

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BRIAN CHARLES VAETH

*Plaintiff,*

v.

Case No. RDB-17-2400

MAYOR & CITY COUNCIL OF  
BALTIMORE, *et al.*,

*Defendants,*

**RESPONSE TO THE STATE OF MARYLAND AND GOVERNOR HOGAN'S MOTION  
TO DISMISS**

**INTRODUCTION**

The State of Maryland and Governor Larry Hogan, move under Fed. R. Civ. Pro. 12(b)(1) and (6), to dismiss Plaintiff's complaint for lack of subject matter and failure to state a claim. The complaint requests this Court for declaratory and injunctive relief under 42 U.S.C. § 1983. Plaintiff has standing to bring the claim because the Defendant's action threatens an immediate and irreparable denial of Plaintiffs' constitutional rights, and has already chilled the exercise of due process rights through the unlawful removal of the statue in question. The Defendants' Motion that this Court should refrain from exercising its jurisdiction should also be denied because the federal constitutional issues cannot be eliminated by any state court construction of federal statute and it would simply delay an adjudication to protect Plaintiff's rights.

**THE MOTION TO DISMISS HAS NO MERIT**

Defendant's Motion is without merit and must be denied. Defendant's Memorandum in support of their Motion is based in large part on unsupported factual assertions and matter of

opinion without any support for the same apparent beyond, perhaps, counsel's views, and it does not in any way support dismissal under the standard for considering Rule 12(b) motions. Plaintiff must be permitted to go forward with discovery and to a trial on the merits of the important constitutional claims, as a matter of public interest.

### **MOTIONS TO DISMISS UNDER RULE 12(b)**

“The purpose of a 12(b)(6) motion is to test the sufficiency of a Complaint; ‘importantly, [a Rule 12(b)(6)] motion does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses.’” *Butler v. U.S.*, 702 F.3d 749, 752 (4th Cir. 2012)(quotation omitted). “To survive a Rule 12(b)(6) motion, a Complaint must satisfy the pleading standard articulated in Fed.R.Civ.P. 8(a)(2), which requires a ‘short and plain statement of the claim showing the pleader is entitled to relief.’” *Sinclair v. Parnell*, 2014 WL 4052859, \*3 (D. Md., August 13, 2014)(Russell, J.); *Petty v. Sampong*, 2014 WL 4662397 (D. Md., September 16, 2014); Fed.R.Civ.P. 8(a)(2); *Buckler v. Israel*, 2014 WL 1464472, \*4 (S.D. Fla., April 14, 2014); *Baez v. Root*, 2014 WL 1414433, \*2 (S.D. Fla., April 11, 2014). A complaint “attacked by a Rule 12(b)(6) motion does not need detailed factual allegations;” however, (F)actual allegations must be enough to raise a right to relief above the speculative level.” *Id.*, quoting from, *Bell Atlantic Corp. V. Twombly*, 550 U.S. 544, 555 (2007). The complaint must be “plausible on its face” and must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Mancinni v. Broward County Sheriff*, 2014 WL 7792953, \*2 (S.D. Fla., October 21, 2014), citing, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quotations omitted); *Covey v. Assessor of Ohio County*, 777 F.3d 186, 192 (4th Cir. 2015); *Sinclair*, at \*3. “When considering a motion to dismiss, all facts set forth in the Plaintiff’s complaint are accepted as true and the court limits its consideration to the pleadings” (where, as

here, there are no exhibits attached thereto). Mancinni, Id. Further when considering whether dismissal is appropriate pursuant to Fed.R.Civ.P. 12(b)(6), the court must construe the allegations and draw all favorable inferences in the light most favorable to the Plaintiff. Shiheed v. Shaffer, 2015 WL 4984505, \*2 (D. Md., August 18, 2015)(Russell, J.). A complaint may not be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) ‘unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” Mancinni, Id. (Citations omitted).

### **ARGUMENT**

A complaint “must be liberally construed” and “should not be dismissed simply because the court is doubtful that the Plaintiff will be able to prove all of the necessary factual allegations.” Indeed, “a well pleaded complaint will survive a motion to dismiss ‘even if it appears that a recovery is very remote and unlikely.’” Spadaro v. City of Miramar, 855 F.Supp.2d 1317, 1328 (S.D. Fla. 2012), quoting from, Twombly, 550 U.S. at 555-556.

The Fourth Circuit has found that, “[a] lawsuit need not be meritorious to proceed past the motion-to-dismiss stage.” In fact, ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbably and that a recovery is very remote and unlikely. To dismiss because of some initial skepticism would be to mistakenly ‘collapse discovery, summary judgment[,] and trial into the pleading stages of a case.’” SD3 LLC v. Black and Decker (U.S.) Inc., – F.3d –, 2015 WL 5334119, \*17 (4th Cir., September 15, 2015).

Suits against state and local officials under Section 1983 are classified either as official capacity or personal capacity suits. Official capacity suits are brought against government officials who are merely carrying out their duties under an unconstitutional statute or rule.

Damages in such suits are collected from the government treasury. Official capacity suits are comparable to suits against the government itself. Damages may be assessed against local government officials acting in their official capacity, or against the local governments themselves. No damages may be awarded, however, in suits against state officials acting in their official capacity. Personal capacity suits are brought against government officials who exceed or abuse their authority under state or local law. Under Section 1983, officials who exceed or abuse their authority under state or local law can be held personally liable for damages. The damages are limited, however, by various immunities. Some officials, such as judges, legislators, and prosecutors, enjoy absolute immunity from damages. Most other officials and employees receive qualified, or limited, immunity from damages. Officials with qualified immunity may be held liable only for actions which violated the "settled constitutional rights" of the Plaintiff at the time of the action.

In the 1961 decision of *Monroe v. Pape*, the Supreme Court held that Section 1983 provided a damage remedy against members of the Chicago Police Department who had violated the plaintiffs' constitutional rights. In *Monroe*, thirteen police officers entered and ransacked a private home without a search warrant and detained the owner for ten hours without an arrest warrant. The Court found that the defendants had acted "under color of" state law, despite the fact that their actions exceeded their official authority and, in fact, were in violation of state law. The Court refused to impose a requirement that the defendants' acts be "willfully" done, stating that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. "

Plaintiff alleges the following in the Complaint in this case:

Following an incident in Charlottesville, Virginia, where the authorities failed to keep order, essentially abandoning their oaths of office during a protest brought by citizens, incidents of civil unrest broke out among those citizens. Sadly, a person participating in the protest, died and many others were injured when pedestrians took to blocking and impeding the flow of traffic on a public street. As a result of these people being in the street, a person in a car who was allegedly fleeing a possible violent attack by protestors, drove his car into those people. Several were injured, and the driver was arrested. The suspect has not faced criminal charges, as of yet. This incident occurred, as a result of the protest related to the removal of a statue honoring Robert E. Lee, the commander of the southern military forces during the Civil War.

Immediately thereafter, the Baltimore City Council took action to remove four statues in Baltimore and the Defendants used a “predicted” threat to public safety, as justification for it due to what had occurred in Charlottesville. Those statues were removed despite co-defendant, Mayor Catherine Pugh, publicly announcing that considerations of the public, in relation to removing the statues, would be solicited through a process that included public input. That did not happen, and the public was seemingly duped into believing the assertions of the Mayor. Two days later the statues were removed. The next day, Governor Hogan took the same action and removed a controversial statue of Chief Justice Roger Taney.

The U.S. Supreme Court has continuously held that legitimate property interests have existed where an individual was “receiving. . .benefits under statutory and administrative standards defining eligibility ... has an interest in continued receipt of those benefits that is safeguarded by procedural due process.” The Governor’s action, as a result of the Mayor of Baltimore’s order to remove the statues without affording the due process rights afforded to them, violated the constitutional rights of Maryland citizens.

Defendants allege that Plaintiff's complaint should be dismissed for a lack of subject matter jurisdiction and failure to state a claim due to his lack to sufficiently establish his standing to bring a claim against the State or Governor Hogan. As Plaintiff has rebutted this assertion in the aforementioned, the Governor ordered the removal of the statue of the former Chief Justice of the United States Supreme Court without providing the citizens with the required due process right, as provided in the Fifth Amendment to the US Constitution. Plaintiff has sufficiently shown standing in this Court.

The complaint alleges that the Court's jurisdiction is founded upon federal questions arising under the Fourth, Fifth and Fourteenth Amendments. It is alleged that the damages were suffered as a result of the defendants' violation of their Constitutional right to be free from deprivation of their liberty without due process of law, and subjecting protected property to seizure, in violation of their Constitutional right to be free from unreasonable searches and seizures.

Plaintiff seeks recovery squarely on the ground that Defendants violated the Fourth, Fifth, and Fourteenth Amendments and charges that the defendants conspired to do acts prohibited by these amendments. Before deciding that there is no jurisdiction, the Court must look to the way the complaint is drawn to see if it is done so as to claim a right to recover under the Constitution and laws of the United States. For, to that extent, "the party who brings a suit is master to decide what law he will rely upon, and . . . does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States by his declaration or bill." *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 228 U. S. 25. Though the mere failure to set out the federal or Constitutional claims as specifically would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the

Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. Thus, allegations far less specific than the ones in the complaint have been held adequate to show that the matter in controversy arose under the Constitution of the United States. *Wiley v. Sinkler*, 179 U. S. 58, 179 U. S. 64-65; *Swafford v. Templeton*, 185 U. S. 487, 185 U. S. 491-492. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief, as well as to determine issues of fact arising in the controversy.

Jurisdiction, therefore, cannot be defeated, as Defendant seem to contend, by the possibility that the averments might fail to state a cause of action on which Plaintiff could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits, and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law, and, just as issues of fact, it must be decided after, and not before, the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford v. Templeton*, 185 U. S. 487, 185 U. S. 493-494; *Binderup v. Pathe Exchange*, 263 U. S. 291, 263 U. S. 305-308. The previously mentioned exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. *The Fair v. Kohler Die & Specialty Co.*, *supra*, 228 U.S. at 228 U. S. 25.

Contrary to assertions made by the Attorney General, Plaintiff has not requested that this Court make any special accommodation related to his pro se status in adjudicating the merits of the complaint. Plaintiff is fully aware that he responsible for litigating this matter according to the rules established by this Court. If Plaintiff didn't feel as though he could handle the matter to the satisfaction of the Court, he would not have presented it.

**DECEPTIVE PRACTICES THAT AMOUNT TO FRAUD  
PERPETRATED ON THE PUBLIC**

The fact pattern leading up to the statues removal raises serious concerns about Defendants' misleading the public and exerting improper influence over the process. As stated in the complaint, On Sunday August 13, 2017, Baltimore City Councilman Brandon Scott said that he was going to introduce a resolution to the Baltimore City Council that called for the removal of Confederate monuments in the City and that he wanted them to be destroyed. There was no comment on this from Governor Hogan, as he is the highest law enforcement official in the State of Maryland, demonstrated by his oath, to address the matter. On Monday August 14, 2017, Baltimore Mayor Catherine Pugh announced that she wanted the monuments removed and was in the process of appointing a working group of staffers to guide the process. Again, there was no comment made by the Governor and no indication that this action was motivated by the events that occurred in Charlottesville by the Mayor, nor were any known protests planned. By her very own actions, Mayor Pugh made no assertion that there was any imminent threat or danger presented to the public associated with Baltimore's statues, as she publicly announced she was in the process of appointing a working group of staffers to guide the process. It is obvious that the statues in question were nothing more than pawns in the chess game that is the growing political debate over race relations since the election of President Donald J. Trump in November of 2016.

That evening it was reported that the Baltimore Bloc threatened to take action. Others online were reported to have made the same vow. A #doitlikedurham hashtag began circulating on social media, wherein protestors in Durham, North Carolina unlawfully took justice into their own hands and pulled a statue down themselves. No threat of physical violence was communicated, merely the suggestion of civil disobedience. Surely, the Governor and Mayor could have dispatched the required law enforcement personnel to uphold the law, as vigilantism is not acceptable and thereby violators would be subject to prosecution for any actions they took in removing the statues themselves. To do otherwise is to abandon their oath of office and not uphold the law.

In the early morning hours of Tuesday August 15, 2017, under the cloak of darkness not unlike when the Baltimore Colts were moved to Indianapolis in the dead of night and without warning, statues of Robert E. Lee, the Confederate Soldiers and Sailors Monument, the Confederate Women's Monument, and the Statue of former Chief Justice to the Supreme Court Roger B. Taney.

That day, Governor Hogan made his announcement that referred to, "*properly acknowledging our past and glorifying the darkest chapters of our history*", seemingly besmirching the reputation of a former Chief Justice of the United States Supreme Court in the process, by "*asking the State House Trust, to take that action immediately.*" The Governor's actions could not have been taken due to any reported protest or violence, or prediction that it would occur. The Taney statue was located on the property of Government House, which is the residence of the Governor of Maryland. This property is gated and is protected by sworn State law enforcement officers.

In an interview conducted on August 16, 2017, Mayor Pugh said that she was not aware of activists purported plans to tear down the monuments. What she was aware of she said, was the violence that broke out in Charlottesville, Virginia amid a rally by armed Neo-Nazis and white supremacists around a statue of Robert E. Lee that was targeted for removal, but no single group has been identified as being the cause of that violence.

Defendants assert in their Motion that “significant civil unrest was predicted and avoided with the removal of the statues” but was that based upon a perceived threat or imminent threat of civil unrest? The social media communication in reference to #DoItLikeDurham is insufficient to establish the imminent harm required for Defendants to take emergency actions that effectively disregard constitutional rights of the people to be free from unlawful searches and seizures and denied due process, because it only called for an act of civil disobedience that could have been met by Defendants with a significant showing by police. The communication was not even met with a call for counter-protests from what Mayor Pugh so callously refers to as “white supremacists and Neo-Nazis.” The Mayor is irresponsibly painting people with an awfully wide brush, which could rise to inciting someone’s contempt for another based on what they look like or perhaps even the color of their skin. It is Plaintiff’s belief that no one has been found to be responsible for the violence that occurred, although several lawsuits in civil court are pending on that particular issue. Until such time as guilt is assigned to the perpetrators of the violence that occurred, do not all involved enjoy a presumption of innocence until such time as verdicts are rendered?

**OTHER DECEPTIVE PRACTICES THAT SUPPORT THE ALLEGATIONS IN THE COMPLAINT THAT DEMONSTRATES THE INTENT TO CONTINUE TO PERPETRATE THE FRAUD ON THE PUBLIC**

On the day Plaintiff filed the complaint in this Court, August 21, 2017, a petition began circulating on the internet that said the Maryland Flag was under attack. The media immediately tied to the flag to the Confederacy and its secessionist symbolism, thereby attempting to paint supporters of it, as racists. It has garnered over 50,000 signatures in favor of saving it. Governor Hogan even shared the petition on both Change Maryland's and on his official facebook page. In those the Governor made a pretty bold statement in defense of the flag. He said:

*“Not only is the Maryland state flag a symbol of unity and pride, but it is also the most beautiful and most recognized state flag in America. You can rest assured that it will never be changed as long as I'm governor.”*

One problem though, the petition was discovered to be a hoax. No member of the General Assembly was calling for the flag's removal. It was started by a group named Red Maryland and as stated by their, editor-in-chief, “the petition was meant to be a pre-emptive strike to dissuade lawmakers from considering changes to the State flag.” When contacted by Channel 9, the representative at Red Maryland explained, "Our Flag is a symbol of unity, we wanted to make sure that people understood that this symbol of unity is out of bounds for people who were trying to revise some of our history." As Red Maryland takes responsibility for the hoax, this should not allow Governor to escape scrutiny on this matter.

Since then, Governor Hogan has not explained his decision to involve himself in the controversy. His early statements show that he was well prepared to respond to any action taken against the flag. Red Maryland's position that it was to dissuade lawmakers has changed totally from the original. It no longer blames them for the action but says that activists are attacking the flag. Red Maryland says that, "We should not be trying to use its origin as a reason to divide people." None of that was considered by Red Maryland when they started the petition.

This could have sparked a major riot and was incredibly irresponsible of the Governor. His connection to Red Maryland is widely known and leads to question what he knew about the petition and when he knew about it. After the removal of the statue of Judge Taney, Governor Hogan's favorability dropped, which raises doubts as to the intent of the Governor to support the petition forwarded by Red Maryland without as much as vetting it first. Subjecting the flag to adverse actions that could have resulted in not only the removal of it, but injury to the public had any civil unrest occurred if this deception had any consequences, or was allowed to continue. No rioting occurred, nor was any planned, as result of this hoax. The issue in this instance is over using symbolism of our State flag, which belongs to us all and is something that Gov. Hogan asserts should be a source of unity and pride for all Marylanders, and subject it to its possible removal due to the very fact that most symbols of our past can be tied slavery and to attempt to spark racial tensions among us, in an attempt to deceive Maryland voters to gain back support that he lost.

### **THE REQUEST FOR A PRELIMINARY INJUNCTION**

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. See *Munaf v. Geren*, 553 U. S. \_\_\_, \_\_\_ (2008) (slip op., at 12); *Amoco Production Co. v. Gambell*, 480 U. S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U. S. 305, 311–312 (1982). Plaintiff has shown a likelihood of success on the merits of this claim.

When a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a “possibility” of irreparable harm. *Id.*, at 696–697; 530 F. Supp. 2d, at 1118 (quoting *Faith Center Church Evangelistic Ministries v.*

Glover, 480 F. 3d 891, 906 (CA9 2007); *Earth Island Inst. v. United States Forest Serv.*, 442 F. 3d 1147, 1159 (CA9 2006)). Plaintiff has already been irreparably harmed, as the statues have already been removed and were not provided the due process necessary to justify their removal.

The balance of equities tips in Plaintiff's favor, as this action questions whether government officials may legally authorize the removal of historically protected Confederate monuments when removal constitutes deprivation of a property interest. The citizens satisfy enacted state criteria in order to be beneficiaries of historical and educational monument preservation, creating a legitimate claim to the continued receipt of those acknowledged benefits. Baltimore City has repeatedly acknowledged and reaffirmed the benefits associated with monument preservation by Baltimore's explicit recognition of the citizens' benefits by not only their place in CHAP's newly adopted regulations, but also in the City and State code. The Due Process Clause provides that no persons may be denied their life, liberty, or property without due process. Baltimore City's affirmative action in maintaining these benefits impacts the application of due process when removal of the monuments constitutes city action removing existing government benefits. Both CHAP and the Special Commission are governed by the land use article of the Maryland code on historic preservation. Clear legislative intent mandates commission operation under a policy of preservation, not of removal. Although the Special Commission's recommendation is subject to the mayor's final decision, the Special Commission's recommendation to remove the monuments is in direct contrast with codified public policy as well as CHAP's recently enacted mission statement. Even in the absence of a constitutional violation, there is a glaring disparity between Maryland's unwavering policy in support of historical preservation and the Special Commission's recommendation to the mayor.

On the issue of public interest in the matter, an individual's property interest requires property, a benefit stemming from the property, and the individual's "legitimate claim of entitlement" to receive the benefits. The U.S. Supreme Court has noted that property exists in many different forms, including in the form of an existing receipt of government benefits. While the designation of property does not require positive or negative economic value, CHAP's preservation of the City's monuments creates benefits of honor, protection, expert review, and economic tax incentives according to CHAP's 2012 Designated Landmark List. The recognized benefits that stem from the preservation of Baltimore City's monuments therefore satisfy the threshold requirement of "property" in determining whether a property interest has been created. In order to foster a legitimate claim of entitlement, an individual must show what elements of state law support eligibility to receive a benefit that is reasonably expected based on "rules or understanding [from state law] that secure certain benefits and that support claims of entitlement to those benefits." Once an individual's interest is established, there is an inherent constitutional protection of a property interest in the continued receipt of the benefit.

### **CONCLUSION**

For the reasons demonstrated in the complaint and in the contents presented in this Motion in Opposition, Plaintiff requests that this Court deny Defendant's Motion to Dismiss and permit discovery, so this matter can proceed on the merits of the complaint filed. Defendants assert that this action was taken upon a predicted event of significant civil unrest. Without the justification to take such action against the property rights of the citizens of Baltimore City and the State of Maryland in this manner, Defendants should be made to answer the questions surrounding their intent under oath before a jury in this Court. This is necessary to uphold the public trust that the citizens bestow upon our elected officials.

**CERTIFICATE OF SERVICE**

I, Brian Charles Vaeth, Plaintiff in proper person in the above captioned matter do hereby solemnly affirm that the contents of the enclosed Motion has been forwarded on to the Defendants by US mail on the 31st day of October 2017., first class, postage prepaid.

Submitted,

Brian Charles Vaeth  
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Nottingham, Maryland 21236