IN THE SUPREME COURT OF VIRGINIA

Record No. 210113

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

v.

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

BRIEF OF A.E. DICK HOWARD AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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April 19, 2021

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus A.E. Dick Howard is the Warner-Booker Distinguished Professor of Law at the University of Virginia. He served as Executive Director of the Commission on Constitutional Revision and then as counsel to the General Assembly when it reviewed the Commission's recommendation. He is the author of *Commentaries on the Constitution of Virginia*. As Appellants have cited that treatise in supposed support of their opening brief on the question of separation of powers, Professor Howard has a particular interest in correcting Appellants' misunderstanding of the *Commentaries*. He has a further interest in ensuring that separation of powers principles are applied correctly to preserve the independence of the judiciary and the General Assembly's authority to make new law.

INTRODUCTION

The General Assembly must have the power to declare the Commonwealth's public policy. That principle is at the core of this case. The mere pendency of a lawsuit does not preempt the legislative authority to pass laws that reflect current policy preferences and cast off the policies of a bygone era.

Appellants' position boils down to this: In 1889—with the rise of the Lost Cause movement—the Virginia General Assembly passed a resolution allowing the Governor to accept a monument of General Robert E. Lee that the Commonwealth would keep and maintain. Once Appellants filed suit in this case, the General Assembly was rendered powerless to change or repeal that ancient resolution and was obliged to let the statue continue in place. Appellants' preferences regarding the statue, in other words, prevail over those of the Commonwealth's elected representatives.

Amicus offers this brief to explain why Appellants' position turns the separation of powers doctrine on its head. It is the General Assembly's constitutional function to make policy for the Commonwealth. It performed that function last year when, in a special session, it passed a bill ("2020 Law") that repealed the 1889 resolution and directed the Department of General Services to comply with the Governor's directive to remove the Lee Monument.

A line of federal and state cases leading up to and extending beyond *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), establishes the principle that the General Assembly has the power to make new law, even if such law is outcome determinative to pending litigation. These cases control the separation of powers inquiry here. In enacting the 2020 Law, the General Assembly made new law; it did not direct courts to reach an outcome under old law. The new law is not impermissible special legislation in violation of separation of powers even if the law affects a narrow class of parties or even just one party. The 2020 Law does not instruct courts to reopen final judgments.

The General Assembly's instruction to remove the Lee Monument is but one part of a larger policy movement to reckon with manifestations of white supremacy in the public sphere. The Circuit Court properly considered the 2020 Law as evidence of the Commonwealth's public policy position. The 2020 Law is a permissible exercise of the General Assembly's legislative power, and the ruling of the Circuit Court should be affirmed.

ARGUMENT

I. Federal and state courts have long held that the separation of powers doctrine does not prevent a legislature from passing new law.

While the Continental Congress in Philadelphia debated, drafted, and approved the Declaration of Independence in July 1776, Virginia leaders were holding a convention of their own. In June of that year, they finalized a state Constitution. 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 7 (1974) ["Howard *Commentaries*"]. Virginia's Declaration of Rights made explicit what the federal Constitution later embraced implicitly: that "the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct." Va. Const. art. I, § 5. Article III, § 1 reinforces this principle. It states that the "legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time." *Id.* art. III, § 1. Article VI § 1, like its counterpart in Article III of the U.S. Constitution, reflects these principles and vests the judicial power in a Supreme Court and other courts as established by the General Assembly. *Id.* art. VI, § 1.

Throughout the nearly 250 years since, federal and state courts have continually reaffirmed a concept at the heart of the constitutional division of powers: The General Assembly has the power to pass new law, even if doing so affects ongoing litigation.

A. Federal separation of powers jurisprudence informs Virginia courts' interpretation of Article I, § 5 and Article III, § 1.

Both the federal and state constitutions divide governmental powers into three coordinate branches—the legislature, executive, and judiciary—to safeguard liberty. *See* U.S. CONST arts. I-III; Va. Const. art. I, § 5 & art. III, § 1; *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law."). The idea that one branch may not "tread[] impermissibly" on the other has coalesced into a separation of powers doctrine with a robust case history. *Bank Markazi*, 136 S. Ct. at 1323.

Congress—like the General Assembly in Virginia—makes laws, and through their representatives, the people speak: "The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78 (Alexander Hamilton); *see also* The Federalist No. 51 (James Madison) (noting that the legislative power would "predominate[]"). The Founders expected the judiciary to respect the legislative power. The judiciary would act "always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738, 866 (1824). In Virginia, the legislative branch has the inherent authority to enact new laws, limited only by constitutional constraints. Howard *Commentaries* 450 ("[U]nless limits spring either from the Federal or the Virginia Constitution, the Assembly can

act."); *see Commonwealth v. Tate*, 30 Va. (3 Leigh) 802, 809-10 (1831) ("It belongs to the legislature to say what the law shall be . . . .").

Virginia courts look to federal decisions when evaluating the parameters of the separation of powers doctrine reflected in both constitutions. *See Moreau v. Fuller*, 276 Va. 127, 137 (2008) (citing U.S. Supreme Court precedent in determining separation of powers issue under state Constitution); *Bd. of Supervisors of Norfolk Cnty. v. Duke*, 113 Va. 94, 98 (1912) (quoting and relying on U.S. Supreme Court precedent in discussing separation of powers issue); *Winchester & S.R. Co. v. Commonwealth*, 106 Va. 264, 269-70 (1906) (relying on federal case law and Joseph Story's *Commentaries on the Constitution of the United States* to explain separation of powers principles); *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 83-84 (1793) (quoting The Federalist 78 in detailing the powers of the judiciary versus the legislature); *Harris v. Commonwealth*, 759 S.E.2d 29, 33 (Va. Ct. App. 2014); *see also* Douglas Laycock, *Legislators on Executive-Branch Boards are Unconstitutional, Period*, 28 WM. & MARY BILL OF RIGHTS J. 1, 10 (2019) ("The Supreme Court of Virginia has relied on decisions interpreting the federal separation of powers in interpreting the state provisions.").

Indeed, Appellants concede that United States Supreme Court precedent is "instructive on the issue of separation of powers" and "pertinent" to this case. Appellants' Br. at 19, 25. Yet, all told, in fact, Appellants cite a single *federal* case—

and no Virginia or other state cases—in discussing the separation of powers issue here. The reason is clear: Federal and state case law and principles on this issue largely overlap.

Virginia is not alone in adopting federal court rulings as persuasive authority informing the application of separation of powers principles to decide cases. At least 23 state appellate courts take a similar tack, either expressly following the lead of the U.S. Supreme Court in applying their own constitutional separation of power provisions or applying analytical frameworks that mirror the federal approach to uphold legislation. *See Amicus Curiae* App. 1 (collecting cases).[1] *Amicus* is aware of no case in which a state appellate court has found a separation of powers violation when the state legislature passes new law during a pending case, and Appellants cite none in their opening brief. Those state rulings, and the federal case law, pull uniformly in the same direction: A legislature may amend underlying substantive law—even if it affects pending litigation.

[1] At least 39 states follow Virginia in including explicit separation of powers provisions in their Constitutions, and other state constitutions (like the federal constitution) are structured implicitly to embrace the separation of powers. Research suggests that fewer than half of the state appellate courts in this country have had an opportunity to opine on the type of separation of powers question before this Court, but of those jurisdictions that have, *Amicus* is aware of no cases that have reached a result inconsistent with the Virginia and federal court approach discussed herein. *See Amicus Curiae* App. 1.

B. Under the separation of powers doctrine, legislatures retain their constitutional authority to pass and amend laws, even if the amendment determines the outcome of a judicial proceeding.

A newly passed law can, consistent with the separation of powers, affect pending litigation—and it can even determine the outcome of that litigation. This principle animates countless state and federal court decisions interpreting the constitutional division of powers. These cases explain that separation of powers principles impose few and narrowly-tailored limits on the legislature's otherwise broad authority to pass laws.

1. Legislatures may pass new law without running afoul of the constitutional separation of powers doctrine, even if the new law affects pending litigation.

Federal and state cases are in accord: passing and amending substantive laws is a quintessential legislative function, and the filing of a private lawsuit cannot disable that authority.

a. Federal Precedent

For more than 150 years—since at least *Pennsylvania v. Wheeling & Belmont Bridge Co*., 59 U.S. (18 How.) 421 (1855)—the United States Supreme Court has consistently held that a law does not violate the separation of powers merely because it has effect on a pending case. In *Wheeling & Belmont Bridge*, the Court held that Congress may amend substantive law to overcome an ongoing and prospective injunction issued by the courts respecting a bridge. Once Congress passed a law

declaring the bridge no longer a public nuisance, no court order could say otherwise. It was, the Court ruled, within Congress's power to make such a law—even though Congress's law addressed only a single bridge.

Time and again the Supreme Court has reaffirmed this approach. Three instructive separation of powers guideposts emerge.

First, Congress may pass a new law during a pending lawsuit that determines the outcome of the dispute. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995) (reviewing cases). This principle holds true for appellate courts as well as trial courts: appellate courts must "rule[] on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court," because courts decide cases based on existing laws. *Id.* at 227.

This first principle has played out in a variety of circumstances over the years. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), for instance, the Supreme Court upheld Congress's power to withdraw a court's jurisdiction during an appeal, ruling that Congress's then-recent repeal of the act conferring jurisdiction required the Supreme Court to dismiss the case for want of jurisdiction, even though the Court had already heard oral arguments and taken the case under advisement. In *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), the Court explained that Congress can change the underlying substantive standard for wildlife management areas in a way that directs the result of an environmental case testing the adequacy of federal

agency regulations. *Id.* at 438. Similar reasoning was later applied to uphold Congress's intervention in the *Bank Markazi* financial asset and *Patchak* tribal land trust litigations (discussed below). "Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins." *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion).

The limit of this principle was tested in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), in which the Supreme Court ruled Congress would run afoul of the separation of powers if instead of passing a *new* law, it attempted to direct the result of a case under *old* law. There the question concerned the legal effect of a pardon. Congress, the Supreme Court explained, had limited power to "prescribe rules of decision to the Judicial Department . . . in cases pending before it[.]" *Id.* at 146. The problem in *Klein*, as more recent decisions have made clear, was that Congress had infringed on the judiciary's authority to interpret the effect of a pardon—under existing law—to pending cases. "Klein does not inhibit Congress from amend[ing] applicable law." *Bank Markazi*, 136 S. Ct. at 1323 (citations omitted).

Second, laws need not be generally applicable to withstand a separation of powers inquiry—they can affect a small group or even a single person. "Private bills in Congress are still common" and "[e]ven laws that impose a duty or liability upon a *single individual* or firm are not on that account invalid." *Plaut*, 514 U.S. at 239

n.9 (emphasis added); *see Bank Markazi*, 136 S. Ct. at 1328 (noting laws can affect "one or a very small number of specific subjects"). The same is true under Virginia law. *See Holly Hill Farm Corp. v. Rowe*, 241 Va. 425, 430 (1991) (noting that legislation "[r]outinely . . . pertains to specific classifications of persons, places, or property").

Third, Congress goes too far when it "retroactively command[s] the federal courts to reopen final judgments." *Plaut*, 514 U.S. at 219. Once the time for appeal has lapsed and a case becomes final, Congress cannot order the judiciary to revive the action. *Id.* at 227. If Congress could do so, it would usurp the judicial power to determine what the law *is* (or was) at the time of the lawsuit. *Id.* This rule aligns with founding principles: "A legislature, without exceeding its province cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." The Federalist No. 81 (Alexander Hamilton). Thus, there are two circumstances in which Congress impermissibly treads on judicial authority: when Congress orders courts to reopen final judgments, or when Congress attempts to direct the courts how to rule under old law. *Plaut*, 514 U.S. at 219; *Patchak*, 138 S. Ct. at 905.

The sole case that Appellants cite in their opening brief on this question—*Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016)—falls squarely in this line of authority and affirms the legislature's power to change the law. There, Congress

enacted a statute that made assets at a bank available to satisfy judgments in lawsuits brought by American nationals seeking money damages from state sponsors of terrorism. *Id.* at 1316-17. The statute referenced the cases by caption and docket number and facilitated execution of judgments in each case. *Id.* at 1326. So long as a court made certain findings, Congress instructed that the "financial asset . . . shall be subject to execution . . . in order to satisfy any judgment" in the cases at issue. *Id.* at 1318-19 (quoting 22 U.S.C. § 8772).

The Court rejected Bank Markazi's argument that the law improperly infringed on the judicial branch by prescribing a rule of decision in a pending case. The Court reaffirmed that "Congress . . . may amend the law and make the change applicable to pending cases even when the amendment is outcome determinative." *Id.* at 1317. "Congress," the Court made abundantly clear, "may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." *Id.* at 1325. A "statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Id.* The law at issue in *Bank Markazi* "changed the law by establishing new substantive standards" reflecting "Congress' policy judgments"—a "commonplace" enactment for the judiciary to implement. *Id.* at 1326. And the law at issue was no less valid because it applied to a narrow set of subjects. Statutes need not be "generally applicable," and "particularized legislative action" is not per se impermissible. *Id.* at 1327 (quoting *Plaut*, 514 U.S. at 239 n.9).

Most recently, the Court dispelled any doubt that might have lingered concerning Congress's ability to affect a single pending case. In *Patchak v. Zinke*, 138 S.Ct. 897 (2018), the Court upheld a law that would require federal courts to dismiss then-pending actions challenging the Interior Secretary's decision to take certain land into trust on behalf of an Indian Tribe. *Id.* at 903, 909. Congress would "cross the line from legislative power to judicial power," the Court explained, if it passed a law that said "'[i]n *Smith v. Jones*, Smith wins,'" because such a statute would tell the court how to rule under old law. *Id.* at 905 (plurality opinion). But when Congress enacts new substantive law, the law applies to pending lawsuits "even when it effectively ensures that one side wins." *Id.*

Supreme Court precedent is clear: Congress can modify, amend, and pass new law—even in ways that affect pending cases and even if the legislation affects a small number of individuals. Congress cannot, however, reopen final judgments or direct a court to rule a particular way under old law. In the hypothetical *Smith v. Jones*, Congress cannot say "Smith wins," but it can change the law in an outcome-determinative such that Smith does, in fact, win.

b. Virginia Precedent

Virginia case precedent dictates the same conclusion, and for the same reasons. This Court has, for example, upheld legislation altering the timeframe for appeal during a pending case. *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140

Va. 37, 41-45 (1924). The Court has reiterated that a law enacted during an appeal that "intervenes and positively changes the rules which govern . . . must be obeyed." *Bain v. Boykin*, 180 Va. 259, 266 (1942).

The rule from *City of Norfolk v. Stephenson*, 185 Va. 305 (1946), highlights the point. There, the legislature amended the tax code to clarify ownership of land *after* the lower court had ruled. This Court considered whether "the law in effect at the time of the rendition of the decree or the law in effect at the time of the decision of the appellate court applies." *Id.* at 312. The Court ruled that the legislature can change the law in such a way that reverses a decision of a trial court so long as it is done "before the decision of the appellate court." *Id.* at 316-17.

No unconstitutional interference occurs when the General Assembly amends the law during a pending appeal. In *Bain v. Boykin*, for instance, a business dispute made its way to this Court, which stood ready to rule when the General Assembly enacted a statutory amendment that "materially affected a decision of the case." 180 Va. at 263. But just as the U.S. Supreme Court has ruled that Congress can enact retroactive legislation to apply to pending cases, *see Bank Markazi*, 136 S. Ct. at 1324-25, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, so too this Court held in *Bain*: "Though it be conceded that the act is retroactive, unless it deprives defendant of a vested right, it must, under our decision be declared a valid enactment." 180 Va. at

265. That was true even though "it may result in the reversal of a judgment which was correct at the time it was rendered by the trial court." *Id.*

In other words, under Virginia law, as under *Plaut* and other federal court precedent, the General Assembly can change the underlying substantive law even if it affects a pending lawsuit, but it cannot order courts to reopen final judgments. When "a statute which is clearly intended to be retroactive and to apply to pending litigation is enacted after judgment" of a lower court but "pending appeal, the appellate court may dispose of the case in accordance with the law as changed by the statute." *Stephenson*, 185 Va. at 317 (citation omitted); *see also Ratcliffe v. Anderson*, 72 Va. (31 Gratt.) 105 (1878) (holding that any act that "authorizes the reopening of a judgment" was "in contravention of the constitution"); *Martin v. S. Salem Land Co.*, 94 Va. 28 (1897) (following *Ratcliffe* to rule that the General Assembly could not compel a court to reopen a judgment or hold a rehearing); Howard *Commentaries* 84 (noting that acts "applied to suits already decided . . . would amount to an unconstitutional invasion of the judicial power").

2. This line of cases embodies the founding era understanding of the role of the legislature.

This approach—taken both nationally and in Virginia—fits comfortably with the Framers' vision of a legislature empowered to make law and with that era's understandings of separation of powers. *Wayman*, 23 U.S. (10 Wheat.) at 46; *Tate*, 30 Va. (3 Leigh) at 809. In the founding era, one thing was clear—the *people*

through their elected representatives were to play a central role in government. *See* The Federalist No. 51 ("In republican government the legislative authority necessarily predominates."). It is a core proposition of state constitutional law that, while the federal Constitution is a grant of power to the legislative branch, state legislatures have all powers not denied them by the state and federal constitutions. *See Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29 (1966); Howard *Commentaries* 8 ("The Constitution of 1776 created a General Assembly with virtually no explicit limits on its power to legislate."). This Court has long recognized "the Legislature has the power to legislate on any subject unless the Constitution says otherwise." *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 592 (2010) (citing Howard *Commentaries* 538). The Constitution grants "generous power to legislate" such that only "particularly egregious legislative action would be required before a court would interfere" under separation of powers. Howard *Commentaries* 439.

The authority to announce the state's public policy by enacting substantive law is part and parcel of the legislative power. *Tvardek v. Powhatan Vill. Homeowner's Ass'n*, 291 Va. 269, 280 (2016); *Chicago, Burlington, & Quincy. R.R. Co. v. McGuire*, 219 U.S. 549, 565 (1911) (legislature is "the arbiter of the public policy of the state"). That is why the "best indications of public policy are to be

found in the enactments of the Legislature." *City of Charlottesville v. DeHaan*, 228 Va. 578, 583 (1984).

Nothing in the laws, precedent, or history of the Nation or the Commonwealth suggests that the General Assembly loses this power when a private citizen files a lawsuit. On the contrary: A private plaintiff does not, by virtue of filing suit, gain veto power over the legislature's authority. Instead, when the legislature chooses to act during pending litigation, the courts must follow the amended law. *See Stephenson*, 185 Va. at 315 (if "before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied" (quotation omitted)); *see also Bain*, 180 Va. at 266 (appellate court must decide a case based on law as it stands during time of appeal). Otherwise, simply by filing a complaint, a private party could preempt the Commonwealth's power to declare public policy and effectively enjoin the General Assembly from exercising key powers. That cannot be the law. Virginia and federal cases confirm that it is not.

3. Courts have consistently upheld a legislature's authority prospectively to change the law in a way that affects pending litigation, with only limited exceptions.

The vast weight of authority upholds the legislative prerogative to pass new laws that affect pending cases.

Courts have deemed a broad array of outcome-determinative laws to constitute permissible exercises of the legislative function:

- Congress can pass outcome-determinative environmental standards to apply to pending lawsuits by amending underlying law. *Robertson*, 503 U.S. 429.

- Congress can pass laws that determine what assets are available for post-judgment satisfaction in pending lawsuits when Congress leaves issues for adjudication and changes substantive law, rather than directing the court how to rule. *Bank Markazi*, 136 S. Ct. 1310.

- Congress may pass jurisdiction-stripping laws that remove courts' ability to hear ongoing pending cases—even when the law specifically identifies particular cases—because doing so amounts to a change in substantive law, not directing results under old law. *Patchak*, 138 S. Ct. 897.

- Congress may amend substantive law to overcome an ongoing and prospective injunction issued by the courts respecting a single bridge. *Wheeling & Belmont Bridge Co*., 59 U.S. (18 How.) 421.

- Congress may strip courts of jurisdiction even after the court has heard oral argument on a particular case. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506.

- Legislatures may pass bills that amend underlying law even when they go into effect during an appeal and they require reversal of a lower court's ruling. *Stephenson*, 185 Va. at 316; *Bain*, 180 Va. 259.

- A court may amend the time to appeal a lower court's judgment, even though that change in the law will affect pending cases. *Kennedy Coal Corp.*, 140 Va. at 41-45.

- Congress can direct construction of a World War II memorial on the National Mall and bar judicial review of agency decisions underlying the construction. *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001).

Courts have limited this broad legislative authority to change the law in ways that affect pending litigation in only the rarest circumstances:

- The legislature cannot order courts to reopen judgments, *Plaut*, 514 U.S. at 219; *Ratcliffe*, 72 Va. (31 Gratt) at 106-07, because doing so would "depriv[e] judicial judgments of the conclusive effect that they had when they were announced" and so violate separation of powers, *Plaut*, 514 U.S. at 228.

- A legislature may not usurp the judicial function to direct a result in a particular lawsuit under old law—such as telling the judicial branch the effect of a pardon during a pending case under preexisting law. *Klein*, 80 U.S. (13 Wall.) 128; *see Bank Markazi*, 136 S. Ct. at 1323-26; *Robertson*, 503 U.S. at 437-39; *Patchak*, 138 S. Ct. at 903.

- Because courts have inherent powers to "self-defense and self-preservation" necessary to efficient court operation, the legislature cannot prescribe the manner in which courts may hold parties in contempt of court for making false statements to the court. *Carter v. Commonwealth*, 96 Va. 791, 801, 816 (1899).

One leading constitutional scholar has summarized the rule this way: Legislatures "cannot dictate how [] courts decide specific cases," but may "modify [] statutes in a way that determines the outcome in pending cases." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 178 (6th ed. 2019); *see* R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 324 (7th ed. 2015) ("[C]ongressional power to make valid statutes retroactively applicable to pending cases has often been recognized.").

C. Appellants misread the doctrine as explicated by Professor Howard.

Appellants cite Professor Howard's treatise in support of their separation of powers argument. Appellants' Br. at 24-25. But the treatise's treatment of the separation of powers doctrine does not align with Appellants' view. Appellants misread Professor Howard's teachings by plucking one statement out of context.

The excerpted language at issue reads:

> Thus any case over which a court has asserted jurisdiction becomes a judicial mater, and the result of the case may not be affected by special legislation. Such a principle, that a legislative body may not intervene to dictate or influence the results of questions *sub judice*, would inhere anyway in due process of law and the separation of powers, but the principle is reinforced both by this paragraph of section 14, as well as by subparagraphs (1), (2), and (3) of the section.

Howard *Commentaries* 539-40.

That statement, however, appears in a section of the treatise that pertains *not* to Articles I, III, or VI, but rather to Article IV, § 14 regarding the general authority of the legislature and the question of special legislation. And in that context it makes perfect sense. Article IV details specific prohibitions on legislative actions—among them, special legislation that "grant[s] relief" to particular parties. Va. Const. art IV. The quoted statement simply prefigured what *Bank Markazi* and *Patchak* explained

many years later—that "in *Smith v. Jones*," the General Assembly cannot pass a law stating "Smith wins."[2]

What this passage of the treatise assuredly does *not* mean is that the General Assembly is disabled from changing the law. And it is noteworthy that, at the time this portion of the treatise was drafted, Professor Howard did not have the benefit of subsequent U.S. Supreme Court precedent on separation of powers principles. The guiding jurisprudence in *Robertson*, *Plaut*, *Bank Markazi*, and *Patchak* were still decades away. Yet Professor Howard's analysis was as correct then as it is now. The last half century of case law has confirmed that the legislature can—consistent with separation of powers principles—enact outcome-determinative laws. Congress runs afoul of separation of powers when it directs courts how to rule under old law. In this way, the separation of powers and special legislation provisions in Articles I, III, IV, and VI of the Virginia Constitution are self-reinforcing and internally consistent. *See* Howard *Commentaries* 539-40 (discussing how Article IV buttresses separation of powers).

It is telling that Appellants do not cite the two treatise chapters dedicated expressly to separation of powers. That is no doubt because Professor Howard's treatise does not support Appellants' claims. Nowhere does Professor Howard

[2] As explained in Part II below and in Part 1.B.2 of Appellees' brief, the law at issue in this case does not grant relief to particular parties. The law is constitutionally sound for purposes of an Article IV inquiry.

suggest that a law affecting a pending case would by that alone violate separation of powers. *See id.* at 81-86 (Va. Const. art. I, § 5) & 433-48 (Va. Const. art. III, § 1).

II. The General Assembly did not violate separation of powers when it passed a new law repealing a 130-year-old resolution.

This background shows why the 2020 Law fits securely within the General Assembly's constitutional authority. *First*, the General Assembly merely repealed a 130-year-old resolution—an action well within the Assembly's authority. *Second*, the General Assembly exercised core powers to change the law and announce the state's public policy as part of the Commonwealth's broader effort to remove the vestiges of white supremacy from its public spaces. *Finally*, notwithstanding the General Assembly's authority to pass legislation that affects pending litigation, this particular law was not outcome determinative to the Circuit Court's opinion and could not have infringed the separation of powers.

A. The 2020 Law is new law and does not direct a result under old law.

More than 130 years ago, Virginia's General Assembly passed a resolution respecting a monument to the Confederacy and reflecting the public policy of the time. In late 2020, the modern General Assembly changed that policy:

> Notwithstanding the provisions of Acts of Assembly 1889, Chapter 24, which is hereby repealed, the Department of General Services, in accordance with the direction and instruction of the Governor, shall remove and store the Robert E. Lee Monument or any part thereof.
>
> 2020 Spec. Sess. I, Va. Acts ch. 56, ¶ 79(I).

The 2020 Law repeals the 1889 resolution and directs the Department of General Services to follow the Governor's order to remove the Lee Monument. Appellants admit that the 2020 Law "would simply revoke a law authorizing the Commonwealth's acceptance of the Lee Monument in 1890 and direct the Governor to remove it." Appellants' Br. at 25. Just so. The bill repeals a more-than-a-century-old resolution. It does not direct the court how to rule under old law and it does not order a court to reopen a final judgment.

Appellants' crucial admission—that the 2020 Law "chang[ed] the law," Appellants' Br. at 25-26—suffices to resolve this separation-of-powers question in favor of Appellees. *E.g.*, *Robertson*, 503 U.S. at 438-41; *see supra* Part I.

Appellants try to circumvent this conclusion by asserting that the 2020 Law does not create any new legal standard. Appellants' Br. at 25. But it plainly does: It repeals and replaces a prior law to reflect new public policy of the state. And that policy choice informs whether the restrictive covenants at issue remain valid—something the court still must decide. *See Hercules Powder Co. v. Cont'l Can Co.*, 196 Va. 935, 939 (1955).

The Circuit Court's ruling reflects this understanding. It determined that the 2020 Law (among other evidence) showed "the current public policy of the . . . Commonwealth" which invalidated deeds in violation of that policy. *See* Taylor Appendix ("T.A.") at 412 (Circuit Court's ruling). The 2020 Law informed the

court, but it did not tell the court how to rule. Lawmakers, in other words, gave judges the public policy of the state. But what to do with that public policy—how to *apply* it to deeds in this case—remained up to the court, even if the 2020 Law altered the outcome of the case. *Bank Markazi*, 136 S. Ct. at 1317; *id.* at 1325 ("Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases."); *Patchak*, 138 S. Ct. at 905 (Congress may pass law to "effectively ensure[] that one side wins"). This result makes good sense: because the "best indications of public policy are to be found in the enactments of the Legislature," *DeHaan*, 228 Va. at 583, the Circuit Court used the 2020 Law as evidence to decide the legality of the deeds and covenants at issue.

A private party, by filing a lawsuit, cannot prevent the General Assembly from effectuating that policy. Appellants' argument to the contrary is not just nonsensical; it flies in the face of centuries of precedent establishing that the legislature has the ability to announce the Commonwealth's public policy even while a case is pending. *See supra* Part I. The General Assembly's powers do not end with service of process.

B. The 2020 Law is part of a larger effort to effectuate new public policy.

The Commonwealth's reckoning with the Lee Monument is but one instance of a larger debate taking place throughout Virginia over monuments and other manifestations of an era that public bodies should be free to repudiate. In recent years, public entities have made plain their intent to do away with symbols of the

Lost Cause. Sometimes those efforts are undertaken by the executive, the state legislature, or municipalities. Sometimes those efforts are undertaken by public institutions such as public universities. The last two years alone have witnessed a groundswell of these efforts in Virginia:

- Governor Northam's signing of a bill to remove from Capitol Square the statue of Harry Byrd, one of the chief architects of Virginia's Massive Resistance to the United States Supreme Court's decision in *Brown v. Board of Education*.[3]
- The removal of the statue of Stonewall Jackson at Virginia Military Institute in December 2020.[4]
- The renaming of buildings at public universities, including at Virginia State University, Virginia Commonwealth University, James Madison University, and the College of William and Mary.[5]

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[3] Andrew Cain, *Northam signs bill to remove segregationist Harry Byrd Sr.'s statue from Capitol Square*, Richmond Times-Dispatch (Mar. 19, 2021), https://richmond.com/news/state-and-regional/northam-signs-bill-to-remove-segregationist-harry-byrd-sr-s-statue-from-capitol-square/article_ea59d2dd-20f0-57fd-8fa9-b7f2d8bd074f.html.

[4] Dustin Jones, *Virginia Military Institute Removes Statue of Confederate Gen. 'Stonewall' Jackson*, NPR News (Dec. 7, 2020), https://www.npr.org/2020/12/07/943961997/virginia-military-institute-removes-statue-of-confederate-gen-stonewall-jackson.

[5] Eric Kolenich, *Virginia State University will rename four buildings named for people with ties to racism*, Richmond Times-Dispatch (March 25, 2021), https://richmond.com/news/local/education/virginia-state-university-will-rename-four-buildings-named-for-people-with-ties-to-racism/article_e89624ce-1586-5c42-ab80-512f2ea45607.html; Lilah Burke, *Virginia Commonwealth to Rename Buildings Honoring Confederates*, Inside Higher Ed (Sept. 21, 2020), https://www.insidehighered.com/quicktakes/2020/09/21/virginia-commonwealth-rename-buildings-honoring-confederates; Maggie More, *At William & Mary, renaming efforts are part of nation's struggle with its slaveholding past*, The Virginia Gazette (March 30, 2021), https://www.dailypress.com/virginiagazette/va-

- The successful effort to take down statues of Robert E. Lee and Stonewall Jackson in public parks in downtown Charlottesville pursuant to a General Assembly law confirming the authority of localities to remove such monuments. *See City of Charlottesville v. Payne*, Record No. 200790, 2021 WL 1220822 (Va. Apr. 1, 2021).

- The removal of the Robert E. Lee statue from the U.S. Capitol.[6]

- The elimination of a state holiday honoring Lee and adding a new holiday to celebrate Juneteenth.[7]

- Decisions by public universities to raise public consciousness about slavery and racism, such as the University of Virginia's April 2021 dedication of a memorial to enslaved laborers.[8]

There is another critical dimension in the dramatic shift in public policy from the era of the Lost Cause and white supremacy to the present time. The Constitution of Virginia is the ultimate source of public policy in the Commonwealth. Thomas Jefferson invited each generation to reconsider to what extent the Constitution meets the needs of their own time. *See Letter from Thomas Jefferson to Samuel Kercheval*

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vg-william-mary-renaming-part-2-0331-20210330-uhufg3ufjfejlhri7j2l33mgfm-story.html.

[6] Gregory S. Schneider, *Gen. Robert E. Lee statue removed from U.S. Capitol*, Wash. Post (Dec. 21, 2020), available at https://www.washingtonpost.com/local/virginia-politics/virginias-statue-of-gen-robert-e-lee-removed-from-us-capitol/2020/12/20/07cb9c18-432a-11eb-975c-d17b8815a66d_story.html.

[7] *See* 2020 Va. Acts ch. 418; 2020 Spec. Sess. I, Va. Acts ch. 5.

[8] Eva Surovell, *'May we push forward in earnest': U.Va. officially dedicates Memorial to Enslaved Laborers*, The Cavalier Daily (Apr. 11, 2021), https://www.cavalierdaily.com/article/2021/04/may-we-push-forward-in-earnest-u-va-officially-dedicates-memorial-to-enslaved-laborers.

(July 12, 1816), in 10 The Papers of Thomas Jefferson: Retirement Series 222, 227 (J. Jefferson Looney ed., 2013). Indeed, in the years since 1776, the Constitution has been rewritten several times.

When a convention met in Richmond in 1901 to revise the Constitution, the delegates knew what they wanted: white supremacy. As one delegate proclaimed, to great applause, "I want it distinctly understood here that I am a white man and propose to represent white interests." 1 James Lindsay, *Report of the Proceedings and Debates of the Constitutional Convention State of Virginia: Held in the City of Richmond June 12, 1901, to June 25, 1902*, at 208 (1906) ("Debates"). The Civil War had brought an end to slavery, and Virginia's 1870 Constitution had enfranchised former slaves. Va. Const. of 1870, art. II, § 1 ("Every male citizen of the United States . . . shall be entitled to vote."). The delegates in 1901-02, however, were determined, as a Southside politician declared, "that the negro would be eliminated as an element in our state politics." M. Q. Holt to Allen Caperton Braxton, Braxton Papers (June 25, 1901), quoted in *Wythe Holt, Virginia's Constitutional Convention of 1901-1902*, at 101 (New York, 1990).

History and theology were invoked to justify subjection of African-Americans. In his opening speech to the 1901-02 convention, the presiding officer declared that "ever since the dawn of history," the Black man "had occupied a position of inferiority." Lindsay, *Debates* at 20. As a delegate asserted, "there is

but one spot within the Commonwealth of Virginia where he can make himself useful . . . and that spot is in the corn field and on the tobacco ground[.]" *Id.* at 1225. Moreover, some delegates thought education was wasted on Black children. If they were taught to read, one delegate predicted, instead of reading the Bible, they would read "Jesse James and Billie the Kid, and Uncle Tom's Cabin." *Id.* at 1222.

The "primary purpose" of the 1901-02 convention, as a leading member put it, was "to eliminate every negro of whom we could be rid without running counter to the prohibition of the Federal Constitution." *Id.* at 293. Because the United States Supreme Court, in 1898, had rejected a challenge to Mississippi's post-Reconstruction Constitution, *Williams v. Mississippi*, 170 U.S. 213 (1898), the delegates in Richmond had a green light to achieve their goal of white supremacy. Thus, their final product, the 1902 Constitution, provided that tax-paying property owners and those who had served in the United States or Confederate army or navy (and their sons) were entitled to register to vote. Va. Const. of 1902, art. II, § 19. Otherwise, an applicant had to be able to read any section of the Constitution submitted to him by the registration officials and to give "a reasonable explanation" of that section. *Id.* Needless to say, the convention delegates had no doubt that persons of color would be unable to satisfy the registrar. And, as a further barrier to registration, there was the requirement to pay the poll tax. *Id*. §§ 18, 20-21; *see id.* § 22 (declaring that men who had served in the Union or Confederate Army or Navy

"during the late war between the States" were exempt from paying the poll tax). To make sure that Black Virginians understood that they were second-class citizens, the Constitution mandated racial segregation in public schools. *Id.*, art. IX, § 140.

The delegates at the 1901-02 convention achieved their purpose with grim efficiency. In 1867, almost half of Virginia's voters (more than 100,000) had been Black. After 1901, there were 21,000—just 4.7% of all registered voters. Hanes Walton Jr. et al, *The African American Electorate: A Statistical History*, at 321 tbl. 17.20 (2012).

Even a brief review of this history makes clear that the symbolism represented by the statues being erected on Monument Avenue and elsewhere in Virginia was being written into Virginia's most fundamental charter, its Constitution. The Lost Cause had its monuments, and white supremacy was emphatically enabled by the Constitution of 1902.

For a half century and more, Virginians lived under the shadow of the 1902 Constitution. 1954 brought *Brown v. Board of Education*, 347 U.S. 483 (1954), and reactionary Massive Resistance policies to block the desegregation of public schools. Change was in the air in the 1960s. Cries for social justice brought the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. The United States Supreme Court struck down the poll tax,

Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966), and decreed that legislative seats must be apportioned on the basis of population, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Davis v. Mann*, 377 U.S. 678 (1964) (Virginia reapportionment case).

In that environment, Virginia's 1902 Constitution was a relic. So Governor Mills E. Godwin, Jr., appointed the Commission on Constitutional Revision in 1968. Among its members were an eminent civil rights attorney, Oliver W. Hill, and a future Supreme Court Justice, Lewis F. Powell, Jr. After the General Assembly reviewed and adjusted the commission's recommendations, the voters of Virginia approved the new Constitution by an affirmative vote of almost 72%.[9] The revised Constitution became effective on July 1, 1971.

As a statement of public policy, the 1971 Constitution is an emphatic repudiation of the 1902 charter. For the first time, Virginia's Constitution includes an anti-discrimination clause, forbidding governmental discrimination on the basis of race, color, religion, national origin, or sex. Va. Const. art. I, § 11. Where the old Constitution had been interpreted to allow counties and cities to close their

[9] *See* Commonwealth of Virginia, *Votes Cast for United States Senator and Members of Congress in July 14, 1970 Democratic Primary, United States Senator, Members of Congress, and Proposed Amendments to the Constitution in November 3, 1970, General Election* (1970), *available at* https://historical.elections.virginia.gov/data/serve_file_pages_for_item/3526/BallotQuestion/.

schools to avoid desegregation, the new Constitution mandates the General Assembly to provide a statewide system of public education for all school-age children. *Id.* art. VIII, § 1; *see Cnty. Sch. Bd. of Prince Edward Cnty. v. Griffin*, 204 Va. 650 (1963) (holding that, notwithstanding the language of Section 129 of the 1902 Constitution that the General Assembly establish and maintain an efficient system of public schools, an "efficient" system could exist even if there were no public schools in one or more localities). Further, the Constitution places an enforceable duty on localities to put up their share of school funding once the General Assembly has crafted a funding formula. Va. Const. art. VIII, § 2.

Day to day, year to year, Virginia's elected representatives—above all, those in the General Assembly—shape public policy. When they do so, they act against the backdrop of public policy as articulated in the Constitution of Virginia. At the beginning of the Twentieth Century, that public policy took the form of white supremacy. Its material manifestation—statues of Confederate leaders—was homage to the Lost Cause. Today, Virginia's Constitution charts a different course—an aspiration to racial justice. Its counterpart in public places is to take away those monuments that remind Virginians, whatever their race, of a past in which we should take no pride.

It is in light of such developments in Virginia's public policy that the decisions in *Wheeling & Belmont Bridge*, *Bank Markazi*, *Patchak*, and other cases come into

play. The lesson of those cases is clear: separation of powers principles do not prevent public officials from engaging in a sweeping and thorough campaign to rid the state of monuments and other markers honoring those who championed white supremacy. That is the state's declared public policy, manifested in this 2020 Law and other contemporaneous acts.

True, as Appellants state, the 2020 Law's language affects a narrow class of litigation. But that approach is constitutionally permissible. It does not, on its own, mean that the legislature has impermissibly intervened in that litigation. Private bills and laws that impose duties on small numbers or even a single individual are not constitutionally infirm on that basis alone. *Plaut*, 514 U.S. at 239 n.9. Appellants' view would clash with this principle by requiring the General Assembly to cobble all state statues into a single bill or risk their being struck down as too narrow. The General Assembly may choose to legislate one monument at a time rather than all monuments as a group; nothing in the hundreds of years of state and federal cases requires the contrary.

Appellants therefore misapprehend the thrust of Supreme Court rulings when they say that "[b]oth the majority and dissenting opinions in *Bank Markazi* acknowledged that if § 8772 had applied to a single case it would have violated the constitutional separation of powers." Appellants' Brief. at 25. *Bank Markazi* says just the opposite, and in fact the statutes upheld in *Robertson* and *Bank Markazi* both

identified particular cases by caption and docket number. Laws need not be "generally applicable" because there is nothing "wrong with particularized legislative action." *Bank Markazi*, 136 S. Ct. at 1327 (quoting *Plaut*).

C. The unsigned 2020 Law did not direct the Circuit Court how to rule.

A final fact undercuts Appellants' separation of powers argument: The 2020 Law had no binding legal effect at the time of Circuit Court's ruling. The Circuit Court did not consider itself bound by the bill but instead correctly acknowledged that the bill reflected a changed public policy relevant to the legal questions before it. *See* T.A. at 412 (describing the 2020 Law as "significant evidence").

As this Court is aware, bills in Virginia must complete several steps before becoming law. The process includes bicameralism and presentment to the Governor. Va. Const. art V, § 6(a). General appropriations bills passed at a special session—like the 2020 Law—take effect "from its passage, unless another effective date is specified in the act." Va. Code Ann. § 1-214(C); *see also* Va. Const. art. IV § 13 (effective date of laws). The 2020 Law specified that in § 4-14.00 the bill "is effective on its passage as provided in § 1-214."

Thus, the 2020 Law took effect—it became *law*—only after the General Assembly passed the bill and the Governor signed it in November 2020.[10] That all occurred after the Circuit Court issued its decision in October 2020.

Because the 2020 Law did not take effect until November 2020, it could not have dictated a particular result to the Circuit Court. The Circuit Court properly looked to the 2020 Law not as a binding directive from the General Assembly on how to rule but instead as persuasive evidence of the General Assembly's changed policy toward monuments and other vestiges of white supremacy. T.A. at 412 ("[W]hether they are ultimately signed by the Governor or not, these acts of the General Assembly clearly indicate the current public policy of the General Assembly, and therefore the Commonwealth, to remove the Lee Monument from its current position on the state owned property on Monument Avenue."). To be sure, the bill has legal effect *now*—it is the law. But Appellants have not argued that the 2020 Law directs *this* Court how to rule (and if Appellants did make this argument, it would still fail because the law does not direct any court how to rule, *see supra* Parts II A, B).

[10] *See* Press Release, Governor Northam Signs Revised State Budget That Makes Key Investments, Provides Critical Relief During COVID-19 Pandemic (Nov. 18, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/november/headline-861427-en.html.

As Appellants present their argument to this Court, they effectively ask the Court to rule that a bill passed by the General Assembly but not yet signed by the Governor can bind lower courts and require them to rule for particular parties. They would also, by corollary, give lower courts the power to declare proposed legislation unconstitutional under separation of powers. That is wrong. It would create a constitutional separation of powers problem of its own. Courts may not declare bills unconstitutional *before* they are signed by the executive and given legal effect. *See Scott v. James*, 114 Va. 297, 304 (1912) (ruling that the judiciary cannot "enjoin the transmission of" a bill "passed by both houses of the General Assembly" from being sent to the governor because doing so would "manifestly be an unwarranted interference by the courts with the constitutional processes of the legislative department"); *Marshall v. Warner*, 64 Va. Cir. 389, 393 (Va. Cir. Ct. 2004) (declining to intervene in the legislative process to declare a bill, yet to be signed by the Lieutenant Governor and Speaker of the House, unconstitutional); *Bond v. United States*, 564 U.S. 211, 222-23 (2011) (noting bills passed by Congress must be signed by the President before becoming law); *see also* Howard *Commentaries* 446 ("Courts . . . may not properly pass on proposed legislation as a condition of its effectiveness.").

* * *

Separation of powers concerns arise when a legislative act directs a court how to rule under old law or instructs a court to reopen final judgments. *Bank Markazi*, 136 S. Ct. at 1324-26; *Plaut*, 514 U.S. at 219. Neither occurred here. The 2020 Law announced the Commonwealth's changed public policy with respect to symbols of white supremacy—a legislative action well within the purview of the General Assembly and consistent with separation of powers principles.

CONCLUSION

This Court should affirm the judgment of the Circuit Court and rule that the 2020 Law does not infringe the separation of powers embodied in Articles I and III of the Virginia Constitution.

Dated: April 19, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Virginia Supreme Court Rule 5:26(h), I hereby certify that this brief complies with Rule 5:26. This brief complies with Rule 5:26(b) because it is 36 pages long, not including the cover page, table of contents, table of authorities, and certificates, and with the case list appendix it is a total of 39 pages.

Dated: April 19, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2021, pursuant to Rule 1:12 of the Rules of the Supreme Court of Virginia, I caused a true copy of the foregoing document to be served by electronic mail to counsel of record, as follows:

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AMICUS CURIAE APPENDIX

APPENDIX OF STATE JURISDICTIONS

Arizona: *State v. Montes*, 245 P.3d 879 (Ariz. 2011) (en banc) (holding that legislative act providing for retroactive application of prior amendment to self-defense statute that shifted burden of proof on justification defense to the state did not violate separation of powers clause of state constitution).

California: *People v. Bunn*, 37 P.3d 380 (Cal. 2002) (discussing *Plaut* and noting "[s]eparation of powers principles do not preclude the Legislature from amending a statute and applying the change to both pending and future cases, though any such law cannot 'readjudicat[e]' or otherwise 'disregard' judgments that are already 'final'").

Colorado: *City of Greenwood Vill. v. Pet'rs for Proposed City of Centennial*, 3 P.3d 427 (Colo. 2000) (citing *Plaut* and holding that no separation of powers issue arises where legislature amends substantive law that affects a pending case).

Connecticut: *Bhinder v. Sun Co*., 819 A.2d 822 (Conn. 2003) (reviewing *Plaut* and holding that state law clarifying the meaning of a statute during pending litigation did not violate separation of powers).

Georgia: *Franklin v. Franklin*, 475 S.E.2d 890 (Ga. 1996) (holding "[a] reviewing court should apply the law at the time of its judgment rather than the law prevailing at the rendition of the judgment under review," and changes in the law during pending lawsuit are permitted).

Illinois: *Sanelli v. Glenview State Bank*, 483 N.E.2d 226 (Ill. 1985) (upholding retroactive legislation because "[t]he legislature has power to change the law, and the court, in the decision of pending cases, will dispose of them under the law in force at the time its judgment is rendered").

Iowa: *Schwarzkopf v. Sac Cnty. Bd. of Supervisors*, 341 N.W.2d 1 (Iowa 1983) (no separation of powers violation under state constitution where legislature changed law affecting pending litigation).

Kansas: *Gleason v. Samaritan Home*, 926 P.2d 1349 (Kan. 1996) (noting that Kansas separation of powers rules are "almost identical to the federal Constitution" and citing *Plaut* while holding that new laws passed during a pending case did not violate separation of powers because "the legislature may permissibly pass laws regulating judicial jurisdiction").

Kentucky: *King v. Campbell Cnty.*, 217 S.W.3d 862 (Ky. App. 2006) (reviewing *Plaut* and *Robertson* and holding that legislature can amend law applicable to pending case because there is "no reason to construe Kentucky's separation-of-powers provisions differently" from federal cases).

Louisiana: *Morial v. Smith & Wesson Corp.*, 785 So.2d 1 (La. 2001) (holding that under state constitution separation of powers provision, legislature can amend the law to affect pending litigation).

Michigan: *Quinton v. Gen. Motors Corp.*, 551 N.W.2d 677 (Mich. 1996) (employing federal separation of powers principles under *Plaut* to determine whether, under the state constitution, a law encroached the judicial power, and recognizing that "where . . . state separation of powers concerns are implicated, we acknowledge the weight a decision of the [U.S. Supreme Court] carries").

Mississippi: *City of Belmont v. Miss. State Tax Comm'n*, 860 So.2d 289 (Miss. 2003) (no separation of powers violation where statute applies to pending litigation).

Missouri: *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854 (Mo. 1997) (citing *Plaut* in concluding that "if a court has not yet finally adjudicated an issue in a pending case, even a retroactive amendment to the governing law does not constitute a separation of powers violation").

Nevada: *Karadanis v. Bond*, 993 P.2d 721 (Nev. 2000) (holding that a statute adopted after a district court's opinion did not "impact the integrity of the district court's decision" under separation of powers principles).

New Hampshire: *Petition of N. H. Sec'y of State*, 203 A.3d 77 (N.H. 2019) (holding "[s]eparation of powers principles do not preclude the Legislature from amending a statute and applying the change to both pending and future cases, though any such law cannot readjudicate or otherwise disregard judgments that are already final").

North Dakota: *Wilkinson v. Bd. of Univ. & Sch. Lands*, 903 N.W.2d 51 (N.D. 2017) (citing *Plaut* while observing that "when a law is enacted or amended while an

appeal is pending and it applies retroactively, courts generally apply the new law even if it affects the outcome of the case").

Oklahoma: *Indep. Sch. Dist. No. 65 of Wagoner Cnty. v. State Bd. of Ed.*, 289 P.2d 379 (Okla. 1955) (holding that the legislature can pass laws that "apply to pending proceedings").

Oregon: *City of Damascus v. State*, 472 P.3d 741 (Or. 2020) (en banc) (explaining that no separation of powers violation occurs when a legislature retroactively applies new legal standards to cases).

Rhode Island: *Spagnoulo v. Bisceglio*, 473 A.2d 285 (R.I. 1984) (applying statute retrospectively to pending lawsuit).

Texas: *Vandyke v. State*, 538 S.W.3d 561 (Tex. Crim. App. 2017) (holding legislature "does not violate separation of powers when it validly exercises its power to repeal criminal laws" governing a case pending appeal).

Vermont: *State v. Aubuchon*, 90 A.3d 914 (Vt. 2014) (noting a "legislature may define the meaning of statutory language by enacting new law and may apply that law retroactively within constitutional bounds").

Washington: *In re Estate of Hambleton*, 335 P.3d 398 (Wash. 2014) (en banc) (citing *Plaut* when noting under separation of powers analysis that "the legislature is not prohibited from passing amendments that directly impact cases pending in our court system").

Wisconsin: *Elm Park Iowa, Inc. v. Denniston*, 280 N.W.2d 262 (Wis. 1979) (holding legislature had "not violated the separation of powers doctrine" by "making the new appellate structure retroactively applicable to a limited class of cases").

Subsequent Pleading eCertificate

Document Type: Amicus Curiae Brief

Case Information:

Case Style: Taylor v. Northam Record #: 210113

Submitted By: PATRICIA T WINGFIELD

Certification (Opposing Counsel):

Pleading Provided To Opposing Counsel/Party