

IN THE SUPREME COURT OF ALABAMA
CASE NO. 1180342

STATE OF ALABAMA,
Appellant,

v.

CITY OF BIRMINGHAM, et al.,
Appellees,

AMICUS BRIEF OF FOUNDATION FOR MORAL LAW
IN SUPPORT OF APPELLANT STATE OF ALABAMA

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Fleming, Walter L., <u>Civil War and Reconstruction</u> , Columbia University Press 1905, pp.241-45	10
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<http://www.george-orwell.org/1984/2/html> 3

Historical and Theological Foundations of Law,
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[www2.iath.virginia.edu/sixties/HTML_docs/Resources/Primary/Manifestos/VVAW Kerry Senate.html](http://www2.iath.virginia.edu/sixties/HTML_docs/Resources/Primary/Manifestos/VVAW_Kerry_Senate.html). 14

L. Leon, Diary of a Tar Heel Soldier i pp 1-28, (1913) .14-17

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INTRODUCTION

"Remove not the ancient landmark, which thy fathers have set." Proverbs 22:28

First they came for the Confederate monuments.

Next they came for the Christopher Columbus monuments.

Now they're coming for the George Washington and Thomas Jefferson monuments, and, as the American Legion v. American Humanist Association, 139 S. Ct. 951 (2018), case demonstrates, the military cross monuments.

What's next? Nobody knows, because it all depends on what temporary majority has control of government, media, and education. A radical Left municipal government may decide that Abraham Lincoln, Frederick Douglas, Booker T. Washington, and George Washington Carver are not "politically correct" because they were not sufficiently radical. Or, if the political winds were to shift in the opposite direction, monuments commemorating Martin Luther King, Jr., Rosa Parks, and the Selma March might be threatened with elimination.

Yet, Alabama's duly elected Legislature sought to protect all these "ancient landmarks" (and more) with the Alabama Memorial Preservation Act ("AMPA" or "the Act").

But why do some people want to destroy monuments? And why do monuments even matter? Probably for the same reasons we read the Bible to our children, tell them family stories, keep scrapbooks and preserve newspapers of old on microfilm. Monuments are a visible way to teach history, especially to those who are not inclined to read about it. Taking down monuments is a way to make sure no one remembers that there was a time past during which people thought differently, when memorable events of human achievement and merit took place and when watershed moments in policy, politics, and change occurred -- or, as the AMPA puts it, at the time of "an event, a person, a group, a monument, or military service that is part of the history of the people or geography...of Alabama." § 41-9-231(6), Ala. Code 1975.

The desire for historical destruction is nothing new. New civilizations have often destroyed the records of the old. The Spanish conquistadors destroyed the writings of the conquered Aztecs, believing they were formulas for devil-worship. The Aztecs had destroyed the writings of the Toltecs who preceded them, and so on. Nazis, Communists, and conquerors of every sort have tried to consolidate

their control by burning books and eliminating memories of the past. By controlling people's memory of the past, they attempt to shape people's view of the present and to dictate that of the future. Remember Winston Smith, the protagonist officer of the Ministry of Truth in George Orwell's 1984: "This, thought Winston, was the most frightening aspect of the party regime -- that it could obliterate memory, turn lies into Truth and alter the Past. The Party slogan was 'Who controls the past controls the future; who controls the present controls the past.'"¹

I. The State of Alabama has a substantial interest in preserving Alabama history

All three branches of the federal government, and state and local governments as well, have recognized the value of historical memorials and monuments and have made provisions for their creation and preservation.

At the federal level, Congress adopted the American Antiquities Act of 1906 "to preserve for present and future generations the historic, scientific, commemorative, and cultural values of the archeological and historic sites and structures on these lands. It also authorizes the

¹ George Orwell, 1984, available at <http://www.george-orwell.org/1984/2/html> (last visited Apr. 19, 2019).

President to protect landmarks, structures, and objects of historic or scientific interest by designating them as National Monuments."² The Executive Branch preserves historical monuments, usually through the Department of Interior which includes the National Park Service, but also through the Department of Defense and other branches.

The U.S. Supreme Court has recognized the value of historic preservation. In Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978), the Court upheld New York City's Landmarks Preservation Law and the restrictions it imposed on developing property that has historic significance, against the property rights of those whose property the Law prohibited from development. As the Court said at 107-08,

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of

² American Antiquities Act of 1906, National Park Service, <https://www.nps.gov/subjects/legal/american-antiquities-act-of-1906.htm>

either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.

(Emphasis Added)

Other cases that recognize the importance of historic preservation include Maier v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), A-S-P Assoc. v. City of Raleigh, 258 S.E.2d 444 (1971), and Figarsky v. Historic District Commission, 368 A.2d 163 (1976).

History and the preservation of it is important for many reasons:

- It shows people how to understand our nation and our state and how they came into being.
- It helps people understand the nature of our laws, customs, and governmental institutions.
- It causes people to appreciate and honor the sacrifices made by many for the freedoms and the way of life we have today.

- It helps shape our identity as a state and nation.
- It develops critical thinking skills as we relate the events and personages of history to movements and ideas.
- It is valuable economically as a tourism attraction.
- It inspires people to civic action, making them realize they are part of a bigger picture of ongoing history.
- It motivates people to serve their state (and nation) and to sacrifice for it, even their lives, knowing that future generations will remember them as we now remember soldiers of the past.
- It encourages people to become civic leaders, seeing the recognition given to leaders of the past.
- It helps people understand the mistakes and even evils of the past and points people toward finding ways to avoid making those mistakes in the future. "Those who cannot remember the past are condemned to repeat it."³

³ This statement, or variations of it, has been attributed to George Santayana, Winston Churchill, Edmund Burke, and others. The Foundation cites it for its own intrinsic merit.

- It causes people to study toward understanding why others believed and acted as they did and why people believe and act as they do. (As David Hume said, history's "chief use is only to discover the constant and universal principles of human nature."⁴)
- "Man is explicable by nothing less than all his history."⁵

For all of these and arguably other reasons, the State of Alabama has strong rationale for preserving history.

In 1966, Alabama codified the importance of historic preservation in § 41-9-240, Ala. Code 1975, with the creation of the Alabama Historical Commission:

The historical heritage of the State of Alabama is among its most valued and important assets, and the preservation of historic sites, buildings and objects within the state is of great concern to Alabama and its people. It is of special value to the youth of Alabama as a constant reminder of the circumstances under which our state was born and nurtured and under which our great nation has developed. To further foster

⁴ David Hume, quoted in The Lessons of History: Famous Quotations and Quotes, Age of the Sage, https://www.age-of-the-sage.org/history/quotations/lessons_of_history.html (last visited Apr. 18, 2019).

⁵ Ralph Waldo Emerson, quoted in id.

the understanding and preservation of our heritage, there is hereby created and established an agency of the State of Alabama to be known as the Alabama Historical Commission.⁶

Also, § 11-68-1, Ala. Code 1975, set out the legislative purpose for the creation of local historic commissions within the state. They are to

promote the educational, cultural, economic and general welfare of Alabama municipalities: through the preservation and protection of buildings, sites, structures, areas, and districts of historic significance and interest; through the preservation and enhancement of the national, state, and local historic, architectural, archaeological, and aesthetic heritage found in Alabama; and through the promotion and enhancement of Alabama's historic and aesthetic attraction to tourists and

⁶ The detailed purpose for creating the Alabama Historic Commission is found in § 41-9-242, Ala. Code 1975, and is illustrative of The Foundation's argument on the importance of historic preservation.

visitors⁷.

The stated purpose of the Alabama Historical Association (which has been meeting annually since 1948) "shall be to discover, discuss, interpret, procure, preserve, diffuse and enjoy whatever may relate to the natural, civil social, literary, cultural, economic, ecclesiastical and political listing of the State of Alabama and its surrounding geographical area." See www.alabamahistory.net/articles-of-incorporation.

History is not always nice and neat; it is oftentimes confusing, conflicting, ironic and even messy. But, that

⁷ Although "historical markers" as defined are specifically excluded from protection by the AMPA (see §41-9-231 (6)), they often mark and bear description of an event or historic site that itself is protected by the AMPA. For example, the 2009 marker for the Doster Road Artesian Well House would not enjoy AMPA protection, but the Well House itself (609 Doster Rd., Prattville, AL 36067) arguably would after 2021. (It was erected in 2001 through cooperation with the Historic Prattville Redevelopment Authority to commemorate Prattville's over 400 artesian wells.) These markers are actually more explicit than the monuments or memorials themselves and allow communities to make commentary on historical events.

doesn't make it less worth preserving⁸.

Clearly, Alabama has a record of cultural and historical preservation as an important object not just to promote one version of history but to also save it from urban sprawl, commercial over-development and economic exigencies. The AMPA is a reasonable means of furthering these objectives⁹.

II. Honoring fallen ancestors is a moral imperative

There is another reason the State of Alabama has decided to preserve monuments in general and this monument specifically: to honor and remember those who have fought and died for Alabama. See e.g. Ala. Code § 41-9-242(5). Whichever position one takes on the War, these soldiers and

⁸ For example, the Alabama Historical Commission is headquartered in the historic Teague Home in Montgomery. Built in 1948, it served as the headquarters for Federal troops as they occupied Montgomery in April 1865. A historic marker in front reminds the reader that Union General James H. Wilson placed the first Capitol of the Confederacy under martial law by Proclamation read from the home's front portico.

<https://www.loc.gov/resource/highsm.05713/> (Last visited April 20, 2019).

⁹ The AHC maintains a map of all properties and historic districts listed on the Alabama Register of Landmarks and Heritage attached herewith as Appendix A.

sailors fought and sacrificed, and in many cases gave their lives, for the State of Alabama and its people.¹⁰ It is entirely appropriate that the State of Alabama should honor them and preserve their memory through the AMPA.

The moral imperative to honor one's ancestors, especially those who have fallen in battle, seems universal. David honored Saul and Jonathan after they died in battle, and he also honored his general Abner, saying "there is a prince and a great man fallen this day in Israel." II Samuel 3:38.

And think of Sophocles' play Antigone, written around 442 BC. The City of Thebes has been ravaged by civil war, and Eteocles and Polynices, brothers of Antigone, have died fighting on opposite sides. The victor and ruler of Thebes, King Creon, has decreed that Eteocles will be buried with full honors while Polynices will lie on the

¹⁰ The precise number of Alabamians who fought in the War is unknown. Estimates go below and above 100,000. <http://www.archives.alabama.gov/teacher/civil.html>, (last visited April 19, 2019). Reconstruction Governor Lewis E. Parsons in his inaugural proclamation of July 20/21, 1865, placed Alabama's adult male population in 1860 at 126,587 yet Alabama enlisted 122,000 soldiers at a rate over 96%. Fleming, Walter L., Civil War and Reconstruction in Alabama, Columbia University Press 1905, pp. 241-45

field unburied. Nevertheless, Antigone provides her brother with a burial. When she is brought before King Creon, the following exchange takes place:

Creon: You knew the order not to do this thing?

Antigone: I knew, of course I knew. The word was plain.

Creon: And still you dared to overstep these laws?

Antigone: For me it was not Zeus who made that order. Nor did that Justice who lives with the gods below mark out such laws to hold among mankind. Nor did I think your orders so strong that you, a mortal man, could over-run the gods' unwritten and unchanging laws. Not now, nor yesterday's, they always live, and no one knows their origin in time....

Sophocles, Antigone, quoted in II John Eidsmoe, Historical and Theological Foundations of Law 511(2d ed. 2016).

Antigone is saying there is a Higher Law, higher than any governmental authority - our Declaration of Independence calls it "the laws of nature and of nature's God" - that requires that she honor her fallen brothers by burying them with military honors, even if King Creon forbids it. The Divine imperative to honor one's kinsmen, especially those who have died in battle, is universal. By

preserving the AMPA and, in turn, this monument, Alabama is acting in accord with this universal moral imperative.

The Legislature may have had another broader interest in mind: protecting Alabama persons and property from violence. Observing the rioting and violence in Charlottesville, VA, and the controversies over monuments elsewhere, the Legislature wisely placed Alabama's monuments above mob violence and the storms of local politics. Seeing the destruction that has taken place on the University of North Carolina campus and elsewhere, the Legislature's decision was clearly wise.

The Act establishes a Committee on Alabama Monument Protection (§ 41-9-234 (a)) to evaluate requests to move, remove, or alter protected buildings, streets, schools, or monuments that between twenty and forty years old.¹¹ There are no waivers for such structures more than forty years old. § 41-9-232 (a). Whether one agrees or disagrees with this forty-year distinction is not the issue; the issue is

¹¹ The Alabama Historical Commission requires properties to be at least 40 years old to be eligible for listing (over 3200 to date) in the Alabama Register of Landmarks and Heritage. See <http://ahc.alabama.gov/alabamaregisterFAQ.aspx>.

whether the distinction renders the Act unconstitutional. The Legislature had good reasons for providing greater protection for older monuments:

- Older monuments tend to have greater, more lasting historic significance.
- Due to the fading of memories and historical provenance, the replacement of older monuments may be more difficult or impossible.
- If one seeks to remove a monument less than forty years old, the generation having erected it would still be living and able to submit materials and argument to the Committee to defend the monument. Older monuments may have no one to defend them.

This Court should consider: what would those Confederate soldiers and sailors say and think, if they knew the City of Birmingham wanted to destroy their monument because it considers them racists and defenders of slavery? Undoubtedly, they would ask this Court to consider the sacrifices they made for the State of Alabama -- not just those who died but also those who put their lives on the

line and suffered many privations at the call of duty.¹²

North Carolina soldier, L. Leon kept a diary during his service. In 1913 at age 72, he decided to publish it because, he had "read so many histories written by our officers, but have never seen in print a history written by a private," and "to the younger generation of Southern-born it will show how we endured and suffered, but still fought on for the cause we know was right."¹³

A few excerpts from Pvt. Leon's diary are presented for this Court's consideration as to whether it violates Alabama's Constitution to honor men like him:

June 10 [1861] - At three o'clock this morning the long roll woke us up. We fell in line, marched about five miles, then counter-marched, as the Yankees were advancing on us. We got to our breastworks a short time before the Yankees came,

¹² In a similar vein of ingratitude and false history, recall the April 22, 1971, testimony of 27 year old John Kerry who described the Vietnam War soldier as one who committed "crimes... on a day-to-day basis, with the full awareness of officers at all levels of command." "[W]e cannot consider ourselves America's best men when we are ashamed of and hated what we were called on to do in Southeast Asia."

http://www2.iath.virginia.edu/sixties/HTML_docs/Resources/Primary/Manifestos/VVAW_Kerry_Senate.html.

¹³ L. Leon, Diary of a Tar Heel Soldier i (1913).

and firing commenced. We gave them a good reception with short and shell. The fight lasted about four hours....

This is the first battle of the war, and we certainly gave them a good beating, but we lost one of our regiment, Henry Wyatt [the first Confederate soldier killed in battle], who was killed while gallantly doing a volunteer duty. Seven of our men were wounded. ... After the fight some of the boys and myself went over the battlefield, and we saw several of the Yankee dead - the first I had ever seen, and it made me shudder....

From now on I will never again grumble about digging breastworks. If it had not been for them many of us would not be here now.

...

August 30 [1862] - Our company went to work to-day throwing up breastworks.

August 31 - Still digging dirt.

...

September 19 - Left Wakefield at 9 P.M. and marched twenty miles - laid in the woods without shelter and it raining very hard. Therefore did not need to wash myself in the morning.

September 20 - Resumed our march at 6 o'clock this morning. Arrived at Blacks Church after three hours' march, then turned about and tramped

nine miles and camped for the night at Joyner's Church.

...

December 21 - I went to the creek to wash my clothing and myself, and when I got back the water had frozen on my head so that I was obliged to hold my head by the fire so as to thaw it out. Wortheim's eyes are so bad that he can hardly see. Sam Wilson broke his shoulder blade.

December 25 - There is nothing new up to to-day, Christmas. We moved our camp a little piece. Eigenbrun came to see us to-day from home, and brought me a splendid cake from Miss Clara Phile. This is certainly a hard Christmas for us - bitter cold, raining and snowing all the time, and we have no tents. The only shelter we have is a blanket spread over a few poles, and gather leaves and put them in that shelter for a bed.

...

April 4 [1863] - Firing at intervals all day. The reserve was sent to the river to support our artillery. The colors went with them. It is raining hard. We laid in line two and a half hours in an old field. It is very cold. The Yankees are firing all the time. Then the 43rd Regiment came and relieved us. Katz came in to-day and reported Henry Wortheim dead - he died Monday, March 30.

April 5 - Everything is quiet on our line to-day.

April 6 - A little firing to-day. Went to the river to throw up breastworks. Worked all night. We put up one piece of cannon right on the river bank, but had to work all night in the swamp to do so. We carried sandbags for breastworks to protect the artillerymen.

...

May 21 - Left this morning, marched twenty-one miles, halted at 5:30. It is a very hilly country, warm and dusty.

May 22 - Marched twenty miles to-day, and halted at 6 P.M.

May 23 - Marched fifteen miles and halted. On our to-days' march we saw any amount of dead horses, which did not smell altogether like cologne.

May 24 - Laid here all day, it being Sunday."¹⁴

(Underline Added).

This is a small portion of what Pvt. Leon recorded as having sacrificed for North Carolina; it represents what thousands of soldiers sacrificed for Alabama. Yet, Leon lived to tell his story. It is entirely fitting for the

¹⁴ Leon, pp. 1-28.

State of Alabama to recognize the sacrifice of the Confederate soldier by preserving a monument in his honor.

III. The Framers of the Alabama Constitution of 1901 created a strong Legislature to protect Alabamians against abuses by either federal intrusions or by local populist majorities

If one reads only the speech by the Convention President John B. Knox, (as cited by the Southern Poverty Law Center ("SPLC") in its amicus brief to the Circuit Court), one is likely to conclude that the Convention's lone purpose was to restore or preserve white rule. But an examination of the entire Proceedings (some 5,070 pages in multiple volumes covering eighty-two days of deliberations)¹⁵ leads to a broader conclusion. The 155 delegates were elected from every county and district in the state, and race played little factor in the day-to-day discussions and debates. They were much more concerned about the nuts and bolts of effective republican government. A careful reading of the Proceedings demonstrates that the delegates had done their homework;

¹⁵ Official Proceedings of the Constitutional Convention of the State of Alabama May 21st, 1901 to September 3, 1901 (Wetumpka, AL: Wetumpka Printing Co. 1941) hereinafter Proceedings.

repeatedly they cited the constitutions of other states, north and south, east and west, and even those of other nations, comparing and contrasting the provisions of those states and countries to determine what would be best for Alabama. They divided into twenty-one standing committees to consider specialized issues and provisions.

To strengthen the Legislature, the delegates provided that the legislators would meet every other year rather than every four years, and they also adopted a measure insulating legislators from outside pressure by making them ineligible to hold other offices during their legislative terms. They also gave the Legislature considerable power over municipalities to prevent city governments from abusing citizens' rights, especially property rights. As Colonel John W. A. Sanford told the delegates,

"What have we done here in Montgomery [referring to its municipal government]? I tell you gentlemen it has been confiscation. Men have left the city. Men have house in Montgomery for which they can never pay owing to the debts on them for pavements and sidewalks and tessalate streets, and Belgian blocks, and there is starving inside of their houses. ... Why, only the other day a citizen said to me, 'Colonel, if they carry out their project of paving the streets as they are doing now, I will have to sell my house and move away because I

will be unable to pay the cost of the benefits.' ... One of the fittest establishments in Montgomery is today under a mortgage which the young men owning it are laboring day after day simply to pay the interest and it will finally be swept from them. Another young man has a house which he inherited from his father, and he has said: 'You can take my house for the pavements, and the supposed benefit.' These are facts. Your bankers have moved from Montgomery. Men who owned houses on the prominent streets have gone to the country, gentlemen of fortune, have built outside the city. ... Today a man said to me, 'For God's sake don't let them continue this system of government. We rely upon you and our other friends to prevent that.' ... [Opponents] say we are choking municipalities to death. Who are the municipalities? Are they not the people [they ask]? ... We are protecting the people against these grasping municipalities and you will hear our voices before this Convention adjourns in more forms than one."¹⁶

(Emphasis added).

Because they feared municipalities in the hands of temporary populist majorities may threaten citizen's rights to liberty and property, the Convention delegates sharply curtailed the power of municipal governments and established a strong Legislature to check the power of

¹⁶ Proceedings at II:1531-32.

municipalities. The AMPA is an outworking of that allocation of power.

**IV. This Court need not determine the causes of the War
Between the States to rule the AMPA constitutional**

Apparently relying on a very one-sided amicus brief by the SPLC, the Circuit Court concluded that the motive of Confederate soldiers fighting in the War was to preserve slavery and white supremacy. Then the trial court apparently reasoned that the only building, structure, park, permanent memorial or monument destined for protection by the AMPA was that to the Confederacy.¹⁷ Therefore, the court ruled the AMPA unconstitutional because a memorial to Confederate soldiers must be a memorial to slavery and white supremacy, even though the Confederate Soldiers and Sailors Monument in Birmingham never mentions nor depicts race or slavery. In an incredible leap of logic, the Circuit Court concluded that the prime purpose of the AMPA is to protect Confederate

¹⁷ For a lengthy list (200 pages) of Alabama properties nominated by the AHC and listed on the National Register of Historic Places, see <https://www.nps.gov/state/al/index.htm> and <https://ahc.alabama.gov/nationalregisterPDFs/NationalRegisterPropertiesinAlabama%202.2019.pdf> (Last visited, April 19, 2019.).

memorials notwithstanding the fact that the vast majority of all Alabama historical structures, memorials and monuments protected by the AMPA are NOT related to the War Between the States¹⁸.

The court then erred in concluding that the Act constituted a content-based restriction on speech. In doing so, it conflated the various political and other reasons for secession with the personal reasons common soldiers gave for fighting in a war.

In another leap of logic, the Circuit Court assumes it "undisputed" that because Birmingham has a majority black population, "an overwhelming majority of the body politic of the CITY is repulsed by the Monument" (Opinion 3) even though the Court cites no poll to that effect nor evidence that the Monument was ever an issue in city election campaigns. And in still another leap of logic, the Circuit Court concludes that the City of Birmingham has a free speech right to speak on behalf of all its citizens by

¹⁸ None of the requirements for inclusion of a site, building, structure, etc. in the Alabama Register of Landmarks and Heritage or for verification into the Historical Cemetery Marker and Plaque Program, specify that it must be of a confederate nature.

removing a monument with a message the City finds offensive.

The causes of the War Between the States will probably be debated until the end of time. The SPLC's amicus brief below labels as "revisionist" the belief that secession rather than slavery caused the war but acknowledges that "belief in this myth remains prevalent."¹⁹ (The SPLC seems oblivious to the possibility that the "myth" remains prevalent because there is ample evidence for reasonable minds to conclude that it is correct.) The SPLC cites the Confederate States' Constitution Art. IV, § 3 cl. 3 as protecting the institution of slavery in all Confederate territories,²⁰ but it ignores the fact that the same Article I § 9 cl. 1 also totally prohibited the slave trade. The SPLC brief quotes CSA Vice President Alexander H. Stephens saying the CSA government is founded upon slavery but ignores the following statement of President Lincoln:

My paramount object in this struggle is to save

¹⁹ Brief of Amicus Curiae Southern Poverty Law Center at 4, State ex rel. Attorney General Steve Marshall v. City of Birmingham, No. 01-CV-2017-903426.00 (Jefferson Cir. Ct. 2018).

²⁰ Id. at 3.

the Union, and is not either to save or destroy slavery. If I could save the Union without freeing any slaves, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the colored race, I do because I believe it helps to save the Union; and what I forebear, I forebear because I do not believe it would help to save the Union.²¹

(Emphasis added).

It further ignores the reasons for the War in the Congressional pronouncement of the Crittenden-Johnson Resolution, stating:

That in this national emergency Congress, banishing all feeling of mere passion or resentment, will recollect only its duty to the whole country; that this war is not waged upon our part in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights of established institutions of those States, but to defend and maintain the supremacy of the Constitution and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; and that as soon as these

²¹ Abraham Lincoln, in Abraham Lincoln from His Own Words and Contemporary Accounts 29 (Roy E. Appleman, ed., National Park Service Source Book Two, Washington, DC 1956).

objects are accomplished the war ought to cease.²²

Just as many Northerners can be quoted saying the War's purpose was to save the Union, many Southerners can be quoted saying the War was about states' rights. Others can be quoted to establish that the War was about tariffs, sectional differences, disparate taxation and many other factors. Rather than engaging in a war of dueling quotations and analyses, the Foundation suggests that it is not the duty of the Circuit Court nor of this Court to determine the causes of the War, and that by presuming to do so the Circuit Court has exceeded both its jurisdiction and its competence.

Accordingly, the Circuit Court erred in concluding, both outside its jurisdiction and contrary to historical fact, that the Confederate soldier fought for slavery and the monument is therefore a memorial to racism. The Circuit Court too narrowly focused the statute's purpose to one application -- the one that offends the SPLC.

V. Municipalities may be empowered to engage in "government speech" but do not have First Amendment

²² Cong. Globe, 37th Cong., 2d. Sess. 222 (1861). This Resolution passed the House 119-2 and the Senate 30-5. See id. at 223.

free speech rights.

The Circuit Court cites Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Rust v. Sullivan, 500 U.S. 173 (1991); and Nat'l Endowment for Arts v. Finley, 524 U.S. 569 (1998) (Scalia. J., concurring) for the proposition that "[a] city has a right to speak for itself, to say what it wishes, and to select the views that it wants to express." Order for Cross Motion on Summary Judgment at 4, State of Alabama ex rel. Attorney General Steve Marshall v. City of Birmingham, No. 1-CV-2017-903426.00 (Jefferson Cir. Ct. Jan. 14, 2019).

But none of these cases stand for the proposition that municipalities have free speech rights under the First Amendment. Rosenberger held that the University of Virginia could not engage in viewpoint discrimination by denying a subsidy to a religious organization that was granted to other organizations. Rust held that Congress could deny federal funds for family-planning services to programs in which abortion is a method of family planning. Finley held that the National Foundation on the Arts and Humanities Act does not impermissibly discriminate on the basis of viewpoint by giving grants to some but not others;

Justice Scalia's concurrence addresses the free speech issue in terms of whether Congress can deny funding without violating the First Amendment rights of artists, not whether Congress has First Amendment rights.

Finally, the Circuit Court cites a Seventh Circuit opinion, Creek v. Village of Westhaven, 80 F.3d 186 (7th Cir. 1996), for the proposition that municipalities act as amplified voices of their constituents and that the marketplace of ideas would be unduly restricted if municipalities could not voice their concerns. But the Seventh Circuit held only that the marketplace of ideas was enhanced by the City engaging in government speech, not that the First Amendment guaranteed the City's right to do so. Furthermore unlike the City of Birmingham which seeks to suppress the Monument by overthrowing the AMPA, the Village of Westhaven sought to enhance the marketplace of ideas by encouraging people to write letters. The Seventh Circuit said, "We need not decide whether the lobbying, the 'letterwriting campaign,' was privileged, because we already held that Creek's claim for damages ended no later than July 1, 1980, and the campaign did not begin until the following month." The Court said further,

Only a few cases address the question whether municipalities or other state subdivisions or agencies have any First Amendment rights. All but one, and that not a case against a municipality, answer "no." Columbia Broadcasting System, Inc. v. Democratic National Comm., 412 U.S. 94, 139, 93 S.Ct. 2080, 2104-05, 36 L.Ed.2d 772 (1973) (concurring opinion); Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir.1990); NAACP v. Hunt, 891 F.2d 1555, 1565 (11th Cir.1990); Student Government Ass'n v. Board of Trustees, 868 F.2d 473, 481 (1st Cir.1989); see also Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371, 379 (5th Cir.1989). Contra, Nadel v. Regents of University of California, 28 Cal. App.4th 1251, 34 Cal.Rptr.2d 188, 197-98 (1994)."²³

The municipal power to engage in "government speech" is not conveyed to states or municipalities by the First Amendment.

In recent decisions the U.S. Supreme Court has discussed "government speech" and suggests that government speech is not subject to the same forum analysis and content/viewpoint analysis that is applied to individual

²³ In the one "contra" case cited above, the California Court District in Nadel held only that a governmental entity (in that case the state university system) was entitled to the "public figure" defense in a defamation action. It did not hold that a municipality is not protected by the First Amendment Free Speech Clause

speakers. See Grove City v. Sumnum, 555 U.S. 460 (2009).

The right to free speech is part of the "liberty" recognized in the Declaration of Independence as having been endowed on "all men" by the Creator. The First Amendment guarantees that liberty to individuals and sometimes to associations of individuals, but governments do not have liberties granted to them by God. Rather, governments have powers that are granted by God (Romans 13:1-7) and established by constitutions. The power of a city to engage in government speech is part of the city's plenary power to act for the safety and welfare of its constituents. Unlike the trial court's reliance on Gomillion v. Lightfoot, 364 U.S. 339 (1960), which involved Tuskegee citizens challenging a legislative change to the City's municipal boundaries, the U.S. Constitution poses no barrier to the Legislature restricting a City's authority to cover or destroy a 100 year old historical monument.²⁴

In response to the argument that the City of Birmingham

²⁴ The trial court erred in perceiving that the City's officials could trump the legislative occupation of the field under the AMPA. The Act is not facially invalid because there are ample opportunities for it to operate constitutionally, even here. See Ex Parte Tulley, 199 So. 3d 812, 821 (Ala.2015).

as a municipal corporation has free speech rights, we note that: (1) Municipal corporations are different from other corporations, because other corporations are voluntary associations and speak only for those officers, directors, employees, and shareholders who have chosen to associate with the corporation. In contrast, a municipality has the power of governmental force over all who are within its jurisdiction. They are creatures of the State, "existing under and by virtue of authority and power granted by the State." Ex parte Tulley, 199 So.3d 812,821 (Ala. 2015).

(2) Other kinds of corporate speech are entitled to only lower- or middle-tier protection, rather than the strict scrutiny afforded individual speech. They are therefore subject to regulation based on state interests that would not justify regulation of individual speech. See Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980); but see also Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (invalidating restrictions on corporate campaign contributions).

The City has impermissibly attempted to regulate the Linn Park Monument in contradiction to the State's express directive in the AMPA.

CONCLUSION

No society can long endure that teaches its children to hate their ancestors and be ashamed of their heritage. The State of Alabama has rightly enacted the Alabama Memorial Preservation Act to preserve and protect historic places and structures, to remember those of our past, to honor their sacrifices, to express gratitude for their service, and perhaps even to learn from their mistakes.

Monuments stand as voices of the past, what Edmund Burke called the "democracy of the dead" by which their voices live on in remembered tradition. As such, monuments are a voice of dissent, a reminder to the politically-correct orthodoxy and those who blindly adhere to it, that there was a time when people thought maybe the same as today, maybe differently. May this voice not be silenced, either by the vandal's sledgehammer or by the official's plywood barricade.

For, to again quote Orwell, "Who controls the past controls the future. Who controls the present controls the past."²⁵

²⁵ Orwell, supra.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2019, a copy of the foregoing brief has been served on the following recipients:

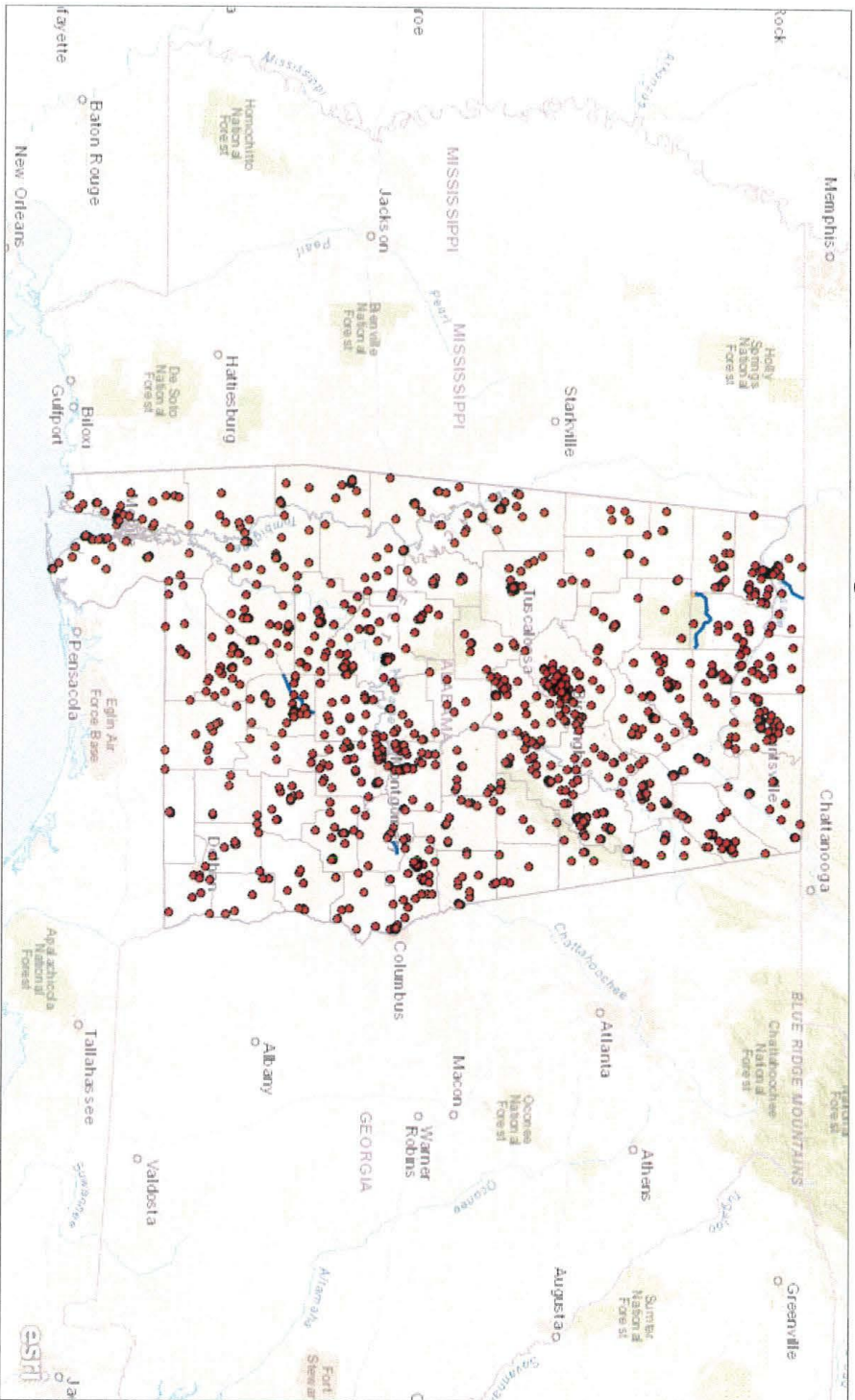
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/s/ Jack B. Hinton, Jr.

APPENDIX

Alabama Register of Landmarks and Heritage

Alabama Register of Landmarks and Heritage



This map represents properties and historic districts listed on the Alabama Register of Landmarks and Heritage.

Esri, HERE, Garmin, FAO, NOAA, USGS, EPA, NPS