



defies the law of injunctions in Virginia and is contrary to the evidence of record concerning probable damages to the College in the event that the injunction is not made permanent.

**A. Petitioners' Ability To Pay The Requisite Bond Is Irrelevant.**

The purpose of a bond under Va. Code § 8.01-631 is to require the party seeking an injunction to post an amount sufficient “to pay all such costs as may be awarded against the party obtaining the injunction, and all such damages as may be incurred, in case the injunction shall be dissolved.” The plain meaning of the statute requires a bond sufficient to cover costs and damages that may be incurred by the enjoined party as a result of the injunction. *See Bremer v. Bitner*, 44 Va. Cir. 505, 505-506 (Fairfax 1996) (ordering injunction bond of \$550,000). The statute says nothing about consideration of the ability to pay of the party seeking the injunction. Petitioners' inability to raise the entire amount to post the bond by the deadline set by this Court is irrelevant. Further reduction of the bond based upon Petitioners' inability to pay would unfairly deprive the College of its rights to recover for wrongful injunction because the College would be limited to an action on the bond, which this Court has already found should be \$1 million. *See Carr v. Citizens Bank & Trust*, 228 Va. 644, 325 S.E.2d 86 (1985) (defining recoverable damages as “those which are the natural and proximate result of the issuance of the injunction”).

**B. The \$1 Million Injunction Bond Ordered By This Court Is Amply Supported By The Evidence.**

The College's request for a significant injunction bond was supported by (1) the affidavit of Paul Provost of Christie's, demonstrating the potential decline in value if the auctions were cancelled or delayed, and (2) testimony from Christopher Burnley, Vice President for Finance Administration and Treasurer of the College, demonstrating the more intangible damages the College would incur if unable to infuse its endowment before its next accreditation review.

Plaintiffs provided no evidence with regard to the College's damages. Based upon the only evidence available, the circuit court found that the College's hard economic damages could exceed \$19 million, without even reaching the more intangible damages the College may incur if placed on probation by its accrediting body. (Nov. 8 Hearing Tr. 225:1-9.) The record evidence more than supports the \$1 million injunction bond ordered by this Court. *See, e.g., Seniors Coalition v. Seniors Found.*, 39 Va. Cir. 344, 351 (Fairfax 1996) (requiring plaintiff to post \$1 million bond before temporary injunction took effect).

**C. Petitioners Are Not “Representatives” In Any Capacity That Would Exempt Them From Posting A Sufficient Bond Under Va. Code § 8.01-631.**

To the extent Petitioners seek further reduction of the bond based upon their alleged “representative” status, Petitioners are not “representatives” in any capacity that would exempt them from posting a sufficient bond under Va. Code § 8.01-631. In the first place, Petitioners are comprised of 19 disgruntled students, alumni, former employees, and residents out of hundreds of current students and employees, thousands of alumnae and donors, and over 70,000 citizens of Lynchburg. There is no basis to believe that the agenda of these Petitioners is in any way “representative” of the thousands of other people being affected by Petitioners' litigiousness.

Second, Petitioners wrongly assert that “representative” parties as a class are exempted from posting any injunction bond under Va. Code § 8.01-626. If Petitioners' position was correct, then any association could obtain an injunction without posting a bond simply by alleging it is “representing” its members. That is not the state of the law. Under the plain language of the statute, the only so-called exceptions to Va. Code § 8.01-626 are 1) a narrow and explicit exemption for a “fiduciary” or 2) a discretionary exemption granted by the court awarding the injunction. Petitioners do not, nor could they, claim to be fiduciaries. And neither

the circuit court nor this Court has found any of these Petitioners to be a “person from whom in the opinion of the court” ordering a bond may be “unnecessary or improper.”

Petitioners’ reliance on *Deeds v. Gilmer*, 162 Va. 157, 174 S.E. 37 (1934), for an additional exception to Va. Code § 8.01-626 is misplaced. In *Deeds*, this Court held that it would be “a very exceptional case in which a court can, without abusing its discretion, grant an injunction to a person (other than a personal representative or some other person suing in a similar representative capacity) without requiring bond.” *Id.* at 271. “Personal representative” is defined by statute in Virginia as:

[T]he executor of a will or the administrator of the estate of a decedent, the administrator of such estate with the will annexed, the administrator of such estate unadministered by a former representative, whether there is a will or not, any person who is under the order of a circuit court to take into his possession the estate of a decedent for administration, and every other curator of a decedent's estate, for or against whom suits may be brought for causes of action that accrued to or against the decedent. Va. Code. § 1-234.

Petitioners do not fit this definition.

The explicit “exception” noted in *Deeds*, as well as the explicit exception for a “fiduciary” contained in Va. Code § 8.01-626 itself, reflect the legal principle that executors, administrators and fiduciaries should not be required to post an injunction bond because they do not sue in their own right. *See Lomax v. Picot*, 2 Rand. 247 (Va. 1824) (“The cases alluded to, are those of executors and administrators; as to which, the Courts seem uniformly to have held, that they are not bound to give security under the act; not because such security can be dispensed with in all cases, but because, upon the just construction of the law, it does not extend to those cases, but only to cases in which the party prays an injunction in his own right”). Further, fiduciaries and personal representatives are exempt from posting an injunction bond because in nearly all cases, a fiduciary or personal representative has already posted a bond. *See, e.g.,*

*Wilson v. Wilson*, 11 Va. (1 Hen. & M.) 16 (1806) (noting executors and administrators having given security for their administration are not generally required to give security upon obtaining injunctions”); accord *Shearman v. Christian*, 22 Va. (1 Rand.) 393 (1823).

Clearly Petitioners are not “personal representatives” as that term is defined under Virginia law, nor have they filed suit in any “similar representative capacity” to that of a personal representative, nor are they fiduciaries of any kind. Thus the narrow exceptions in Va. Code § 8.01-626 and set forth in *Deeds* do not apply. The circuit court correctly rejected Petitioners’ alleged “representative” status as grounds for eliminating a bond. (See Nov. 13 Tr. 29:3-8). In setting a \$1 million bond, this Court too has already implicitly considered and rejected Petitioners’ argument that they are “representatives” and therefore exempt from Va. Code § 8.01-631. Nothing has changed since this Court’s Order of November 16, 2007 other than the fact that Petitioners have not been able to post the requisite bond.

Moreover, Petitioners’ assertion that they are self-anointed “representatives” for the Lynchburg and the College communities is barred by the doctrine of judicial estoppel. Petitioners did not assert any claim in a “representative capacity” in the Complaint, but rather pled on a plaintiff-by-plaintiff basis the alleged individual “harm” each would suffer if the College sold the Four Paintings. (See Pls.’ Compl. ¶¶ 64(a) – 64(f).) Petitioners put on more than three hours of evidence seeking to establish Petitioners’ individual harm and “personal stake” in the sale of the paintings in order to survive the College’s demurrer. (See, e.g., Nov. 8 Hearing Tr. 21:4-43:14; 30:22-43:15; 46:10-85:19; 89:7-102:12.) Petitioners’ counsel asserted that “in each and every one of these instances we have the uniqueness of these plaintiffs being impacted in a very specific way,” (*id.* 193:9-13) and that “these individuals are uniquely injured.” (*id.* 194:7-9.) It is clear from the record that the circuit court ruled in Petitioners’ favor on individual

standing. (*See, e.g.*, Nov. 8 Hearing Tr. 218, discussing the individual harms alleged by Plaintiff Whitehead and Plaintiff Williams.)

Petitioners cannot claim individualized injuries for purposes of surviving a standing challenge on the College's demurrer, prevail on that issue, and then for purposes of the required injunction bond claim to be suing in a "representative capacity." This position is barred by textbook judicial estoppel principles. *See, e.g., Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 380-81, 601 S.E.2d 648, 650 (2004) ("Judicial estoppel forbids parties from assuming successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory.").

Finally, it should also be noted that the auctions took place (without the College's four paintings) as scheduled at Christie's in New York on November 19 and November 29. The auction on November 29, in which three of the four paintings were to be sold, generated sales of over \$71 million, a figure unprecedented in the relevant art market. The success of that auction further demonstrates that the amount of damages the College will probably suffer from being prohibited from selling the paintings in the current market will almost certainly exhaust the \$1 million injunction bond. *See, e.g., Carr*, 228 Va. at 651-652, 325 S.E.2d at 90 ("The proper measure of a decrease in market value of property caused by delay resulting from wrongful issuance of an injunction is the difference in market value at the time it would have been sold absent any restraint and the market value when the injunction no longer prevented the sale.")

In sum, Petitioners have provided no proper legal or factual basis for this Court to reduce the injunction bond by 50 percent simply because the Petitioners are unable to pay. The College is entitled to a bond sufficient to protect the College from damages incurred as a result of the injunction. To the extent Petitioners ask for more time, under the applicable law Petitioners are

simply not entitled to a lengthy, unsecured temporary injunction. The College respectfully submits that a \$1 million injunction bond is more than supported by the evidence of the College's potential damages, and that it should not be disturbed.

Respectfully submitted,

RANDOLPH COLLEGE

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**CERTIFICATE OF SERVICE**

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of November, 2007, upon:

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