbors members support the removal of the Lee Monument. Monument removal is not a new idea in our nation's history. As British colonies, American cities—including New York, Boston, Philadelphia, and Savannah, among others—used to host many statues of King George—not so much anymore. *See Andrew Lawler, Pulling down statues? It's a tradition that dates back to U.S. Independence: Enthusiasm for the American Revolution led colonists to*

*burn, disfigure, and deface any symbol of Britain and its hated king,*  
NAT'L GEOGRAPHIC (July 1, 2020).

Furthermore, a large and growing number of Richmond residents favor removing Confederate monuments from public places. The Wason Center for Public Leadership at Christopher Newport University conducted a survey in late 2020 revealing that 71% of Richmond residents support removal of Confederate statues in public places. Mark Robinson, *RTD-CNU poll: Stoney leading Richmond mayoral race, but 30% of voters still undecided*, RICHMOND TIMES-DISPATCH, Oct. 10, 2020, [https://richmond.com/news/local/rtd-cnu-poll-stoney-leading-richmond-mayoral-race-but-30-of-voters-still-undecided/article\\_b5d8abf0-6e38-5bd9-a8ed-b723f0dda692.html](https://richmond.com/news/local/rtd-cnu-poll-stoney-leading-richmond-mayoral-race-but-30-of-voters-still-undecided/article_b5d8abf0-6e38-5bd9-a8ed-b723f0dda692.html).

Support for removing monuments continues to grow rapidly nationwide.<sup>2</sup> Two separate national polls from the summer of 2020

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<sup>2</sup> Although support for removal of these monuments has recently reached an all-time high, it is worth noting that there were many contemporary critics of these statues when they were first erected. *See Complicated History: The Memorial to Robert E. Lee in Richmond*, The UncommonWealth (July 27, 2017), <https://uncommonwealth.virginiamemory.com/blog/2017/07/27/complicated-history-the-memorial-to-robert-e-lee-in-richmond/>.

demonstrate a marked increase in public support for Confederate statue removals. A June 2020 Quinnipiac University Poll revealed 52% support for removals—a considerable increase from a 2017 poll which showed 39% support. Press Release, Quinnipiac University Poll, June 17, 2020 - 68% Say Discrimination Against Black Americans A "Serious Problem," Quinnipiac University National Poll Finds; Slight Majority Support Removing Confederate Statues (June 17, 2020). *See also* Carrie Dann, *Poll: More voters acknowledge symptoms of racism but disagree about its causes*, NBC NEWS, July 21, 2020.

***B. Removing the Lee Monument will not harm Appellants' property interests.***

Appellants claim that removing the Lee Monument is an “invalidation of a valuable property right,” but fail to define or provide any support for such assertion. Taylor Br. at 31. In actuality, purchases and purchase prices for property along Monument Avenue have risen in the months since the Governor announced his plans to remove the monument. Coleen Butler Rodriguez, a Circle Neighbor member and licensed real estate agent, reviewed publicly available records of property sales in the Monument Avenue Historic District in the period

before and after Richmond removed its city-owned Confederate monuments<sup>3</sup> and with the prospect of the near-term removal of the Lee Monument. App. A. The average price per square foot of neighborhood properties is up by 6.7% and property along Monument Avenue continues to be in high demand—indeed, homes on Monument Avenue garner some of the highest sales prices in Richmond. City-owned Confederate monuments’ removal and the threat of the Lee Monument’s removal have neither invalidated Appellants’ property rights nor harmed Appellants’ property values.

Further, Appellants’ insinuations that removal of the Confederate monuments could negatively affect their property rights by adversely affecting the neighborhood’s designation as the Monument Avenue Historic District or harming the Commonwealth’s policy in favor of historic preservation is not grounded in reality. Taylor Br. at 8, 42. The

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<sup>3</sup> Although the Commonwealth-owned Lee Monument still stands, the Mayor ordered City-owned Confederate monuments along the same avenue removed in the summer of 2020 as an emergency measure, with the city council subsequently endorsing permanent removal. Andrew Lawler, *The Black, Millennial Mayor Who Tore Down His City’s White Monuments*, POLITICO (Aug. 9, 2020), <https://www.politico.com/news/magazine/2020/08/09/richmond-mayor-monuments-392706>.



Historic District has historic significance independent of the Lee Monument and the Confederate statutes removed by the city of Richmond. The District includes 775 contributing buildings and objects, including a variety of architecturally significant houses, churches, and grand boulevards. Nat'l Hist. Landmark Nomination, Nat'l Register of Hist. Places (Dec. 3, 1997), [https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174\\_Monument\\_Avenue\\_HD\\_1997\\_Nomination\\_NHL-4.pdf](https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174_Monument_Avenue_HD_1997_Nomination_NHL-4.pdf). To the extent that the Appellants fear a substantial loss of integrity to the National Historic Landmark District, that, too, is illogical. The National Historic Landmark District contains 257 contributing buildings and objects.<sup>4</sup>

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<sup>4</sup> The Court may take judicial notice of the above-stated facts insofar as they are matters of public record. Monument Avenue Hist. Dist., Nomination Form, Nat'l Register of Hist. Places (Feb. 16, 1970), [https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174\\_Monument\\_Avenue\\_HD\\_1969\\_NRHP\\_nomination\\_Final.pdf](https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174_Monument_Avenue_HD_1969_NRHP_nomination_Final.pdf); Monument Avenue Hist. Dist. Amendment, Registration Form, Nat'l Register of Hist. Places (Dec. 3, 1990), [https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174\\_Monument\\_Avenue\\_HD\\_1990\\_Amendment\\_NRHP\\_nomination\\_Final.pdf](https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174_Monument_Avenue_HD_1990_Amendment_NRHP_nomination_Final.pdf); Monument Avenue Hist. Dist., National Historic Landmark Nomination (Dec. 3, 1997), [https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174\\_Monument\\_Avenue\\_HD\\_1997\\_Nomination\\_NHL-4.pdf](https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174_Monument_Avenue_HD_1997_Nomination_NHL-4.pdf).

Finally, unprecedented social justice protests and community mourning at Richmond's monuments are themselves historic, having drawn sustained global attention. These events can form the foundation of supplemental factors sustaining the Monument Avenue Historic District designations, just as recognition of Reconstruction Era and Civil Rights Era activities contribute to many places' historic significance. The National Historic Landmark District in Beaufort, South Carolina, provides an instructive example. Originally based solely on architecture, Beaufort's landmark designation has been expanded over time to encompass social justice activities, culminating in the establishment of the Reconstruction Era National Historical Park<sup>5</sup> and Penn Center,<sup>6</sup> a National Historic Landmark District. Hist.

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<sup>5</sup> For more information, see Beaufort Nat'l Hist. Landmark Dist., Nat'l Parks Serv., <https://www.nps.gov/reer/planyourvisit/visitor-center.htm>. *See also* Proclamation No. 9567, Establishment of the Reconstruction Era Nat'l Monument, 82 Fed. Reg. 6167 (Jan. 12, 2017), <https://www.nps.gov/reer/learn/proclamation.htm>.

<sup>6</sup> For more information, see Penn Center, <http://www.penncenter.com/>. *See also* Penn Center Hist. Dist., Nomination Form, Nat'l Register of Hist. Places (Sept. 9, 1974), <https://npgallery.nps.gov/AssetDetail/NRIS/74001824>.

Beaufort, Nomination Form, Nat'l Register of Hist. Places (Dec. 12, 1969) at 21, <http://www.nationalregister.sc.gov/beaufort/S10817707001/S10817707001.pdf>. To the extent that Appellants' claims could somehow be interpreted as linking removal of the Lee Monument to loss Monument Avenue's historic designations, they cite no authority.

***C. The interests of Circle Neighbors is more at risk from this litigation than the interests of the Appellants.***

On moral and public safety grounds, members of Circle Neighbors do not enjoy living next to a monument that has become a global symbol of our nation's persistent racial strife. To the extent that the Court considers Appellants' sentimental stances on the Lee Monument, Circle Neighbors urges the Court to consider the overwhelming countervailing sentiment of the majority of current and future neighborhood residents and their safety.

**a) Property interests of Circle Neighbors are at risk if the statue remains.**

While Appellants assert no basis for their claim that their property interests are at stake, Circle Neighbors urges this Court to consider whether, in direct contradiction to Appellants' concerns, the continued presence of Lee Monument will *harm* properties and property

values, given the likelihood of sustained conflict at the site. *See* Ezra Marcus, *Will the Last Confederate Statue Standing Turn Off the Lights?*, N.Y. TIMES, Oct. 28, 2020. Further, the pool of prospective buyers who would seek to live near the Lee Monument will continue to shrink as the neighborhood and the nation become increasingly diverse.<sup>7</sup>

**b) The Lee Monument has become a public safety concern.**

Circle Neighbors also supports the removal of the Lee Monument because members daily witness the risk to public safety that it presents. Organized marches for social justice in Richmond have been overwhelmingly nonviolent. The Lee Monument site, however, has hosted clashes between police and protestors, white supremacists and

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<sup>7</sup> The National Historic Landmark nomination's description of the Monument Avenue Historic District's residents in the neighborhood's early years do not reflect the neighborhood's current demographics. The nomination provides: "The families that owned houses on Monument Avenue were generally well-off, often professionals, only sometimes old Richmond families, and always white." Nat'l Hist. Landmark Nomination, *supra*, at 36. Circle Neighbors reflects racial diversity. For additional details concerning Monument Avenue's longstanding divisiveness, see Andrew Lawler, *The origin story of Monument Avenue, America's most controversial street*, NAT'L GEOGRAPHIC (July 27, 2020), <https://www.nationalgeographic.com/history/article/origin-story-monument-avenue-america-most-controversial-street>.

protestors, factions of protestors, and protestors and neighborhood residents, leaving people harmed and property damaged. Marcus, *supra* (“police detained several individuals who were armed with assault-style rifles and handguns after a pickup truck ran into a group of bicyclists near the statue.”). Moreover, instances of Confederate monuments remaining in place elsewhere have led to tragic, including fatal results, as the nation witnessed in Charlottesville, Virginia. *See, e.g.*, Jacey Fortin, *The Statue of at the Center of Charlottesville Storm*, N.Y. TIMES (Aug.13, 2017); Lynda Robinson, *Robert E. Lee Statue and Daughters of Confederacy Building Attacked by Richmond Protestors*, WASH. POST (May 31, 2020); Press Release, National Trust for Historic Preservation Statement, Public Statement on Confederate Monuments (June 18, 2020), <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials#.YG8lxjwpBLM>. Allowing the Lee Monument to stand will continue to pose a safety threat to those gathering at the site and living nearby.

### **III. Historic Preservation Policy in Virginia and the United States Supports Removal.**

A common thread within Appellants’ appeals is the argument that removing Confederate monuments violates the Commonwealth’s public

policy in favor of historic preservation. Gregory Br. at 13; Taylor Br. at 10, 22, 33. This argument reveals Appellants' fundamental misunderstanding of preservation. To claim historic preservation policy prohibits change defines historic preservation in an unacceptably narrow way and, in fact, contradicts the objectives of the historic preservation movement as it stands today.

*A. Background on Preservation Law and the Preservation Movement*

Appellants' argument regarding historic preservation is out of step with the values embodied by the National Trust for Historic Preservation—the nation's leading historic preservation advocacy organization chartered by Congress in 1949 to support the preservation of America's diverse sites, neighborhoods, and heritage. *See generally* JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 1 (1997) (noting how historic preservation can limit change, but also balances competing goals with alternative courses or actions). To the contrary, preservation law and policy as effectuated by the National Trust and other preservation entities clearly allow for, and even encourage, appropriate change.

One of historic preservation's chief goals is to preserve our sense of orientation as an American people. *E.g.*, Robin Elisabeth Datel, *Preservation and a Sense of Orientation for America's Cities*, 75 GEOGRAPHICAL REV. 125-41 (Apr. 1985). Orientation in the historic preservation movement means the bearing or position that one has in the world and the way in which historic resources can influence our sense of commonality and direction.

Congress embedded this foundational idea in the statement of purpose to the National Historic Preservation Act, which became law in 1966. Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515 ("the Act"). Since the Act's passage, every state government and over two thousand cities, towns, and counties have established preservation laws designed not only to protect and preserve historic properties, sites, landscapes, and objects, but also to allow appropriate change when needed.

The letter and intent of historic preservation law and policy balance history while accommodating the need for change with appropriate safeguards. Although the origins of the preservation movement were often based on a patriotism and respect for the

accomplishments of one's forbears, historic preservation has also evolved towards an orientation based more on community, identity, and a place's full historic context. *See* Datel, *supra*, at 125, and THOMPSON M. MAYES, *WHY OLD PLACES MATTER: HOW HISTORIC PLACES AFFECT OUR IDENTITY AND WELL BEING* (2018) (describing the current values and changing nature of historic preservation policy).

For example, federal preservation laws require that federal agencies with undertakings that affect properties eligible for or listed in the National Register of Historic Places find ways to “avoid, minimize, or mitigate harm.” 36 C.F.R. § 800.1(a). This range of outcomes allows for change and was intended to strike a balance between preserving the past and accommodating the future. 54 U.S.C. § 300101(1) (one of preservation's central goals is to foster conditions under which our modern society and historic properties can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations). In addition, federal and state governments provide financial incentives, such as historic rehabilitation tax credits, that allow owners and investors to rehabilitate and modify historic



properties for adaptive reuse. *E.g.*, Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 (Dec. 22, 2017); Va. Code Ann. § 58.1-339.2.

Likewise, state and local preservation laws allow changes to historic properties if the proposed changes are appropriate and receive approval from permitting authorities. The city of Richmond, like many other local governments across the Commonwealth and country, permits changes to local historic landmarks with approval by a Commission of Architectural Review. Richmond, Va., Code of Ordinances, § 30-930.3(d); Va. Code Ann. § 15.2-2306.

### ***B. History and Policy Surrounding Confederate Statues.***

Although the overwhelming majority of preservation laws allow change, the few laws ever passed in the United States to prohibit change to historic properties were passed by states to prevent the removal of Confederate monuments, an issue this court already addressed in *City of Charlottesville v. Payne*, 2021 WL 1220822, \_\_\_ S.E.2d \_\_\_ (Va. 2021). Even the classification of these laws as historic preservation laws has been debated, with some scholars describing them more accurately as preemption laws designed to strip local governments of their jurisdiction over Confederate monuments in the

face of evolving social values. Jess R. Phelps, & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 659 (2019). For these reasons, any argument that claims a statute provides justification for preservation against all other public policy concerns is fundamentally flawed.

Furthermore, the preservation of Confederate statues and monuments is one that historic preservation practitioners have addressed repeatedly. One of the most controversial issues faced by the historic preservation movement is how to interpret history to tell the full story of the American experience, especially when confronting difficult eras such as the Civil War and the legacy of the Lost Cause movement. As explained in greater detail in the Commonwealth's brief and as carefully weighed by the Court below, the Lost Cause movement developed as an ideology that fostered the belief that even in defeat, the Southern cause in the Civil War was correct and rooted in justice. Historians have explained the Lost Cause as a "myth" that romanticized the origins and justification for the Civil War, including those who participated in it, and in so doing often falsified history. *See, e.g.*, GARY W. GALLAGHER, *THE MYTH OF THE LOST CAUSE AND CIVIL WAR*

HISTORY (2010).<sup>8</sup> At the same time, Lost Cause promoters simultaneously used the movement to advance white supremacy. *See, e.g.,* ATLANTA HISTORY CENTER, CONFEDERATE MONUMENT INTERPRETATION GUIDE (2016), <https://www.atlantahistorycenter.com/learning-and-research/projects-initiatives/confederate-monument-interpretation-guide/>; Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy* (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>.

In recent years, local and state governments, as well as federal and state courts, have had to confront with increasing frequency issues involving the removal of Confederate monuments, one of the most common physical manifestations of the Lost Cause movement.<sup>9</sup> As

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<sup>8</sup> Gallagher is currently the John L. Nau III Professor in the History of the American Civil War at the University of Virginia.

<sup>9</sup> Appellants' arguments belie the reality of how governments are addressing Confederate monuments and symbols. In 2020 alone, there were 167 removals of Confederate monuments and symbols, 71 of which were in Virginia. Southern Poverty L. Ctr., *Confederate Symbol Removals*, <https://www.splcenter.org/data-projects/2020-confederate-symbol-removals>. Data spanning from 2015 to 2019 show more than 100 monuments and other Confederate symbols being removed in 22

research by the Atlanta History Center and Southern Environmental Law Center shows, while many Confederate monuments of the 1860s through the 1880s were erected to mourn and honor those who died in the Civil War, the vast majority of Confederate monuments were created in the Jim Crow Era, beginning in the 1890s. *Id.* Former Confederates and those opposed to racial integration used the statues as a symbol of their cause, one that reflected the social, political, and economic order of the South before the Civil War and the emancipation of slaves. *Id.*

Appellants contend that Confederate statues are part of our history and should never be removed; the monuments themselves, however, are historically significant *only in the sense* that they were

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states, including the District of Columbia. The Southern Poverty Law Center, as of February 1, 2019, had identified 114 Confederate symbols removed since the Charleston massacre, including 48 monuments and three flags, and name changes for 35 schools and one college, and 10 roads. Among them was the Confederate battle flag that had flown at the South Carolina State House grounds in Columbia for 54 years. Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy* (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>.

part of a movement intended to tell an incomplete, false, and harmful history. To require that the Lee Monument remain in place would contradict the very core of the purpose of preservation law.

### CONCLUSION

For the reasons discussed above, the Court should dismiss the appeals for lack of subject matter jurisdiction. Alternatively, the Court should affirm the Governor's authority to remove the Lee Monument, both the statue and the base, from its place of prominence to a place more suitable for contextual interpretation.

Date: April 19, 2021

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND FILING

I hereby certify that, on April 19, 2021, this brief was filed electronically with the Court. Copies have also been served to all counsel of record via email:

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Gregory A. Werkheiser

# APPENDIX A



## DECLARATION OF ALICE MASSIE

1. My name is Alice Massie and I am over the age of 18 and competent to give this declaration. The following information is based on my experience and personal knowledge.
2. I am a resident of the City of Richmond and have lived in the Monument Avenue Historic District for 22 years with direct views from my residence of the Robert E. Lee Monument.
3. Upon discovering that five Richmond residents were appealing Governor Northam's order to remove the Lee Monument, I, along with my neighbor Coleen Butler Rodriguez, invited all other homeowners with direct views of the Lee Monument to identify themselves if they *supported* the Governor's effort to remove the Monument.
4. Fifty-five of my close neighbors identified as strongly supporting removal. We are eleven times the number of Appellants. Collectively we own approximately 95% of all homes with views of the Lee Monument.

5. Our properties are also much more proximate to the Lee Monument than most of the Appellants' homes, two of whom live four and six blocks away, respectively.
6. While organized marches for social justice in Richmond have been overwhelmingly nonviolent, the Lee Monument site has hosted clashes between police and protestors, white-supremacists and protestors, factions of protestors, and protestors and neighborhood residents, leaving people harmed and property damaged.
7. Circle Neighbors fears that should the Court order the Lee Monument to remain, our enjoyment and the value of our properties, and the enjoyment of new and diverse neighbors whom we hope to welcome in the years ahead, will be harmed.

I hereby declare under penalty of perjury pursuant to the laws of the United States that the information contained in this declaration is true and correct to the best of my knowledge.

Dated this 18<sup>th</sup> day of April 2021.

DocuSigned by:  
*Alice McGuire Massie*  
7098B462B0644D0...

Alice Massie

## DECLARATION OF COLEEN BUTLER RODRIGUEZ

1. My name is Coleen Butler Rodriguez and I am over the age of 18 and competent to give this declaration. The following information is based on my experience and personal knowledge.
2. I am a resident of the City of Richmond and have lived in the Monument Avenue Historic District for 15 years with direct views from my residence of the Robert E. Lee Monument.
3. Upon discovering that five Richmond residents were appealing Governor Northam's order to remove the Lee Monument, I, along with my neighbor Alice Massie, invited all other homeowners with direct views of the Lee Monument to identify themselves if they *supported* the Governor's effort to remove the Monument.
4. Fifty-five of my close neighbors identified as strongly supporting removal. We are eleven times the number of Appellants. Collectively we own approximately 95% of all homes with views of the Lee Monument.
5. Our properties are also much more proximate to the Lee Monument than most of the Appellants' homes, two of whom live four and six blocks away, respectively.

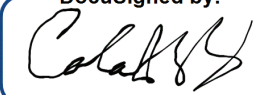
6. I am a licensed realtor in the Commonwealth of Virginia, with experience buying and selling real estate in Richmond, Virginia.
7. Using my experience as a realtor together with publicly available property data, I have studied property sales along the historic area of Monument Avenue.
8. I reviewed 16 properties sold in the historic area of Monument Avenue, from June 2019 through April 2020 and June 2020 through April 2021, to compare like periods, reviewing sale price and price per square foot.
9. My research showed that in the period of June 2020 to April 2021, following the removal of many of the Confederate statues, the average price per square foot of sales in the historic area of Monument Avenue rose by 6.7% over the same period the previous year. Price per square foot is the most relevant measurement as the houses in this area vary greatly in size. Average sale price also increased from \$1,296,667 to \$1,301,000 during the same periods.
10. My conclusion is that even during a period of significant civil unrest in our front yards, and even while most Confederate monuments have been removed and with the prospect of the Lee

Monument's removal well known, properties along Monument Avenue continue to be in high demand and continue to garner some of the highest sales prices in Richmond.

11. However, while organized marches for social justice in Richmond have been overwhelmingly nonviolent, the Lee Monument site has hosted clashes between police and protestors, white-supremacists and protestors, factions of protestors, and protestors and neighborhood residents, leaving people harmed and property damaged.
12. Circle Neighbors fears that should the Court order the Lee Monument to remain, our enjoyment and the value of our properties, and the enjoyment of new and diverse neighbors whom we hope to welcome in the years ahead, will be harmed.

I hereby declare under penalty of perjury pursuant to the laws of the United States that the information contained in this declaration is true and correct to the best of my knowledge.

Dated this 18<sup>th</sup> day of April 2021.

DocuSigned by:  
  
3306153158B546F...

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Coleen Butler Rodriguez

## Subsequent Pleading eCertificate

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### Case Information:

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Submitted By: ANTHONY G LANTAGNE

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