IN THE SUPREME COURT OF VIRGINIA

Record No. 210113

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

v.

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

BRIEF *AMICUS CURIAE* OF THE OLD DOMINION BAR ASSOCIATION IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE

The Old Dominion Bar Association ("ODBA") has a long legacy of leading the fight to promote equality and social justice for African Americans and other minorities in Virginia. Founded in 1942, the ODBA was established by a group of African American attorneys in response to racial discrimination in Virginia's legal community. Civil rights trailblazer, Oliver Hill, was the ODBA's first President – and membership quickly spread to include African American lawyers across the Commonwealth. Today, anyone licensed to practice law in Virginia is welcome to join the ODBA and to help it serve as a voice defending justice, inclusion and diversity in the legal community.

In furtherance of these objectives, the ODBA and its membership have a strong public interest in supporting Governor Northam's decision to remove the large Monument celebrating General Robert E. Lee – who fought to preserve and protect slavery – which stands on state land in Richmond.

STATEMENT OF THE CASE

This is a case involving whether the Governor of Virginia possessed authority to mandate the removal of a statue of a Confederate Hero, Robert E. Lee, from Commonwealth land in the center of Virginia's capital city. The Circuit Court correctly found that Governor Northam's directive did not violate the Virginia Constitution and was not contrary to existing Virginia public policy.

Plaintiffs contested the Governor's decision to move the Lee Statue. Plaintiffs claimed that an 1889 Joint Resolution of the Virginia General Assembly – which "authorized and requested" the Governor to accept as a gift the Lee Monument and the land upon which it stands and to maintain it and hold it sacred (JA 11-12, 252) – remained binding on the Commonwealth today and perpetually. Plaintiffs asserted that the Governor's intended removal overstepped his authority vis-à-vis the legislature in violation of Article V, § 1 ("executive power"); Article IV, § 1 ("legislative power"), Article I, § 5, and Article III, § 1 ("separation of powers") of the Virginia Constitution. Plaintiffs further alleged that restrictive covenants contained in 1887 and 1890 Deeds associated with the creation of the Monument Circle (JA 14-22) also bound the Commonwealth to maintain the Lee Monument in perpetuity. Plaintiffs further asserted that Va. Code § 2.2-2402(B) (historic preservation) prohibited removal of the Lee Monument.

Plaintiffs' claim under Va. Code § 2.2-2402 was dismissed on demurrer based on a lack of standing and Plaintiffs' lack of a private right of action – but the Commonwealth's demurrer was overruled as to the other claims. (JA 360.) In discussing the role of "public policy" in resolving the remaining dispute, the Court's pre-trial opinion noted: "the Court does not set public policy, any such determination is a factual one, and can only be determined by the Court after the hearing of evidence . . ." (Opinion letter, August 25, 2020, p. 5.)

At the trial, however, the Plaintiffs' case in chief consisted of two title reports and no witness testimony. (JA 406, 458.) By contrast, the Commonwealth produced extensive evidence relating to public policy – and the atmosphere and circumstances that surrounded establishment of the Lee Monument. (JA 407-08.) This evidence came in the form of expert testimony from Dr. Edward Ayers and Dr. Kevin Gaines, and a series of exhibits. (*Id.*; JA 491-559, 560-602.) The Court took judicial notice of copious documents and events including Governor Northam's announcement of June 4, 2020 of his intention to remove the Lee Monument from Monument Avenue (JA 408), and the 2020 General Assembly bills that (1) provided funds for the removal and storage of the Lee Monument and (2) repealed the 1889 Act of the General Assembly which authorized the Statue's placement on the Circle. (JA 409, 412.) The Plaintiffs put on limited rebuttal evidence – and at the conclusion of the evidence only the Commonwealth moved to strike. (JA 638.) The Court denied the motion, finding consideration of the evidence necessary to render a decision.

In analyzing the record, the Court specifically commented on the dearth of evidence provided by Plaintiffs at trial (JA 414), and noted that the Commonwealth "overwhelmingly established" that the Lee Monument was created as an homage to the Confederacy's "Lost Cause" and to vindicate the former way of life of the white citizenry under the Confederacy. (JA 411.) The Court further found that the

General Assembly's legislation in 2020 "clearly" evinced the Commonwealth's public policy to remove the Lee Monument from its position of honor on state owned land. (JA 412.)

The Court relied heavily on recent budget legislation (House Budget Bill H.B. 5005 and Senate Budget Bill S.B. 5015) in reaching its conclusion on public policy, but Plaintiffs suggested that the 2020 enactments were unconstitutional under Article IV, § 14 ("special legislation"), Article I, § 11 ("contracts clause") and Article I, § 5 and Article III, § 1 ("separation of powers") of the Virginia Constitution – and that unconstitutional legislation could not set Virginia's public policy. The Circuit Court, thus, analyzed and rejected Plaintiffs' Constitutional claims that the General Assembly's 2020 enactments were "special legislation" (JA 413), and violated separation of powers concepts. (JA 413-14.) The Court further found that any restrictive covenants asserted in the Deeds of 1887 and 1890 "would be in violation of the current public policy of the Commonwealth of Virginia" and that the restrictive covenants advanced by Plaintiffs are "unenforceable." (JA 415.) This finding concurrently defeated Plaintiffs' claim under the "Contracts Clause." Va. Const. art. I, § 11; U.S. Const., art. I, § 10.

STATEMENT OF FACTS

One of the basic precepts behind democratic government is that legislative policies can evolve over long periods of time to reflect changing public attitudes. The facts of this case focus on two timeframes set 130 years apart.

The 1890's, Jim Crow and the Erection of the Lee Monument.

After the abolition of slavery and the end of the Civil War, Virginia politics became severely splintered. (*See* JA 494-500.) Expert witnesses testified that during Reconstruction and the War's aftermath, African-American citizens of Virginia enjoyed political clout and opportunity like never before. (JA 497-501.) The empowerment of African-Americans led to resentment and discontent among many white citizens, culminating in a wave of "Jim Crow" laws beginning in the 1880's as white Virginians sought to re-establish their social and political dominance. (JA 500-01, 510, 515, 563, 596-97.) These laws fostered broad desegregation and a loss of voting rights by African-Americans. (JA 515.) Testimony revealed that poll taxes and related legislation disenfranchised approximately 100,000 African-American Virginians during this period. (JA 616.)

According to the expert testimony, along with the rise of Jim Crow laws, a "Lost Cause" narrative emerged which glorified the Confederate legacy. This narrative moved the conversation away from the Confederacy's attempts to preserve slavery – and focused on State's Rights and Confederate valor on the

battlefield "which was considerable." (JA 505-06.) General Lee personified this valor – and his image was appropriated to conjure all that was good about the pre-War South, notwithstanding its reliance upon human bondage. Thus, the Statue was a "monument to the reassertion of power that white conservatives, former Confederates, had lost" after the War. It was a symbol of regaining control (JA 501, 510), but also "a demonstration of the solidarity and power of white people." (JA 517.)

In Dr. Ayers' words, the Lee Monument was:

> a reclaiming of public space for the story that the former Confederates would like to tell about themselves. It's that we are Virginia, we are Richmond, this is who we are; we fought for a noble cause under this noble man.

(JA 510-11.) The Statue and others like it appearing in this timeframe "were erected as symbols of defiance to Reconstruction" and "in defiance" of any negative narrative of the Confederate cause. (JA 551.) As Dr. Gaines summed up the Lee Monument's power: it was "the exclamation point of a Jim Crow order that was founded on white supremacy and black subordination." (JA 563.)

Against this backdrop, in 1887 a deed was entered conveying property to the Lee Monument Association to lay the groundwork for a statue honoring General Lee. In 1889 a Joint Resolution of the General Assembly "authorized and requested" the Governor, "in the name and in behalf of the Commonwealth, to

accept at the hands of the Lee Monument Association, the gift of the Monument…of General Robert E. Lee, including the Pedestal and Circle" upon which it stands. (JA 11-12, 252.) The Joint Resolution further requested that the Governor "execute any appropriate conveyance…in token of such acceptance, and of the guarantee of the state that it will hold said statue and pedestal and ground perpetually sacred to the monumental purpose to which they have been devoted." *Id.*

To effectuate the 1889 Joint Resolution, in March 1890, the Governor accepted a deed conveying the Robert E. Lee Monument, its Pedestal, and the Circle surrounding the Monument to the Commonwealth. (JA 14-22, 253-57.) The Deed provided that "[t]he State of Virginia, party of the third part acting by and through the Governor of the Commonwealth and pursuant to the terms and provisions of the Special Statute herein…executes this instrument in token of her acceptance of the gift and of her guarantee that she will hold said Statue and Pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted and that she will faithfully guard it and affectionately protect it." (JA 15, 255.)

The Statue stood in this place of honor for over 130 years.

The 2020's, a Shift in Public Policy, and a Legislative Move Away from Commemorating and Glorifying the Days of Slavery.

On June 4, 2020 Governor Northam announced his intention to remove the Lee Statue from Monument Avenue and to relocate it. (JA 408.) This decision did not come in a vacuum. Throughout 2020 a series of events occurred which dramatically altered the state's recognition of Civil War leaders:

- On March 23, 2020, the General Assembly eliminated a State holiday "honor[ing] Robert E. Lee," 2020 Va. Acts ch. 418; (JA 601-02);
- In July 2020, a Commission created by the General Assembly to consider the future of the Lee Statue in the U.S. Capitol voted unanimously in favor of its removal; (*Id.*);
- In July 2020, the Speaker of the House of Delegates ordered the removal of a life-sized statue of Lee and seven busts depicting other ex-Confederates from the Capitol's Old House Chamber; (*Id.*);
- In June 2020, protestors fought over Confederate monuments in the City of Richmond; (JA 595);
- During July 2020, the City of Richmond removed three Confederate monuments along Monument Avenue; (JA 603);
- In October 2020, the General Assembly established "Juneteenth" as a holiday "to commemorate the announcement of the abolition of

slavery…and to recognize the significant roles and many contributions of African Americans to the Commonwealth and the nation." Senate Bill 5031, House Bill 5052, Va. Gen. Assemb. (2020 Special Session 1); (JA 601-02);

- In early 2021, it was announced by the Federal government that all three military bases in Virginia named for Confederate generals – Fort Lee, Fort Pickett and Fort A.P. Hill – would be renamed;[1]
- House Budget Bill H.B. 5005 and Senate Budget Bill S.B. 5015, were passed by Virginia's General Assembly appropriating funds to cover the cost of removing the Lee Monument, and repealing the 1889 Resolution authorizing the Statue. (JA 412-13.)

The text of the Budget Amendment was offered to the Circuit Court by the Commonwealth without objection. The Court took judicial notice of the relevant language which provides:

> 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.

[1] *Three Military Bases in Virginia Named After Confederate Generals to Be Renamed*, NBC12 (Jan. 5, 2021), https://www.nbc12.com/2021/01/05/military-bases-va-named-after-confederate-generals-be-renamed/

Additionally, the Amendment provides that the removal will occur:

> Notwithstanding the provisions of Acts of Assembly 1889 chapter 24, which is hereby repealed.

The repealed Act of Assembly referred to is the Joint Resolution of 1889 requesting and authorizing the Governor to accept the gift of the Lee Monument from the Lee Monument Association and the pledge that the space would be held "sacred to the monumental purpose to which it had been devoted."[2]

Simply put, over time it became increasingly evident that honoring the Confederate cause – which fought and sought to keep slavery in place – constituted an affront to many Virginians. As the expert, Dr. Gaines, explained, the existence of the Lee Monument "does not reflect values of equality, inclusion and diversity." (JA 571.) The expert added that "the monuments are a troubling presence in our contemporary society." (JA 580).

Further, in the recent political climate, evidence showed the Confederate "monuments have become a lightning rod for extremist elements" of society (JA 595), leading to unrest, violence, and bloodshed resulting in the Commonwealth's expenditure of funds and resources to protect its citizens. (JA 595, 600.) The

[2] House Budget Bill H.B. 5005 was subsequently signed into law by the Governor. In their assignments of error, the Plaintiffs refer to the portion of this legislation that repeals the 1889 Joint Resolution and requires removal of the Lee Monument as the "Budget Amendment." The legislative history of H.B. 5005 is available here: https://lis.virginia.gov/cgi-bin/legp604.exe?202+sum+HB5005

record revealed several recent violent confrontations involving monument disputes across the Commonwealth (*Id.*) – and, of course, the related 2017 "Unite the Right" unrest in Charlottesville (also initiated by a Confederate monument dispute) brought national scrutiny upon the issue.

In weighing the General Assembly's legislative decisions, as well as the one-sided evidence at trial, the Circuit Court found that the Governor's decision to remove the Lee Monument did not violate public policy. (JA 415.) Similarly, the Court found the covenants upon which Plaintiffs sought to rely were unenforceable. (JA 415.)

STANDARD OF REVIEW

The assignments of error present questions of law, which are reviewed de novo. *See Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 577 (2017) ("[Q]uestions of statutory and constitutional interpretation [are] review[ed] de novo."). However, in reaching its holding that the restrictive covenants in the 1887 and 1890 Deeds are unenforceable based on the current public policy of the Commonwealth, the Circuit Court carefully weighed the evidence presented by the parties. (JA 411-15.) When reviewing a trial court's application of the law to the facts, this Court gives "deference to the trial court's factual findings and view[s] the facts in the light most favorable" to the prevailing party below. *Kim v. Commonwealth*, 293 Va. 304, 311 (2017). Accordingly, the evidence presented at

trial should be viewed in light most favorable to Governor Northam and the other appellees. And the Circuit Court's conclusions about the evidence should be afforded deference. Such conclusions include the Court's finding that the testimony of the Commonwealth's expert witnesses "overwhelmingly established the need of the southern citizenry to establish a monument to their 'Lost Cause,' and to some degree their whole way of life, including slavery." (JA 411.)

ARGUMENT AND AUTHORITIES

I. The Governor's Decision to Relocate the Lee Monument was a Proper Exercise of Executive Power Which Did Not Violate Virginia Public Policy. (Assignments of Error 1-6.)

The Governor of Virginia is charged with determining whether Commonwealth works of art "shall be removed, relocated or altered." Va. Code § 2.2-2402(A). In this case, Governor Northam declared that the Lee Monument operated "not to celebrate unity, but to honor the calls of division,"[3] and experts established, without contradiction, that the Monument "does not reflect values of equality, inclusion and diversity." (JA 571.) To the contrary, the Statue served to commemorate and glorify the Confederate cause, which included the effort to preserve slavery.

[3] Governor Northam's press conference can be found at: https://www.rev.com/blog/transcripts/gov-ralph-northam-virginia-press-conference-transcript-removal-robert-e-lee-statue

This message of suppression was rendered all the more troubling because it occurred on Commonwealth property and, therefore, postured as State supported speech. A government entity has the right to "speak for itself," *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000) and "it is entitled to say what it wishes." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *see Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212 (2015) ("a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message.") But to have miscreants and fringe elements of society laud days of slavery is one thing – to have the State openly celebrate the defender of slavery is quite another.

As the United States Supreme Court observed in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 477 (2009) (citation omitted.)

> The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes."

The *Summum* Court gave various examples of this phenomenon.[4] Such a change in perception is what happened here – while the General Assembly of 1890 embraced

[4] The Court observed: "A striking example of how the interpretation of a monument can evolve is provided by one of the most famous and beloved public *cont'd. to next page . . .*

the "Lost Cause" narrative, their modern contemporaries have focused on the Confederacy's divisive and troubling fight to maintain slavery and dissolve the Union.

Plaintiffs attacked the Governor's removal decision as contrary to public policy. The "policy" Plaintiffs sought to embrace, however, was the 1889 Joint Resolution accepting the gifted Lee Monument and the related pledge to preserve it. Plaintiffs similarly argued that the nineteenth century deeds' restrictive covenants bound the Commonwealth to preserve Lee's likeness in a place of honor in perpetuity. In essence, Plaintiffs position was that a small group of private individuals from the distant past could impose a deed restriction on Virginia's government mandating a state-sponsored message a century later that was

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monuments in the United States, the Statue of Liberty. The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. See J. Res. 6, 44th Cong., 2d Sess. (1877), 19 Stat. 410 (accepting the statue as an "expressive and felicitous memorial of the sympathy of the citizens of our sister Republic"). At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the widespread influence of American ideals. See Inauguration of the Statue of Liberty Enlightening the World 30 (1887). Only later did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom. See Public Papers of the Presidents, Ronald Reagan, Vol. 2, July 3, 1986, pp. 918-919 (1989), Remarks at the Opening Ceremonies of the Statue of Liberty Centennial Celebration in New York, New York; J. Higham, The Transformation of the Statue of Liberty, in Send These to Me 74-80 (rev. ed. 1984)." *Id*. at 477.

antithetical to the General Assembly's current vision of Virginia. This argument properly failed.

A. The Circuit Court Correctly Concluded that the Governor's Executive Action Does Not Run Afoul of Virginia's Current Public Policy as Expressed by the General Assembly.

This Court and the Court of Appeals of Virginia have long held that the legislature, not the judiciary, is the "sole 'author of public policy.'" *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 280 (2016); *see also In re Woodley*, 290 Va. 482, 490 (2015); *Wallihan v. Hughes*, 196 Va. 117, 124-25 (1954); *Marblex Design Int'l, Inc. v. Stevens*, 54 Va. App. 299, 309 (2009). The United States Supreme Court has stated that "[t]he legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state." *Chicago, B. & O.R. Co. v. McGuire*, 219 U.S. 549, 565 (1911). Accordingly, the "best indications of public policy are to be found in the enactments of the [l]egislature." *City of Charlottesville v. DeHaan*, 228 Va. 578, 583 (1984) (quoting *Mumpower v. Housing Authority*, 176 Va. 426, 444 (1940)).

Plaintiffs argued from the inception of this action that the General Assembly, through the 1889 Joint Resolution, established the binding public policy of the Commonwealth to memorialize General Lee in a place of honor. The Circuit Court, however, made a finding that there had been "a change" in public

policy since 1889. (JA 415). Central evidence relied on by the Court to support this finding was the passage of 2020 bills repealing the 1889 resolution and appropriating funds for the removal and storage of the Lee Monument. (JA 412.) But copious other events and legislation reconfirmed this conclusion. (JA 408-09.)

For example, earlier in the year, the General Assembly had eliminated a State holiday honoring General Lee. (JA 409, 601-02.) Other busts of Civil War figures – including Lee – and Confederate monuments were removed from the Capitol, Monument Avenue and the U.S. Capitol. (*Id.*) The holiday of Juneteenth was established to commemorate the abolition of slavery. (*Id.*) The General Assembly plainly was moving away from celebration and commemoration of those who fought to defend slavery consistent with Dr. Gaines' testimony that "the monuments are a troubling presence in our contemporary society" (JA 580) that do "not reflect the values of equality, inclusion, and diversity." (JA 571.)

The Circuit Court further noted that, after trumpeting the 1889 Joint Resolution as the binding public policy of Virginia after 1889, "clearly Plaintiffs cannot now argue that this latest legislation does not evidence existing public policy." (JA 413.) In short, the current General Assembly has spoken – and it spoke in a context of civil unrest in which Confederate monuments had proven to be a flashpoint for violence (JA 595, 600) and government action was necessary to protect the public welfare. Virginia's General Assembly of 2020 was free to set its

own policy and was not frozen in place by the ghosts of Confederate sympathizers from 130 years earlier.

B. Restrictive Covenants Asserted and Relied Upon by Plaintiffs in the Nineteenth Century Deeds are in Violation of the Current Public Policy of Virginia and are Unenforceable.

The purported restrictive covenants which Plaintiffs seek to enforce in the deeds conveying the Monument and Circle contain language which Plaintiffs claim requires the Commonwealth to hold and maintain the Lee Statute "perpetually sacred" and to "faithfully guard it and affectionately protect it." (JA 15.) This Court has long held that in order to enforce restrictive covenants, such enforcement must not be contrary to public policy. Similarly, such covenants cannot be enforced where conditions have so radically changed as to practically destroy the original purposes of the covenant. *See Barner v. Chappell*, 266 Va. 277, 285 (2003); *Hercules Powder Co. v. Continental Can Co.*, 196 Va. 935, 944 (1955); *Ault v. Shipley*, 189 Va. 69, 76 (1949). The burden of establishing that restrictive covenants are not enforceable as against public policy rests upon the party asserting unenforceability – here, the Commonwealth. *See Barner*, 266 Va. at 285; *Wallihan*, 196 Va. at 125.[5]

[5] A prominent example of restrictive covenants that were upheld in former times, but plainly violate public policy in contemporary society are covenants *cont'd. to next page . . .*

As the United States Supreme Court observed in *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 45 (1977) (emphasis added):

> One of the fundamental premises of our popular democracy is that *each generation of representatives can and will remain responsive to the needs and desires of those whom they represent*. ***Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days***.

The Court went on to explain:

> The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

. . . *cont'd. from previous page.*
prohibiting members of certain races or religious faiths from living in particular neighborhoods. For example, the restrictions upheld in *Ault* in 1949 were based on residential versus commercial grounds – but the covenants also prominently stated: "Said property is not to be sold or leased to any person of African descent." 189 Va. at 72. Such race-based restrictive covenants are now plainly unenforceable. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24, 34 (1948) (holding enforcement of racially restrictive covenants "is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of its supervisory powers over the courts" (footnotes omitted)); *Bradley v. Sch. Bd. of City of Richmond*, Va., 317 F. Supp. 555, 577 (E.D. Va. 1970) ("Racially restrictive covenants are prohibited and violative of the Fourteenth Amendment."); *see also Duvall v. Ford Leasing Dev. Corp*., 220 Va. 36, 45 (1979) ("Equity does recognize that a [deed] restriction, reasonable when imposed, may become unreasonable and, therefore, unenforceable because of a change of conditions.").

Id. The same logic applies to Plaintiffs' efforts to force the purported 1890 restrictive covenants (while property rights rather than "contracts") upon the Commonwealth as "policy" to be maintained in perpetuity.

After weighing the General Assembly's sweeping shift in policy against honoring protectors of slavery, as well as the Commonwealth's uncontested expert testimony, the Circuit Court concluded:

> the Commonwealth has carried its burden of proving by clear and certain evidence that enforcement of the restrictive covenants in the Deeds of 1887 and 1890 would be in violation of the current public policy of the Commonwealth of Virginia. The Court therefore holds that, at this time, the restrictive covenants are unenforceable by this Court.

(JA 415.)

Plaintiffs failed to put on testimony to dispute the shift in public policy that had occurred in the Commonwealth between the end of Reconstruction and the present day. Having squarely lost on this evidentiary finding, Plaintiffs were left to argue that the Budget Amendment was unconstitutional – so that the Circuit Court could not properly rely upon it to analyze the General Assembly's current public policy. This, too, was a losing proposition.

II. The Plaintiffs Failed to Overcome the Budget Amendment's Presumption of Constitutional Validity. (Assignments of Error 1-3.)

"There is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of the legislature." *Whitlock v. Hawkins*, 105 Va. 242, 248 (1906). "[T]he courts are powerless to declare an act invalid, except where it appears beyond doubt that it contravenes some provision of the State or Federal Constitution." *Citizens Mut. Bldg. Ass'n v. Edwards*, 167 Va. 399, 411 (1937). The Plaintiffs assert three meritless constitutional challenges to the Budget Amendment, claiming it violates the prohibition against special legislation, separation of powers doctrine, and proscription against impairing the obligation of contracts. The General Assembly has plenary power to set the public policy of the Commonwealth and the Budget Amendment was a proper exercise of that power.

A. The Circuit Court Properly Applied the Rational Basis Test When Holding that the Budget Amendment Is Not Special Legislation.

The Plaintiffs maintain that the Budget Amendment constitutes "special legislation" under the second paragraph of Article IV, § 14 of the Virginia Constitution, which provides:

> The General Assembly shall confer on the courts power to grant divorces, change the names of persons, and direct the sales of estates belonging to infants and other persons under legal disabilities, and shall not, *by special legislation, grant relief in these or other cases of*

which the courts or other tribunals may have jurisdiction.

Va. Const. art. IV, § 14 (emphasis added); (Opening Br. 10). In rejecting the Plaintiffs' argument, the Circuit Court properly relied on the rational basis test applied in *Holly Hill Farm Corp. v. Rowe*, 241 Va. 425 (1991), and *Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd. P'ship*, 51 Va. App. 583 (2008). (JA 413.) As the Circuit Court observed, the constitutional prohibition against special legislation in Article IV, § 14 "track[s] the minimum rationality requirements employed by longstanding due process and equal protection doctrines." *Laurels of Bon Air, LLC*, 51 Va. App. at 597. "[T]he burden is upon the assailant of the legislation to establish that it does not rest upon a reasonable basis, and is essentially arbitrary." *Holly Hill Farm Corp.*, 241 Va. at 431.

The Plaintiffs contend that the Circuit Court erred by applying the rational basis test because the Budget Amendment does not involve a "classification that separates persons into different categories." (Opening Br. 11-13.) They observe that *Holly Hill Farm* and *Laurels of Bon Air* both involved legislation that classified persons or businesses, and incorrectly infer that the rational basis test is limited to these circumstances. To the contrary, the "test for statutes challenged under the special-laws prohibitions in the Virginia Constitution is that they must bear 'a reasonable and substantial relation to the object sought to be accomplished by the legislation.'" *Jefferson Green Unit Owners Ass'n, Inc. v. Gwinn*, 262 Va.

449, 459 (2001) (quoting *Benderson Dev. Co., v. Sciortino*, 236 Va. 136, 147 (1988)); *Willis v. Mullett*, 263 Va. 653, 659 (2002) (applying "the so-called 'rational basis' test" to review legislation's "constitutionality under due process, equal protection, and special legislation provisions").

By repealing the 1889 Joint Resolution and directing the Department of General Services to remove the Lee Monument, the General Assembly established that the public policy of the Commonwealth is best served by eradicating statues that honor the Confederacy. The Commonwealth has the right to "speak for itself." *Board of Regents of Univ. of Wisconsin Sys*., 529 U.S. at 229; *see also Summum*, 555 U.S. at 473-81 (city was free to deny placement of monument in public park because such monuments were a form of government speech); *Walker*, 576 U.S. at 212 (state was permitted to decline to issue specialty license plate with image of Confederate flag because license plate designs are government speech). The Budget Amendment bears a reasonable and substantial relationship to the Commonwealth's plain interest in expressing its views about the Confederacy. And as the Circuit Court correctly concluded, Plaintiffs failed to present "evidence that these presumptively constitutional enactments [the House and Senate Bills preceding the Budget Amendment] are not rationally related to the current legislative desire to remove the Lee Monument." (JA 413.)

Attempting to resist that the Budget Amendment easily surmounts the low bar presented by the rational basis test, the Plaintiffs insist that legislation which applies to a "single object" is "always" special legislation. (Opening Br. 10-14.) Such legislation, they say, is "special legislation by its nature." (Opening Br. 13.) In support of this argument, they cite two cases that provide examples of special legislation. *See Alderson v. Cty. Of Alleghany*, 266 Va. 333, 341 (2003) (legislation concerning taxation of property by county after city reverted to town was special legislation specifically authorized by Virginia Constitution); *City of Portsmouth v. City of Chesapeake*, 205 Va. 259, 263 (1964) (provision of city charter regarding annexation suits was special act, which was not prohibited by Virginia Constitution). The Court did not hold in either case that certain kinds of enactments are inherently special legislation.

Rational basis is the test for determining whether a legislative act is special legislation. *Willis*, 263 Va. at 659; *Jefferson Green Unit Owners Ass'n, Inc.*, 262 Va. at 459; *Holly Hill Farm Corp.*, 241 Va. at 430-31. Because the Budget Amendment is rationally related to the Commonwealth's interest in expressing its views about the Confederacy, the Circuit Court correctly concluded that the Plaintiffs failed to meet their heavy burden of showing this legislation "does not rest upon a reasonable basis, and is essentially arbitrary." *Holly Hill Farm Corp.*, 241 Va. at 431.

B. The Budget Amendment Is Not Impermissible Special Legislation Because It Did Not Grant Relief in this Case.

Even if the Budget Amendment were special legislation, it does not contravene the Virginia Constitution, unless it "grant[s] relief" in a case over "which the courts or other tribunals may have jurisdiction." Va. Const. art. IV, § 14. This Court has interpreted the phrase "grant relief" in Article IV, § 14 on only one occasion, where it held that a city's charter provision requiring the circuit court to order referendums in certain circumstances did not "grant relief" within the meaning of § 14. *R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13*, 239 Va. 484, 487, 492 (1990). In light of the dearth of precedent on the meaning of this phrase, it should be construed in accordance with the "pervading philosophy" of Article IV, § 14, which "reflects an effort to avoid favoritism, discrimination, and inequalities in the application of the laws." *Benderson Dev. Co. v. Sciortino*, 236 Va. 136, 147 (1988). The Budget Amendment furthers this philosophy, as the Lee Monument "does not reflect values of equality, inclusion and diversity." (JA 571.)

Section 14 should also be construed in a manner that avoids infringing on the legislature's plenary power to enact laws at any time and its unique role in crafting public policy. As this Court has observed, when an "issue involves a multitude of competing economic, cultural, and societal values," the "legislative

machinery is specially geared" to balancing these considerations:

> A legislative change in the law is initiated by introduction of a bill which serves as public notice to all concerned. The legislature serves as a forum for witnesses representing interests directly affected by the decision. The issue is tried and tested in the crucible of public debate. The decision reached by the chosen representatives of the people reflects the will of the body politic. And when the decision is likely to disrupt the historic balance of competing values, its effective date can be postponed to give the public time to make necessary adjustments.

Bruce Farms, Inc. v. Coupe, 219 Va. 287, 293 (1978); *see also Williamson v. Old Brogue, Inc*., 232 Va. 350, 354 (1986) ("Where, as here, the issue involves many competing economic, societal, and policy considerations, legislative procedures and safeguards are particularly appropriate to the task of fashioning an appropriate change, if any, to the settled rule.").

The evidence presented at trial established that the decision to remove the Lee Monument "involves a multitude of competing economic, cultural, and societal values." *Bruce Farms, Inc.*, 219 Va. at 293. As such, the legislature is the proper branch of government to make policy as to whether the Monument should remain displayed in a place of honor on government property.

The Plaintiffs are asking this Court to hold that the legislature invaded the province of the judiciary by enacting the Budget Amendment on the grounds that it "grants relief" in this case. The 1889 Joint Resolution directed the Governor to

accept the gift of the Lee Monument. The Budget Amendment repealed this law and directed the Department of General Services to remove the Lee Monument. The legislature does not "grant relief" by enacting legislation that may affect the outcome of pending litigation, especially where that legislation merely repeals a law. It is well-established the legislature's role is "to say what the law shall be; it is for this Court to say what the law is." *Horsley v. Garth*, 43 Va. 471, 490 (1846). The Plaintiffs' interpretation of Article IV, § 14 would infringe on the legislature's power to enact and repeal laws at any time.

Moreover, adopting the Plaintiffs' interpretation would effectively bar the General Assembly from promulgating laws whenever they may affect pending litigation, thereby allowing opponents of proposed legislation to file lawsuits to prevent the enactment of that legislation. This untenable result would invite gamesmanship and impair the orderly administration of the legislature's core law making function.

C. The Budget Amendment Does Not Violate the Separation of Powers Provisions of the Virginia Constitution.

Both Article I, § 5 and Article III, § 1 of the Virginia Constitution provide that the "legislative, executive, and judicial departments" of the Commonwealth shall be "separate and distinct." Reiterating their arguments in support of the first assignment of error, the Plaintiffs assert that by "intervening to grant relief in a

pending case" and "directing its outcome" the Budget Amendment violates the separation of powers doctrine. (Opening Br. 24-25.) The Circuit Court correctly rejected this argument because the legislature is not prohibited from enacting laws that affect the outcome of pending litigation.

In reaching its holding, the Circuit Court found that *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325 (2016), was instructive.[6] (JA 413.) In that case, the Supreme Court considered whether the Iran Threat Reduction and Syria Human Rights Act ("Act") violated "the separation of powers by purporting to change the law for, and directing a particular result in, a single pending case?" *Id.* at 1317. To assist victims of terrorism with enforcing money judgments against Iran, the Act designated particular assets owned by Iran and rendered them available to satisfy judgments underlying a consolidated enforcement proceeding, which the statute identified by the District Court's docket number. *Id*. at 1316, 1319. When Congress passed the Act during the pendency of the enforcement proceeding, the Central Bank of Iran claimed it violated the separation of powers doctrine because

[6] Where, as here, the Virginia and United States Constitutions have analogous provisions, this Court often looks to federal courts' interpretation of the United States Constitution. *See, e.g.*, *Elliott v. Commonwealth*, 267 Va. 464, 473 (2004) ("We take this opportunity to declare that Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment.").

it prescribed a rule of decision in a pending case. *Id*. at 1320-23. The Court disagreed, holding Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." *Id*. at 1317.

The Plaintiffs claim *Bank Markazi* is distinguishable because the Act concerned a category of post-judgment execution claims, rather than a single case, and created a new legal standard. (Opening Br. 25.) While the Court observed that the Act was not fairly portrayed as a "one-case-only regime," it did not rule that new legislation affecting a single case was impermissible. *Id*. at 1317. Instead, it clarified that new laws enacted during pending litigation offend separation of powers principles when they compel "findings or results under old law," such as a statute that states "Smith wins" in "Smith v. Jones." *Id*. at 1326; *see also Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 225 (1995) (explaining "legislation that prescribes what the law *was* at an earlier time" contravenes separation of powers principles).

Here, the Budget Amendment did not announce which party prevails in this case or dictate findings or results under "old law." Nor did it usurp the Circuit Court's authority to decide whether the restrictive covenants are enforceable. Although the Circuit Court made clear that the Budget Amendment was "perhaps the most significant evidence offered by the Commonwealth," it was not required

to reach this conclusion. (JA 412.) The Plaintiffs relied heavily on the 1889 Joint Resolution, asserting it established the public policy of the Commonwealth, until it was repealed during the pendency of this case. (JA 412-13.) The fact that the Budget Amendment undermined the Plaintiffs' litigation strategy does not demonstrate that it violates the separation of powers doctrine.

The legislature is free to change the law at any time, even if doing so affects pending litigation, provided that it does not purport to interpret or apply the law. As the Court in *Bank Markazi* concluded, the legislature "may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." 136 S. Ct. at 1325; *see also Plaut*, 514 U.S. at 226 ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1094-97 (D.C. Cir. 2001) (statute exempting specific memorial from generally applicable statutory requirements, which was enacted while litigation challenging construction of the memorial was pending, did not violate separation of powers principles, even though statute only affected single memorial, because Congress may change the "rule of decision in a pending case").

D. The Budget Amendment Does Not Violate the Contract Clauses of the United States and Virginia Constitutions.

Both Article I, § 10 of the United States Constitution and Article I, § 11 of the Virginia Constitution limit the legislature's authority to enact "law[s] impairing the obligation of contracts." However, the Contract Clauses do not "operate to obliterate the [State's] police power." *Working Waterman's Ass'n of Virginia, Inc. v. Seafood Harvesters, Inc*., 227 Va. 101, 110 (1984) (alteration in original) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978)); *see also id.* at 109 ("The Virginia contract clause has been interpreted by this Court in a manner similar to the treatment of the federal clause by the United States Supreme Court.").

Every contract contains an implied condition that it is subject to the state's exercise of its police powers. *Smith v. Commonwealth*, 286 Va. 52, 58 (2013). "Thus, contracts are deemed to implicitly incorporate the existing law and the reserved power of the state to amend the law or enact additional laws for the public welfare." *Id*. The state's authority to exercise its police powers is "paramount" and the Contract Clauses do not prevent the legislature from enacting laws that affect contracts:

> The proscription against enacting statutes that impair the obligation of contracts does not prevent the State from exercising power that is vested in it for the common good, even though contracts previously formed may be

> affected thereby. "'This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.'"

Working Waterman's Ass'n of Virginia, Inc., 227 Va. at 109-10 (quoting *Spannaus*, 438 U.S. at 241). At trial, expert testimony established that the Lee Monument is "a contradiction to present social values" and there is "consensus that [Confederate] monuments are a troubling presence." (JA 412.) In light of the Commonwealth's "sovereign right" to protect the "health, morals, comfort and general welfare of the people," the Budget Amendment was a proper exercise of its police powers.

The Plaintiffs acknowledge that the Contract Clauses do not negate the Commonwealth's police powers. (Opening Br. 26.) Nevertheless, they argue the Budget Amendment constitutes an impermissible "permanent and unconditional impairment" on the restrictive covenants under *Citizens Mut. Bldg. Ass'n v. Edwards*, 167 Va. 399, 399 (1937). (Opening Br. 29.) That case involved a law authorizing the State Corporation Commission to suspend loan associations' payment obligations to creditors indefinitely. *Id*. at 403-05. The Court held the law violated the Contract Clauses of the United States and Virginia Constitutions, noting the relief afforded by the law was "neither temporary nor conditional,"

given that the law permitted the Commission to suspend debts without any "limitation of time, amount, circumstances, or need." *Id.* at 408.

Contrary to the Plaintiffs' reading of *Citizens Mutual*, the Court did not hold that whenever a law affects the enforceability of a contract, it cannot withstand scrutiny under the Contract Clauses, unless the affect is temporary or conditional. This Court has upheld laws that permanently and unconditionally affect contracts. *See, e.g.*, *Smith,* 286 Va. at 57-58 (retroactive reclassification of conviction which subjected defendant to more stringent sex-offender registration requirements did not violate Contract Clause, where less stringent laws were in force at time of plea agreement); *Haughton v. Lankford*, 189 Va. 183, 190 (1949) (discontinuation of shipping permits for oysters did not violate Contract Clause by impairing contract for sale of oysters that required out-of-state shipment due to state's police power to regulate oysters); *Hurley v. Hurley*, 110 Va. 31, 37 (1909) (explaining laws which operate retrospectively by validating contracts which were unenforceable when made do not violate the Contract Clause). The Budget Amendment was a proper exercise of the Commonwealth's police powers and the Plaintiffs have presented no basis for holding otherwise.

III. The Governor's Decision to Remove the Lee Statue is not Prohibited by Concepts of Historical Preservation Under the Constitution of Virginia nor under Va. Code § 2.2-2402(B). (Relating to Assignment of Error 6.)

Plaintiffs' reliance on concepts of "Historical Preservation" do not invalidate the Governor's decision to remove the Lee Monument. Plaintiffs suggest that invalidation of the restrictive covenants in the Nineteenth Century deeds would be contrary to public policy under Article XI, §§ 1 and 2 of the Constitution of Virginia with respect to historical preservation.[7] This Court has previously ruled that Article XI, § 1 is not self-executing. *Robb v. Shockoe Slip Foundation*, 228 Va. 678 (1985) ("We hold … that Va. Const. art. XI, § 1 is not self-executing.") As this Court stated in *Robb*:

> A constitutional provision is self-executing when it expressly so declares. *See, e.g.,* Va. Const. art. I, § 8. Even without benefit of such a declaration, constitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct. "Provisions of a Constitution of a negative character are generally, if not universally,

[7] Article XI, § 1 titled, Natural resources and historical sites of the Commonwealth, provides: "To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."

> construed to be self-executing." *Robertson v. Staunton,* 104 Va. 73, 77, 51 S.E. 178, 179 (1905); *see, e.g., Burns v. Board of Supervisors,* 218 Va. 625, 627, 238 S.E.2d 823, 825 (1977); *Swift & Co. v. Newport News,* 105 Va. 108, 120, 52 S.E. 821, 827 (1906); *Campbell v. Bryant,* 104 Va. 509, 514-15, 52 S.E. 638, 640 (1905). But Article XI, § 1, is not prohibitory or negative in character. Rather, it confines itself to an affirmative declaration of what the chancellor described as "very broad public policy."

Id. at 681-82.

The provisions of Article XI, § 2 are similarly non-prohibitory in nature and are not self-executing in character – the terms are broad and permissive.[8] The section certainly does not provide a private cause of action to citizens. Thus, Plaintiffs cannot bring a valid claim under Article XI.

Plaintiffs also allege that Va. Code § 2.2-2402(B) prohibits the removal of the Lee Monument. Plaintiffs suggest that such a statutory violation would be a

[8] Article XI, § 2 titled, Conservation and development of natural resources and historical sites, provides: "In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states."

usurpation of power in violation of separation of powers concepts under the Virginia Constitution.

The flaws in this logic are numerous – particularly since Va. Code § 2.2-2402 does require the Governor's action for removal of such monuments. More basic than this, however, the statute provides no legal right to seek judicial enforcement of Plaintiffs' claimed cause of action. *Cherrie v. Virginia Health Servs., Inc.*, 292 Va. 309, 318 (2016). The Circuit Court's analysis of this standing problem was correct:

> "In Virginia, 'substantive law' determines whether a private claimant has a right to bring a judicial action." Substantive law includes the Constitution of Virginia, laws enacted by the General Assembly, and common law. However, the Plaintiffs' allegation that removal of the Lee Monument would violate the statute does not have a common law or constitutional basis. The Plaintiffs allege that violation of the statute would violate constitutional principles of separation of powers. However, the statute was passed by the General Assembly, and even if it restricts the Governor's ability to remove an existing structure like the Lee Monument, any violation of the statute would be just that, a violation of the statute, and not a constitutional or common law violation. There is nothing about the statute which implicates a violation of constitutional separation of powers. Consequently, the only basis for a right of action for a violation of the statute would necessarily require statutory standing.

(Opinion, 8/25/20, p. 6, citations omitted.)

The Circuit Court reasoned that statutory standing "asks 'whether the plaintiff is a member of the class given authority by a statute to bring suit.'" *Cherrie*, 292 Va. at 315 (quoting *Small v. Federal Nat'l Mortg. Ass'n*, 286 Va. 119, 125 (2013). As this Court explained in *Cherrie*:

> In other words, the question is whether the legislature 'accorded *this* injured plaintiff the right to sue the defendant to redress his injury….'" It is simply not enough that the plaintiff has 'a personal stake in the outcome of the controversy,' or that the plaintiff's rights will be affected by the disposition of the case … Rather, the plaintiff must possess the 'legal right' to bring the action, which depends on the provisions of the relevant statute.

292 Va. at 858 (internal citations and quotations omitted, emphasis in original.)

This Court "has made abundantly clear that when a statute … is silent on the matter of a private right of action, one will not be inferred unless the General Assembly's intent to authorize such a right of action is 'palpable' and shown by 'demonstrable evidence.'" *Fernandez v. Comm'r of Highways*, 842 S.E.2d 200, 202 (Va. 2020).

Here, the statute is entirely silent as to any right of public enforcement. It provides no statutory standing and no right of action under which the general public could proceed to bring suit. Accordingly, Plaintiffs lack standing on this claim.

Finally, to the extent Plaintiffs suggest that the General Assembly's 2020 enactments conflict with other general statutes involving historic preservation, this argument succumbs to the adage that "the specific controls the general." *Crawford v. Haddock*, 270 Va. 524, 530 (2005). The specific bills calling for the relocation of the Lee Monument would control general statutes regarding preservation concepts. There is no merit to Plaintiffs' claims that century old restrictive covenants can silence today's General Assembly from advancing current public policy. To the contrary, monuments on government land speak for the government, and the government "has the right to speak for itself." *See Summum*, 555 U.S. at 470-71.

CONCLUSION

The expert witness, Dr. Gaines testified that removing the Lee Monument would send a powerful message "that our society stands for the values of equality before the law and freedom and equity and democracy for all, not democracy for some." (JA 599.) He added that the Lee Statue's removal would be "a repudiation of the disturbing past that the monument represents." (*Id*.) The General Assembly, the arbiters of Virginia's public policy, properly and rationally determined that the days of glorifying the Confederate Cause and its ties to slavery were best behind us. The Governor's decision to remove the Lee Monument from its place of

prominence on state land is consistent with – and certainly not contrary to – this way forward.

For the foregoing reasons, the Old Dominion Bar Association respectfully requests that the judgment of the Circuit Court be affirmed.

Respectfully submitted,

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Appellants,

v.

RALPH S. NORTHAM, *et al*.,

Appellees.

BRIEF OF *AMICUS CURIAE* VIRGINIA STATE CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ON BEHALF OF APPELLEES

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