STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
CHATHAM COUNTY	19-CVS-809

BARBARA CLARK PUGH; GENE TERRELL BROOKS; THOMAS HENRY CLEGG; and THE WINNIE DAVIS CHAPTER 259 OF THE UNITED DAUGHTERS OF THE CONFEDERACY, Plaintiffs, v. KAREN HOWARD; MIKE DASHER; DIANNA HALES; JIM CRAWFORD; and ANDY WILKIE, in their official capacities as members of the Board of County Commissioners of Chatham County, North Carolina, Defendants. WEST CHATHAM BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE and CHATHAM FOR ALL, Defendant-Intervenors	**MOTION FOR LEAVE TO FILE RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION OR, IN ALTERNATIVE, MOTION TO FILE AMICUS CURIAE BRIEF**

Proposed Defendant-Intervenors, West Chatham Branch of the National Association for the Advancement of Colored People ("NAACP") and Chatham For All ("CFA"), (collectively, "Proposed Defendant-Intervenors") appearing by and through the undersigned counsel, and pursuant to Rule 7 of the North Carolina Rules of Civil Procedure, respectfully submit this Motion for Leave to File Response in Opposition to Plaintiffs' Motion for Preliminary Injunction or, in the alternative, Motion to File Amicus Curiae Brief.

1. On or about October 23, 2019, Plaintiffs Barbara Pugh, Gene Thomas, Thomas Clegg, and The Winnie Davis Chapter 259 of the United Daughters of the Confederacy ("Plaintiffs") filed their complaint seeking a declaratory judgment concerning a monument owned by Plaintiff United Daughters of the Confederacy (the "UDC's Monument"). In their Complaint, Plaintiffs further sought relief in the form of a Preliminary Injunction Motion restraining and enjoining the Defendant Chatham County from removing or relocating UDC's Monument from public property.

2. Proposed Defendant-Intervenor CFA is a community based nonprofit unincorporated association with a mission to lawfully and peacefully persuade the Chatham County Board of Commissioners ("BOCC") to remove UDC's Monument from public property, because of the racially discriminatory message it conveys in its current location in front of the historic courthouse in the center of Pittsboro.

3. Proposed Defendant-Intervenor NAACP is the nation's oldest and largest civil rights organization. Its mission is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and discrimination. The NAACP has followed a variety of strategies to carry out this goal, including filing lawsuits and Title VI administrative claims, public education, direct advocacy, peaceful protests, and civic engagement in order to promote and protect equal rights and to enforce anti-discrimination laws for the benefit of its members. The West Chatham Branch, which is part of the North Carolina State Conference, has worked to pursue that mission across North Carolina, but especially in Chatham County. Because of the UDC Monument's location and its support for the racially discriminatory legacy of the Confederacy, the maintenance of UDC's Monument on the courthouse grounds frustrates the mission of the NAACP.

4. On or about November 4, 2019, Proposed Defendant-Intervenors filed a Motion to Intervene in this action. Because Proposed Defendant-Intervenors' Motion to Intervene will not be

heard prior to the hearing on Plaintiffs' request for a preliminary injunction, Proposed Defendant-Intervenors respectfully request that the Court grant them permission to submit a Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction, which is attached hereto as Exhibit A. If Proposed Defendant-Intervenors are unable to submit their Response, they may not have an opportunity to oppose the injunctive relief sought by Plaintiffs, despite their clear interests in avoiding that preliminary injunction and their related pending Motion to Intervene.

5. In the alternative Proposed Defendant-Intervenors respectfully request that the Court treat the Response as an *amicus curiae* brief as the brief will be helpful to the Court in deciding the Plaintiffs' motion for preliminary injunction. Proposed Defendant-Intervenors' participation is desirable because they are civil rights organizations which advocate for the rights of African Americans whose rights are infringed by the continued presence of UDC's Monument.

WHEREFORE, Proposed Defendant-Intervenors respectfully request that this Court grant its Motion for Leave to File a Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, or in the alternative, treat the Response as an Amicus Curiae brief.

Respectfully submitted, this the 5th day of November 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing MOTION FOR LEAVE TO FILE RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION has been served on all parties and/or counsel by U.S. Postal Service, first-class delivery, and by direct transmission to the electronic mailing addresses shown below:

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This the 5th day of November, 2019.

Joseph S. Dowdy

Exhibit A

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
CHATHAM COUNTY	19-CVS-809

BARBARA CLARK PUGH; GENE TERRELL BROOKS; THOMAS HENRY CLEGG; and THE WINNIE DAVIS CHAPTER 259 OF THE UNITED DAUGHTERS OF THE CONFEDERACY, Plaintiffs, v. KAREN HOWARD; MIKE DASHER; DIANNA HALES; JIM CRAWFORD; and ANDY WILKIE, in their official capacities as members of the Board of County Commissioners of Chatham County, North Carolina, Defendants.	**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Proposed Defendant-Intervenors, West Chatham Branch 5378 of the National Association for the Advancement of Colored People ("NAACP") and Chatham For All ("CFA"), (collectively, "Defendant-Intervenors") appearing by and through the undersigned counsel, respectfully submit this Response in Opposition to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs seek to have this Court require Chatham County to continue to keep a monument that belongs to the United Daughters of the Confederacy ("UDC") on Chatham County property despite the lawful vote by the Board of County Commissioners ("BOCC") on 19 August 2019 to

revoke the license which permitted the United Daughters of the Confederacy ("UDC") to place its monument on County property. This atypical request fails the Rule 65 standard, as Plaintiffs have no likelihood of success on the merits, cannot show irreparable harm, and advance no objective that would be just or equitable. Accordingly, Plaintiffs' Preliminary Injunction Motion should be denied.

BACKGROUND

This case concerns the UDC's Confederate Veterans' Monument (the "UDC's Monument"), which UDC caused to be placed upon the courthouse grounds pursuant to a license from Chatham County. UDC's Monument was set upon the courthouse grounds in 1907 during the post-Reconstruction, Jim Crow era of the South – an era of racial inequality and unfortunately common race-related legal and extra-legal violence against African Americans.[1] The placement of UDC's Monument, which purports to pay homage to Confederate veterans, occurred forty-seven years after those veterans participated in an illegal, armed insurrection against the government of the United States and forty-two years after that insurrection ended in the Confederacy's formal defeat.

Though rooted in shameful aspects from our State's past, UDC's Monument stands prominently on the courthouse grounds in the center of Pittsboro's public square. It reminds the citizens of Chatham County and all who visit that there are those who dissent from the progress of the Civil Rights Era and equal protection of

[1] *See https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/.*

the law guaranteed within the confines of the courthouse and who identify themselves with the lamentable legacies of the Confederacy and Jim Crow.

UDC's monument is the property of a pro-Confederacy interest group, but it has been allowed, by license, to continue to occupy the public space for 114 years. No longer wishing to be burdened with the display, Chatham County has revoked the license and asked the UDC to remove the monument. If the UDC does not do so, the County has stated that it will remove and store the monument until the UDC retrieves it.

Plaintiffs, however, insist that unless Chatham County continues to adopt their viewpoint by leaving the license and UDC's Monument in place, they will be irreparably harmed. This alleged harm, Plaintiffs contend, rests on Chapter 100 of the North Carolina General Statutes ("the Statute"), which addresses the removal of "objects of remembrance" owned by the State and its subdivisions. But Plaintiffs lack standing to sue under the Statute, and in any event, are not aggrieved parties with any legally cognizable claims. Even if they could clear this jurisprudential hurdle, the plain language of the statute precludes Plaintiffs' putative claims. Furthermore, the Statute is not susceptible to the construction Plaintiffs urge this Court to adopt, which contradicts certain provisions of Article I of the North Carolina Constitution.

Plaintiffs thus lack any viable right of action and any recognizable injury. They cannot demonstrate any legal harm, much less irreparable harm. They have no basis for proceeding in this Court and no basis for obtaining the extraordinary relief of a preliminary injunction.

STATEMENT OF FACTS

Defendant-Intervenors hereby incorporate by reference their statement of facts from their Motion to Intervene and Brief in Support of Their Motion to Intervene.

ARGUMENTS AND AUTHORITIES

I. RULE 65 REQUIRES DENIAL OF PLAINTIFF'S MOTION.

A preliminary injunction will be denied unless "(1) the plaintiff is able to show a likelihood of success on the merits of the case and (2) the plaintiff is likely to sustain irreparable harm, or, in the opinion of the court, the injunction is necessary to protect the plaintiff's rights during the course of litigation." *Stout v. City of Durham*, 121 N.C. App. 716, 717, 468 S.E.2d 254, 256 (1996) (citation omitted). Because Plaintiffs can neither show a likelihood of success on the merits nor demonstrate irreparable harm, Plaintiffs' motion for preliminary injunction should be denied.

II. PLAINTIFFS LACK STANDING TO SUE AND THEREFORE ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION.

The party invoking the Court's jurisdiction has the burden of establishing standing. *Munger v. State*, 202 N.C. App. 404, 409, 689 S.E.2d 230, 235 (2010). Plaintiffs not only fail this burden, but their Complaint conclusively establishes that they lack standing to sue. To establish standing, a plaintiff must show

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002). Standing is a prerequisite for suit because "only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Willomere Community Association v. City of Charlotte*, 370 N.C. 553, 809 S.E. 2d 558 (2018); *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

Grasping at standing, the individual Plaintiffs, Barbara Pugh, Gene Brooks, and Thomas Clegg, allege that they pay their county property taxes. (Compl. ¶¶ 1-3.) However, "[g]enerally, an individual taxpayer has no standing to bring a suit in the public interest." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43 (2001); *Greene v. Eure*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975) ("It is not sufficient [to establish standing] that [a plaintiff] has merely a general interest common to all members of the public." (quoting *Charles Stores v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 1965)). The individual Plaintiffs also allege that they each are "a direct ancestor of a member of the armed forces of the Confederate States of America during the Civil War." (Compl. ¶¶ 1-3.) This argument has been rejected as a basis for standing by each court to consider the issue. *Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1276 (M.D. Fl. 2019) (holding that "genealogical relationships" to Confederate soldiers were insufficient to establish standing because they constitute "general, public interest grievance[s]" that are "not sufficiently particularized"); *McMahon v. Fenves*, 323 F. Supp. 3d 874, 880 (W.D. Tex. 2018) ("[Plaintiffs] may be more deeply attached to values embodied by the Confederate monuments than the average

student rushing to class on the mall, but the identities as descendants of a Confederate veteran do not transform an abstract ideological interest in preserving the Confederate legacy into a particularized injury sufficient [to establish standing].") Notably, none of the individual Plaintiffs allege any ownership, property right, or other vested interest in the UDC Monument.

Plaintiff Winnie Davis Chapter 259 of the United Daughters of the Confederacy alleges that it is a nonprofit "Confederate heritage group," which claims representational standing to the extent its members have standing. (Compl. ¶ 4.) It, along with the individual Plaintiffs, claim to have unspecified "legitimate interests of Plaintiffs in the monument, its display, and its placement in front of the Chatham County Courthouse" and unspecified "legitimate and cognizable interests in insuring that Chatham County is governed and that its affairs are conducted in a manner which is within its lawful authority as a body politic . . . ." (Compl. ¶¶ 22, 24.) But, as indicated above, standing generally does not exist for general, public interest lawsuits. Further, in an unpublished case, the North Carolina Court of Appeals held that aesthetic enjoyment of a Confederate monument was insufficient to establish standing. *Historical Preservation Action Committee, Inc. v. Reidsville*, 230 N.C. App. 598, __ S.E.2d. __ (2013) (unpublished). Additionally. the complaint fails to make the minimal showing to establish associational (or representative) standing.

> A plaintiff can establish "representational standing" to sue on its members' behalf when "(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand*

> *at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013). Applying Supreme Court precedent, the Fourth Circuit has held that the first requirement of representational standing—demonstrating that an organization's members would have standing to sue in their own right—requires an organization to "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id.*

N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections, 283 F. Supp. 3d 393, 399 (M.D.N.C. 2017). Because the Complaint fails to include specific allegations about any legal injury or harm suffered by members of the UDC, the organization has no standing to bring this litigation.

Plaintiffs pray for a declaratory judgment that Chatham County cannot remove the UDC Monument pursuant to G.S. Chapter 100, Article 1. However, the statutory language establishes no private right of action in favor of Plaintiffs, and generally, standing to bring a declaratory judgment claim depends upon a party having a contractual right at issue. *Beachcomber Properties, L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (2005) (holding that "[a]bsent an enforceable contract right, an action for declaratory relief to construe or apply a contract will not lie"); *Town of Nags Head v. Tillett*, 314 N.C. 627, 629, 336 S.E.2d 394, 396 (1985) ("[T]he Declaratory Judgment Act is restricted to declaring the rights and liabilities of parties regarding property.") Plaintiffs affirmatively allege that they do not have an ownership interest in the UDC Monument. (Compl. ¶ 18.) Accordingly, they lack standing to bring a declaratory judgment action.

Perhaps most importantly, Plaintiffs can point to no harm whatsoever, to their organization or members, as they are required to do. *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) ("[I]njury in fact is an invasion of

a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."), *aff'd*, 360 N.C. 398, 627 S.E.2d 461 (2006). Plaintiffs are unable to show any harm to a legally protected interest (the individual plaintiffs have failed to identify any legal interest).[2]

As noted above, if the Plaintiffs are correct in their assertion that the UDC does not own the Monument, they also cannot show harm to any legally protected interest. Similarly, even if the UDC is the owner, Plaintiffs have no legally protected interest. Plaintiffs have admitted that the UDC Monument sits on county property by virtue of a license revocable at will. The UDC Monument is not being destroyed. It is being removed from the courthouse grounds, and safely stored until UDC claims it. Plaintiffs' contention that the UDC Monument will be less inspirational to them in an alternative location is insufficient to constitute harm.[3]

Plaintiffs have no standing, and, therefore, no case. They are not entitled to proceed and are not entitled to the extraordinary relief of a preliminary injunction.

III. PLAINTIFFS CANNOT CARRY THEIR BURDEN TO SHOW LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THE PLAIN LANGUAGE OF G.S. CHAPTER 100 UNDERCUTS PLAINTIFFS' CLAIMS.

Chapter 100, Article 2 of the North Carolina General Statutes provides in Section 100-2.1 that "a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North

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[2] Indeed, when asked at the TRO hearing about harm, Plaintiffs' counsel relied on the "harm to all Chatham County Citizens."

[3] At the TRO hearing, the Plaintiffs asserted that the harm to which they were subjected was potential "criminal trespass." However, they presented no evidence related to that allegation. The undisputed evidence presented showed that the County's sole intention was to remove the UDC Monument from public property and store it until the UDC retrieves it. These were the only consequences of the monument being considered a trespass. Dasher Aff. ¶ 9.

Carolina Historical Commission." The prohibition on moving State-owned monuments is subject to subsection (b) of the Statute, which provides that "an object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection." N.C. Gen. Stat. § 100-2.1(b). An object of remembrance is defined as "a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history." *Id.* If permanently relocated, the object or remembrance "shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated."[4] *Id.* This prohibition on relocation does not apply to the following circumstances:

> (1) Highway markers set up by the Board of Transportation in cooperation with the Department of Environmental Quality and the Department of Natural and Cultural Resources as provided by Chapter 197 of the Public Laws of 1935.
>
> (2) An object of remembrance owned by a private party that is located on public property and that is the subject of a legal agreement between the private party and the State or a political subdivision of the State governing the removal or relocation of the object.
>
> (3) An object of remembrance for which a building inspector or similar official has determined poses a threat to public safety because of an unsafe or dangerous condition.

Id. at § 100-2.1(c)(1)-(3).

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[4] Notably, these objects "may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location." *Id.*

Because the UDC's Monument is owned by a private party, located on public property and subject to a legal agreement, the Statute does not apply. Further, Plaintiffs' "gift" argument fails because the Statute does not apply to UDC's Monument as this "monument" was never approved by the State Historical Commission, nor did the County ever adopt a resolution or ordinance accepting the UDC monument as a gift. Finally, because Chatham County has determined that the UDC's Monument poses a threat to public safety, the Statute also fails to apply.

A. N.C. Gen. Stat. § 100-2.1 applies to monuments owned by the state, not to privately owned monuments set on County property pursuant to a license.

An exception to the requirements related to removal of objects of remembrance under the Statute requires that: (1) a private party owns the object which has been placed on public land; (2) there is a legal agreement between the private party and the subdivision of the state governing removal and relocation of the object. N.C. Gen. Stat. § 100-2.1(c)(2). Plaintiffs' position about ownership of UDC's Monument relies on their contention that UDC's Monument was a "gift" to Chatham County. However, Plaintiffs' designation of UDC's Monument as a "gift" fails because the County explicitly permitted the UDC to erect the Monument on county property through a written license agreement which explicitly leaves the Monument in the UDC's care and keeping. *See* Monument License, attached hereto as Exhibit 1.

As an initial matter, the County only has authority to accept a gift through ordinance or resolution by a county's board of commissioners. *See, e.g.*, N.C. Gen. Stat. § 153-158 (stating that a county has the power to "acquire, by gift, grant, devise,

exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property for use by the county or any department, board, commission, or agency of the county"); N.C. Gen. Stat. § 153A-12 (stating that "each power, right, duty, function, privilege and immunity of the corporation shall be exercised by the board of commissioners, . . . [and]a power, right, duty, function, privilege, or immunity that is conferred or imposed by law without direction or restriction as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the board of commissioners"); *Bd. of Comm'rs of McDowell Cnty. v. Hanchett Bond Co.*, 194 N.C. 137, 138 S.E. 614, 615 (1927) (noting a county exercises its power through its board of commissioners). Plaintiffs cite to no resolution by Chatham County accepting UDC's Monument as a gift. The Monument License clearly establishes that UDC's Monument would remain the property of a private party, the UDC, and accordingly, it does not demonstrate a conveyance of UDC's Monument to Chatham County as a gift or otherwise.

The Monument License, a legal agreement between the UDC and Chatham County, rather than Chapter 100, Article 2, therefore governs both the status and removal of UDC's Monument. Plaintiffs have acknowledged as much, as evidenced by the execution of a Memorandum of Understanding between Plaintiff UDC (executed by Plaintiff Barbara Pugh) and Chatham County. *See* Memorandum of Understanding, Exhibit 2 hereto. In that MOU, the parties agreed that they would "meet, cooperate and work together in good faith to develop a mutually agreeable framework for 'reimagining' the monument erected by the UDC and located in front

of the Historic County Courthouse ***pursuant to a license granted by the County to the UDC on July 8, 1907.***" Exhibit 2, hereto (emphasis added). Given these representations and admissions, the UDC should be equitably estopped from now claiming that UDC's Monument is a "gift." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (discussing equitable estoppel).

While a license allows a licensee such as UDC to do some act upon the land which it would otherwise not be able to do, a structure erected by the licensee does not become the property of the licensor. *See, e.g., Lee-Moore Oil Co. v. Cleary*, 295 N.C. 417, 420, 245 S.E.2d 720, 722–23 (1978) ("Buildings or other improvements erected by the licensee not only do not become the property of the landowner, but remain the personal property of the tenant, and are not forfeited to the landowner if not removed when the license is revoked, or where the licensee dies."). Further, if a licensor determines that it no longer wishes to allow the licensee's property, the licensor may freely revoke the license and demand that the licensee remove its property. *See id.*, 295 N.C. at 420, 245 S.E.2d at 723 ("Moreover, if consent is given to the placing of the fixtures on the land, then, without more, there is implied the consent that the licensee may remove them.").

Chatham County, acting through its duly elected county commissioners, had the authority pursuant to law and to the Monument License to revoke the license and exercised that authority on 19 August 2019. Because UDC's Monument is owned by a private party (the UDC), is subject to a legal agreement (the Monument License), and the license governs the removal or relocation of UDC's Monument, Chapter 100,

Article 2 does not apply. Plaintiffs are thus unlikely to succeed on the merits of their declaratory judgment claim and their preliminary injunction motion should be denied.

B. N.C. Gen. Stat. § 100-2.1 applies only to monuments that are approved by the State Historical Commission

Plaintiffs' categorization of UDC's Monument as a "gift" similarly falls afoul of other requirements of the Statute in question. N.C. Gen. Stat. § 100-2 describes the circumstances under which the State may accept as its own property "[a] monument, memorial, or work of art." Specifically, it provides:

> Approval of memorials before acceptance by State; "work of art" defined. A monument, memorial, or work of art *may not become the property of the State by* purchase, *gift* or otherwise, unless the monument, memorial, or work of art, or a design of the same, together with the proposed location of the same, is submitted to and approved by the North Carolina Historical Commission. *A monument, memorial, or work of art, until so submitted and approved, may not be contracted for, placed in or upon, or allowed to extend over any property belonging to the State.* The term "work of art" as used in this Article includes any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration.

N.C. Gen. Stat. § 100-2 (emphasis added).

Plaintiffs do not allege or offer any evidence that the North Carolina Historical Commission has approved UDC's Monument as required prior to acceptance by the State as a "gift" under N.C. Gen. Stat. § 100-2, and therefore the Statute does not apply to UDC's Monument. Because Plaintiffs' allegations that it was a gift are the sole basis for their declaratory judgment claim, Plaintiffs are unlikely to succeed on the merits and their preliminary injunction motion should be denied.

C. N.C. Gen. Stat. § 100-2.1 does not preclude removal of monuments if there is a public safety need to remove them.

Objects which a building inspector or similar official "has determined pose[] a threat to public safety because of an unsafe or dangerous condition" are also similarly excepted from the requirements of the Statute. So even if UDC's Monument was a "gift" to Chatham County, it is excepted from the Statute's requirements because there is a public safety need to remove it.

Mike Dasher, Chair of the Chatham County Board of Commissioners stated in his affidavit that UDC's Monument posed a "threat to public safety because of the nature and content expressed by the Monument and as such, its placement on public property makes it an unsafe or dangerous condition." *See* Paragraph 14 of Affidavit of Mike Dasher, attached to Def. Mem. in Opp. to TRO. In support of that statement, Commissioner Dasher noted the following:

> (1) He was "aware of social media postings in 2019 where threats have been communicated to incite action by individuals to forcefully remove the Monument." (¶ 10.)[5]
>
> (2) On the date the Monument could be removed, "at least two individuals placed themselves in a street in front of a tractor/back-hoe creating a situation where bodily injury could be sustained by one or more individuals and such act could constitute a violation of North Carolina's criminal laws." (¶ 12.)
>
> (3) Chatham County has spent "approximately $103,000" as a result of requirements for additional security "due to the contentious protests that have been taking place concerning the presence of the Monument." (¶ 13.)
>
> (4) In September and October 2019, at least eight individuals have been arrested during "several contentious interactions between groups of

[5] Mr. Dasher includes several examples of these social media posts in his Affidavit.

individuals with one group wanting the Monument to remain and one group wanting it to be removed." (¶ 11.)

In addition to Defendants' above-referenced assertions, leading up to and following Defendants' vote to rescind the UDC license, neo-confederate and alt-right groups (one of which has been identified as a violent hate group[6]) made various posts on social media, urging Confederate supporters to protest the decision. *See* attached Exhibit 3. Supporters of the Confederacy erected two Confederate battle flags on private property in Pittsboro, one directly across the street from Horton Middle School, which was the historic African American elementary and high school during segregation. *See* Mtn to Int., Exhibits 1-3. Some of these neo-confederate demonstrators have harassed, intimidated, attacked, or threatened peaceful counter-demonstrators, creating serious public safety risks.

As a result, the UDC Monument's placement on public property makes it an unsafe and dangerous condition.[7] Accordingly, Chapter 100, Article 2 does not apply to the removal of UDC's Monument and, therefore, Plaintiffs' motion for preliminary injunction should be denied.

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[6] https://www.splcenter.org/fighting-hate/extremist-files/ideology/neo-confederate

[7] Independently of the exception under § 100-2.1 for unsafe conditions, the County has broad authority to remedy unsafe conditions and detriments to the public health. *See* N.C. Gen. Stat. § 153A-121 (The County has the express authority to "define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances."); N.C. Gen. Stat. § 153A-140 (The County has authority "to remove, abate, or remedy everything that is dangerous or prejudicial to the public health or safety."); N.C. Gen. Stat. § 153A-169 (The Board of Commissioners for the county has authority to "supervise the maintenance, repair, and use of all county property," and to "issue orders and adopt by ordinance or resolution regulations concerning the use of county property....").

IV. PLAINTIFFS CANNOT CARRY THEIR BURDEN TO SHOW LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THEIR CASE DEPENDS UPON AN UNCONSTITUTIONAL CONSTRUCTION OF G.S. CHAPTER 100.

A. Construction of the Statute to protect Confederate monuments is inconsistent with the N.C. Constitution.

Plaintiffs contend that UDC's Monument is an "object of remembrance" under N.C. Gen. Stat. § 100-2.1. The statute defines an "object of remembrance" as a publicly owned "monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history." Plaintiffs contend that the UDC Monument honors the armed forces of the Confederate States of America during the Civil War.

It bears remembering that the Confederate soldiers, whom the UDC seeks to commemorate with its Monument, engaged in treason against the United States by fighting against it in the Civil War. U.S. Const. Art. III, Sec. 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."). The symbol the UDC seeks to perpetuate in existence on the courthouse grounds is, therefore, a badge and symbol of that lawlessness, and a badge and incidence of slavery. In ordinary parlance, "military service" does not connote fighting against one's own country. *Cf. State v. Koberlein*, 309 N.C. 601, 605, 308 S.E.2d 442, 445 (1983) ("Where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or clearly indicated by the context in which they are used.").

The Legislature may well have intended to protect publicly owned Confederate monuments. Indeed, the social context in which the General Assembly acted suggests that at least some legislators wished to do so.[8] But Chapter 100, Article 1 does not expressly refer to Confederate monuments; quite differently, it refers to "military service." The Confederates did not engage in military service – they engaged in an armed insurrection against our country. The words selected by the General Assembly connote meaning. *Cf. N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (holding that the courts presume that the General Assembly "carefully chose each word used" in drafting legislation and construing legislation in accordance with the words chosen).

Our Constitution also informs the construction of State statutes. It is a "well recognized" rule of statutory construction in this State" that if "a statute is susceptible to two interpretations one constitutional and one unconstitutional[,] the Court should adopt the interpretation resulting in a finding of constitutionality." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978) (citing *Smith v. Keator*, 285 N.C. 530, 206 S.E.2d 203 (1974); *State v. Frinks*, 284 N.C. 472, 201 S.E.2d 858 (1974); *Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966).). The plain language of the North Carolina Constitution counsels strongly against an interpretation of

[8] N.C. Gen. Stat. § 100-2.1 was passed in 2015 in reaction to the reaction to Dylann Roof's shootings at a predominantly African American church in Charleston, S.C. *See https://www.dailymail.co.uk/news/article-3136355/It-belongs-museum-not-sovereign-ground-Rallying-cry-anti-Confederate-demonstrators-South-Carolina-s-State-House-demanding-legislators-remove-flag-grounds.html; https://www.dailymail.co.uk/news/article-3137365/Demonstrators-burn-flag-Denver-protests-against-state-sponsored-racism-spread-America-wake-South-Carolina-shooting.html*

Chapter 100, Article 1 that would require local governments to maintain symbols of insurrection against the United States on public property.

Article I, Section 5 of the North Carolina Constitution, titled "Allegiance to the United States," provides that: "Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force." Article I, Section 4 of the North Carolina Constitution, titled "Secession prohibited," provides that:

> This State shall ever remain a member of the American Union; the people thereof are part of the American nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

Displays of secessionist, Confederate symbols on publicly owned property, which are intended to commemorate and honor an illegal insurrection, are inconsistent with these constitutional provisions.

The proper construction of Chapter 100, Article 1 is that it protects publicly-owned monuments commemorating North Carolinians' true military service – service in the Armed Forces of the United States of America for the defense of our Nation. UDC's Confederate Monument fails every element where it is privately owned and venerates treason.

B. Plaintiff's construction of G.S. Chapter 100 would impermissibly require Chatham County to endorse plaintiffs' pro-Confederacy, anti-Civil-Rights speech in violation of the First Amendment.

Even if § 100-2.1 did apply to the monument at issue here, Plaintiffs' proposed construction of § 100-2.1 would violate Chatham County's right to control its own speech.

Courts have recognized a county's right to speak for itself and to choose the messages it expresses. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) ("A government entity has the right to 'speak for itself.' It is entitled to say what it wishes, and to select the views that it wants to express.") (internal quotation marks and citations omitted); *Am. Civil Liberties Union of N.C. v. Tennyson*, 815 F.3d 183, 185 (4th Cir. 2016) (holding that North Carolina could reject certain specialty license plates because the issuance of state license plates constituted government speech that it had the right to control). This right includes when a city "speaks" by choosing which monuments to place or remove in a public area. *Summum*, 555 U.S. at 472-73 (holding City exercised its right to speak by "select[ing] those monuments that it wants to display for the purpose of presenting the image of the city that it wishes to project"); *see also Walker v. Texas Division, Sons of Confederate Veterans*, 135 S. Ct. 2239, 2246 (2015) (holding that state government can decline to display Confederate-themed license plates); *Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1276 (M.D. Fla. 2019) ("The City's decision to remove the [monument] is also government speech. The government's freedom to speak for itself "includes 'choosing not to speak' and 'speaking through the ... removal' of speech that the government disapproves.").

A construction of G.S. § 100-2.1 that would *require* Chatham County to retain Confederate monuments on its property—as Plaintiffs propose—would violate Chatham County's right to "select the views that it wants to express." *See, e.g.*, *United Veterans Mem'l & Patriotic Ass'n of The City of New Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468, 477-78 (S.D.N.Y. 2014). In *City of New Rochelle*, the plaintiffs sought an injunction requiring the City of New Rochelle to permit them to fly the Gadsden Flag at an armory in the City "to honor veterans and U.S. military history." *Id.* at 477. The court dismissed the plaintiffs' claims, holding that "the City has a valid interest in expressing the messages that it chooses through its flagpole, and may decide to avoid speech that it believes will be perceived by some of its constituents as divisive," noting the City's argument that the Gadsden Flag had recently become associated with the Tea Party movement. *Id.* at 478. The court further held that "the City's expressive rights would be diminished were this Court to order the City to display the flag against its wishes." *Id.*; *see also Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 332 (1st Cir. 2009) (affirming summary judgment in favor of Town where plaintiffs sought an injunction requiring the Town to include a link to plaintiffs' website on the Town website, holding that "plaintiffs are trying to dictate to the government what it must include in its [speech]," which "raises risks to values protected by the First Amendment"); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1143-44 (10th Cir. 2001) (affirming dismissal of action seeking to require City to place winter solstice sign on City building because "the City acted within its rights to control the contents of its own speech"). Indeed, one court has already held a similar

state statute unconstitutionally violated a city's right to free speech. *See Alabama v. City of Birmingham*, CV 17-903426-MCG, at 2-9 (Jefferson Cnty. Cir. Ct., Jan. 14, 2019), attached to this Response as Exhibit 4. The Alabama court held that the State had no authority to, through the statute, force the City of Birmingham to retain a Confederate statue located on City property, holding that enforcing the statute would "impermissibly forc[e] the City to speak in favor of the Confederacy and its values, and as such ... deny[] the City its right to government speech." *Id.* at 6-7.

Likewise, forcing Chatham County to retain the UDC's Monument would force it to espouse Plaintiffs' point of view, despite the County's decision that it should remove the UDC's Monument because it is no longer consistent with the "ruling values of the county." Dasher Aff. ¶ 7. Plaintiffs' proposed construction of §100-2.1 would therefore violate the City's right to control the contents of its own speech.

The Court should reject Plaintiffs' construction of § 100-2.1, which is inconsistent with our Constitution. *See In re Banks*, 295 N.C. at 239 ("[W]here a statute is susceptible to two interpretations one constitutional and one unconstitutional the Court should adopt the interpretation resulting in a finding of constitutionality.").

V. PLAINTIFFS CANNOT CARRY THEIR BURDEN TO SHOW IRREPARABLE HARM.

A showing of irreparable harm requires "more than merely alleg[ing] that irreparable injury will occur." *United Tel. Co. of Carolinas v. Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). A plaintiff must "set out with particularity facts supporting such statements so the court can decide for itself if

irreparable injury will occur [and] [i]t is not enough for the plaintiff to allege simply that the commission or continuance of the act will cause him injury, or serious injury, or irreparable injury; but he should allege the facts, from which the court may determine whether or not such injury will result." *Id.*

Plaintiffs allege that the irreparable harms they will suffer if UDC's Monument is removed are:

> (1) An actual and substantial controversy exists that must be resolved prior to adjudication of the ownership dispute (Compl. ¶ 35.A)
>
> (2) The ordinances, resolutions, and statutes used to justify removal require an imminent threat to public health and safety and no acts of vandalism or violence have been directed against the monuments (Compl. ¶ 35.B)
>
> (3) Maintenance of the status quo will not prejudice the interests of any Party. (Compl. ¶ 35.C)
>
> (4) "Plaintiffs will be irreparably harmed if Defendants take affirmative action to remove, alter, destroy, and/or attempt to relocate the Confederate monument prior to a full adjudication of the respective rights and obligations of the Parties." (Plaintiff's Mot. for TRO, ¶ 13)

None of these forms of alleged harm are actual harms. Even if there were harms, none are irreparable.

Plaintiffs claim that they do not own UDC's Monument. Compl. ¶¶ 17-18, 23. Their own allegations establish that there is no harm to them as they have stated that they have no property interest in UDC's Monument. *Id.* Neither do they establish with particularity any actual harm as non-owners of UDC's Monument, other than the above conclusory statements that they will be harmed. *See Town of Knightdale v. Vaughn*, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461 (1989) ("It is not enough that a

plaintiff merely allege irreparable injury. Rather, the applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur." (internal quotation marks omitted)). *See also Gardner v. Mutz, supra* (holding that "genealogical relationships" to Confederate soldiers were insufficient to establish standing because they constitute "general, public interest grievance[s]" that are "not sufficiently particularized") and *McMahon v. Fenves, supra.*

Further, Plaintiffs cannot establish harm because, as the actual owners of UDC's Monument, they have not forecast (or alleged) that the monument will be damaged upon removal. Upon revoking the Monument License, Defendants stated in their resolution that any removal be done "safely and respectfully" and that UDC's Monument be preserved and stored until UDC takes possession. Accordingly, Plaintiffs cannot demonstrate that they will be irreparably harmed and thus their motion for preliminary injunction should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be denied.

Respectfully submitted, this the 5th day of November 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION has been served on all parties and/or counsel by U.S. Postal Service, first-class delivery, and by direct transmission to the electronic mailing addresses shown below:

James A. Davis
301 North Main St.
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This the 5th day of November, 2019.

Joseph S. Dowdy

Office of the Board of County Commissioners of Chatham County, N. C.

ORDERED, That the Winnie Davis Chapter of the Daughters of the Confederacy are hereby authorized and permitted to erect on the court-house square and in front of the court-house a monument to Chatham's Confederate soldiers, and to cut down the shade tree in front of the court-house near to the place proposed for said monument; and the said monument may remain in the care and keeping of the said Daughters of the Confederacy and such person or person s as they may hereafter designate.

This July 8th. 1907.

Chairman of Board.

MEMORANDUM OF UNDERSTANDING

This **MEMORANDUM OF UNDERSTANDING** (this "**MOU**") is made and entered into this 17 day of ~~June~~ July, 2019 by and between the Winnie Davis Chapter of the United Daughters of the Confederacy (the "**UDC**") and Chatham County (the "**County**").

The UDC and the County agree to meet, cooperate, and work together in good faith to develop a mutually agreeable framework for "reimagining" the monument erected by the UDC and located in front of the Historic County Courthouse pursuant to a license granted by the County to the UDC on July 8, 1907. This MOU does not commit either party to any particular course of action, but does commit both parties to discussions and negotiations in good faith concerning the monument.

IN WITNESS WHEREOF, this MOU is executed effective as of the date first written above.

WINNIE DAVIS CHAPTER OF THE UNITED DAUGHTERS OF THE CONFEDERACY

By: Barbara Pugh

Name: Barbara Pugh

Title: _____

CHATHAM COUNTY

By: _____

Name: Mike Dasher

Title: Chair, Board of Commissioners

7106790

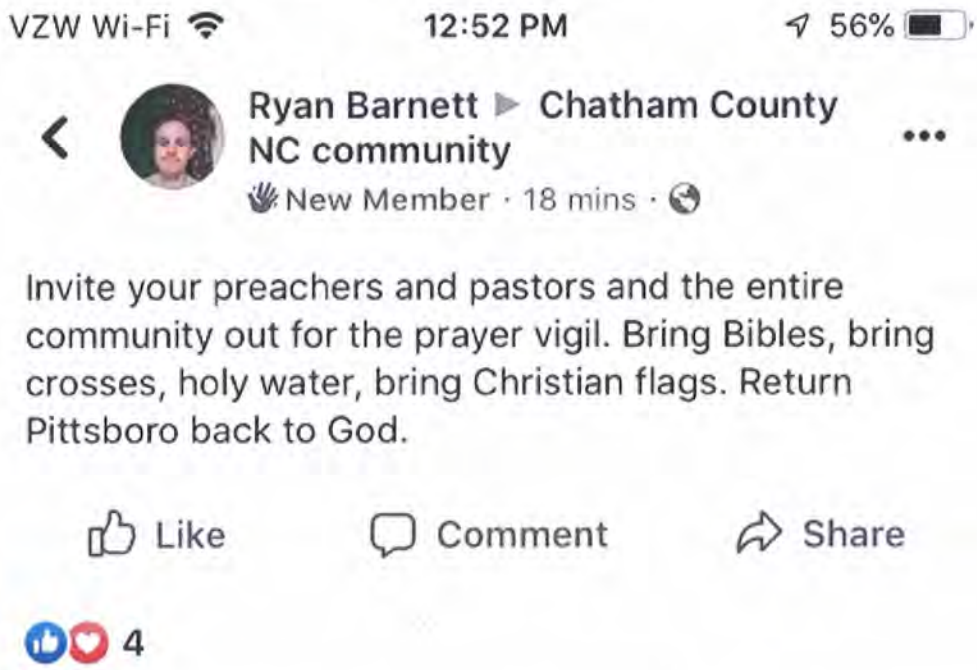
EXHIBIT

tabbies

2

Mike Dasher
October 25 at 9:48 AM ·

Please - friends who are legitimate and heartfelt monument supporters that just plain disagree with the County's position, be aware of some of the folks trying to capitalize on your anger. This guy was convicted of urinating and scrawling the n-word on a memorial to the slaves that helped build UNCs campus. The anti-racism activists come out because they follow guys like him, and groups like the Hiwaymen and League of the South who've also been coming to PBO. These folks are here to recruit people. Just be aware.



Ilana Dubester, Andrea Batsche and 16 others 12 Comments

Like Comment

;

EXHIBIT
tabbies
3

Woody Weaver Jr
August 21 ·

This Friday the 23rd. 2 pm to 7pm. We will be having a honor celebration of Chatham County Confederate History. From now on the 3rd Week of August will be given this title. The 23rd marks the dedication date of our Monument.
All groups. And I mean all are welcome. There are differences with us all. But I'm not worried about that right now. All Confederate Flags and symbols welcome. I would prefer no Heritage not Hate. COEXIST. Gray. None of that. The Gadsen Snake is welcome. This is a Confederate Event.
Absolutley no vulgarity. I know it is hard. But for the sake of honor. Hold your mouth. Gather off the Courthouse Green. The outside circle and the downtown strip is where to be. Don't want any permit issues. I prefer no spending of money in Downtown at all. The convenience store behind the Courthouse and Verilles restraunt have been supportive so if you need a cold drink or food please use them as they support our cause. I'll touch base with them. Stroll around downtown like you own it. Like a walk thru the park. There are many benches. You can park on. No one and I mean no one is to venture off by themselves. For safety purposes. I prefer groups of 3.
I don't know if Antifa or the Heather Redding crowd is going to show up. One reason for leaving the Courthouse Green open. Lure them to that spot. Us

our cause. I'll touch base with them. Stroll around downtown like you own it. Like a walk thru the park. There are many benches. You can park on. No one and I mean no one is to venture off by themselves. For safety purposes. I prefer groups of 3.
I don't know if Antifa or the Heather Redding crowd is going to show up. One reason for leaving the Courthouse Green open. Lure them to that spot. Us surrounding them. Plus it will be much easier for the local police to handle them. Now the local police have been very good to us. I want them to be respected at all times.
Now no outside carry of Firearms. Don't want Antifa to blow it all out of proportion. If you have a proper CCL. You want to carry concealed that's on you. I will not give any advice on that issue.
I want a peaceful honorable deal from us. If the Nasties come to town with all their Filth. I want Pittsboro to see what 4 of the BOC Barosso and Fifer support. Waving BLM Banners shouting vulgar chants. We have asked the downtown merchants to stand up to the BOC. Support us. They have did nothing. Also the historical society nothing.
It is in the works to give Bon Lee the Honarary title as the county seat of Chatham County.
Any questions. Feel free to PM me. Or respond on this post. I will respond as soon as possible.
Thanks to all our Southern Patriots.

ELECTRONICALLY FILED
1/14/2019 11:40 PM
01-CV-2017-903426.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACKIE SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
CIVIL DIVISION / BIRMINGHAM

STATE OF ALABAMA,	)	
Ex rel, ATTORNEY GENERAL STEVE MARSHALL	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**CV 17-903426-MGG**
	)	
	)	
CITY OF BIRMINGHAM; and,	)	
RANDALL L. WOODFIN, in his OFFICIAL CAPACITY	)	
As MAYOR OF THE CITY OF BIRMINGHAM,	)	
	)	
Defendants,	)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

On May 1, 2018, the Court issued an ORDER [Doc. 68] in which it requested post-hearing briefing on the interpretation of several portions of the Alabama Memorial Preservation ACT of 2017 (***"the ACT"***) and Defendants CITY OF BIRMINGHAM and MAYOR RANDALL WOODFIN's (collectively, ***"the CITY"***) affirmative defenses to enforcement of the ACT on the grounds that it violated their federal free speech and equal protection rights. In response, the CITY filed its POST-HEARING BRIEF [Doc. 70].

Shortly thereafter, the SOUTHERN POVERTY LAW CENTER (***"SPLC"***) filed its MOTION FOR LEAVE TO FILE BRIEF OF AMICUS [Doc. 74] urging this Court to grant the CITY's CROSS-MOTION FOR SUMMARY JUDGMENT [Doc. 51] and deny the MOTION FOR SUMMARY JUDGMENT [Doc. 43] filed by the STATE OF ALABAMA (***"the STATE"***). As no opposition was filed to SPLC's MOTION FOR LEAVE, it is due to be **GRANTED**. The Court has **CONSIDERED** its BRIEF OF AMICUS CURIAE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF DEFENDANTS.

Finally, the STATE then filed its CONSOLIDATED RESPONSE TO THE DEFENDANTS' POST-HEARING BRIEF AND BRIEF OF AMICUS CURIAE SOUTHERN POVERTY LAW CENTER [Doc. 84]. Each of the foregoing have Exhibits that are set out in the official record of this ACTion.

DISCUSSION

The STATE contends this Court need not reach the issues of statutory interpretation the Court posed in its ORDER [Doc. 68] as to the cited provisions of the ACT because the only

portions of the ACT at issue in this suit—and the only portions the Court accordingly has jurisdiction to apply—are whether the CITY violated ALA CODE § 41-9-232(a) (1975)[1] "altered" or "otherwise disturbed" the Confederate Soldiers and Sailors Monument in Linn Park (***"the Monument"***) (stipulated to have been situated in Linn Park for more than forty years) by placing a plywood screen around it; and, whether the STATE may enforce the penalty provision against the CITY on a $25,000.00 per-day basis.

Generally, the STATE contends that because an Alabama municipality is a mere instrumentality of the STATE, the STATE can restrict the CITY's power to express its disagreement with the ACT. Likewise, the STATE further contends, this Court need not reach the issues raised with respect to the CITY's federal constitutional defenses "... because a well-established line of federal cases holds that municipalities lack standing to assert state statutes violate their rights under the United States Constitution because they are creatures or instrumentalities of their states of origin" [Doc. 84, p. 2], and not private citizens.

The STATE contends that it brought suit under specific provisions of the ACT, and the CITY lacks standing to assert it is injured by the potential application of other portions of the ACT not at issue in this case. The STATE emphasizes "Standing . . . turns on whether the party has been injured in fact and whether the injury is to a legally protected right." *State v. Property at 2018 Rainbow Drive known as Oasis*, 740 So. 2d 1025, 1028 (Ala. 1999) (internal quotation and citation omitted). [Emphasis added] To suggest this lawsuit is simply whether the CITY's placing a twelve-foot high wooden screen around the Monument "altered" or "otherwise disturbed" the monument in violation of the ACT, presumes simply that the ACT cannot be challenged, period. To so argue makes the STATE's power unassailable, period.

However, there is a well-established line of cases establishing that a state's power over its municipalities—like any state power—is subject to constraints. Although a state's legislative control over municipalities is extensive, the U.S. Supreme Court has never acknowledged the states' "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations." *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979)[2]. Rather, municipalities, including those in Alabama, have rights not conferred by state legislative

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[1] The ACT is codified at ALA. CODE §§ 41-9-231, *et. seq.* (1975).

[2] Unless later superseded by Eleventh Circuit precedent, a Fifth Circuit decision issued before October 1, 1981, binds this court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*); *Muhammad v. Muhammad*, 2016 WL 3509529 (11th Cir.)

grace, which include: (1) a "legally protected right" to free speech, and, (2) a "legally protected right" not to be deprived of its property without due process of law.

LEGALLY PROTECTED RIGHT TO FREE SPEECH

Although the U. S. Supreme Court has not articulated a precise test for distinguishing government speech from private speech, the Courts have identified three relevant factors from *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015), and *Pleasant Grove City*[3] *v. Summum*, 555 U.S. 460, 467-68 (2009) (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000), to-wit: (1) the history of the speech at issue; (2) a reasonable observer's perception of the speaker; and (3) control and final authority over the content of the message. The result reached in *Summum* was the conclusion, "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* at 470. Therefore Pleasant Grove City's speech (action regarding the display) is protected, and citizens cannot force the city to propound speech or ideas with which it does not agree. Importantly, the Court also found that a monument's message "may change over time," noting that "[a] study of war memorials found that people reinterpret the meaning of these memorials as historical interpretations and the society around them changes." *Id.* at 477 (internal quotations omitted).

As to the whether the CITY enjoys protected speech, the Court examines the three relevant factors from *Walker* and *Summum*. First, the history of the Monument need not be set out here, as it is extensively set out in the SPLC's BRIEF. Briefly, as stipulated [Doc. 38]:

- in 1905, the Pelham Chapter of the United Daughters of the Confederacy dedicated the Monument to Confederate soldiers who fought in the Civil War in Capitol Park, since renamed Linn Park;
- the Monument contains the phrases "In Honor of the Confederate Soldiers and Sailors" … "The manner of their death was the crowning glory of their lives" … "To the memory of the Confederate soldiers and sailors. Erected by the Pelham Chapter, United Daughters of the Confederacy. Birmingham, Ala. April 26, 1905."; and,
- The Monument contains inscriptions of crossed sabers, muskets, and an anchor, with four stone artillery balls lying at its base

The fact that the CITY has had for many years an overwhelmingly African-American population and a majority African-American elected Mayor and City Councilors also need not be set out, again, because it is set out in the BRIEFS. It is undisputed that an overwhelming majority of the body politic of the CITY is repulsed by the Monument.

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[3] This is not "Pleasant Grove, Alabama"; rather a city in the State of Utah

As to a reasonable observer's perception of the Monument, in *Summum*, the Court held that Pleasant Grove City was exercising its right to government speech in rejecting a privately-donated monument for permanent display in the city's Pioneer Park. *Id.* at 472. Despite being donated by a private organization, the Court determined that the display of the monument at issue would be government, as opposed to private, speech because persons observing the monument on city property would reasonably interpret the monument as conveying a message on the city's behalf. *Id.* at 470-471 ("Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."). The Court found that "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land. City parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world." *Id.* at 472.

As to control and final authority over the content of the message of the Monument, per § 41-9-232(a), since it has sat in Linn Park for more than forty years, it cannot be "... relocated, removed, altered, renamed, or otherwise disturbed." § (b) addresses whether a defined structure has been situated or otherwise for twenty years but less than forty years; and, §(c) addresses schools which fall under the pertinent definitions. § 41-9-235(a) establishes a waiver process to avoid the ACT's restrictions for those things described under § 41-9-232(b) and (c), but not as described under § (a), which, of course, the subject Monument falls. In short, under any reading of the ACT, there is simply no way, no process, no procedure available for the CITY to petition for relief to do anything to the Monument despite how much it does not want to be perceived as honoring what it honors. Thus, the ACT establishes absolute control and final authority over the content of the message, i.e., homage to the Confederacy.

A city has a right to speak for itself, to say what it wishes, and to select the views that it wants to express. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)); *see also Creek v. Vill. of Westhaven*, 80 F.3d 186, 192 (7th Cir. 1996) (observing that municipalities ACT as amplified voices for their constituents and that "the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern.") (Posner, J.). Thus, for example, a city may exercise editorial control over privately-donated monuments situated on city land. *Summum*, 555 U.S. at 471-72.

This is not the first time the STATE has "invoke[d] generalities expressing the State's unrestricted power" over municipalities to impose its will. *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960). In *Gomillion*, the STATE OF ALABAMA raised this same unrestricted, unassailable power to contend that African American residents of the City of Tuskegee could not challenge a legislative change to municipal boundaries as discriminatory under the Fourteenth and Fifteenth Amendments. *Id.* at 340. The U. S. Supreme Court rejected the argument "that the States have power to do as they will with municipal corporations regardless of consequences." *Id.* at 344. Rather, the Court reaffirmed that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344–45

The U. S. Constitution's limitations on speech regulation apply to states, *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994), and the STATE cannot flout those limitations and restrict the CITY's expressive conduct vis-à-vis the Monument. The STATE acknowledges that the CITY is generally free to engage in government speech, (Doc. 62 at 13), but explains that the ACT withdraws from the CITY the right to engage in a particular expressive message, (Doc. 62 at 10-12). This explanation is impermissibly content-based. Just as the STATE cannot manipulate a city's boundaries to pursue the illegitimate purposes of discrimination and disenfranchisement, *Gomillion*, 364 U.S. at 344–45, it also cannot manipulate the CITY's speech for the illegitimate purpose of favoring certain content or viewpoints.

Here, the STATE's interest in preserving the Monument, and its means of doing so, are bound up with the Monument's expressive content. For example, the STATE does not own the property on which the Monument is situated, (Doc. 58 at ¶ 3), and therefore the STATE has no property interest to protect. And, as the leading cases on government speech establish, the CITY's ownership of the park all but determines that the CITY is the speaker. *See, e.g., Summum*, 555 U.S. at 471-72. When "considered [in] the context in which it occurred," *Johnson*, 491 U.S. at 405—the aftermath of racially-motivated violence in other Southern states, (Doc. 54 at 13–14)—the CITY's conduct here is only expressive disassociation from a pro-Confederacy message. The STATE has not articulated an interest in penalizing this conduct other than disagreement with the message.

Despite the CITY's desire to reject a pro-Confederacy message, the STATE contends the ACT compels the CITY to do so. This cannot be. *Summum* and its progeny establish that the CITY, as the park's owner, is the entity communicating at the park. Just as the STATE could not force any particular citizen to post a pro-Confederacy sign in his or her front lawn, so too can the STATE

not commandeer the CITY's property for the State's preferred message. That the ACT compels the CITY to express the STATE's preferred message does not transform the message into the STATE's speech. The relevant speaker in Linn Park is, under *Summum*, the CITY. The STATE can substitute its speech for the CITY's only through constitutional means, which necessarily excludes unjustified compelled ideological speech. *Id.* Thus

The practical ramification of the STATE's position is that the ACT renders pro-Confederate speech immune from a local political process that rejects a message of white supremacy. But the Constitution protects "an open marketplace where ideas, most especially political ideas, may compete without government interference," *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008), and "it is the democratic electoral process that first and foremost provides a check on government speech," *Walker*, 135 S. Ct. at 2245. The democratic process here flew into motion after the people of Birmingham witnessed race-based violence across the South and decided, through their elected officials, to reject a message of African American inferiority. Under the ACT, however, the people of Birmingham cannot win. No matter how much they lobby CITY officials, the STATE has placed a thumb on the scale for a pro-Confederacy message, and the people, acting through their CITY, will never be able to disassociate themselves from that message entirely. This is so because the ACT makes no provision for removing those monuments most likely to convey a pro-Confederacy message. It is no answer that the CITY could erect *other* monuments or signs criticizing the Confederacy (Doc. 62 at 13-14); the CITY has the right to disassociate from a pro-Confederacy message entirely. By rendering that result impossible no matter how much the people of Birmingham lobby or vote, the ACT risks the further harm that "[m]any persons . . . will choose simply to abstain from protected speech"—advocacy to remove pro-Confederate messages—"harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The STATE's power over the CITY is no answer where, as here, the basis for the exercise of state power is a distortion of the marketplace of ideas that the Constitution does not allow. *Cf. Gomillion*, 364 U.S. at 344–45 ("Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."). Just as when the Supreme Court recognized municipal rights as enforceable against the federal government, protecting the CITY's speech here advances the interests not only of "the public entity," but of "the persons served by it." *50 Acres of Land*, 469 U.S. at 31. In short, the STATE

is impermissibly forcing the City to speak in favor of the Confederacy and its values, and as such, is denying the CITY its right to government speech.

LEGALLY PROTECTED RIGHT TO DUE PROCESS

The ACT also violates the Fourteenth Amendment to the U. S. Constitution because it deprives the CITY of property without due process of law. As already discussed, the power of a state over its municipalities, while broad, is not limitless; it is circumscribed by "the relevant limitations imposed by the United States Constitution." *Gomillion,* 364 U.S. at 344-45.

That the CITY is being deprived of property is clear. *First*, the STATE seeks to recover at least $25,000.00 from the CITY. *Second*, the STATE seeks to control what the CITY may or may not build on its own land, thus restricting its exercise of its rights as the owner of Linn Park. The STATE also seeks to control how and even whether the CITY maintains the Monument, thus restricting its exercise of its rights as the owner of the Monument and also forcing it to spend some of its monies on preservation of this Monument. (*See* Doc. 58 at ¶ 8). The Court **RECOGNIZES** the CITY's argument as to violation of Amendment 621 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, and **AGREES** it unconstitutionally imposes an increased expenditure of municipal funds. [Doc. 70, p.16] That the CITY's property interests are affected by this case is not in dispute.

What process is due under the Fourteenth Amendment before deprivation of property is a question for the United States Constitution, not a state statute. *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 541 (1985). A state's deprivation of real property can be accomplished only with notice and an adequate hearing. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

Under the ACT, there is no process at all – no notice and no hearing. According to the STATE, it may decide what the CITY can and cannot do with its own property, Linn Park and the statuary inside it. There is no provision in the ACT for the CITY or its citizens to be heard concerning the use of Linn Park and the Monument. And while of course the current litigation provides due process before the STATE will take $25,000.00 or more in fines, under the STATE's reading of the law, the Court's role would be merely pro forma, since the CITY has no rights as against the STATE. (Doc. 62 at 11). The absence under the ACT of an opportunity to be heard at all, much less at a meaningful time and in a meaningful manner, violates the Fourteenth Amendment.

THE LACK OF A SEVERABILITY CLAUSE IN THE ACT

The ACT does not contain a repeal clause. A general act may amend or repeal a local act by express words or by necessary implication. *Vaughan v. Moore*, 379 So.2d 1240 (Ala.1980). It is well established that repeal by implication is not favored. *Willis v. Kincaid*, 983 So.2d 1100 (Ala.2007). More specifically, this Court has recognized "[t]he rule that implied repeal is disfavored when the earlier act is specific and the subsequent act is general." *Marks v. Tenbrunsel*, 910 So.2d 1255 (Ala. 2005). A later statute may repeal an earlier statute by implication only under certain circumstances, such as when the two statutes, taken together, are so repugnant to each other that they become irreconcilable. *Hurley v. Marshall County Comm'n*, 614 So.2d 427, 430 (Ala.1993)

By way of example, municipalities in Alabama have authority, but are not required, to repair or demolish unsafe structures, or seek such actions, pursuant to several different provisions of the ALA. CODE (1975) including statutes that provide authority through Class legislation for Class 2, 4, 5, 6, and 8 municipalities. Most of these statutes contain "Cumulative" clauses which state that the provisions "...shall be cumulative in its nature, and in addition to any and all power and authority which any such city may have under any other law." As stated, repeal by implication is not favored. Implied repeal is essentially a question of determining the legislative intent as expressed in the statutes. *Shiv–Ram, Inc. v. McCaleb*, 892 So.2d 299 (Ala.2003) (quoting *Fletcher v. Tuscaloosa Fed. Sav. & Loan Ass'n,* 314 So.2d 51 (1975), quoting in turn *State v. Bay Towing & Dredging Co.*, 90 So.2d 743 (1956)). Statutes should be construed together so as to harmonize provisions as far as practical, and in event of conflict between two statutes, specific statute relating to specific subject is regarded as exception to, and will prevail over, general statute relating to broad subject. *Ex parte Jones Mfg. Co., Inc.* 589 So.2d 208 (1991); *Murphy v. City of Mobile*, 504 So.2d 243 (Ala.1987); *Bouldin v. City of Homewood*, 174 So.2d 306 (1965). Moreover, " 'the last expression of the legislative will is the law, in cases of conflicting provisions in the same statute, or in different statutes, the last enacted in point of time prevails.' " *Williams v. State ex rel. Schwarz,* 197 Ala. 40, 54, 72 So. 330, 336 (1916).

The ACT also does not contain a severability clause. The inclusion of a severability clause is a clear statement of legislative intent to that effect, but the absence of such a clause does not necessarily indicate the lack of such an intent or require a holding of inseverability. The judiciary's severability power extends only to those cases in which the invalid portions of an act are not so intertwined with the remaining portions that such remaining portions are rendered meaningless by

the extirpation. *State ex rel. Pryor ex rel. Jeffers v. Martin*, 735 So.2d 1156 (Ala.1999). The lack of a severability clause does not end the court's inquiry, because "courts will strive to uphold acts of the legislature." *City of Birmingham v. Smith*, 507 So.2d 1312 (Ala.1987).

Where a statute is partly infected with invalidity, a severable or saving clause is persuasive that the legislature intended that should an invalid portion be stricken, the valid part should survive. *Hamilton v. Autauga County*, 268 So.2d 30 (Ala.1972). If after the deletion of the invalid part, the remaining portions of an Act are complete within themselves, sensible, and capable of execution, the Act will stand notwithstanding its partial invalidity. *Springer v. State ex rel. Williams*, 157 So. 219 (Ala.1934).

If any part of an Act is declared invalid or unconstitutional, that declaration shall not affect the part which remains unless an unconstitutional provision in the Act is overbroad and unreasonable and is "so intertwined with the remaining portions" of the Act that the Act would be meaningless without it. *State ex rel. Jeffers v. Martin*, 735 So.2d 1156 (Ala.1999) ("Under these well-established principles, the judiciary's severability power extends only to those cases in which the invalid portions are ' "not so intertwined with the remaining portions that such remaining portions are rendered meaningless by the extirpation." ' *Hamilton v. Autauga County*, 268 So.2d 30 (1972) (quoting *Allen v. Walker County*, 199 So.2d 854 (1967)). If they are so intertwined, it must be assumed that the legislature would not have passed the enactment thus rendered meaningless. In such a case, the entire act must fall as the objectionable portion cannot be severed, and the Act in its entirety is unconstitutional. *State v. Lupo*, 984 So.2d 395 (Ala. 2007).

The subject part of the ACT that combines to deprive the CITY of its Constitutionally protected speech, as well as to deny its Constitutional right to due process is § 41-9-235(a). This section permits a waiver process for protected things at least twenty years old, but less that forty years old, and, schools. The Court cannot rewrite § 41-9-235(a) by inserting language to allow structures sitting on public property for more than forty years to apply for a waiver, or otherwise modify § (a). § (a) is clearly intertwined in the entire ACT because it is the "gatekeeper" of who can apply for a waiver. As such, it is also overbroad and unreasonable.

Under these principles of statutory interpretation, having already DETERMINED those parts and aspects of the ACT that deprive the CITY of its Constitutionally protected rights, this Court has no choice but to, reluctantly, **DECLARE** that ACT 217 of the 2017 Regular Session of the Legislature of the State of Alabama, popularly known as the Alabama Memorial Preservation Act, is **VOID** and of **NO** legal effect or authority.

Accordingly, it is hereby **ADJUDGED, ORDERED** and **DIRECTED** as follows:

1. ACT 217 of the 2017 Regular Session of the Legislature of the State of Alabama, popularly known as the Alabama Memorial Preservation Act, is **VOID** and of **NO** legal effect or authority;
2. The MOTION FOR LEAVE TO FILE BRIEF OF AMICUS [Doc. 74] SOUTHERN POVERTY LAW CENTER [Doc. 74] is **GRANTED**;
3. The MOTION FOR SUMMARY JUDGMENT [Doc. 43] filed by the STATE OF ALABAMA is **DENIED**;
4. The CROSS-MOTION FOR SUMMARY JUDGMENT [Doc. 51] filed by the CITY OF BIRMINGHAM and MAYOR RANDALL WOODFIN, is **GRANTED**; and,
5. Costs are **TAXED** as paid.

DONE and **ORDERED** this date, *January 14, 2019.*

S/Michael G. Graffeo
MICHAEL G. GRAFFEO
Circuit Judge