19A1021



SCV Record No. 191235
Circuit Court No. CL19-3928

**IN THE SUPREME COURT OF THE UNITED STATES**

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ROY L. PERRY-BEY AND RONALD M. GREEN,

*Applicants,*

v.

CITY OF NORFOLK, VIRGINIA, AND MARK R. HERRING, ATTORNEY GENERAL FOR THE COMMONWEALTH OF VIRGINIA., ET AL.

*Respondents.*

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*On Application to Stay or Recall the Mandate of the Supreme Court of Virginia for the Fourth Judicial Circuit*

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# APPLICATION TO STAY OR RECALL THE SUPREME COURT OF VIRGINIA MANDATE PENDING THE FILING AND DISPOSITION OF A WRIT OF CERTIORARI

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April 7, 2020

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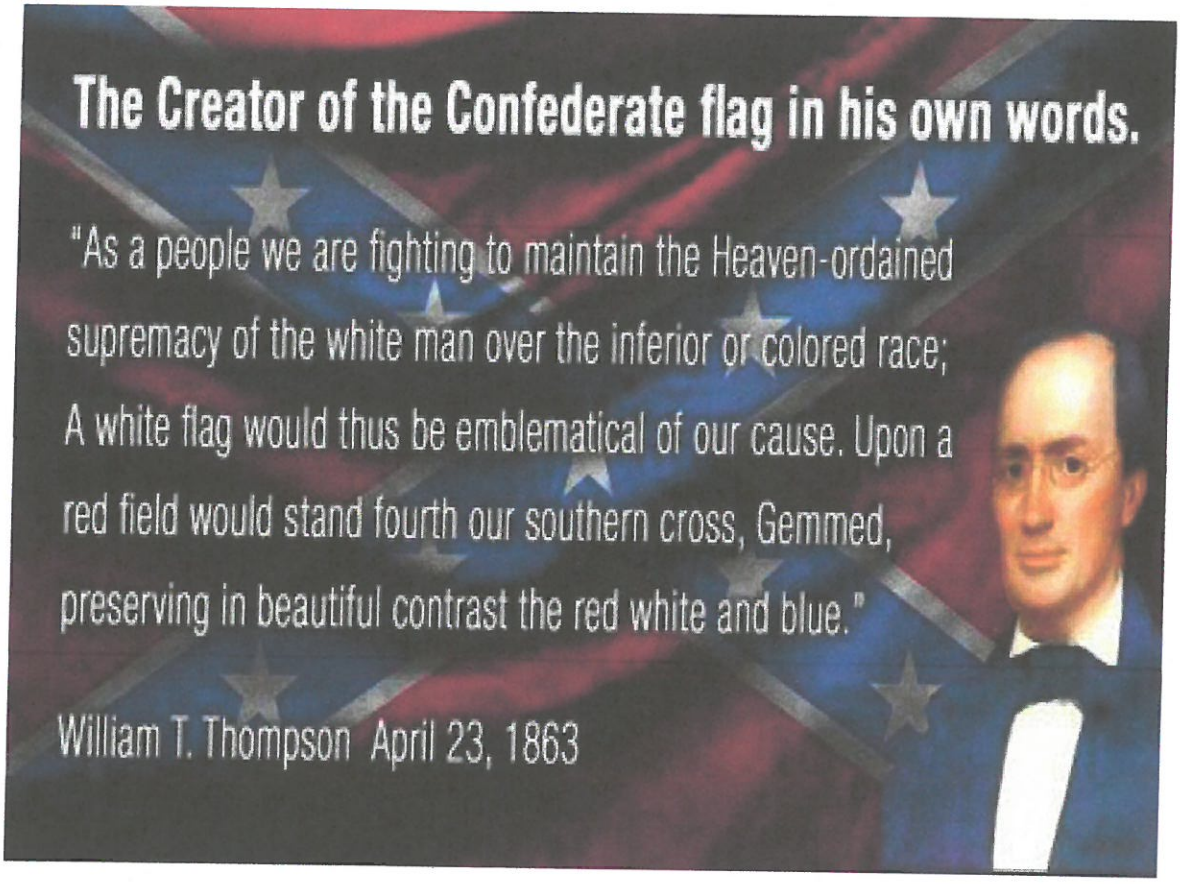
## CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, Applicants Roy L. Perry-Bey and Ronald M. Green, does not hold any corporate ownership interest in case.

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6. **TAKE JUDUCIAL NOTICE:** In general, Va. R. Sup. Ct. 5:1A provides that if their is a failure or "deficiency" to include a written statement of facts or argument section in the petition for appeal, from the trial court or other tribunal from which the appeal is taken, of this rule, a rule to show cause will issue pursuant to Rule 5:1A(iv). Exhibit(s) 9,10,19&28.

To the **HONORABLE JOHN G. ROBERTS, JR.**, Chief Justice of the United States Supreme Court and Chief Justice of the Supreme Court of Virginia:

## ARGUMENT

### I. THIS COURT SHOULD STAY THE MANDATE PENDING PERRY-BEY AND GREEN'S PETITION FOR CERTIORARI

Pursuant to 28 U.S.C. § 2101(f), 28 U.S.C. § 2112(f) and Rule 23 U.S. Supreme Court, Perry-Bey and Green applies to stay, or in the alternative, recall the mandate of the Supreme Court of Virginia pending the disposition of their forthcoming petition for a writ of certiorari. This case presents a question of exceptional importance concerning a party's right to have its case adjudicated according to the law and the unauthorized practice of law as it exists at the time its case is decided. On February 04, 2020, the Supreme Court of Virginia for the Fourth Judicial Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court while deciding or refusing to decide an important structural constitutional question implicating foundational concerns about the due process and equal protection assurances, as to call for an exercise of this Court's supervisory power. In Perry-Bey v. City of Norfolk, Record No. CL19-3928, the lower court arbitrarily or capriciously denied petitioners fundamental right to a fair or impartial trial and it severely undermined this Court's rulings as to the First and Fourteenth Amendments due process and equal protection provisions. A divided panel of the Supreme Court of Virginia Fourth Judicial Circuit, however, departing from this Court's longstanding precedent, declined to impartially apply the law to Perry-Bey and Green's appeal. Exhibit(s)19&28.

The majority held that "failure to raise an argument issue in the opening brief forfeits the challenge." This holding conflicts with this Court's established rules or cases recognizing that fundamental due process and equal protection guaranteed by the First and Fourteenth Amendments Due Process Clause warrant excusing ordinary waiver principles and instead recognize the significance of law should apply to pending appeals, regardless of waiver. At the very least, there is a reasonable likelihood that this Court will decide to hear the case and reaffirm these principles as they apply to the important due process and equal protection questions decided in Brown.

Granting a stay will allow this Court to consider these issues without further threatening Perry-Bey and Green's due process and equal protection rights. The underlying due process and equal protection at issue claim a federal and state action or enforcement of law which abridge the privileges or immunity of Perry-Bey and Green, without due process of law, or denied to them within its jurisdiction the equal protection of the laws; in depriving them of a fair trial and witnesses before an impartial tribunal that, as result of Perry-Bey and Green's deprivation of a fair or impartial trial, they have been harmed. Absent a stay, Perry-Bey and Green might continue lose these valuable rights before this Court has a chance to weigh in. By contrast, any harm to Norfolk and the Commonwealth of Virginia, from a stay of the court's mandate will be minimal at best. In addition to seeking a hearing en banc before the Supreme Court of Virginia, denied them; Perry-Bey and Green filed a notice of appeal to this Court and Emergency Stay in the Supreme Court of Virginia denied. Ex.18

## BACKGROUND

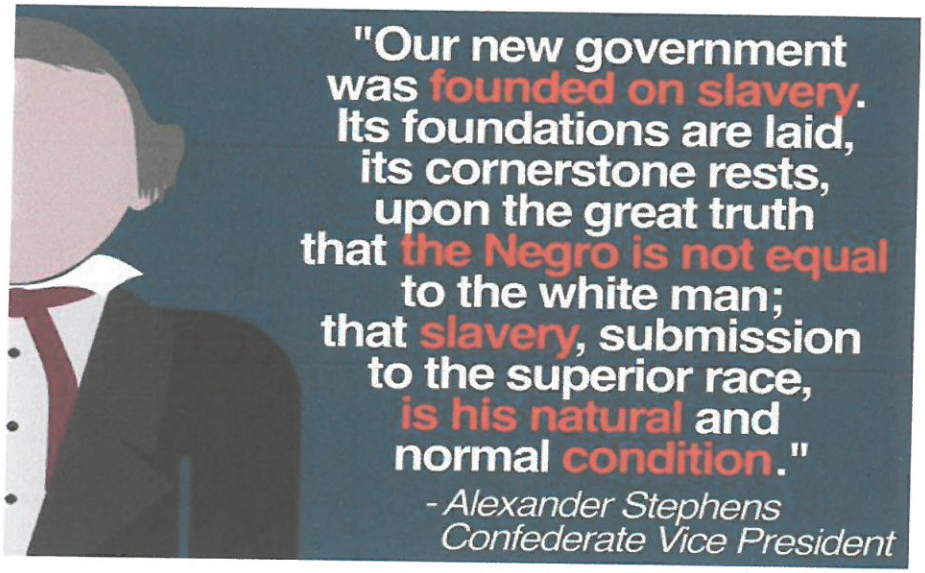
This petition concerns the lower tribunal's egregious abuse of discretion, refusing the said petition for appeal "and resting its descision on a clearly erronoeous finding of a material fact, or by missapprehending the law with respect to underlying issues in refusing to review the trial court's decisions" on May 31, 2019 and July 22, 2019, on the ground its denial of judgment was improper, and applicants notice of appeal complied with Rule 5:11(c)(2), that no additional transcript filed with the Court will be filed and no additional written notice of filing of transcripts was required and its notice of appeal served as notice of filing transcripts for the purpose of this Rule. Moreover, the lower court trial judge failed or refused to inquire into the City's actions or ascertain whether it was exceeding its corporate powers or to disqualify an attorney employee, defendant, client or fact witness from improper, unethical, illegal or prohibited appearances, violated Petitioners First and Fourteenth Amendment due process and equal protection rights to the U.S. Constitution, Article I § 12 of the Constitution of Virginia, and 42 U.S.C. § 1983. Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327 (1937). Ex.10 at pg.15,M,19,28.

### A. There Is a Reasonable Possibility That The Supreme Court Will Grant Certiorari

The trial judge has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Ex. 10,19,M&P.

**B. There Is a Fair Prospect That This Court Will Reverse the Fourth Judicial Circuit**

Petitioners challenge the court's refusal to exercise its inherent power, apart from statute or rule, to disqualify any attorney employees, defendants, clients, and fact witnesses violated Petitioners First and Fourteenth Amendments due process and equal protection rights to the United States Constitution, Article I § 12 of the Constitution of Virginia, and 42 U.S.C. § 1983. Perry-Bey v. City of Norfolk, **Record No. CL19-3928**. When the lower court in this case arbitrarily or capriciously denied petitioners' declaratory judgment and fundamental right to a fair trial it severely undermined this Court's rulings as to the First and Fourteenth Amendments due process and equal protection provisions. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985); See Hayden v. County of Nassau, 180 F. 3d 42, 48 (2d Cir. 1999). Exhibit(s)10&24.

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4. Thus, judges are required to "personally observe high standards of conduct" (Canon 1A/2A Rule 1.1) and maintain "the highest standards of judicial and personal conduct" and comply with the law (Preamble). Exhibit(s) 10&P

In so doing, the state court trial judge necessarily determined the government was likely to succeed on the merits, a petitioner satisfies the standard as here by demonstrating that reasonable jurists would find the court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the state court denies relief on procedural grounds, the prisoners must demonstrate both the dispositive procedural ruling was debatable, and the petition states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85. Accordingly, the record plainly demonstrates Perry-Bey and Green made the requisite showing. Despite this Court's rulings, The Supreme Court of Virginia affirmed the lower court's unlawful trial and judgment. The Supreme Court of Virginia did not even attempt to reconcile its prior decision in Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327 (1937). Ex. 10&P.

**C. Absent a Stay, Applicants Will Suffer Irreparable Harm**

Instead, the lower Court denied the petition contrary to Rule 5:11 (c)(2), and its Rule 5:17(c)5 procedure denial and refusal of the said petition is actually "pretextual" to uphold the lower court's improper or unlawful ruling on the merits, and its disregard or unconstitutional interpretation of the Court's 1937 prior ruling. The Court denied petitioners fundamental right to a fair trial and witnesses before an impartial tribunal, thus abandoning its own prior decision that it would be improper for an attorney employee of a corporation to assist the corporation in the unauthorized practice of law and consideration by the full court is therefore necessary to secure and maintain fundamental uniformity of the court's decisions. Exhibit(s) Q,S,9,10,12,19,21,28&M.

That conclusion effectively reads out of the Supreme Court of Virginia's 1937 ruling that it would be improper for an attorney employee of a corporation to assist the corporation in the unauthorized practice of law and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The government concedes Va. Code § 15.2-1812 (hereinafter "the Protection Statute"), which forbids the removal of war memorials does not apply to the City's Confederate monument and unlawfully restraines its free speech or an overbroad limitation on free speech. Moreover, Norfolk Circuit's July 22, 2019, decision on the merits in favor of the government proceeding without legal counsel or jurisdiction over the Respondents and denial of the Applicants' judgment as a matter of law, and its fundamental right to a fair or impartial trial was improper, illegal or renders it unconstitutional. Exhibit(s) 10,Q,S&T.

The Norfolk's City Council voted unamously to move the 80-foot Confederate flag monument in August 2017, in the wake of the deadly Unite The Right Rally in Charlottesville. The council said it wanted to move the statue from the downtown intersection of East Main Street and Commercial Place to Elmwood Cemetery it has not done, but only once it was clear the move would be legal. Exhibit(s) T.

This Court's immediate intervention is thus needed. The Virginia Supreme Court's decision which will take effect (February 04, 2020) the mandate has frustrated their First and Fourteenth Amendments due process and equal protection provisions this Court made clear years ago could. See Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

That is the antithesis of what the Court's February 04, 2020 mandate prescribed and what its order preserved. Exhibit(s) Q.

The Court should not permit its rulings to be frustrated in that fashion, and it should not allow the "equitable balance" it carefully struck. (Brown v. Board of Education (17 May 1954); Loving v. Virginia (12 Jun 1967) to be upset while the merits of the appeal are pending before it.

The Court can and should prevent further uncertainty and disruption by staying the court's erroneous mandate with respect to depriving Petitioners fundamental procedural due process and equal protection assurances. Ex.Q.

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5. This Court's Rule 23.3 provides that, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought" in the court below. On July 12, 2019, the petitioners objected to the proceedings, and moved the court for a stay pending opportunity to respond or appeal, **CL19-3928** VA, but on July 22, 2019, the lower court arbitrarily denied that motion pending appeal. At a minimum, this case presents "extraordinary circumstances." Sup. Ct. R. 23.3. Exhibit(s) 10,16,18,19,20,21,23,28,27,P,Q&S.

To be clear, the government's attempts to overcome Richmond Ass'n of Credit Man v. Bar Assoc's plain language are not persuasive. First, the lower court's decision is impermissible, unconstitutional or unlawful interpretation of the "unauthorized practice of law". Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327 (1937), that it would be improper for an attorney employee of a corporation to assist the corporation in the unauthorized practice of law that suffice to effectively exempt the government based on the Court's July 29, 2019 ruling, which are in absolute contradiction with the court prior ruling and established rules of professional conduct, harmful to the City of Norfolk, Virginia the Court and (the "City of Norfolk"), attorney-client privilege one of the oldest common law privileges sanctioned by the courts. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); In United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 579, 93 S. Ct. 2880, 2897, 37 L. Ed. 2d 796 (1973), the Supreme Court has indicated that prohibitions on conduct are sufficient constitutionally as long as they can be understood and complied with by "the ordinary person exercising ordinary common sense."

This is so because "[t]he wisdom of hindsight should be avoided' in applying the appropriate objectively reasonable standard of review." Gilmore, 259 Va. at 467 (quotation omitted)). See Flora, 262 Va. at 220 (citing Gilmore v. Finn, 259 Va. 448, 467 (2000)).

Petitioners complied with the requirements of Rule 5A:18 by making the appropriate motions and other requests for relevant judicial actions, arguments, and contemporaneous objections with reasonable certainty at trial and other proceedings in the Court. Ex. 10,21,22,23,24,25,28&P.

The requirements of Rule 5A:18 are applied in all cases including divorce matters. Lee v. Lee, 12 Va. App. 512, 514, 404 S.E.2d 736, 737 (1991). In Lee, the Court of Appeals affirmed the trial court's ruling in a divorce matter because the questions raised on appeal were not preserved for appellate review. Exhibit(s) 10&P.

On appeal, counsel for both parties agreed that it was their local practice not to object with specificity to a trial court's final decision in a divorce case. Local practice also provided that counsel would not include specific objections in the final order.

The Court of Appeals explained the Rules of the Supreme Court may not be disregarded based upon local practice or the agreement of counsel. "Economy, both of litigation costs and of judicial time, requires that we enforce Rule 5A:18 in all cases." Lee v. Lee, 394 S.E.2d 490, 491 (Va. Ct. App. Jun. 5, 1990), aff'd en banc Lee v. Lee, 12 Va. App. 512, 404 S.E.2d 736 (1991).

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6 Perry-Bey and Green additionally intends to challenge the Supreme Court of Virginia Fourth Judicial Circuit's failure to issue a show cause notice pursuant Rule 5:1A, its erroneous refusal of said petition and determination that failure to include an argument section in the petition for appeal forfeits appeal in its forthcoming petition for certiorari. Va. Sup. Ct. Rule 5:17(c)(5)Ex.7.

The purpose behind Rule 5A:18 "is to require that objections be promptly brought to the attention of the trial court as here with sufficient specificity that the alleged error can be dealt with and timely addressed and corrected when necessary." Brown v. Commonwealth, 8 Va. App. 126, 131, 380 S.E.2d 8, 10 (1989). "The purpose of this rule is to allow correction of an error if possible during the trial, thereby avoiding the necessity of mistrials and reversals". "To hold otherwise would invite parties to remain silent at trial, possibly resulting in the trial court committing needless error." Gardner v. Commonwealth, 3 Va. App. 418, 423, 350 S.E.2d 229, 232 (1986). "A perhaps more compelling reason for the rule is that it is unfair to the opposing party, who may have been able to offer an alternative to the objectionable ruling, but did not do so, believing there was no problem." Lee v. Lee, 394 S.E.2d at 491. Exhibit(s) 10&P.

In most cases, you can comply with the requirements of Rule 5A:18 by stating your objection as here at the time of the ruling; Petitioners stated their objection in a motion to strike; stated their objection in closing argument; stated their objection in a motion to reconsider; and included their objection in the final order. See Lee 12 Va. at 515-16, 404 S.E.2d at 738. However, objections to the admissibility of evidence was made when the City's evidence was presented. "A litigant may not, in a motion to strike [the evidence], raise for the first time a question of admissibility of evidence. Such motions deal with sufficiency rather than the admissibility of evidence. " Bitar V. Rahman, 272 Va. 130, 140, 630 S.E.2d 319, 325 (2006). Ex. 10&25.

The record reflects the trial court was clearly aware of Petitioners objections and had an opportunity to rule on them before the twenty-one day time period of Rule 1:1 expired. Exhibit(s) 10,21,22,25&P.

The Petitioners asserted the contemporaneous objection exception in Virginia Code § 8.01-384(A): "[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal." Va. Code Ann. § 8.01-384. If a litigant, through no fault of his own, does not have an opportunity to object to a ruling when it is made, it is not necessary to file a motion to reconsider to preserve an issue for appellate review. See Commonwealth v. Amos, 287 Va. 301, 306-307, 754 S.E.2d 304, 307 (2014). The trial court failed, refused or ignored Petitioners request for a timely ruling on their motions to preserve the issue for appeal. See Brandon v. Cox, 284 Va. 251, 255-256, 736 S.E.2d 695, 697 (2012). Exhibit(s) 10,21,22,23,24,25,26&P.

Petitioners asserted the ends of justice exception because an error at trial is clear, substantial and material, that a miscarriage of justice has occurred. Michaels v. Commonwealth, 32 Va. App. 601, 608, 529 S.E.2d 822, 826 (2000). The Petitioners' Objection was not waived because it was included in Assignments of Error. See Rule 5A:20(c); Fox v. Fox, 61, Va. App. 185, 202, 734 S.E.2d 662, 670 (2012). Exhibit(s) 10,15,17,24,25,26&P.

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5. Pursuant to Supreme Court Rule 23(2) and 28 U.S.C. § 2112(f), this Court may stay the mandate of the Fourth Judicial Circuit pending the disposition of Perry-Bey and Green's forthcoming petition for a writ of certiorari. In reviewing an application to stay the mandate, this Court considers whether there is "a reasonable probability that certiorari will be granted" and "a significant possibility that the judgment below will be reversed," as well as "a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). When these factors are present, the Court also balances "the equities," including "the relative harms to applicant and respondent, as well as the interests of the public at large." at 1304– 05 (citation omitted). This case satisfies each of these factors. First, this application presents a compelling case for certiorari. The Fourth Judicial Circuit issued an erroneous decision or refused to said petition on an indisputably important question of constitutional, statutory, federal and state law. Id.

**D. The Equities Favor a Stay**

The equities, too, weigh heavily in favor of a stay. This Court must "balance the equities" and "explore the relative harms to applicant and respondent, as well as the interests of the public at large." Barnes, 501 U.S. at 1305. But this balancing is "quite easy" where, as here, there is "no irreparable harm that granting the stay would produce." Id.

Petitioners therefore respectfully requests that the Court stay the Court's mandate affirming the lower court's decision, insofar as it deemed denial of judgment was proper and for an attorney employee, client, defendant and fact witnesses of a corporation to assist the corporation in the unauthorized practice of law. Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327(1937); sufficient to exempt the government based on the Court's improper February 04, 2020 ruling in violation of Va. Sup. Ct. Rule 5:1A. Ex. 10,11,13,15,S&M. Alternatively, the Court should construe this application as a petition for a writ of certiorari, grant a stay pending its disposition of the petition, and either hold the petition, summarily reverse, or consider the prohibited unauthorized practice of law question together with the underlying merits of the lower court's final judgment as a matter of fact and law. Whichever course the Court adopts, it should grant a temporary administrative stay while it considers this application. This is so because "[t]he wisdom of hindsight should be avoided' in applying the appropriate objectively reasonable standard of review." Gilmore, 259 Va. at 467 (quotation omitted)). See Flora, 262 Va. at 220 (citing Gilmore v. Finn, 259 Va. 448, 467 (2000)). Petitioners complied with the requirements of Rule 5A:18 by making the

appropriate motions and other requests for lawful judicial actions, arguments, and contemporaneous objections with reasonable certainty at trial and other proceedings in the Court. The requirements of Rule 5A:18 are applied in all cases including divorce matters. Lee v. Lee, 12 Va. App. 512, 514, 404 S.E.2d 736, 737 (1991). In Lee, the Court of Appeals affirmed the trial court's ruling in a divorce matter because the questions raised on appeal were not preserved for appellate review. Exhibit(s) 10&P.

On appeal, counsel for both parties agreed that it was their local practice not to object with specificity to a trial court's final decision in a divorce case. Local practice also provided that counsel would not include specific objections in the final order. The Court of Appeals explained the Rules of the Supreme Court may not be disregarded based upon local practice or the agreement of counsel. "Economy, both of litigation costs and of judicial time, requires that we enforce Rule 5A:18 in all cases." Lee v. Lee, 394 S.E.2d 490, 491 (Va. Ct. App. Jun. 5, 1990), aff'd en banc Lee v. Lee, 12 Va. App. 512, 404 S.E.2d 736 (1991). The purpose behind Rule 5A:18 " is to require that objections be promptly brought to the attention of the trial court as here with sufficient specificity that the alleged error can be dealt with and timely addressed and corrected when necessary." Brown v. Commonwealth, 8 Va. App. 126, 131, 380 S.E.2d 8, 10 (1989). "The purpose of this rule is to allow correction of an error if possible during the trial, thereby avoiding the necessity of mistrials and reversals". "To hold otherwise would invite parties to remain silent at trial, possibly resulting in the trial court committing needless error." Gardner v. Commonwealth, 3 Va. App. 418, 423, 350 S.E.2d 229, 232 (1986). Exhibit 10.

## STATEMENT

Three provisions of the Order are at issue in this litigation. Ignored it would be improper for an attorney employee, client, defendant and fact witness of a corporation to assist the corporation in the unauthorized practice of law in conflict with. Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327 (1937). The Petitioners complied with the requirements of Rule 5A:18 by making the appropriate motions, objections and other requests for relevant judicial actions, arguments, and contemporaneous objections with reasonable certainty at trial and other proceedings in the Court. Ex. 10,15,24,25,26&P. The Court committed procedural error when it failed to provide show cause notice in violation Va. Sup. Ct. R. 5:1A, or excusable neglect to cure any Rule 5:17(c)5 defect and pretextually denied the petition and thus, deferred to the lower court's disregard, unethical, improper or unconstitutionally sustaining demurrers and interpretation of Supreme Court of Virginia's 1937 prior ruling, was prejudicial, and fatally defective or jurisdictional. Ex. 10,13,11,20,P&Q.

3. Respondents in this case **(No. CL19-3928)** the City of Norfolk and Mark R. Herring, Attorney General for the Commonwealth of Virginia, concurred with the lower court's improper decision and unethical or unconstitutional interpretation of the "unauthorized practice of law. As here in the prohibition, illegal or unauthorized practice of law that impermissibly suffice to exempt the government and the Supreme Court of Virginia's egregious abuse of discretion and impermissible February 04, 2020, mandate should be stayed or recalled. Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327 (1937),

## INTRODUCTION

4. The Supreme Court of Virginia's February 04, 2020, ruling was improper or impermissible upholding Norfolk Circuit Court's July 22, 2019, unlawful decision that was prejudicial, improper, unethical, unconstitutional or which contravenes even this Court's Prohibition Against Practice Supreme Court Rule 7; and attorney-client privilege ruling one of the oldest common law privileges sanctioned by the courts and upends the equitable balance this Court struck. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Ex. 19.

5. The lower courts' unethical, impermissible conclusion that it would not be improper for an attorney employee, client, defendant and fact witness in the above referenced matter, on behalf of the City of Norfolk, due to its contractual commitment to assist or legally represent the government a municipal incorporation, essentially, in the unauthorized practice of law; unconstitutionally conflicts with its own holding. Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327 (1937). Exhibit(s) 10,11,15,17,20,25,26,P,S&M.

6. This Court can and should stay the Supreme Court of Virginia's mandate affirming the Court's improper, unlawful impermissible rulings with respect to the unethical decision on the merits and that it would not be improper for an attorney employee, defendant and fact witness of a corporation to assist the corporation in the unlawful unauthorized practice of law, pending this Court's disposition of the merits of the underlying appeal from the lower court's original arbitrary denial of the Petitioners' judgment. Lee v. Gentlemen's Club, Inc., 208 W. Va. 564, 568, 542 S.E.2d 78, 82 (2000) (citation omitted).Ex.24.

7. The trial court judge unlawfully sustained demurrers and permitted the City of Norfolk, filings, or pleadings tendered in bad faith and for delay in court, through its attorney employee Deputy City Attorney Adam D. Melita, where the City's attorney employees, defendants, clients and fact witnesses made repeated prohibited appearances thus, usurping the functions of an officer of the court, was such a conflict of interests or unethical preparation of legal instruments as to constitute illegally engaging in the unauthorized practice of law, in violation of the rules of professional conduct. Wichita Ass'n of Credit Men, Inc., 42 Kan. 403, 49 P.2d 1041.(1935). Exhibit(s) 10,11,20,21,22,S,P&Q.

8. The state court trial judge failed to exercise the Court's inherent power, apart from statute or rule, to inquire into the conduct of any person to determine whether that individual "is usurping the functions of an officer of the court and illegally engaging in the practice of law and to put an end to such unauthorized practice where found to exist. Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327, 335-36, 189 S.E. 153, 157 (1937). see also Blodinger v. Broker's Title, Inc., 224 Va. 201, 205, 294 S.E. 2d 876, 878 S.E. at 157) (citing Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. At 335, 189 S.E. at 157). Exhibit(s) 10,11,12,14,15,16,21,22,25,26,P,S&M.

9. Petitioners contend that Deputy City Attorney, Adam D. Melita, an attorney employee, defendant, client and fact witness, never received permission nor could have of the trial court or Supreme Court of Virginia to make prohibited appearances, file briefs, pleadings or other legal instruments that should have been refused and viewed in the context of a violation of Virginia law. Ex.10&11

10. The City's failure to a have a proper counsel of record's signature on briefs, pleadings or other legal instruments implicates the fundamental supervisory power of the Court over the practice of law in Virginia is governed by statute as supplemented by the Rules of the Supreme Court of Virginia." Brown v. Supreme Court, 359 F. Supp. 549, 553 (E.D. Va. 1973) aff'd 414 U.S. 1034 (1973) (mem.); see also Horne v. Bridwell, 193 Va. 381, 384, 68 S.E. 2d 535, 537 (1952). While the matter is addressed by rule and statute, this Court has the inherent power, apart from statute or rule, to inquire into the conduct of any person to determine whether that individual "is usurping the functions of an officer of the court and illegally engaging in the practice of law and to put an end to such practice where found to exists." Richmond Ass'n of Credit Man v. Bar Assoc., 167 Va. 327, 335-36,189 S.E. 153, 157 (1937). Independent of statute, it is contrary to public policy for a corporation to practice law, directly or indirectly. UPL Opinion 60 (1985). See Rule 3:7 Lawyer as witness.

20. Thus, while we recognize that "there is no jurisdictional requirement that a litigant file a brief, "Smith v. Transit Co., 206 Va. 951, 953, 147 S.E. 2d 110, 112 (1966), we are persuaded that under the dictate of our rules, together with that of Rule 1A:4 and Virginia's regulations governing the unauthorized practice of law in our courts, all respondents' filings or pleadings must be dismissed. see also Rule 8:8 and Rule 3:7.

## CONCLUSION

For the foregoing reasons, Perry-Bey and Green respectfully requests that the Court grant their Application to Stay or Recall the Supreme Court of Virginia Mandate until the Filing and Disposition of a Writ of Certiorari, direct that the mandate be recalled and stayed, pending the disposition of Perry-Bey and Green's petition for a writ of certiorari in these matters.

Respectfully submitted,

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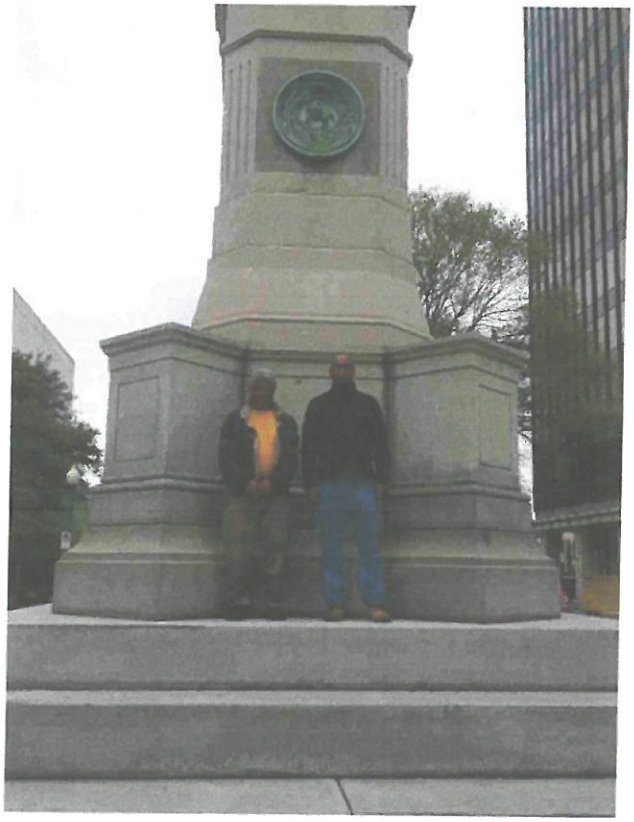
# APPENDIX

# APPENDIX CONTENTS



Supreme Court of Virginia. Richmond

# Richmond Ass'n v. Bar Ass'n

167 Va. 327 (Va. 1937) · 189 S.E. 153
Decided Jan 14, 1937

January 14, 1937

Present, All the Justices

1. ATTORNEY AND CLIENT — *Nature of Right to Practice Law.* — The right to practice law is in the nature of a franchise from the State, conferred only for merit.

2. ATTORNEY AND CLIENT — *Right to Practice — Corporation.* — The practice of law is not a lawful business for a corporation to engage in, since it cannot perform the conditions required by statute and the rules of the court.

3. ATTORNEY AND CLIENT — *Nature of Relation — Cannot Exist between Attorney for Corporation and Client Thereof.* — The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation.

4. ATTORNEY AND CLIENT — *Right to Practice — Corporation.* — Independent of statute, it is contrary to public policy for a corporation to practice law, directly or indirectly.

5. ATTORNEY AND CLIENT — *Admission — Police Power of State.* — Limiting the members of the bar to those who possess the necessary moral and educational requirements is for the protection of the public and within the State's police power.

6. ATTORNEY AND CLIENT — *Officer of Court — Power of Courts to Supervise Conduct.* — Since an attorney is an officer of the court, the latter possesses the inherent power to supervise his conduct, both in and out of court, to the point of reprimanding or even removing him from office for misconduct.

7. ATTORNEY AND CLIENT — *Inherent Power of Courts to Inquire into Illegal Practice — Necessity for Statutory Definition of Practice of Law.* — The courts have the inherent power, apart from statute, to inquire into the conduct of any person — whether an individual, a lay agency, or a corporation — to determine whether he or it is illegally engaging in the practice of law, and to put an end to such unauthorized practice, so that it is unimportant that section 3422 of the Code of 1936, prohibiting the practice of law by an unlicensed person
328 does not define "the practice of law." *328

8. ATTORNEY AND CLIENT — *Unauthorized Practice of Law — Collection Agency Employing Lawyers to Collect Accounts for Creditors — Case at Bar.* — In the instant case appellant solicited the business of collecting liquidated commercial accounts and when it needed the services of a lawyer selected him, made contact with him and employed him as agent for the creditor. Employment was by form letter in which the claim was sent to the attorney, the creditor not even knowing the attorney's name. Charges were fixed in

advance; all correspondence passed from the lawyer to appellant, as did remittances; appellant had the right to discharge the lawyer or supervise his conduct, and the total compensation paid was shared by the lawyer and appellant.

*Held:* That while technically the relation of attorney and client was established between the lawyer and the creditor, appellant was the real client and its business was that of supplying for a consideration to others the legal services of lawyers, and was the practice of law by an unlicensed lay agency, contrary to public policy and statute.

9. ATTORNEY AND CLIENT — *Officer of Court — Power of State Court to Inquire into Conduct in Federal Court.* — Since an attorney is an officer of a State court, the latter has jurisdiction to inquire into his conduct in a Federal court itself, and disbar him for misconduct committed in that tribunal.

10. ATTORNEY AND CLIENT — *Unauthorized Practice of Law — Jurisdiction of State Court to Ascertain Whether Domestic Corporation Engaged in Unauthorized Practice in Federal Courts — Case at Bar.* — In the instant case the lower court decreed that appellant, a Virginia corporation which solicited the collection of commercial, liquidated accounts and engaged attorneys, when necessary, to collect claims in the name of the creditor, was engaged in the unauthorized practice of law, but refused to make any finding as to whether the collection of similar claims in bankruptcy, in the same manner, constituted the unauthorized practice of law, on the ground that since the Federal courts had exclusive jurisdiction over bankruptcy cases, any interference by a State court would amount to interference by one sovereign power with the functions of another sovereign power.

*Held:* That since appellant was a Virginia corporation, the State courts had jurisdiction and power to inquire into its actions and ascertain whether it was exceeding its corporate powers and engaging in the unauthorized practice of law.

Appeal from a decree of the Law and Equity Court of the city of Richmond, Part Two. Hon. Frank T. Sutton, Jr., judge presiding. Decree for complainants. Defendant appeals.

329 *Modified and affirmed.* *329

The opinion states the case.

*Edwards Davenport* and *Alexander H. Sands,* for the appellant.

*Ralph T. Catterall* and *Henry C. Riely,* or the appellee.

*Gregory, Stewart Montgomery* (New York City), *William B. Layton* (Portland, Ore.) and *Alexander H. Sands* (Richmond, Va.), for the National Association of Credit Men, *amicus curiae.*

EGGLESTON, J., delivered the opinion of the court.

This is a suit in equity wherein The Bar Association of the City of Richmond and others ask for a declaratory judgment, under chapter 254A of the Code of Virginia (section 614oa et seq.), that the Richmond Association of Credit Men, Inc. (hereinafter referred to as the credit association), is engaged in the unauthorized practice of law. From a decree holding that it is so engaged the credit association has taken this appeal.

The material agreed facts are as follows:

The Richmond Association of Credit Men, Inc., is a non-stock corporation organized under the laws of Virginia, with its principle office in the city of Richmond. Among its members are some of the leading business men and firms of that city. It is expressly stipulated that "None of them desires to violate the law and all wish a declaration from the court instructing them what the law is."

The credit association, as part of its business, regularly engages in the collection of commercial, liquidated accounts. These it solicits from both its members and others.

It first undertakes to collect the claim by its own efforts, either through personal calls of an agent or by letters sent to the debtor. In case the debtor pays the claim to the credit association, the latter deducts for its services a
330 percentage of the amount collected and fixed at the rate adopted by the *330 Commercial Law League of America.

There is no contention that such collections constitute the unauthorized practice of law, and hence we may dismiss without further consideration transactions of this character.

When the collection of a claim is first undertaken, it is "understood that if the association is unable to collect the claim without suit it is authorized by the creditor to employ an attorney at law for the creditor to collect the claim by bringing suit on it in the name of the creditor."

If the debtor fails to pay upon demand of the credit association, the latter so notifies the creditor and obtains from him express authority to select and employ a lawyer to collect the claim. The credit association then selects a lawyer for such purpose, and, without necessarily disclosing his name to the creditor, forwards to the lawyer the claim attached to the following form letter:

"RICHMOND ASSOCIATION OF CREDIT MEN, INC. 305 Travelers Building Richmond, Virginia

"Date ..... "Amount ..... "In Re: ..... This claim is vs ..... sent to you because ..... of your listing in ..... The C-R-C Law List

"1. As agent for the creditor, we enclose the above claim for collection and remittance to our order, and you are to be governed by the following rates and conditions:

"RATES NET TO YOU — NO COLLECTION NO CHARGE

"9% on the first $500.00.

"6% on the next $500.00.

"3% on the excess of $1,000.00.

"$4.50 on claims between $15.00 and $50.00.

"30% on claims of $15.00 and under.

"SUIT FEE: $7.50 unless otherwise arranged; on claims under $30.00 you shall first deduct your commission
331 and then a fee for *331 suit, but in no case shall your suit fee together with commission, plus our share of commission, exceed 50% of the amount collected.

"2. Retention of this claim will signify your acceptance of our terms. If these terms are not satisfactory; if claim is worthless; if you represent debtor, or for any reason you cannot attend to it, kindly return claim immediately.

"3. Fees and disbursements due on one claim cannot be deducted from another. Any fees or costs unpaid we will endeavor to collect for you, but under no circumstances are WE to be held personally responsible therefor.

"4. Incur no expense unless you have written authority. Unauthorized compromises will not be recognized.

"5. If suit is necessary and advisable, state what papers required and actual disbursements to be advanced, which must be accounted for in the final settlement of the case. If you recommend suit, advise us fully regarding debtor's financial condition, how soon judgment could be obtained, and the ultimate prospects of judgment being satisfied.

"6. Failure to acknowledge receipt of claim, answer letters or follow instructions will constitute a breach of this contract and give us the liberty to place duplicate claim with other representatives without NOTICE and without payment of commissions or other charges. IN THIS EVENT WE WILL REPORT ALL FACTS TO YOUR RECOMMENDER.

"7. Our bank does not charge exchange; therefore send us your checks. DEDUCTIONS FOR EXCHANGE WILL NOT BE ALLOWED.

"8. INTEREST MUST BE COLLECTED ON NOTES AND ON OPEN ACCOUNTS WHEN POSSIBLE."

The lawyer acknowledges receipt of, and agrees to handle the claim on prescribed terms and conditions by filling in and returning to the credit association the following form:

"We have received the above-mentioned claim, which will be handled by us on the rates and conditions set
332 forth in your *332 forwarding schedule, unless other arrangements are subsequently agreed to by you.

"PLEASE NOTE OUR ANSWERS TO THE FOLLOWING INQUIRIES

"What are the prospects of collection? .....

"Is debtor financially responsible? .....

Own real estate? .....

"Do you advise suit? ... If so, see paragraph No. 5 above and advise fully. "....., 19 ...

vs.

"..... Amount $.....

"Richmond Assn. of Cr. Men, Inc., 305 Travelers Bldg., Richmond, Va.

"What would be the actual cost of suit? $.....

"All advancements to cover court costs will be accounted for by us.

"If collection cannot be enforced by suit, what are the chances of collecting by dunning?

..... .....

..... "Attorney."

If the lawyer collects the claim, either with or without suit, he deducts for his services the fee fixed by the schedule in the form letter, and remits the balance to the credit association. The latter deducts a fee for its services and remits the balance to the creditor.

If the claim cannot be collected without suit, the lawyer so notifies the credit association, and the latter in turn notifies the creditor. If the creditor desires suit brought, it so notifies the credit association, which transmits this information to the lawyer. All court costs are advanced by the creditor and transmitted to the lawyer through the credit association.

In all cases, whether collections are made by the lawyer with or without suit, the total compensation paid by the creditor to the lawyer and to the credit association, and the proportion thereof received by each, is in
333 accordance with the rates adopted by the *333 Commercial Law League of America, and have been previously agreed to by the creditor.

Where collections are handled through lawyers, the only compensation received by the credit association is a percentage of the amount collected by the lawyer, which percentage is the same whether suit be necessary or not.

If the collection is with suit the lawyer receives an additional sum, called a "suit fee," no part of which is shared by the credit association.

In most cases, there is no direct contact or correspondence between the lawyer and the creditor. All letters written by the lawyer in regard to the claim, and all legal opinions with reference thereto, are sent by him to the credit association and by it transmitted to the creditor. Likewise, all communications from the creditor, including his decision with respect to bringing suit, the compromising of claims, etc., are sent by the creditor to the credit association and by it transmitted to the lawyer. In some few instances the lawyer may correspond directly with the creditor.

On these agreed facts the lower court held and decreed that the credit association was "engaged in the unauthorized practice of the law in the following ways: In the solicitation of persons, firms or corporations, whether members of defendant association or not, to turn over to defendant the collection accounts or debts with the understanding that defendant will employ for the creditor an attorney to prosecute the claim in court if necessary to collect it; in employing for creditors attorneys at law to collect claims for them in court; in conducting the business of acting as agent or broker to bring about the relationship of attorney and client between persons wishing to have debts collected and attorneys wishing to receive compensation for collecting debts; in furnishing to others for compensation the legal services of attorneys at law."

There is no claim here that the credit association is licensed to practice law. Indeed, it concedes that it cannot practice directly, and cannot do so indirectly by employing attorneys to practice for it. It further concedes that a
334 lay agency, having on its pay *334 roll lawyers who perform legal services for its customers, for compensation paid into the treasury of such agency, is engaged in the unauthorized practice of law.

But it earnestly contends that it is not engaged in the practice of law, either directly or indirectly; that it merely acts as an intermediary in bringing together the creditor and the lawyer; that it establishes and maintains throughout the transaction the direct relation of attorney and client between the lawyer and the creditor; and that in performing the collection services the lawyer is acting for the creditor and not for it, the credit association.

The bar association, on its part, contends that the credit association is engaged in the business of conducting for profit and employment agency for lawyers; that it supplies to its customers, for a consideration, the legal services of attorneys selected by it; that it supervises and controls the conduct of such lawyers, and shares in the compensation which the creditors pay for the lawyers' services. The bar association further says that the credit association both renders, and holds out to the public that it will render, this service to its customers, and that such constitutes the unauthorized and unlawful practice of law.

In approaching the question here for decision we should bear in mind certain well-settled principles.

[1, 2] "The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the State, conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the supreme court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such,
335 and to suspension or removal. *335 It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. * * *

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client." *Re Co-Operative Law Co.,* 198 N.Y. 479, 92 N.E. 15, 16, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

Independent of statute, it is contrary to public policy for a corporation to practice law, directly or indirectly, Fletcher Cyclopedia Corporations (Perm. Ed.), volume 6, section 2524, page 251; *Re Co-Operative Law Co., supra; Meisel Company v. National Jewelers' Board of Trade,* 90 Misc. 19, 152 N.Y.S. 913, 916; *Midland Credit Adjustment Co. v. Donnelley,* 219 Ill. App. 271, 275.

Limiting the members of the bar to those who possess the necessary moral and educational requirements is for the protection of the public and within the State's police power. *Bryce v. Gillespie,* 160 Va. 137, 168 S.E. 653.

Since an attorney is an officer of the court, the latter possesses the inherent power to supervise his conduct, both in and out of court, to the point of reprimanding or even removing him from office for misconduct. *Norfolk Portsmouth Bar Ass'n v. Drewry,* 161 Va. 833, 836, 172 S.E. 282, and cases there cited.

It logically follows that the courts have the inherent power, apart from statute, to inquire into the conduct of any person — whether an individual, a lay agency, or a corporation — to determine whether he or it is usurping the
336 functions of an officer of the court and illegally engaging in the practice of law and to put an *336 end to such unauthorized practice where found to exist. *People v. People's Stock Yards State Bank,* 344 Ill. 462, 463, 176 N.E. 901, 906; *State ex rel. v. Perkins,* 138 Kan. 899, 28 P.2d 765, 768; *In re Morse,* 98 Vt. 85, 126 A. 550, 553, 36 A.L.R. 527.

It is, therefore, of no moment in the present discussion that Code, section 3422 (as amended by Acts 1922, chapter 389, section 1), which prohibits the practice of law by an unlicensed person, does not define "the practice of law."

The precise argument advanced here — that the courts have no power to reach the unauthorized practice of law in the absence of a legislative definition of the term — was rejected in *Depew v. Wichita Ass'n of Credit Men,* 142 Kan. 403, 49 P.2d 1041, 1043.

It might as well be argued that section 105 of the Virginia Constitution, and section 5975 of the Code, which provide that no judge of this State shall "practice law" while in office, are unenforceable because neither the Constitution nor the Code defines the phrase.

As was aptly said in *People v. Merchants' Protective Corp.,* 189 Cal. 531, 209 P. 363, 365: "The phrase `practicing law,' or its equivalent, `the practice of law,' has long had a sufficiently definite meaning throughout this country to be given a place in both constitutional and statutory law without further definition."

As we have seen, the credit association holds itself out to be in the business of collecting liquidated, commercial accounts. It solicits such business both from its members and others. When it needs the services of a lawyer to aid it in the collection of one of these accounts it selects, makes contact with, and employs him. This employment is consummated by the form letter in which the credit association sends the claim to the attorney, and by the latter's written acknowledgment of the claim whereby he agrees to the terms and conditions imposed on him.

Although the creditor gives to the credit association express authority to employ a lawyer, it does not appear
337 that at the *337 time of the employment the creditor — the supposed client — even knows the name of the attorney who has thus been selected and engaged to represent him.

While the letter on its face tells the lawyer that the credit association, "as agent for the creditor," is sending the claim to him, he is further told, in no uncertain terms, who is his master and who has control of the situation.

He is told in the letter that he has been selected not by his supposed client, the creditor, but by the credit association because his name is in the C-R-C List. He is next instructed that he is to be "governed" not by any agreement between him and his client, but "by the following rates and conditions" prescribed by the credit association.

He is further told that his charges have been fixed in advance in accordance with the schedule from which he may not deviate. He is informed that the schedule of rates are "net" to him. From this and the credit association's reference to "our share of the commission," he is advised, as he already knows, that the credit association is also making a charge to the creditor for his (the lawyer's) services in making the collection. In this connection it should be remembered that the creditor has previously been advised that the total amount of the collection charges of both the credit association and the lawyer will be governed by the rates of the Commercial Law League of America.

The lawyer is next informed that retention of the claim will signify his acceptance of the terms of the credit association, and if these are not satisfactory the claim should be returned. He is warned that failure to acknowledge receipt of the claim, or to answer letters, or to follow instructions "will constitute a breach of this contract and give us" (the credit association) the right to withdraw the claim.

In acknowledging receipt of the claim the lawyer agrees with the credit association, on the form prescribed by it, to handle the claim "on the rates and conditions set forth in your forwarding schedule, unless other
338 arrangements are subsequently agreed to by you." *338

The other agreed facts show that the lawyer is to have no contact with his supposed client, for all correspondence regarding the claim must pass from the lawyer to the credit association and thence to the creditor. Remittances for collections are made in the same manner.

Under this arrangement we think it is clear that the credit association employs and has the right to discharge the lawyer, supervises and controls his conduct, gives orders to and receives reports from him, fixes his compensation, and is the real master in the situation.

It is equally clear that the total compensation paid by the creditor for the lawyer's services is shared by him and the credit association, for the latter receives a commission when the lawyer is successful in making the collection, and is paid nothing if the lawyer's efforts fail.

But the credit association argues that it only acts as the agent for the creditor: that it creates the relation of attorney and client between the lawyer and the creditor, and maintains this throughout the transaction. This may be technically true, but the real and complete authority, the control and direction over the lawyer, is lodged in the credit association and not in his so-called client with whom he has no direct contract.

The credit association admits that it would have no right to employ on its payroll a staff of lawyers to engage in the business of prosecuting in the courts, for and in the name of the customers of the credit association, such claims as might be brought to it. The courts are unanimous in holding that this is the unauthorized practice of law.

In *re Maclub of America* (Mass.), 3 N.E.2d 272, 105 A.L.R. 1360, the highest court of Massachusetts recently condemned such as being the unauthorized practice of law. It pointed out that the lay agency and not the technical client dominated and controlled the services of the lawyer, and destroyed the confidential and fiduciary relationship which should exist between an attorney and his client.

And yet the technical relation of attorney and client might be created between the individual lawyer-employee
339 of the lay agency and the customer. The court docket would, in fact, show that *339 the customer was represented not by the agency, but by the lawyer, and this relation might obtain from the date of the institution of the suit until final judgment.

We thus see that the mere creation of the technical relation of attorney and client between the lawyer and the customer of the credit association is not controlling where the latter, in fact, directs and controls the services of the lawyer.

Therefore, despite the language in the contract that it is the "agent for the creditor," we are forced to the conclusion that by assuming and maintaining control over the services of the lawyer, the credit association has absorbed and destroyed the relation of direct personal confidence and responsibility which ought to exist between attorney and client.

In this connection we should recall that the 35th Cannon of Ethics of the American Bar Association and of the Virginia State Bar Association provides:

"The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries." Virginia State Bar Association Reports (1935), volume XLVII, page 350.

We have examined all the cases cited in the briefs and find, as counsel have frankly stated, that none is precisely in point. Other decisions dealing with the general subject are found in annotations in 73 A.L.R. 1327; 84 A.L.R. 749; 105 A.L.R. 1364.

Undoubtedly the present tendency of the courts is to restrict the field wherein lay agencies may legitimately conduct businesses of the type here under review. Whether this is due to a growing disposition of such agencies
340 to invade the prohibited territory of the practice of *340 law, or whether it is due to more diligent efforts on the part of the bar to bring to light instances of such invasion, heretofore unchallenged, we need not inquire. The result has been as we have stated.

The case which most nearly resembles the situation with which we are confronted is that of *In re Shoe Mfrs. Protective Ass'n* (Mass.), 295 Mass. 369, 3 N.E.2d 746, decided by the highest court of Massachusetts on September 11, 1936. While not precisely in point it has many of the aspects of the case at bar.

There, the protective association did a large business in the collection and adjustment of commercial accounts for goods sold. Its method of procedure was to seek payment of the debtor by letter, by personal interview, and threats of legal action. It was generally understood between the association and its customers that if these methods failed, the association would have the right to forward the claim to some attorney selected by it, but only after first obtaining the permission of the customer to do so. The attorney and the creditor seldom corresponded directly with each other. In many cases the supposed client never knew who his attorney was. Except for a small "suit fee" the attorney retained 60% of the collection charges and paid the association 40%. All remittances were made to the customer through the association. The association fixed the attorney's charges, imposed conditions upon him, and supervised the conduct of the transaction. Thus far, the business of that association was very similar to that of the credit association here.

It is true that the protective association went further and furnished legal advice to its customers, and prepared legal documents for them. But the court condemned the whole business of the protective association as the unauthorized practice of law. It not only condemned the giving of legal advice and the drawing of legal documents, but had this to say of its further activities:

"It has employed attorneys to carry on litigation who are in effect its agents and whose dealings are with it alone, thereby furnishing or selling legal services and destroying the relation of direct personal confidence and responsibility which ought to exist between attorney at law and client and attempting to assume that relation in
341 *341 its own corporate capacity. It has done all of these things habitually and as part of the business which it carries on for profit. And it is a necessary inference from the facts found that it has held itself out as being entitled to do these things. All of these acts involve the practice of law."

To put a stamp of approval on the business of the credit association here would permit the combination of this corporation and the lawyer selected by it to do, for their joint benefit, that which neither could legally do. The corporation could solicit accounts for the very purpose of turning them over to such lawyer for collection. This the lawyer himself is forbidden to do by Code, section 3424 (as amended by Acts 1932, chapter 129). The lawyer in turn could then institute and prosecute in the courts of this State the necessary suits to enforce the collection of these claims. This the corporation admits that it cannot do.

If such business is to be permitted, what is there to prevent a group of lawyers from organizing a corporation to solicit in its name accounts to be turned over to and collected by such lawyers through the courts of this State, provided the necessary suits are instituted in the names of the creditors?

If a lay agency may engage for compensation in the business of employing lawyers to collect liquidated debts for others, why could it not run an agency to supply lawyers to perform other legal services — that is, to prosecute suits for unliquidated tort claims, unliquidated contract claims, and other suits, so long as such suits are prosecuted by the lawyers in the names of the claimants as their technical clients?

Our view is, that while technically the relation of attorney and client is established between the lawyer and the creditor, in the final analysis the credit association is the master and real client, since it selects the lawyer, employs him, fixes his compensation and shares therein, prescribes the term of his employment, and controls and directs his actions, even to the point of discharging him if it sees fit. All of which it holds out to its
342 customers that it does and will do. In substance, we think, this is the business of supplying for *342 a consideration to others the legal services of lawyers, and is the practice of law by an unlicensed lay agency. Such is against the public policy of the State and violates Code, section 3422, as amended, as well.

The credit association also handles the collection of such commercial claims in bankruptcy. These it solicits and puts in the hands of lawyers selected, supervised, and controlled by it, in the same manner and to the same extent as the other collections of which we have spoken.

In such bankruptcy collections the creditor fills out and delivers to the credit association a proof of claim in which the latter "is hereby empowered to represent the said creditor in all matters relating to the said claim, in and out of court, and in the collection thereof." Such proof of claim is then delivered by the credit association to the attorney, who appears in the proceedings as counsel for the creditor. All of this is pursuant to agreement between the creditor and the credit association.

The lawyer deducts his charges from the amount collected and remits the balance to the credit association, which in turn deducts its charges and remits to the creditor. The total charges paid by the creditor, and the percentage thereof received by the credit association and the lawyer, respectively, is in accordance with the schedule of the Commercial Law League of America.

With respect to these matters the trial court was of the opinion that, since Congress has exclusive jurisdiction over cases in bankruptcy, "Any interference by a state court acting under a state statute with anyone engaged in the practice of law before a Federal tribunal would amount to an interference by one sovereign power with the functions of another sovereign power, each equal within its own sphere." It declined, therefore, to take jurisdiction of this phase of the case, and refused to make any finding as to whether or not such transactions, on the part of the credit association, constituted the unauthorized practice of law.

343 This action of the trial court is made subject of a cross-assignment of error by the bar association. *343

It will be observed that none of the activities of the credit association itself — the solicitation of the accounts, the selection and employment of the lawyer, the supervision and control of his conduct, and the fixing and sharing in of his compensation — take place in a Federal court.

If it is against the State's public policy for a corporation to conduct, in Virginia, an agency to furnish the legal services of lawyers in the State courts, is it not likewise against the public policy of the State for such corporation to be engaged, in this State, in the business of furnishing the legal services of lawyers in the Federal courts?

Can it be doubted that it is against the public policy of this State for a lawyer to solicit in his office or elsewhere, in Virginia, either directly or through a corporation, a damage suit to be brought in a Federal court?

The authorities are unanimous in holding that since an attorney is an officer of a State court, the latter has jurisdiction to inquire into his conduct in a Federal court itself, and disbar him for misconduct committed in that tribunal. 2 Ruling Case Law, page 1098, section 191; 6 C.J., page 583, section 38; *In re Lamb,* 105 App. Div. 462, 94, N.Y.S. 331, 340; *State ex rel. Hardin v. Grover,* 47 Wn. 39, 91 P. 564; *In re Simpson,* 9 N.D. 379, 83 N.W. 541, 553; *In re O___,* 73 Wis. 602, 42 N.W. 221, 226.

In *Norfolk Portsmouth Bar Ass'n v. Drewry, supra,* this court upheld the jurisdiction of the State court to discipline or disbar an attorney licensed in this State, for alleged misconduct committed in connection with proceedings in the United States District Court for the Eastern District of North Carolina.

Undoubtedly, therefore, in proceedings instituted for the purpose, this court would have jurisdiction to inquire into the conduct of the particular attorneys who are employed by the credit association to handle these claims in bankruptcy.

Likewise, since the credit association is a Virginia corporation, the State courts have jurisdiction and power to
344 inquire into its actions and ascertain whether it is exceeding its *344 corporate powers and engaging in that which is contrary to the public policy of this State.

There is no claim that Congress or the United States courts have given to this Virginia corporation the right to practice law in such tribunals, either directly or indirectly. Therefore, we see in the present situation no conflict of jurisdiction between the Federal and State courts.

This precise point of jurisdiction has been before the courts, so far as we have been able to find, in but two other cases, and in each instance the State court held that it had the jurisdiction to determine whether a corporation chartered by that State was engaged in the unauthorized practice of law in connection with the handling of claims in bankruptcy.

In *Depew v. Wichita Ass'n of Credit Men, supra,* the lower court held that it was without jurisdiction to determine matter. The Supreme Court reversed that part of the decree, saying ( 142 Kan. 403, 49 P.2d 1041, 1049); "We are of the opinion that the trial court did have jurisdiction in the matter of proceedings enumerated as taking place in bankruptcy proceedings in the Federal court, and could and should have made an appropriate conclusion which should have been to the effect that such acts on the part of the defendants as enumerated in finding No. 5 were the practice of law and such acts should therefore have been included in the injunction order."

The Supreme Court of the United States declined to review this decision of the Supreme Court of Kansas by denying a writ of *certiorari. Wichita Ass'n of Credit Men v. State ex rel. Beck,* 297 U.S. 710, 56 S. Ct. 574, 80 L. Ed. 997. While such action of the Supreme Court is not conclusive, it is, at least, highly persuasive that there was no substantial Federal question involved in the case.

In *Meisel Co. v. National Jewelers' Board of Trade,* 90 Misc. 19, 152 N.Y.S. 913 (affirmed without opinion, 173 App. Div. 889, 157 N YS. 1113), the jurisdiction of the State court was likewise upheld.

345 Our conclusion is that the trial court erred in declining *345 to take jurisdiction of these acts of the credit association in handling its collections in bankruptcy.

The decree of the lower court will be modified so as to include such acts of the credit association in handling its collections in bankruptcy, and as so modified will be affirmed.

346 *Modified and affirmed.* *346

Exhibits
Ex. P

NORFOLK CITY
PERRY-BEY, ROY L vs. CITY OF NORFOLK

Case No.:CL19003928-00

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| MOTION - TO STRICK DEFENDANTS' DEMURRER | 05/28/2019 | 472 - 474 |
| MOTION - FOR LEAVE OF COURT TO AMEND COMPLAINT | 05/28/2019 | 475 - 476 |
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| AFFIDAVIT - OF STEVEN J. BAGGARLY | 06/04/2019 | 730 - 730 |
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| AMENDED COMPLAINT - CORRECTION OF 1ST PAGE OF AMENEDED COMPLAINT | 06/10/2019 | 734 - 736 |
| NOTICE - OF APPEAL FOR MAY 31, 2019 ORDER | 06/10/2019 | 737 - 797 |
| OBJECTION - TO GREGORY D. UNDERWOOD COMMONWEALTH'S ATTORNEY MOTION TO QUASH | 06/17/2019 | 798 - 800 |
| OBJECTION - TO GREGORY D. UNDERWOOD COMMONWEALTH'S ATTORNEY MOTION TO QUASH | 06/17/2019 | 801 - 803 |

| | | |
|---|---|---|
| NOTICE - TAKE JUDICAIAL NOTICE IN SUPPORT OF AMENDED COMPLAINT | 06/20/2019 | 804 - 812 |
| DEMURRER AND SPECIAL PLEA - CITY OF NORFOLK | 06/21/2019 | 813 - 820 |
| MOTION - TO SUSPEND DISCOVERY | 06/21/2019 | 821 - 824 |
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| AFFIDAVIT - IN SUPPORT OF RONALD M. GREEN IN SUPPORT OF AMENDED COMPALINT | 06/24/2019 | 829 - 833 |
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| MOTION - DEFAULT JUDGMENT | 06/24/2019 | 839 - 840 |
| MOTION - FOR ENLARGEMENT OF TIME | 06/25/2019 | 841 - 844 |
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| NOTICE OF HEARING - JULY 15, 2019 | 06/26/2019 | 856 - 858 |
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| MOTION - FOR DEFAULT JUDGMENT | 07/03/2019 | 871 - 874 |
| OTHER - JUDGE NOTE | 07/03/2019 | 875 - 875 |
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| MOTION - ENLARGMENT OF TIME | 07/11/2019 | 879 - 882 |
| MOTION - OBJECTING TO PROCEEDING | 07/12/2019 | 883 - 889 |
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| FINAL ORDER - SUSTAINING DEMURRERS | 07/22/2019 | 894 - 904 |
| NOTICE - NOTICE APPEAL | 07/23/2019 | 905 - 943 |
| OTHER - LETTER TO COURT | 07/24/2019 | 944 - 953 |
| MOTION - TO CONSOLIDATINGAND JOINING APPEALS | 07/24/2019 | 954 - 957 |
| MOTION - AND OBJECTION TO COURT ORDER | 07/26/2019 | 958 - 961 |

I, George E. Schaefer, Clerk of the Norfolk City, certify that the contents of the record listed in the table of contents constitute the true and complete record, except for exhibits whose omission are noted in the table of contents, and are hereby transmitted to the Court of Appeals on October 18, 2019.

Exhibits

Ex. Q

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 4th day of February, 2020.*

Roy L. Perry-Bey, et al. Appellants,

against Record No. 191235
Circuit Court No. CL19-3928

City of Norfolk, et al. Appellees.

From the Circuit Court of the City of Norfolk

Finding that the appellants failed to include an argument section in the petition for appeal, the Court refuses the said petition filed in the above-styled case. Rule 5:17(c)(5).

Upon consideration whereof, the motions to dismiss filed on October 15, 2019, by appellee, City of Norfolk, and on October 17, 2019, by appellee, Mark R. Herring, etc., are denied.

The Court also denies the November 4, 2019 motion to strike filed by appellants.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: _____

Deputy Clerk

Exhibits

Ex. S

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

Roy Perry-Bey and Ronald Green
PLAINTIFF

v.

LAW NO: CL19-3928

City of Norfolk
DEFENDANT

ORDER

The matter comes before the Court on Plaintiffs' Motion for Leave to Amend. For good cause shown, the motion is GRANTED. The Amended Complaint, lodged with the Court on May 28, 2019, is ORDERED to be FILED. Deputy City Attorney Melita has confirmed his acceptance of service on behalf of all defendants other than Mr. Herring. Those defendants shall have 21 days in which to respond.

~~The Foregoing~~ Document Copy Teste:
George E. Schaefer, Clerk
Norfolk Circuit Court
BY Kecia C Smith
Kecia C Smith, Deputy Clerk
Authorized to sign on behalf
of George E. Schaefer, Clerk
Date: June 03, 2019

DATE: 3 June 2019

ENTER: Mary Jane Hall
Mary Jane Hall, Judge

R M Green

Adam Melita
City of Norfolk

Exhibits
Ex. 7

September 23, 2019

Roy L. Perry-Bey
89 Lincoln Street #1772
Hampton, VA 23669

Ronald M. Green
5540 Barnhollow Road
Norfolk, VA 23502

Re: *Roy L. Perry-Bey, et al. v. City of Norfolk*
Record No. 191235

Dear Mr. Perry-Bey and Mr. Green:

This will acknowledge receipt on September 18, 2019 of the above-styled petition for appeal, with a cover letter asking that the enclosed petition replace a former petition. On September 19, 2019, the Court received what you must have intended to file first and that petition was accompanied by a $50 money order. As the Court received the "second" petition first, that petition is what is being filed as your petition for appeal and will be considered by the Court. You must, however, provide six copies of this petition for appeal. *See* Rule 5:17(e).

Additionally, on the cover page of your petition, you identify the appellee as City of Norfolk, et al. The term "et al." means "and another" or "and others" and indicates that there is more than one appellee. You did not identify any appellees in your certificate.

You also failed to indicate whether you desire to state orally to a panel of this Court the reasons why the petition for appeal should be granted, and, if so, whether you wish to do so in person or by conference telephone call.

Accordingly, in addition to sending the six copies of the petition, please complete and return the enclosed form certificate to clarify the exact identity of the appellees in this appeal and provide your preference regarding oral argument. Please send a copy of the certificate to opposing counsel and confirm with this Court that this has been done. Thank you for your attention to these matters.

Sincerely,

Muriel-Theresa Pitney
Chief Deputy Clerk

MTP/ep
Enclosure
cc: Adam Daniel Melita, Esq. (w/o enclosure)

Exhibits

Ex. 8

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
SEP 30 2019
RICHMOND, VIRGINIA

**Required Certificate Pursuant to Rule 5:17(i)**

Appellant(s): Name(s): Roy L. Perry-Bey
Va. Bar No. _____
Address: 89 Lincoln St #1772
Hampton, VA 23669

Telephone: 917 941.3352
Fax: _____
Email css.unitone@gmail.com

Appellee: Name: _____

Counsel for Appellee:
Name: _____
Va. Bar No. _____
Address: _____

Telephone: _____
Fax: _____
Email _____

(Use the space below to identify any additional appellees and their attorneys using the above format. Please provide the address and telephone number for any appellee not represented by counsel)

Check one: ___X___ I wish to present oral argument in support of the petition and wish to do so in person.
_____ I wish to present oral argument in support of the petition and wish to do so by telephone.
_____ I do not wish to present oral argument in support of my petition.

(If word count is used): I hereby certify that this petition for appeal, including headings, footnotes and quotations contains _____ words.

I hereby certify that a copy of the petition for appeal has been mailed or delivered on the ____ day of _____, 20____, to all opposing counsel and all parties not represented by counsel.

_____
Signature

**Required Certificate Pursuant to Rule 5:17(i)**

Appellant(s): Name(s): RONALD M GREEN
Va. Bar No.
Address: 5540 BARNHOLLOW RD
NORFOLK, VA 23502

Telephone: 757 348 0436
Fax: 757 401 6314
Email ronaldpreppie@aol.com

Appellee: Name:

Counsel for Appellee:
Name:
Va. Bar No.
Address:

Telephone:
Fax:
Email

(Use the space below to identify any additional appellees and their attorneys using the above format. Please provide the address and telephone number for any appellee not represented by counsel)

Check one: X I wish to present oral argument in support of the petition and wish to do so in person.
____ I wish to present oral argument in support of the petition and wish to do so by telephone.
____ I do not wish to present oral argument in support of my petition.

(If word count is used): I hereby certify that this petition for appeal, including headings, footnotes and quotations contains _____ words.

I hereby certify that a copy of the petition for appeal has been mailed or delivered on the ____ day of _____, 20____, to all opposing counsel and all parties not represented by counsel.

R M Green
Signature

Exhibits
Ex. 9

# Va. R. Sup. Ct. 5:17

Rule 5:17 - Petition for Appeal

**(a)** *When the Petition Must be Filed.* Unless otherwise provided by rule or statute, in every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court within the following time periods:

**(1)** in the case of an appeal direct from a trial court, not more than 90 days after entry of the order appealed from; or

**(2)** in the case of an appeal from the Court of Appeals, within 30 days after entry of the judgment appealed from or a denial of a timely petition for rehearing.

**(b)** *Who Must Receive a Copy of the Petition.* When the petition for appeal is filed with the clerk of this Court, a copy of the petition shall be served on opposing counsel.

**(c)** *What the Petition Must Contain.* A petition for appeal must contain the following:

**(1)** Assignments of Error: Under a heading entitled "Assignments of Error," the petition shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below or the issue(s) on which the tribunal or court appealed from failed to rule - upon which the party intends to rely, or the specific existing case law that should be overturned, extended, modified, or reversed. An exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error. If the error relates to failure of the tribunal or court below to rule on any issue, error must be assigned to such failure to rule, providing an exact reference to the page(s) of the record where the issue was preserved in the tribunal below, and specifying the opportunity that was provided to the tribunal or court to rule on the issue(s).

**(i)** Effect of Failure to Assign Error. Only assignments of error assigned in the petition for appeal will be noticed by this Court. If the petition for appeal does not contain assignments of error, the petition shall be dismissed.

**(ii)** Nature of Assignments of Error in Appeals from the Court of Appeals. When appeal is taken from a judgment of the Court of Appeals, only assignments oferror relating to assignments of error presented in, and to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court. If the error relates to failure of the Court of Appeals to rule on any issue, error must be assigned to such failure to rule, providing an exact reference to the page(s) of the petition, briefs or record where the issue was preserved in that Court and, if applicable, the place(s) in the disposition by the Court of Appeals where it failed or refused to rule on such issue(s).

**(iii)** Insufficient Assignments of Error. An assignment of error that does not address the findings or rulings in the trial court or other tribunal from which an appeal is taken, or which merely states that the judgment or award is contrary to the law and the evidence, is not sufficient. An assignment of error in an appeal from the Court of Appeals to the

Supreme Court which recites that "the trial court erred" and specifies the errors in the trial court, will be sufficient so long as the Court of Appeals ruled upon the specific merits of the alleged trial court error and the error assigned in this Court is identical to that assigned in the Court of Appeals. If the assignments of error are insufficient, the petition for appeal shall be dismissed.

**(iv)** Effect of Failure to Use Separate Heading or Include Preservation Reference. If the petition for appeal contains assignments of error, but the assignments of error are not set forth under a separate heading as provided in subparagraph (c)( I) of this Rule, a rule to show cause will issue pursuant to Rule 5:1A. Ifthere is a deficiency in the reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken including, with respect to error assigned to failure of such tribunal to rule on an issue, an exact reference to the page(s) ofthe record where the issue was preserved in such tribunal, specifying the opportunity that was provided to the tribunal to rule on the issue(s) -a rule to show cause will issue pursuant to Rule 5:1A.

**(2)** Required Statements When the Appeal is from the Court of Appeals.
When appeal is taken from a judgment of the Court of Appeals in a case in which judgment is made final under Code § 17.1-410, the petition for appeal shall contain a statement setting forth in what respect the decision of the Court of Appeals involves the following:

**(i)** a substantial constitutional question as a determinative issue, or

**(ii)** matters of significant precedential value.
If the petition for appeal does not contain such a statement, the appeal will be dismissed.

**(3)** Table of Contents and Table of Authorities. A table of contents and table of authorities with cases alphabetically arranged. Citations of all authorities shall include the year thereof.

**(4)** Nature of the Case and Material Proceedings Below. A brief statement of the nature of the case and of the material proceedings in the trial court or commission in which the case originated. This statement shall omit references to any paper filed or action taken that does not relate to the assignments of error.

**(5)** Statement of Facts. A clear and concise statement of the facts that relate to the assignments of error, with references to the pages of the record, transcript, or written statement of facts. Any quotation from the record should be brief. When the facts are in dispute, the petition shall so state. The testimony of individual witnesses should not be summarized seriatim unless the facts are in dispute and such a summary is necessary to support the appellant's version of the facts.

**(6)** Authorities and Argument. With respect to each assignment of error, the standard of review and the argument - including principles of law and the authorities - shall be stated in one place and not scattered through the petition. At the option of counsel, the argument may be preceded by a short summary.

**(7)** Conclusion. A short conclusion stating the precise relief sought.

**(d)** *Filing Fee Required With the Petition.* When it is filed, the petition for appeal must be accompanied by a check or money order payable to the "Clerk of the Supreme Court of Virginia" for the amount required by statute. The clerk of this Court may file a petition for appeal that is not accompanied by such fee if the fee is received by the clerk within 10 days of the date the petition for appeal is filed. If the fee is not received within such time, the petition for appeal shall be dismissed.

**(e)** *Number of Copies to File.* Seven copies of the petition shall be filed with the clerk of this Court.

**(f)** *Length.* Except by leave of a Justice of this Court, a petition shall not exceed the longer of 35 pages or 6,125 words. The page or word limit does not include the cover page, table of contents, table of authorities, and certificate.

**(g)** *Use of a Single Petition in Separate Cases.* Whenever two or more cases were tried together in the court or commission below, one petition for appeal may be used to bring all such cases before this Court even though the cases were not consolidated below by formal order.

**(h)** *Procedure for an Anders appeal.* If counsel for appellant finds appellant's appeal to be without merit, counsel must comply with the requirements of Anders v. California, 386 U.S. 738 (1967), and Brown v. Warden of Virginia State Penitentiary, 238 Va. 551, 385 S.E.2d 587 (1989). In compliance therewith, counsel is required to file (1) a petition for appeal which refers to anything in the record which might arguably support the appeal and which demonstrates to this Court counsel's conscientious examination of the merits of the appeal; (2) a motion for leave to withdraw as counsel; and (3) a motion for an extension of time to allow the appellant to file a supplemental petition for appeal. The petition for appeal and the motion for leave to withdraw as counsel should specifically cite to Anders. All three pleadings must be served on opposing counsel and upon the client and must contain a certificate providing evidence of such service. This Court will rule upon the motion for extension of time upon its receipt, but will not rule on the motion to withdraw until this Court considers the case in its entirety, including any supplemental petition for appeal that may be filed.

**(i)** *What the Certificate Must Contain.* The appellant shall include within the petition for appeal a certificate stating:

**(1)** the names of all appellants and appellees, the name, Virginia State Bar number, mailing address, telephone number (including any applicable extension), facsimile number (if any), and e-mail address (if any) of counsel for each party, and the mailing address, telephone number (including any applicable extension), facsimile number (if any), and e-mail address (if any) of any party not represented by counsel;

**(2)** that a copy of the petition for appeal has been mailed or delivered on the date stated therein to all opposing counsel and all parties not represented by counsel;

**(3)** if a word count is used, the number of words (headings, footnotes, and quotations count towards the word limitation; the cover page, table of contents, table of authorities, and certificate do not count towards the word count);

**(4)** in a criminal case or habeas corpus appeal, a statement whether counsel for defendant has been appointed or privately retained; and

**(5)** whether the appellant desires to state orally to a panel of this Court the reasons why the petition for appeal should be granted, and, if so, whether in person or by conference telephone call.

**(j)** *Oral Argument.*

**(1)** Right to Oral Argument. The appellant shall be entitled to state orally, in person or by telephone conference call, to a panel of this Court the reasons why the petition for appeal should be granted. The appellee shall not be entitled to oral argument, whether in person or by telephone conference call. Any lawyer not licensed in Virginia who seeks to appear pro hac vice to present oral argument to the Court must comply with the requirements of Rule 1A:4.

**(2)** Waiver of Right to Oral Argument. The appellant may waive the right to oral argument on the petition for appeal before a panel by notifying the clerk of this Court and opposing counsel in writing, or by filing a reply brief.

**(3)** No Oral Argument on Pro Se Inmate's Petition. If an appellant is not represented by counsel and is incarcerated, the petition for appeal may be considered by this Court without oral argument.

**(4)** Notice of Oral Argument. If the appellant has requested oral argument, notice of the date and time of such argument shall be provided to counsel for the appellant or to any pro se appellant and to counsel for the appellee or any pro se appellee who has filed a Brief in Opposition or otherwise appeared in the appeal.

*Va. Sup. Ct. 5:17*

*Amended by order dated December 20, 2006; effective February 1, 2007; amended by order dated April 30, 2010, effective July 1, 2010; amended by Order dated March 1, 2011; effective May 2, 2011; amended by order dated Friday, May 16, 2014, effective immediately; amended by Order dated May 16, 2014, effective immediately; amended by order dated April 10, 2015, effective July 1, 2015; amended by order dated March 24, 2017, effective July 1, 2017; amended October 31, 2018, effective January 1, 2019.*

Exhibits
Ex. 10



VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

| | | |
|---|---|---|
| ROY L. PERRY-BEY and RONALD M. GREEN, Plaintiffs, | ) | AT LAW NO. |
| v. | ) | CL19-3928 |
| CITY OF NORFOLK, VIRGINIA, et al., Defendants. | ) | |

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

July 15, 2019

Before: THE HONORABLE MARY JANE HALL, Judge

Appearances:

The plaintiffs appearing pro se

OFFICE OF THE CITY ATTORNEY
By: ADAM D. MELITA, ESQUIRE
810 Union Street, Room 900
Norfolk, Virginia 23510
adam.melita@pwhd.com
Counsel for the Defendant the City of Norfolk

OFFICE OF THE ATTORNEY GENERAL
By: JACQUELINE C. HEDBLOM, ESQUIRE
202 North 9th Street
Richmond, Virginia 23219
jhedblom@oag.state.va.us

THE COURT: Good afternoon.

Okay. This is a motions hearing in the matter of Mr. Perry-Bey and Mr. Green versus the City of Norfolk, etcetera.

Mr. Green and Mr. Perry-Bey, good afternoon to you. They are seated at the table.

Mr. Melita I know.

And why don't you introduce yourself?

MS. HEDBLOM: Good afternoon, Your Honor. I'm Jacqueline Hedblom here on behalf of the Attorney General.

THE COURT: What is the last name?

MS. HEDBLOM: Hedblom, H-e-d-b-l-o-m.

THE COURT: All right. You're representing the Attorney General?

MS. HEDBLOM: Yes, Your Honor.

THE COURT: And, Mr. Melita, anybody else here on behalf of the city?

MR. MELITA: Nobody else in the case, Judge.

THE COURT: All right. Mr. Perry-Bey and Mr. Green, the Court has from the plaintiffs the following, and I'll just list them, request for a subpoena duces tecum June 4th, a motion for default judgment June 24th, motion for sanctions June 25th,

motion to strike all of the defendants' pleadings June 25th, motion for enlargement of time June 25th, motion for default judgment as to Mr. Herring July 3rd. Do you want to speak to all of these?

MR. PERRY-BEY: Yes, Your Honor. We have an oral motion to make, and that is to withdraw the notice of default against the Attorney General.

THE COURT: Okay. That's withdrawn.

There is -- there is kind of a cluster of things that you filed that all have to do with your position that Mr. Melita and the Norfolk City Attorney's Office ought not to be filing pleadings. Since they share a common theme, do you want to address that because --

MR. PERRY-BEY: Yes, I would.

THE COURT: -- I note that the Court has not disqualified the City Attorney, and unless and until the Court does disqualify -- I didn't see any basis in your motions for suggesting that everything that they filed should be considered a nullity and disregarded.

MR. PERRY-BEY: Yes, Your Honor, I would like to address that, if I may. May I come to the podium?

THE COURT: Wherever you're more

comfortable doing is fine. You can stay at the table if you like. You've got all your stuff there, but you're welcome to come to the podium.

MR. PERRY-BEY: Would you give this to the judge, please?

Thank you, Your Honor. May it please the Court, I renew my objection. The City Attorney's Office is conflicted on lack of standing to either represent the City's interest or in his own right Mr. Melita, an attorney, employee and defendant lacks authority as a matter of law to represent the city.

THE COURT: Why?

MR. PERRY-BEY: Well, basically because there is a conflict of interest. There is a basis of divided loyalty.

THE COURT: What's the conflict?

MR. PERRY-BEY: Well, the conflict is he is an employee and a defendant and an attorney. He is representing himself in this matter. The city is the client, so in representing himself in this matter he is acting as attorney/client, attorney/defendant and employee. That is an obvious conflict. Mr. Melita, an attorney, employee and defendant, is forbidden or prohibited to either -- represent himself as an attorney in his official capacity.

THE COURT: And what law are you relying on?

MR. PERRY-BEY: In 8.1 -- I'll go to the code of legal ethics. Bear with me, Your Honor. I have it in my file. I think the code I presented to Your Honor speaks very clearly. 8.01 talks about signing pleadings and what have you, and in General District Court as a general matter a corporation cannot appear without counsel, and of course you can file your motions, but your bill of particulars you have to do through counsel.

The legal ethics rule --

THE COURT: Mr. Melita is counsel.

MR. PERRY-BEY: Pardon me?

THE COURT: You're saying they don't have counsel. Mr. Melita is counsel unless the Court disqualifies him.

MR. PERRY-BEY: I'm saying -- I'm saying they don't have counsel. The city is not represented here by counsel. Mr. Melita cannot as a matter of law represent this case. He cannot act in a couple of capacities. He cannot act as attorney, employee, defendant, attorney for himself at the taxpayers' expenses. He cannot do that.

THE COURT: I'm going to interpret this

as your request of the Court to disqualify Mr. Melita. You keep -- you keep saying he can't have done any of these things, but until he is disqualified, I don't --

MR. PERRY-BEY: I think -- I think the rules say that the Court shall. It doesn't say it's discretionary. I'll give you the legal ethics, and, Your Honor, I'm pretty sure you'll follow them. I ask you to interpret this, but the legal ethics opinion Rule 1.7 makes it very clear that Mr. Melita cannot as a matter of law represent this matter. He cannot. Virginia Rules of Professional Conduct, Rule 1.7, Conflict of Interest -- can you please give this to the judge as well -- makes it very clear he cannot tender pleadings. He cannot. Mr. Pishko cannot. Ms. Heather cannot tender pleadings, motions, file anything in this court as defendant. I will -- as counsel. I will also --

THE COURT: One thing at a time.

MR. PERRY-BEY: Ma'am?

THE COURT: One thing at a time. All right. You've handed up Rule 1.7, Conflict of Interest.

MR. PERRY-BEY: Yes.

THE COURT: It reads a lawyer shall not represent a client if the representation of that

client will be directly adverse to another existing client.

MR. PERRY-BEY: Mr. Melita is an existing client. Mr. Melita is a client. Mr. Melita -- set aside the city for a minute, Your Honor, or City Council members. Mr. Melita cannot practice law for himself at the taxpayers' expense. Those pleadings also represent him in this case. He is acting as his own attorney and defendant, employee and counsel. I would think that's an apparent conflict.

THE COURT: Do you have the amended complaint that you filed?

MR. PERRY-BEY: Yes, I do, Your Honor.

THE COURT: If you've got that handy, can you get that in front of you?

MR. PERRY-BEY: Yes. Your Honor. I would also like to --

THE COURT: I've reviewed this carefully, and I haven't located an allegation in this complaint where you identify any wrongdoing by any person in the Norfolk City Attorney's Office that caused you or Mr. Green harm, so you did include their name in the style, but I'm looking for an actual complaint that they've done anything.

MR. PERRY-BEY: Well, you know, Your

Honor, we're not here to address the merits of the case. There is no facts in dispute. We're here to address the law. In our complaint as a matter of fact we do make reference to the defendants collectively, and that includes the Attorney General. I think we were very clear on that.

THE COURT: I'm just looking for you -- here is what I'm asking, Mr. Perry-Bey, the authority that you handed up I do not believe is relevant. I believe the only authority in the -- that would be relevant to Mr. Melita's qualification or disqualification is found in the Rules of Professional Responsibility, and it prohibits a lawyer from appearing in a case where he is likely to be a witness, Rule 3.7, Lawyer as Witness. I think that's the only arguably relevant provision of law. So the question is would Mr. Melita or Mr. Pishko or Ms. Mullen be a necessary witness, and from reading your complaint I can't conclude that they would be a necessary witness.

MR. PERRY-BEY: Your Honor, we -- as a matter of fact, you denied us our subpoenas to request Mr. Melita and Mr. Pishko as a necessary witness, that we filed an appeal with the Virginia Supreme Court. That issue right now is going up to the Supreme Court.

Mr. Melita -- we maintained from the outset of our filing that they were necessary witnesses and that their testimony was critical. Also I would refer --

THE COURT: I'm asking you what in the complaint that you've asked -- that you've asked for relief has -- is the subject about which those three individuals would be necessary witnesses.

MR. PERRY-BEY: With all -- with all due respect, Your Honor, we're not here to address the merits of the complaint.

THE COURT: Okay.

MR. PERRY-BEY: We're here to address the facts of law. With respect to the complaint, I will answer your question in the complaint since you inquired. In number 36 --

THE COURT: Paragraph 36?

MR. PERRY-BEY: Number 36 of the amended complaint, irreparable harm, due to the defendants' unlawful discrimination and disparate treatment of plaintiffs that they have suffered and will continue to suffer irreparable harm and their rights under 42 USC 1983, the First and Fourteen Amendment of the constitutional rights of citizens who reside in the State of Virginia and utilize machinery of the state and local government and the City Hall government

building, and I think from the face of the complaint that can infer exactly -- speak to the question that you're asking.

THE COURT: Okay. Due to the defendant's unlawful discrimination and disparate treatment, what conduct, what specific conduct is characterized here as unlawful discrimination?

MR. PERRY-BEY: Well, one, because the city has maintained defending succession and white supremacy at the expense of non white minorities, that is disparate treatment under 42 USC 1983.

THE COURT: And by maintaining you mean failure to remove the monument?

MR. PERRY-BEY: No, no, no.

THE COURT: But if they don't, what action have they breached?

MR. PERRY-BEY: I think I have addressed that before, Your Honor. I'll do so again. The monument is pretextural. We're talking about the content. The city has conceded that in public pronouncements that -- as government speech. They just won't go a step further and say we are engaged in private speech on behalf of the Confederacy, white supremacy. They refuse to say that even though they have conceded that fact. So they have made, like the

Attorney General, that we're just offended by the monument. Nothing could be further from the truth. We're offended by the content, the message that is directed at us as non whites that says you're other, you don't belong here and you're inferior.

THE COURT: But what is the conduct of Mr. Pishko or Mr. Melita or Ms. Mullen --

MR. PERRY-BEY: Well, the conduct --

THE COURT: -- that amounts to unlawful discrimination and disparate treatment?

MR. PERRY-BEY: They are and have advised the city that its conduct -- its content is legal while directing at us hate speech, while at the same time simultaneously, which is a total conflict, they have said that the monument prohibits them from controlling their message, and they walked in this court and cited Pleasant and asked for more time to stop doing that which is unconstitutional by saying we cannot utilize our own property and we cannot control our message. I would beg the Court to get beneath that conversation and say, well, if you can't control the message and you're promoting the message, then whose message are you promoting?

THE COURT: I don't understand.

MR. PERRY-BEY: Well, Your Honor, it's

really simple.

THE COURT: You're saying what they have not done. What they have not done is move the monument.

MR. PERRY-BEY: No, no.

THE COURT: What have they done?

MR. PERRY-BEY: Well, they're going to move the monument.

THE COURT: I think they are too. I agree with you.

MR. PERRY-BEY: So our issue is not the monument here. The basis of our case is that hate speech, private hate speech, the city cannot engage in private hate speech. It's a violation of the Establishment Clause under the First Amendment. They're clearly -- and the Attorney General is allowing that, has promoted that. I'm giving an example of the Attorney General's Office.

Now, Mr. Pishko has refused to release -- that we've asked for a FOIA request, Freedom of Information Act request, through a subpoena to provide us the correspondence from the Attorney General to him regarding war memorials. We have yet to see that. What they did is they provided it to the historic resources, Ms. Julie, who we had here a letter that

addressed an advisory opinion. We have yet to see what -- the content of that communication between Mr. Pishko and the Attorney General, and as a result of that Mr. Melita, who cannot represent this case, asked the Court to deny us Freedom of Information Act request information that would clearly speak to that issue, and that was one of the things we were greatly concerned about, why are they going to such extent to try to protect succession and white supremacy. Why are they doing that?

THE COURT: Because they haven't given you correspondence from Mr. Herring, from Attorney General Herring?

MR. PERRY-BEY: No. The correspondence, Your Honor, we don't know what that entails, but we do know the advisory opinion through the historic resource community, we all have seen that. It's in the records. We have yet to see what the Attorney General has actually said about this monument issue to Mr. Pishko, and I think it behooves the Court that we have to get to the bottom of that. We have been denied discovery under Freedom of Information Act information. What does the city have to hide?

Secondly, Mr. Melita cannot represent

himself, the city, Mr. Pishko or Ms. Heather, two additional attorneys at the City Attorney's Office. This was clearly avoidable, Your Honor. This is an unwaiveable egregious breach of his duty as an officer of the Court, Mr. Pishko and Ms. Heather. This conduct is egregious. It borders on criminal, if not criminal.

I also want to call the Court's attention to the transcript in this case of June 3rd.

THE COURT: I don't have that.

MR. PERRY-BEY: I will give it to you, Your Honor.

Can you give it to her?

In that transcript --

THE COURT: Do you have it, Mr. Melita?

MR. PERRY-BEY: We can make copies and come back to it, Your Honor, but I'll paraphrase.

THE COURT: Hang on. Hang on.

Okay. Do you want me to read the part that you've highlighted?

MR. PERRY-BEY: No. I'll paraphrase, Your Honor. On June 3rd during that hearing when Mr. Melita waived service, accepted service for the -- for the defendants, you began to question Mr. Melita about the defendants. You made it clear to Mr. Melita that

there were a number of city officials, attorneys and city employees, including, but not limited to, him as a defendant in this case. Mr. Melita was on notice -- disqualified or not, that he was on notice as a defendant in this case. Mr. Melita dodged subpoenas, intercepted subpoenas that were designated -- I had to meet with the Sheriff's Office and force them to reissue those subpoenas on these officers of the court. When Mr. Melita dodged the subpoenas, he suddenly came up and filed a demurrer thereafter but couldn't be found to be served a subpoena on himself, but he was found to be intercepting subpoenas on behalf of Mr. Pishko, Ms. Heather and others.

At the time also Mr. Melita stopped interfering with the subpoenas I cautioned the Sheriff's Office that this could constitute obstruction of justice and I intended to go to the U.S. Attorney's Office about this. In the subpoena to Mr. Bull, Richard A. Bull --

THE COURT: I have a response to that subpoena duces tecum. I don't see the other ones. Is that the one you're talking about?

MR. PERRY-BEY: All of them. Mr. Melita began to speak to interception when I had him

reserved, and Mr. Morken, who they have messed his name up, the Deputy City Attorney, then intercepted the subpoena for Mr. Richard A. Bull. Clearly --

THE COURT: When you say intercepted, tell me exactly what you mean.

MR. PERRY-BEY: Well, I mean, that's a lawful subpoena designated to Mr. Bull, not to Mr. Morken or anyone else. Just like Mr. Melita, we had to get him reserved and we finally got him served himself. They were intercepting these subpoenas, dodging the subpoenas, buying time to file a demurrer while intercepting lawful subpoenas designated to the particular individual city employee.

The conduct here in this case has been nothing short of nefarious and tortious interference with our access to the court, undermining our right of access to the court as officers of the court. I would urge the Court to either grant us our judgment by default or deny -- give us our order and note our appeal.

THE COURT: All right. Thank you, Mr. Perry-Bey.

Did you want to add anything to that, Mr. Green?

MR. PERRY-BEY: I will need my documents,

Your Honor.

THE COURT: Okay.

Mr. Green, did you -- are you -- I'm assuming everything he says is on your behalf.

MR. GREEN: I concur with Mr. Perry-Bey.

THE COURT: You share in his comments?

MR. GREEN: Yes.

THE COURT: Okay. Anything else you would like to add to that?

MR. PERRY-BEY: I have all my documents right here.

THE COURT: I'm pretty sure I gave you everything.

MR. PERRY-BEY: Yes, ma'am, you did.

THE COURT: Oh, no, here is one more.

MR. PERRY-BEY: I think those are the codes I gave you, Your Honor. I'm not sure. Thank you. Thank you, Your Honor.

THE COURT: All right. Thank you. I will hang onto these.

All right. As I -- as I indicated, in my judgment the only controlling authority respecting the qualification or disqualification of the City Attorney's Office is Rule 3.7, Lawyer as Witness, and that would require the City Attorney's Office to

withdraw if it was determined that they are likely to be a necessary witness. Given that, the defendants have all tendered defensive pleadings which if sustained would suggest that the claims the plaintiffs are asserting are not cognizable at all.

There has also been a request to suspend discovery until the Court addresses the legal issues. I think those are the appropriate actions for the Court to take. If following the Court's ruling on demurrer it does appear that there is something left for trial, we can address qualification or disqualification at that point in time, but at this moment in time I don't find any basis to concur or to conclude that the City Attorney's Office is disqualified, so for that reason I deny all of the various pleadings that are challenging Mr. Melita's documents or pleadings as a nullity, including the motion for default judgment, the motion to strike, the demurrer and the motion for sanctions. I don't find anything sanctionable about the pleadings that Mr. Melita has filed.

MR. PERRY-BEY: We have a motion to make, Your Honor.

THE COURT: All right. Well, let me hear from them on their motions. I have a demurrer

and a special plea from the City of Norfolk defendants. I have Mr. Melita's motion to suspend discovery, which I have already alluded to, I think is an appropriate motion, and I will -- I will suspend discovery until I've had an opportunity to fully address the defensive pleadings, and I have Attorney General Herring's special plea, motion to dismiss and demurrer. Between the two of you who wants to go first?

MR. MELITA: Judge, if I may, for the City of Norfolk, understanding that the motion to suspend discovery will be granted, I'll just proceed with the arguments that we're making in support of our demurrer to the complaint. I'm sorry, the amended complaint. That's the only thing before the Court. That was the one filed on I believe it was --

THE COURT: June 3rd.

MR. MELITA: It was filed on May 28th. We accepted service in court on June 3rd.

Judge, it's clear from the pleadings, it's clear from the presentation by the plaintiffs to the Court today that the issue that underlies all of their claims of unconstitutional behavior by the defendants are based on the message that is being projected by the Confederate monument. I'll put this

as bluntly as I can, and it's not intended to -- to diminish the plaintiffs' case. The moral suasion of their argument or otherwise impugn the purpose for which they're pursuing this relief, Your Honor, but the First Amendment simply does not protect these plaintiffs from what it is that they complain caused them injury. I'm specifically referring to the allegations in paragraph 23 and 28 of the amended complaint, and it's there that the plaintiffs have essentially inserted an additional preposition into the Freedom of Speech clause. We know that the First Amendment to the U.S. Constitution protects the freedom to speak, but it does not protect freedom from speech. It doesn't protect these plaintiffs or any person from being subjected to or hearing or otherwise receiving speech, but both of those paragraphs claim that plaintiffs are entitled to freedom of and from government endorsed -- government endorsed confederacy and further white supremacy. They claim that this is a fundamental right.

Judge, the law has not changed from the Pleasant Grove case in 2009, to the cases most recently decided during the 2013 to 2019 term of the U.S. Supreme Court. It's clear that the First Amendment only protects citizens' right to speech

against efforts by government to constrain, limit or in some cases even compel speech that they do not endorse. None of those things are alleged in this case. These plaintiffs make no allegation that there is something they wish to say, that there is something they wish to display that the City of Norfolk or any defendant is preventing them from doing. Instead what they complain of is that the City of Norfolk has and its Council members and the other natural persons who are defendants have maintained the monument, and I think it can be inferred that they have therefore maintained the expression of speech that visually is displayed by the monument.

The First Amendment does not prohibit that. As the Pleasant Grove case makes clear, monuments generally, and we believe this monument too, are considered government speech. Government speech is not constrained or limited by the First Amendment. The Court goes through considerable explanation as to why that is not the case, and then more recently, during the 2019 term, we believe that the Supreme Court's opinion in the American Legion versus American Humanist Association, a dispute over the memorial to the World War I dead in Bladensburg, Maryland that

takes the form of a Latin cross, maintains public right-of-way much like the City of Norfolk's Confederate monument. It's also not unconstitutional.

The claim in that case is not a First Amendment claim. Again, the First Amendment doesn't prohibit the government from putting up these sorts of monuments. The claim in that case was an Establishment Clause case because of the Christian nature of the symbol that was objected to by the plaintiffs in that case, but the result is the same, that this is government speech, that these monuments do contain messages. They are -- the messages mean different things to different people. A message that might offend one particular viewer might be comforting to another particular viewer, and so the principles that are recognized in the American Legion case are the same here.

To the extent this monument is government speech and to the extent there is one or more persons who are offended by it, it is equally likely that there are other people who are not offended by it, and all of this is to say that these are not constitutional claims. There is not -- certainly not a First Amendment claim. There is definitely no indication of an Establishment Clause claim under the

First Amendment.

The plaintiff offers the Fourteen Amendment as an additional refuge for their claim, but all we can find in the Fourteen Amendment are rights to due process, which apply when rights to life, liberty or property are being deprived. There is no allegation in this complaint that any of the plaintiffs' property -- that they've been deprived of their property or they've been deprived of their lives or that they've been deprived of their liberty, so there is no -- no due process claim here.

THE COURT: You didn't make the standing argument that the Attorney General made. Was that deliberate?

MR. MELITA: Judge, we didn't make the standing argument because we don't believe there is a claim here to have standing on. To the extent the Court thinks there is a claim here, we believe the facts will show that the plaintiffs don't have standing, but we don't believe the standing issue is even ripe when there is nothing that is dealing with a constitutional claim before the Court, and by nothing I mean to include the equal protection claim that is referred to, but, again, all the necessary elements of an equal protection claim, that these plaintiffs are

similarly situated to other people, that they're being treated in some sort of discriminatory way, that the purpose for they are treated is unlawful and otherwise discriminatory, all of that is missing from -- from this complaint.

And so what we really have in the end, Judge, is an allegation that there are particular plaintiffs -- that these particular plaintiffs don't like a message that they perceive in the Confederate monument and that they believe that the Freedom of Speech Clause in the First Amendment entitles them to be free of messages that offend them. It doesn't, and for that reason the claim should be dismissed. We would ask it be dismissed with prejudice. We've been at this for over three months. This is, I think, at least the third version of the complaint that these plaintiffs have endeavored to --

THE COURT: Can you address one other thing because he does allude to some of the Establishment Clause cases and government entanglement with religion, etcetera and characterizes white supremacy as -- as the religious message that's being expressed, and thinking about the cases involving displays of like a nativity by government or other religious displays by government, that is a bit of a

different analysis when -- when it's a religious thing and the government is getting involved, so do you want to respond to that?

MR. MELITA: Judge, all I can do in response to that is point out two things. I want to point out in the complaint that there is no representation of fact to make the connection between establishment of religion and white supremacy. It may be that there is something there that is not part of the common culture of the United States, that there is a religious component to that. I'm not aware of it. It is not described in the complaint, and so I would say -- the second point of my response, I would say looking at the American Legion case, the plaintiffs in that case worked very, very hard to describe why it was that the Latin cross in Bladensburg, Maryland was a representation of anti-Semitism and other offensive religious messages. The Court dispatched that argument after discussing and really disparaging the efforts that were made by the plaintiffs to make a stretch to make out a religious claim when it really wasn't there, and so if all of what was attempted in the American Legion case comes up short, then I think the absence of any connection between our particular monument and the establishment of religion in the

subject amended complaint should suffer the same fate.

THE COURT: Legislative immunity doesn't seem to be really presented by this version of the complaint.

MR. MELITA: Judge, we included that because we don't know if the complaint gets any further whether there is -- we fear that there will an inquiry into what the motives of the Council are behind their resolution, how it is that they interpret the words that they use in the resolution, that they only use the monument when it's clearly demonstrated that state law permits it. So at this point I agree with you, I don't think it's adequately pled in the complaint, but we don't want to waive that issue, and so I wanted to assert it in the responsive pleadings for fear that failure to do so would be a waiver.

THE COURT: All right. And then you haven't said anything about the 1983 claims specifically.

MR. MELITA: Judge, our position on the 1983 claims is that there is no claim independent of the constitutional claim. 1983 is merely a form of a remedy. It says what plaintiffs are entitled to. It includes some other damages, including reasonable attorney's fees, but we believe that the jurisprudence

of 42 USC 1983 is that it doesn't permit any cause of action that doesn't already exist in the Constitution for a bill of rights, so to the extent they have not claimed -- sorry, have not stated any valid claim under the First Amendment or the Fourteen Amendment, then there are no other claims under 1983 that would be available.

THE COURT: All right. Do you want to respond to each of those separately or do you want me to hear from Ms. Hedblom and then come back to you?

MR. PERRY-BEY: Thank you, Your Honor. First of all, Your Honor, we renew our objection to the proceeding with respect to the city. We also object to the Court's failure or refusal to address our enlargement of time should the Court allow the city to proceed. We ask --

THE COURT: I wrote you a letter about that and I didn't hear back from you.

MR. PERRY-BEY: I didn't get a letter to that. That's why -- well, the letter I did get says contact Ms. Wendy. I think it was very clear because the Attorney General had not responded so we filed for an enlargement of time to the Attorney General because we hadn't gotten their response. I just recently got it. We also made it very clear that we were asking

for an enlargement of time with respect to the city should the Court be so inclined to allow them to go forward, which it has done, and we think it's reversible error, so we ask for an oral motion before this Court renewing our objection and ask for a stay pending an appeal with respect to the Attorney General.

THE COURT: Okay. I do note your objection. I don't think there is anything that's been raised in this set of defensive pleadings that shouldn't have been anticipated based on the defensive pleadings that have been asserted to prior versions of the complaint, and that's -- as Mr. Melita mentioned, it's been going on since March and we haven't had an opportunity to analyze the merits so I'm going to proceed.

Now, Ms. Hedblom, on behalf of the City Attorney.

MS. HEDBLOM: Thank you, Your Honor. It is our position that there are really three overarching and independent bases for dismissal of this matter as to the Attorney General. To just briefly outline those, the first is immunity. The Attorney General has both sovereign and qualified immunity in this matter, and it's our position that

the case should be dismissed as to him on those grounds alone.

In addition, Your Honor, these plaintiffs do not have standing to even make the claims -- to bring the claims that they have asserted. As a threshold matter as to one of the plaintiffs, Mr. Perry-Bey, he is not a resident of the City of Norfolk, and as to both plaintiffs, there is no allegation of injury that is sufficient to give rise to standing in the claims, and finally, even if the --

THE COURT: You're assuming for the purpose of that argument that there are claims stated?

MS. HEDBLOM: Correct, for purposes only of the argument, Your Honor, because it's our position that even if they could establish standing, they have still failed to state claims upon which any relief could be granted. We think each of those, Your Honor, is a basis for dismissal in this case as to the Attorney General.

With respect to immunity, Your Honor, it is well established that a suit cannot be brought against the state or a state official pursuant to 42 United States Code Section 1983. Because the state has sovereign immunity, a state official acting in

his official capacity enjoys that same sovereign immunity. It is similarly well established that government officials performing their discretionary functions are shielded from liability provided that their conduct does not violate clearly established statutes or constitutional rights of which a reasonable person would have knowledge.

The sole basis for the plaintiffs' claims against Attorney General Mark Herring is the advisory opinion that the plaintiffs referred to in their complaint and is attached to their complaint. That advisory opinion was provided by the Attorney General in his official capacity and as such the Commonwealth would have sovereign immunity and Mr. Herring, the Attorney General, is also entitled to sovereign immunity, and, again, it is our position that the claims should be dismissed on that basis.

In addition to that, the Attorney General's act of issuing an advisory opinion is inherently discretionary. The Attorney General is required to make a judgment and use his discretion in answering the question posed to him when providing an advisory opinion, and, again, those are offered in his official capacity as the Attorney General.

As I mentioned, the plaintiffs cited and

attached the advisory opinion to their amended complaint, and even the opinion itself concludes by saying that this particular code section in question may or may not prohibit the relocation or removal of certain monuments, so there is no statutory or constitutional right which has been violated by the advisory opinion or could be alleged to have been violated by that opinion. So the Attorney General, Your Honor, is entitled to their qualified and sovereign immunity in this case and should be dismissed.

We believe that the inquiry should stop there, but in the interest of being comprehensive, in addition to those grounds, as I mentioned earlier, the Attorney General believes there are additional bases, and one of those is standing. Mr. Perry-Bey acknowledges in the complaint that he is a resident and registered voter in Newport News. The monument and the expressions that he claims are presented by the monument is located -- the monument itself is located in the City of Norfolk. Mr. Perry-Bey and the plaintiffs in the complaint have stated only that they have to come into direct and unwelcome contact with the monument and it is offensive to them. Standing requires either residency

or specific evidence of a particularized injury, and, again, it is our position, much like that of the City Attorney, that no claims have been properly alleged here that would give rise to a cause of action, but even when you look at the claims that they have made, they do not provide evidence of a particularized injury. So as to Mr. Perry-Bey, Your Honor, we think his claim should be dismissed because he does not have standing to proceed.

As to both plaintiffs, the Supreme Court of the United States has held that offense alone, being offended alone, does not qualify as a concrete and particularized injury. Simply citing a public injury or advancing a public right does not confer standing on a complainant, so the plaintiffs must have suffered a particularized injury that is actual or imminent and there has to be a causal connection between the injury and the conduct for which the defendant is alleged to be liable.

And finally, Your Honor, it has to be likely that the injury will be remedied by a favorable decision. So not only has no concrete or particularized injury been alleged here, but if the injury is the existence and the offensive nature of the monument, there is no causal connection between

the alleged conduct of the Attorney General in providing an advisory opinion and the injury that is purported to have been alleged. The Attorney General didn't authorize the monument, nor has he done anything to require the monument to stay where it is. There simply is no causal connection between the Attorney General and the purported injury that plaintiffs are attempting to complain of.

So as a result, Your Honor, there is no basis for a claim or cause of action against the Attorney General and we would ask the Court dismiss the case as to the Attorney General Mark Herring.

THE COURT: All right. Thank you, Ms. Hedblom.

Do you want to respond to that, Mr. Perry-Bey? What did the Attorney General do that caused injury to you and Mr. Green?

MR. PERRY-BEY: Your Honor, once again we will renew our objection. The Court has failed and refused to address our motion to amend the capacity of the Attorney General to the individual capacity. The Court has failed and refused to address our motion for enlargement of time to respond to the Attorney General, similar to the city. With that being said, Your Honor, note our appeal.

THE COURT: Those weren't noticed for today.

MR. PERRY-BEY: Yes -- yes, they are, Your Honor. We filed those, Your Honor, and so note our appeal, Your Honor. We have nothing further to say.

THE COURT: For the record, those -- those motions were not noticed for today.

Anybody else have anything to say? I'm going to take these motions under advisement and I'll let you hear from me. I'm planning -- planning to get this out within a week.

Anything else?

All right. Thank you-all. Appreciate you being here.

MR. MELITA: Thank you, Your Honor.

(The proceedings were concluded at 2:47 p.m.)

COURT REPORTER'S CERTIFICATE

I, Tracy B. Marinelli, a Registered Professional Reporter, certify that I recorded verbatim by stenotype the proceedings in the above-captioned cause before the Honorable MARY JANE HALL, Judge of said Court, Norfolk, Virginia on July 15, 2019.

I further certify that to the best of my ability, knowledge and belief, the foregoing transcript constitutes a true and correct transcript of the said proceedings.

Given under my hand this 24th day of March, 2020 at Norfolk, Virginia.

Tracy B. Marinelli

Tracy B. Marinelli, RPR

Notary Registration No. 212131

Exhibits

Ex. 11

# NORFOLK

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May 17, 2019

**VIA HAND-DELIVERY**

Hon. George E. Schaefer, Clerk of Court
Norfolk Circuit Court, Civil Division
150 St. Paul's Boulevard
Norfolk, VA 23510

**Re: Roy Perry-Bey, et al. v. City of Norfolk**
**Case No.: CL19-3928**

Dear Mr. Schaefer:

Please find enclosed a DEMURRER, which I ask to be filed with the papers of the above-mentioned case.

Thank you for your attention to this matter.

Respectfully Submitted,

Adam D. Melita
Deputy City Attorney

ADM:lsb
Enclosure

cc: Roy Perry-Bey, *pro se*
Ronald M. Green, *pro se*

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**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK**

| | | |
|---|---|---|
| ROY PERRY-BEY<br>and<br>RONALD M. GREEN<br>Plaintiffs,<br><br>v.<br><br>CITY OF NORFOLK, et al.<br>Defendant. | : | CASE NO: CL19003928 |

**DEMURRER**

Comes now the defendant, City of Norfolk (hereinafter "City"), by counsel, and says that this Court should not take any further cognizance of the allegations set forth by the plaintiffs in this case by reason of the following demurrer:

1. By this action, the plaintiffs seek two remedies, summarized as follows:

   (a) A declaratory judgment that the display of the Confederate monument (hereinafter "Monument") located at Commercial Place in the City of Norfolk is unconstitutional; and

   (b) An injunction compelling the City to remove or relocate the Monument.

   (Compl. p. 10).

**Lack of Subject Matter Jurisdiction**

2. The only cause of action stated in the complaint is the claim that the plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution are violated because the City has failed to move or remove the Monument. (Compl., opening para. & ¶¶ 29, 35-37).

3. The plaintiffs seek to bring this matter within the subject matter jurisdiction of this Court by alleging a justiciable controversy under the Declaratory Judgment Act. (Compl., opening para. & p. 10 at ¶ B).

4. The controversy that is alleged to be justiciable is that the Monument is a display of secession and white supremacy. (Compl. ¶¶ 5-6). It is also alleged to constitute a subsidy of segregation, religious bigotry, and "hate speech." (Compl. ¶ 29). Repeatedly, the plaintiffs use a shorthand moniker of "Display" to identify the Monument that is the subject of their complaint. (Compl. ¶¶ 30-37 & at p. 10 at ¶¶ B, C)). In short, the plaintiffs complain that the Monument displays a message or messages and, thus, constitutes speech by the City.

5. The plaintiffs' allegations regarding the nature of the Monument is consistent with its legal status as an instrument for government speech:

> "Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. ...[A] monument that is commissioned and financed by a government body for placement on public land constitutes government speech."

*Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009). It makes no difference if the monument was funded by the government or erected using private funds and accepted by the government. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470-71 (2009) ("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.").

6. The plaintiffs have no First Amendment right to challenge the Monument's presence based on any message or messages it conveys, since the Free Speech Clause does not regulate government speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (a government "is entitled to say what it wishes.").

7. The plaintiffs have no Fourteenth Amendment right to challenge the Monument's presence based on any message or messages it conveys, since the Due Process and Equal Protection clauses also do not apply to government speech. *See, e.g., Matal v. Tam*, —U.S.—, 137 S. Ct. 1744, 1757 (2017) (observing, in response to a First Amendment Challenge, that "imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.").

8. The plaintiffs allege no and have no property interest that is impaired by the presence of the Monument. The U.S. Supreme Court has defined the types of rights that are protected by the Due Process clause this way:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be

> arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

Nothing about the display of the Monument is alleged to deprive the plaintiffs of any their property rights. Therefore, the Due Process clause does not apply.[1]

9. Because the nature of the injury alleged in the complaint results from a form of government speech and because such speech is not subject to constitutional challenge under either the First or Fourteenth Amendments, the complaint fails to state a justiciable controversy and must be dismissed for lack of subject matter jurisdiction under the Declaratory Judgment Act.

**Separation of Powers**

10. The Norfolk City Council is the legislative body of the City of Norfolk, empowered "to exercise all of the powers conferred upon the city." *See* Norfolk City Charter §§ 4, 12, 14.1.

11. Article III § 1 of the Virginia Constitution mandates that "[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others...."

12. By resolution dated August 22, 2017 (Res. No. 1,678), the City Council has expressed its desire to relocate the Monument "as soon as the governing state law clearly

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[1] Because nothing in the complaint suggests that either plaintiff is deceased, incarcerated, or institutionalized, it does not make out any claim that someone's life or liberty was taken away as a result of leaving the Monument in its current location. Of the three civil rights protected by the Due Process clause, the complaint only infers that the Monument works a deprivation of property, alleging that one of them has given up a residence in Norfolk, (Compl. ¶ 20), and both of them have suffered from "the illegal use of the Display and the public property on which it is placed...," (Compl. ¶ 22).

permits it." (Compl., Ex. pp.7-8). Plainly, it did not authorize or direct the City to remove the Monument immediately following adoption of the resolution.[2]

13. The plaintiffs have alleged no facts to show, or even infer, that the City Council believes that, at the time of filing this suit, the governing state law clearly permits the relocation of the Monument.

14. Because the relief requested in this suit necessitates that this Court find that the City Council has directed the City to remove the Monument, it also necessitates—as a prerequisite—that this Court find that both (i) the governing state law clearly permits it, and (ii) the City Council believes that the governing state law clearly permits it.

15. To survive a demurrer asserting a lack of any justiciable interest, a plaintiff must allege facts demonstrating an actual controversy between the plaintiff and the defendant such that the plaintiff's rights will be affected by the outcome of the case. *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors*, 285 Va. 87, 98 (2013).

16. Neither plaintiff has alleged that this Court's determination of whether the law governing the relocation of the Monument clearly permits it will affect their rights, wherefore subject matter jurisdiction under the Declaratory Judgment Act is lacking.

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[2] The resolution adopted August 22, 2017 is not an ordinance and, as such, does not have the force of law. Whereas an ordinance is generally understood to be a local law of a municipal corporation, *see* McQuillin, *Municipal Corporations* § 15:1 (3d ed. 2013), a resolution "is usually a mere declaration with respect to future purpose or proceedings...," *id.* at § 15:2. Because the Resolution does not have the force of law like an ordinance would have, it does not constitute any sort of authorization, direction, or other legal enactment to cause City forces to commence and complete relocating the Monument.

17. Neither plaintiff has alleged that this Court's determination of whether the City Council believes that the law governing the relocation of the Monument clearly permits it will affect their rights, wherefore subject matter jurisdiction under the Declaratory Judgment Act is lacking.

18. For the injury to the plaintiffs' rights that they allege is caused by the ongoing presence of the Monument at its current location to be remedied, this Court must do what the City Council has not yet done—order its immediate relocation or removal. Such a directive can only be accomplished by a legislative act and, as a result, can only come from the City's governing body, the Norfolk City Council. *See* Norfolk City Charter § 4.

19. Based on the doctrine of separation of powers, this Court cannot order the relocation or removal of the Monument because the judicial branch has no power to compel the City to perform a legislative function. *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 221, 409 S.E.2d 136, 137–38 (1991) (doctrine of separation of powers "prevents one branch from engaging in the functions of another, such as the judicial branch performing a legislative function....").

20. As a result, this Court cannot grant the plaintiffs' request for an order commanding the City to relocate or remove the Monument when, as shown by the resolution of August 22, 2017, the City Council has not yet directed such removal. Because the only relief requested in this suit cannot be granted without violating the doctrine of separation of powers, this matter must be dismissed.

**Lack of Personal Jurisdiction**

21. The named defendant "Norfolk City Attorney's Office" is not a "person" under Virginia law. *See* Va. Code Ann. § 1-230 (defining "Person").

22. The plaintiffs allege that the Norfolk City Attorney's Office is a "governmental entity," (Compl. ¶ 17), which allegation constitutes a conclusion of law. A demurrer does not admit the correctness of the pleader's conclusions of law. *Fox v. Custis*, 236 Va. 69, 69 (1988).

23. Plainly, the Norfolk City Attorney's Office is no sort of legal "entity," and certainly not a "governmental entity." *See* ENTITY, Black's Law Dictionary (10th ed. 2014).[3]

24. Because it is not a legal entity, the City Attorney's Office is not capable of being sued. *Young v. City of Norfolk*, 62 Va. Cir. 307, 310 (Norfolk Cir. Ct. 2003) (dismissing all counts against the Norfolk City Attorney's Office on the grounds that it was not a separate legal entity with the capacity to sue or be sued); *see also Zaboth v. Beall*, 26 Va. Cir. 269, 269-70 (Fairfax County Cir. Ct. 1992) (holding that an estate could not be the named defendant because it was neither a natural nor an artificial person and, therefore, had no capacity to be sued); *Hervey v. Estes*, 65 F.3d 784, 791–92 (9th Cir. 1995), *as amended on denial of reh'g* (Dec. 5, 1995) (holding that the Tahoma Narcotics Enforcement Team, consisting of Tacoma Police Department, the Sumner Police Department, the Pierce County Sheriff's Office, the Pierce County Prosecutor's Office and

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3 "ENTITY" is defined as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners." A "public entity" is [a] governmental entity, such as a state government or one of its political subdivisions."

the Washington State Patrol, is neither a person nor an entity subject to being sued under federal civil rights laws); *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992) (holding that a sheriff's department is not a legal entity and, therefore, not subject to suit or liability under federal civil rights laws); *Waters v. Hollywood Tow Serv.*, No. CV 07-7568 CAS (AJW) at *18 (C.D. Cal. July 27, 2010), *aff'd*, 584 F. App'x 408 (9th Cir. 2014) ("Since plaintiff has cited no authority for the proposition that the Office of the City Attorney is 'a separate legal entity subject to suit' under state or local law, plaintiff's fourteenth and fifteenth claims for relief against the Office of the City Attorney should be dismissed."); *Garrett v. Talladega County Drug & Violent Crime Task Force*, 983 F. Supp. 2d 1369, 1372 (N.D. Ala. 2013) (holding that the Talladega County Drug and Violent Crime Task Force is not a legal entity subject to suit under federal civil rights laws); *Anderson v. Bd. of Pardons & Paroles*, No. 2:07CV339-MHT at *1 (M.D. Ala. June 22, 2007) (holding that the Alabama Office of the Attorney General is not a legal entity subject to suit under federal civil rights laws); *Martinez v. 291st Judicial Dist. Court*, No. 3-01-CV-1907-X at *2 (N.D. Tex. Nov. 19, 2001) (holding that plaintiff could not sue the Dallas County District Attorney's Office because it was not a legal entity subject to suit).

25. Because the City Attorney's Office cannot be sued, this Court does not have personal jurisdiction over it and must strike it as a named defendant in this matter.

WHEREFORE, your Defendant prays that all claims and remedies sought in this matter shall be ruled unavailable because they fail to state any actionable claim, which reasons provide that this Court should dismiss the complaint, with prejudice, or, if not dismissed in its entirety, that the City Attorney's Office be stricken from this case as a named defendant.

**CITY OF NORFOLK,**

By _____
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of May, 2019, a true copy of the foregoing was mailed, postage prepaid, via USPS to Roy L. Perry-Bey, *pro se*, at 89 Lincoln Street, #1172, Hampton, Virginia 23669 and to Ronald M. Green, *pro se*, at 5540 Barnhollow Road, Norfolk, Virginia 23502.

_____
Adam D. Melita
Deputy City Attorney