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IN THE SUPREME COURT OF VIRGINIA

Record No. 210113

HELEN MARIE TAYLOR, *et al.*,
Appellants,

v.

RALPH S. NORTHAM, *et al.*,
Appellees.

BRIEF OF AMICUS CURIAE INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION

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INTEREST OF AMICUS CURIAE

The Institute for Constitutional Advocacy and Protection is a public-interest law group based at Georgetown University Law Center. The Institute's mission is to use the power of the courts to defend American constitutional rights and values. The Institute has extensive experience litigating separation-of-powers and First Amendment issues, including questions regarding the scope of legislative authority and the application of government-speech doctrine in previously undecided contexts. The Institute is therefore well positioned to identify how Plaintiffs' position in this case contravenes the well-established legal principles that restrict a legislature's authority to bind its successors in perpetuity and how Plaintiffs' position would undermine the basis for the government-speech doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case and in *Gregory v. Northam*,[1] Plaintiffs have staked out an extraordinary position: that Virginia's present-day General Assembly is powerless to respond to the needs of its constituents because of a policy choice made by the General Assembly 130 years ago.

[1] Record No. 201307.

All of Plaintiffs' various claims in this case reduce to an assertion that the 2020 law providing for the removal of the Robert E. Lee memorial in Richmond, 2020 Spec. Sess. I, Va. Acts ch. 56, ¶ 79(I), is invalid because the current General Assembly lacks the authority to repeal a joint resolution passed by a previous General Assembly in 1889. That remarkable contention flatly contravenes centuries of settled jurisprudence, legal history, and political theory. And it is particularly problematic where, as here, allowing the 1889 General Assembly to have the final word would entrench a government message—glorifying a Confederate general who took up arms against the United States in the service of preserving slavery—that is now widely perceived as outdated and at odds with public opinion.

I. Plaintiffs' position is contrary to the widespread, well-established understanding that one legislature cannot bind a future legislature in perpetuity. In cases dating back to the early 1800s, the United States Supreme Court has recognized that such legislative entrenchment is generally impermissible with respect to both Congress and state legislatures. *See United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (describing "the centuries-old concept that one

legislature may not bind the legislative authority of its successors."). State courts—including this Court—have long agreed. *See Currie's Adm'rs v. Mut. Assurance Soc'y*, 14 Va. (1 Hen. & M.) 315, 348–49 (1809).

The presumption against legislative entrenchment has deep historical roots. The Founders viewed this principle as a bedrock feature of legislative power. *See*, *e.g.*, 6 *The Writings of James Madison 1790–1802* 16 (Gaillard Hunt ed., 1906) ("A repeal is a thing against which no provision can be made."). The Founders, in turn, were influenced by English common law dating back to the 11th century, which held that such a proscription was necessary to preserve Parliament's sovereignty. *See* 1 William Blackstone, *Commentaries on the Laws of England* *90 (1753) ("Acts of parliament derogatory from the power of subsequent parliaments bind not.").

Modern American scholars have also recognized that legislative entrenchment "violates the underlying democratic principles upon which the Constitution, as well as our entire political system, is based." John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Cal. L. Rev.

1773, 1777 (2003). In particular, entrenchment undermines government accountability, is deeply antidemocratic, and erodes public trust.

II. This long-accepted anti-entrenchment principle has special force where, as here, government speech is at issue. It is well established that monuments and statuary are powerful forms of government expression. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). Under the government-speech doctrine, governments may express the messages of their choosing because they are accountable to the public for the content of those messages. *Id.* at 467–68. If the electorate disagrees with a particular government message, voters may change that message by expressing their displeasure at the ballot box.

If legislative entrenchment were permissible, it would render the current General Assembly unable to respond to the will of the people, severing the accountability mechanism at the heart of the government-speech doctrine. Entrenchment in this case would force the Commonwealth to convey a message it no longer wishes to express and would render the voters unable to influence that message by voting for

new officials. Particularly where the monument at issue has been the source of such public controversy—and, 130 years later, conveys a message that is out of step with public opinion—the General Assembly must have the flexibility to respond to the changing times.

ASSIGNMENTS OF ERROR AND STANDARD OF REVIEW

Like the Commonwealth, the Institute contends that the 2020 law was a valid exercise of the current General Assembly's legislative authority. Therefore, this brief implicates at least the first five errors assigned by the *Taylor* Plaintiffs, each of which presents pure questions of law that this Court reviews de novo. *See Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 577 (2017).

ARGUMENT

I. Plaintiffs' Position Is Contrary to the Bedrock Democratic Principle that One Legislature Cannot Bind a Future Legislature

A defining feature of representative democracy has long been a presumption against legislative entrenchment—*i.e.*, the principle that a legislature may not act in a manner that ties the hands of its successors. Indeed, "legal philosophers, judges, and modern legal scholars have rejected the idea that one legislature, through ordinary legislation, should be allowed to bind future legislatures." John C.

Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Cal. L. Rev. 1773, 1776 (2003); *see* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 Va. L. Rev. 385, 386 (2003) ("Legislative entrenchment, the practice by which a legislature insulates ordinary statutes from repeal by a subsequent legislature, has generally been thought to be both unconstitutional and normatively undesirable.").

Plaintiffs' contrary position that the Virginia General Assembly of 2020 is powerless to change a decision made by the Virginia General Assembly of 1889 is at odds with case law, centuries of Anglo-American history, and core tenets of representative democracy.

A. Courts Have Long Recognized That Legislative Entrenchment Is Generally Impermissible

1. The Supreme Court of the United States has long recognized "the centuries-old concept that one legislature may not bind the legislative authority of its successors." *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing 1 William Blackstone, *Commentaries on the Laws of England* 90 (1765)). This general anti-entrenchment principle protects the legislative power from diminishment and ensures

that legislatures have full flexibility to respond to the electorate's needs and changing public opinion. *Newton v. Mahoning Cnty. Comm'rs*, 100 U.S. 548, 559 (1879); *see Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them."). As the Supreme Court has explained:

> Every succeeding legislature possesses the same jurisdiction and power . . . as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. . . . It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

Newton, 100 U.S. at 559.

Accordingly, in cases involving claims under the Contracts Clause, U.S. Const. art. I, § 10, the Court has consistently recognized a presumption against legislative entrenchment. That Clause "limits the ability of the government to abrogate its own contracts without meeting heightened scrutiny." Roberts & Chemerinsky, *supra*, at 1781. But the

Supreme Court has made clear that the Contracts Clause is strong medicine that rarely overcomes the well-established "principle that one legislative body may not bind its successors," which "is common to all levels of our government and applies to any democratically elected law-making body." *Id.* at 1779.[2]

For example, in 1853, the Supreme Court rejected a Contracts Clause challenge to a state law assessing a tax on a state-chartered bank over the bank's claim that a previous law had exempted it from taxation. The Court explained that "[t]he powers of sovereignty confided to the legislative body of a State are undoubtedly a trust

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[2] For the reasons explained in the Commonwealth's brief—and like the cases discussed in the text that follows this footnote—the Contracts Clause does not apply here because there is no contract, and thus the presumption against entrenchment applies. But even if there were a contract, it would be unenforceable because it is well established that a "[l]egislature cannot bargain away" its police powers, including its authority to legislate regarding "the public health or the public morals." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 436 (1934); *see Stone v. Mississippi*, 101 U.S. 814, 819 (1879) (same). At any rate, "even where courts have found that a legislature is bound by the contractual promises of a former legislature, the remedy is simply damages, not enforcement of a legislative scheme that the future body does not favor." Roberts & Chemerinsky, *supra*, at 1781–82 (citing the Supreme Court's decision in *Winstar*, 518 U.S. 839, and explaining that "the divergent opinions of the justices were together on that simple point").

committed to them, to be executed to the best of their judgment for the public good." *Ohio Life Ins. & Tr. Co. v. Debolt*, 57 U.S. 416, 431 (1853). Therefore, absent a contract, "no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body," including "depriv[ing] a future legislature of the power of imposing any tax it may deem necessary for the public service—or of exercising any other act of sovereignty confided to the legislative body." *Id.*

Similarly, in 1879, the Supreme Court held that the Ohio state legislature was not precluded from moving a county seat from Canfield to Youngstown, despite previous legislation purporting to fix the location of the county seat permanently and investments by the citizens of Canfield in a courthouse in reliance on that legislation. *Newton*, 100 U.S. at 549–52, 559. In that case, the Court held that the previous legislation was not a contract and dismissed as "unsound" the proposition that a former legislature could prevent a future legislature from acting "whatever the public exigencies, or the force of the public sentiment which demanded it." *Id.* at 560.

The Supreme Court has applied the same principle to acts of Congress. In 1932, the Court determined that Congress could erect a firehouse on federal land that previously had been dedicated for use as a public park, over the objections of neighbors whose property values would be adversely affected by the change. *Reichelderfer v. Quinn*, 287 U.S. 315, 316–18 (1932). The Court observed that "[t]he dedication expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years." *Id.* at 318. For this same reason, "[i]t has often been decided that, when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use." *Id.* at 320 (collecting cases).

Additional examples of the Supreme Court's recognition of the anti-entrenchment principle dating back to the early 1800s abound, *see, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (describing "ordinary legislative acts" as "alterable when the legislature shall please to alter it"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (recognizing that "one legislature is competent to repeal any act which a former legislature was competent to pass; and . . . one legislature

cannot abridge the powers of a succeeding legislature"), and the rule has enjoyed continued vitality in modern jurisprudence, *see Winstar*, 518 U.S. at 872; *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring).

2. This Court, too, has long recognized this well-established principle. Indeed, in 1809, this Court rejected the concept of legislative entrenchment in a case involving the Virginia General Assembly's authority to change the terms of a mutual assurance society's statutory charter of incorporation. *Currie's Adm'rs v. Mut. Assurance Soc'y*, 14 Va. (1 Hen. & M.) 315, 348–49 (1809). Affirming the lower court's judgment that such an alteration was within the General Assembly's authority, Judge Roane explained that "[i]t is the character of a legislative act to be *repealable* by a succeeding legislature; nor can a preceding legislature limit the power of its successor, on the mere ground of volition only." *Id.* at 348.

Nearly 100 years later, in 1902, that principle was codified for the first time in the Virginia Constitution, providing that "[a]ny general law shall be subject to amendment or repeal." Va. Const. art. IV, § 64 (1902). That language appears verbatim in today's version. Va. Const. art. IV, § 15 (1971). Relying on that provision, this Court in 1987 struck

down a law that purported to assess an irrevocable tax, explaining that "legislation enacted in one session of the General Assembly may be repealed or amended at a subsequent session of the General Assembly." *Terry v. Mazur*, 234 Va. 442, 456–57 (1987).

Faced with similar questions, other state courts have reached the same conclusion about legislative entrenchment. *See*, *e.g.*, *Terry v. Bishop*, 158 P.3d 1067, 1071 (Okla. 2007) (citing "the fundamental constitutional principle that a legislative body may not irrevocably bind its successors"); *Lynn v. Polk*, 76 Tenn. 121, 137 (1881) ("The constitutional powers of the law-making body of 1881 are in nothing different from those that will attach to the legislatures of ten, twenty or ninety-nine years hence; all are alike defined and restricted."); *City of Philadelphia v. Fox*, 64 Pa. 169, 181 (1870) ("[T]he legislature of this Commonwealth, under the Constitution, could not by contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory. It cannot alienate any part of the legislative power which, by the Constitution, is vested in a General Assembly annually convened. If the legislature were to attempt to erect a municipality with a special provision that its charter should be

unchangeable or irrevocable, such provision would be a nullity[.]" (citations omitted)); *Wall v. State*, 23 Ind. 150, 153 (1864) ("That the legislature can not in such a matter impose limits or restrictions upon its own future action [is a] very plain proposition[], which, we presume, will never be controverted."); *Kellogg v. City of Oshkosh*, 14 Wis. 623, 628 (1861) ("It is not pretended that one legislature can . . . bind a future legislature to a particular mode of repeal.").

B. The Anti-Entrenchment Principle in America Dates Back to the Founding and Has Roots in English Common-Law Notions of Legislative Sovereignty

The rule against legislative entrenchment not only has been repeatedly embraced by courts, but also has a long historical pedigree. The Founders believed this principle to be an essential attribute of legislative authority and treated it as a baseline presumption of the American political system. But the doctrine's roots go back even further to early English common law, where the rule served as a crucial protection of Parliament's sovereignty and legislative power.

1. The Founders subscribed to a general anti-entrenchment principle in correspondence and writings, public statements, and early legislation. For example, in 1789 and 1790, Thomas Jefferson and

James Madison exchanged private letters on political philosophy in which they both acknowledged that, as a general matter, legislatures have no power to bind their successors. Declaring that "[t]he earth always belongs to the living generation," Jefferson argued in one such letter that "[t]he Constitution and the laws of their predecessors are extinguished then, in their natural course, with those whose will gave them being." McGinnis & Rappaport, *supra*, at 404 (quoting *The Mind of the Founder: Sources of the Political Thought of James Madison* 229 (Marvin Meyers ed., 1973)). Although Madison disagreed with Jefferson's statement insofar as it pertained to the Constitution, he did agree that, as a general matter, legislatures may not pass irrevocable laws. *Id.*; *see also The Federalist No. 78* (1788) (Alexander Hamilton) (describing two successive legislatures as having "EQUAL authority").

Around the same time, Madison described an expansive anti-entrenchment principle in a speech to Congress regarding his proposed bill to locate the capital in Philadelphia for ten years before moving it permanently to Washington, D.C. 6 *The Writings of James Madison 1790–1802* 6–16 (Gaillard Hunt ed., 1906). In that speech, Madison responded to some lawmakers' fears that Congress would repeal the

portion of the bill moving the capital, leaving it in Philadelphia indefinitely. Madison acknowledged that such a risk was unavoidable:

> But what more can we do than pass a law for the purpose? It is not in our power to guard against a repeal. Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made. If that is an objection, it holds good against any law that can be passed. If those States that may have a superiority in Congress at a future day will pay no respect to the acts of their predecessors, or to the public good, there is no power to compel them.

Id. at 16.

State legislation from the Founding era also reflects widespread acceptance of the anti-entrenchment principle. One prominent example was Virginia's 1779 Bill for Establishing Religious Freedom, which Jefferson drafted and Madison introduced in the Virginia General Assembly. *See* McGinnis & Rappaport, *supra*, at 405. Although it wished the law to be permanent, the General Assembly explained in the text of the statute: "[W]e well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law." *A Bill for Establishing Religious Freedom,*

18 June 1779, General Assembly of Virginia, Founders Online, National Archives.[3]

2. The Founders were not writing on a blank slate: They were no doubt influenced in part by English common law, which had long held legislative entrenchment to be incompatible with the sovereignty of Parliament. As William Blackstone, a contemporary of the Founders, explained in his authoritative treatise: "Acts of Parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament." 1 William Blackstone, *Commentaries on the Laws of England* *90 (1753); *see* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* *125–27 (2d ed. 1871) (attributing the origins of the American anti-entrenchment rule to Blackstone).

[3] https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082.

Although Blackstone traced this anti-entrenchment principle to Cicero,[4] the rule's adoption in England dates back to at least the Norman conquest of the 11th century, which brought with it the notion that the Crown—and later Parliament—had absolute legislative power. Roger Michener & A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 23–25 n.48 (8th ed. 1915). Under that doctrine, Parliament was the supreme legislative authority, bound by no higher power, including earlier Parliaments. *Id.*; *see also* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379, 391–93 (1987).

Consistent with this idea, Francis Bacon concluded in the early 16th century that Parliament could not bind its successors, explaining that "a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed; no more than if a man should appoint or declare by his will that if he made any later will it

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[4] *See* 1 William Blackstone, *Commentaries on the Laws of England* *90–91 (1753) ("And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. 'When you repeal the law itself, (says he,) you at the same time repeal the prohibitory clause, which guards against such repeal.'").

should be void." 6 *The Works of Francis Bacon* 159–60 (James Spedding et al. eds., 1878). As an example of this principle, Bacon pointed to King Henry VIII's unsuccessful efforts to constrain his minor son's future powers through an act of Parliament. *Id.* at 160. Although Henry VIII was able to procure such legislation, when his son Edward VI ascended to the throne, Parliament immediately repealed the act even though Edward VI was still a minor. *Id.*

English history is replete with similar instances of failed legislative entrenchment. *See* Michener & Dicey, *supra*, at 21–25. To take just one additional example, the Union with Scotland Act of 1706 required Scottish university professors to profess Protestant religious faith as a "Fundamental and Essential Condition" of England's treaty with Scotland. Union with Scotland Act, (1706), c. 11, art. 25 (Gr. Brit.).[5] The Act included express entrenching language, providing that it would remain in effect "without any Alteration thereof or Derogation thereto in any sort for ever." *Id.* Despite that language, Parliament later passed the Universities (Scotland) Act of 1853, eliminating the

[5] https://www.legislation.gov.uk/aep/Ann/6/11.

religion requirement for most professors in Scottish universities. *See* Michener & Dicey, *supra*, at 22.

C. The Anti-Entrenchment Principle Reflects Fundamental Values of American Representative Democracy

In addition to the legislative sovereignty rationale, modern American commentators have recognized that a suite of democratic values underlies the general prohibition on legislative entrenchment. At bottom, entrenchment "violates the underlying democratic principles upon which the Constitution, as well as our entire political system, is based." Roberts & Chemerinsky, *supra*, at 1777. Indeed, entrenchment undermines governments' ability to be accountable to the electorate and respond effectively to changing public opinion, is fundamentally antidemocratic, and results in a host of adverse consequences that erode public trust.

1. As an initial matter, entrenchment undercuts democratic accountability. A foundational constitutional value, accountability allows voters to direct policy and make change through their vote, including voting out officeholders who are out of step with the voters' will. *See id.* at 1796 (explaining that the Constitution embodies this principle in, among other provisions, the "assurance that every state

will be guaranteed a Republican form of government" and various provisions guaranteeing the right to vote). This dynamic provides powerful incentives for legislators to respond to voters' preferences and change the status quo when voters are no longer satisfied.

Legislative entrenchment disrupts this accountability mechanism by depriving the public of its ability to effect change through the franchise. As one scholar has explained:

> Just as members of Congress lack power to extend their terms beyond those set by the Constitution, they may not undermine the spirit of that document by immutably extending their influence beyond those terms. Each election furnishes the electorate with an opportunity to provide new direction for its representatives. This process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters.

Eule, *supra*, at 404–05; *see also id.* at 403 (analogizing legislative power to common-law notions of agency, where "[a]fter the prescribed interval has run its course, the agent no longer enjoys the authority to bind the principal").

2. Relatedly, legislative entrenchment is "inconsistent with the democratic principle that present majorities rule themselves." Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*,

85 Geo. L.J. 491, 509 (1997). When a past legislature purports to tie the hands of future legislatures through entrenched legislation, the votes of past legislators control policy outcomes in perpetuity, even if a majority of the current legislature wishes to change course. Entrenchment thus hamstrings the current legislature's ability to respond to the will of its present-day constituents and restricts the legislature's flexibility to react to the changing attitudes and social mores of the majority. *See* Roberts & Chemerinsky, *supra*, at 1798 (legislative entrenchment is contrary to the "principle that a simple majority is required to enact legislation"); Klarman, *supra*, at 509 (describing entrenchment as "indefensibly antimajoritarian").

3. Moreover, legislative entrenchment can prevent the government from effectively addressing contemporary issues using the most up-to-date information and innovations. When new problems arise, the public expects the government to act. Legislatures are particularly attuned to the needs of the public, have powerful means of acquiring information in aid of legislation, and, as explained above, normally have strong incentives to take action. But "[t]o permit . . . entrenchment prevents those with the greatest knowledge of societal

needs from acting." Eule, *supra*, at 387. In such a situation, "government is transferred 'from those who possess the best possible means of information, to those who, by their very position, are necessarily incapacitated from knowing anything at all about the matter.'" *Id.* (quoting Jeremy Bentham, *Handbook of Political Fallacies* 55 (Harold Larrabee ed., 1952)); *see also* Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189, 195 (1972) ("[T]he passage now of a bill providing for future proceedings would constitute an attempt to settle for the future a number of prudential questions as to which nothing but knowledge of the conditions of the future can furnish a basis for intelligent action.").

In any number of circumstances, legislatures must have the flexibility to protect public health and safety using the most up-to-date knowledge, technology, and information. For example, legislatures must be able to respond nimbly to rapidly evolving public-health crises, natural disasters, or terrorist attacks. But if legislative entrenchment were permissible, laws enacted in a bygone era could preclude legislatures from acquiring and deploying the necessary resources and modern solutions to address such emergencies.

4. Finally, entrenchment can lead to evasion of the law and undermine public confidence in government. Where legislative entrenchment "blocks legitimate measures to confront drastically changed conditions, the restraint invites circumvention" through extra-legislative means. Eule, *supra*, at 387. Such circumvention can take the form of tortured construction of the language of the entrenched law or other methods of official evasion, which "carry a high cost to the moral atmosphere of government and distort the institutional structure." *Id.* At worst, "the inability to repeal [the law] may lead to open defiance"—the public taking matters into its own hands—"affording dangerous precedent for the nonobservance of other legal arrangements." *Id.* at 378–79.

On top of all this, the inalterable nature of a law can raise suspicions of bad motives on the part of the legislature that passed it, further undermining public confidence. Although laws with longstanding support from a majority of the public remain on the books because the public does not desire to change them, laws without such support will survive only if future generations are deprived of the power to change them. Such a law thus "raises a presumption that it has

'some mischievous tendency.'" *Id.* at 379 (quoting Bentham, *Handbook of Political Fallacies*, *supra*, at 66); *see also id.* ("Underlying the discomfort with entrenched laws has been a suspicion that only scoundrels require their efforts to be immutable.").

* * *

The courts, the Founders, English common law, and modern-day scholars have all accepted that legislative entrenchment is nearly always both unlawful and normatively objectionable. Plaintiffs' position in this case—that the Virginia General Assembly of 1889 should control the fate of the Lee monument in 2021 over the objections of the current General Assembly—thus flies in the face of centuries of well-established legal doctrine, history, and political theory.

II. The Anti-Entrenchment Principle Has Special Force Where Government Speech Is at Issue

As explained above, legislative entrenchment is inconsistent with basic principles of representative democracy. But allowing the 1889 General Assembly to have the final word in this case would be especially inappropriate given what Plaintiffs seek to entrench: A particular message, sent by the government, on government-owned land. Freezing the General Assembly's 19th-century message in

perpetuity would deprive the government of its ability to choose the message it wishes to convey and the public from holding the government accountable to 21st-century sensibilities.

1. Under the government-speech doctrine, "[a] government entity has the right to speak for itself[,] . . . is entitled to say what it wishes, and [may] select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (internal quotation marks and citations omitted). As the Supreme Court has recognized, the ability to speak on public issues is a crucial component of governing. Indeed, "it is not easy to imagine how government could function if it lacked this freedom." *Id.* at 468 ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990))).

Governments may favor certain messages over others because they are "accountable to the electorate and the political process for [their] advocacy." *Id.* (quoting *Bd. of Regents of Univ. of Wis. Sys. v.*

Southworth, 529 U.S. 217, 235 (2000)); *see also Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015) ("[I]t is the democratic electoral process that first and foremost provides a check on government speech."). Every government that espouses a position is understood to "represent[] its citizens" in doing so. *Sons of Confederate Veterans*, 576 U.S. at 208. Accordingly, if constituents are unhappy with their government's messaging, they are entitled to reshape it by manifesting their displeasure at the ballot box. *See Southworth*, 529 U.S. at 235 ("If the citizenry objects" to a government message, "newly elected officials later could espouse some different or contrary position.").

2. Monuments like the one at issue in this case are an important mode of government speech. *See Summum*, 555 U.S. at 470 ("Governments have long used monuments to speak to the public."). It is well-established that "[p]ermanent monuments displayed on public property typically represent government speech," *id.*, because they "are meant to convey and have the effect of conveying a government message," *id.* at 472. Indeed, by definition, a monument is "a structure that is designed as a means of expression." *Id.* at 470. Thus, "[w]hen 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." *Id.* Observers are therefore entitled to assume that a government deliberately conveys a "message . . . by allowing a monument to remain on its property," *id.* at 477, and to vote for change if they are unhappy with that message, *see id.* at 468; *see also id.* at 481–82 (Stevens, J., concurring) ("Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views it endorses or expresses through this means.").

3. Preventing the current-day General Assembly from removing the Lee monument, however, severs this essential connection between government speech and democratic accountability. *See supra* Part I.C.1 (explaining generally how legislative entrenchment undermines democratic accountability). Under Plaintiffs' theory, the Commonwealth must display the Lee monument on its property forever, even though the message the monument conveys no longer represents "the image" that the Commonwealth "wishes to project." *Summum*, 555

U.S. at 473. In this circumstance, the Commonwealth no longer speaks for itself; it is forced to carry messages chosen by elected officials 130 years ago. And the present-day electorate is powerless to check or influence those messages by voting for new officials. What's more, because observers reasonably attribute those messages to the present-day government, state legislators may be unfairly chastised for expressing viewpoints that their predecessors have compelled them to embrace. *Cf. Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (noting, in the context of explaining why the anti-commandeering rule promotes political accountability, that although voters "know who to credit or blame" when Congress itself regulates, "responsibility is blurred" when "a State imposes regulations only because it has been commanded to do so by Congress").

Indeed, entrenching the message chosen by the 1889 General Assembly would be particularly perverse in this case, in light of the recent public outcry the Lee monument has generated. After substantial public pressure, in 2020, the General Assembly decided that it no longer wished to glorify the Lost Cause and minimize the horrors

of slavery by memorializing and celebrating a Confederate general.[6] To hold the General Assembly powerless to act would thwart legislators' ability to respond to changing mores and voter preferences in an area of significant public controversy. The General Assembly's inability to act could also result in economic costs for the Commonwealth, which the General Assembly would be powerless to address, if businesses decide they no longer wish to operate in a state that continues to exalt Confederate generals.

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[6] To the extent Plaintiffs dispute the "shameful history that gave rise to the Lee Monument" and the "ongoing pain" that it causes, Taylor Br. 49 (quoting Br. in Opp'n to Pet. for Appeal 25), that argument is irrelevant to the government-speech analysis. As the Supreme Court noted in *Summum*, a monument's meaning will rarely be perceived uniformly. 555 U.S. at 474 ("The meaning conveyed by a monument is generally not a simple one . . . . and may . . . be interpreted by different observers, in a variety of ways."). Most monuments—like most poems, paintings, and plays—will "evoke different thoughts and sentiments in the minds of different observers," *id.* at 475, and "the 'message' conveyed by a monument" also "may change over time," *id.* at 477. In all cases, however, the salient point is that the government has the freedom "to select the views that *it* wants to express" as the speaker. *Id.* at 468 (emphasis added); *see id.* at 474–77; *cf. Sons of Confederate Veterans*, 576 U.S. at 213 (holding that final approval authority over the messages conveyed on specialty license plates allowed Texas "to choose how to present itself and its constituency" and, therefore, to decline to create and sell specialty license plates featuring a Confederate battle flag).

In sum, the Lee monument is now widely understood to convey a message that is out of step with public opinion and outdated. Even more than that, it enshrines a viewpoint that signals the government's desire to deprive people of their constitutional rights based on race. This is the quintessential situation in which the legislature must remain accountable to the public and retain the flexibility to take appropriate action. *See Sons of Confederate Veterans*, 576 U.S. at 207 (describing government-speech doctrine as a reflection of the primary role of the "democratic electoral process" in serving as a check on government speech (citing *Southworth*, 529 U.S. at 235)).

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court for the City of Richmond should be affirmed, and the injunction pending appeal in *Taylor v. Northam* should be immediately dissolved.

Respectfully submitted,

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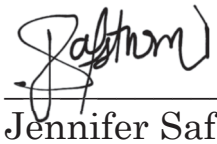

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