IN THE
Supreme Court of Virginia

RECORD NO. 210113

HELEN MARIE TAYLOR, *et al*.,

Appellants,

v.

RALPH S. NORTHAM, in his Official Capacity as
GOVERNOR OF VIRGINIA, *et al*.,

Appellees.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Appellants-Plaintiffs Helen Marie Taylor, Evan Morgan Massey (Trustee),[1] Janet Heltzel, George D. Hostetler and John-Lawrence Smith ("Residents") filed their complaint and motion for preliminary injunctive relief on July 21, 2020, challenging the order of Governor Ralph S. Northam that the monument erected to honor Robert E. Lee on Lee Circle at the intersection of Monument Avenue and Allen Avenue in the City be removed. JA 1-32. Three of the Residents, the Trustee of 1833 Monument Avenue, Janet Heltzel and George D. Hostetler ("the Allen Addition Residents"), own residences in the Allen Addition subdivision, which includes the Lee Circle. JA 219-20. All Residents own property and reside in the Monument Avenue Historic District of the City of Richmond. JA 219-20.

Appellees-Defendants are Governor Northam, the Director of the Department of General Services, and the Director of the Division of Engineering & Building (collectively, "the Governor"). JA 2-3.

The complaint contained five counts. Count I asserted that a 1889 joint resolution of the Virginia General Assembly is binding on the Governor and that the order to remove the Lee Monument violated Article V, § 1 of the Constitution of Virginia because the order exceeded the Governor's constitutional authority.

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[1] Evan Morgan Massey died on March 10, 2021. His successor trustee will be substituted pursuant to Code §8.01-22.

Count II asserted that the Governor's order intruded upon the authority of the General Assembly by claiming to establish a policy in conflict with the policy announced in the 1889 joint resolution. Count III asserted that the Governor had violated the separation-of-powers provisions of the Constitution of Virginia, Article I, § 5 and Article III, § 1 by exercising power reserved to other branches of state government. Count IV charged that the Governor's order violated the Commonwealth's obligation under restrictive covenants contained in 1887 and 1890 Deeds to which the Allen Addition Residents are successors-in-interest and beneficiaries. Count V asserted that the Governor's order was in violation of Code of Virginia § 2.2-2402(B), which prohibits removal of structures described in that statute. JA 1-32.

Following a July 23, 2020 hearing, the circuit court granted Residents a temporary injunction on August 3, 2020. JA51. On August 25, 2020, the circuit court overruled the Governor's demurrer as to Counts I, II, III and IV, but sustained the demurrer as to Count V. JA 33-50, 74-81.

Residents moved for summary judgment on October 9, 2020. JA 189, 82-188. The Governor filed a cross-motion for summary judgment on October 14, relying in part on the Budget Amendment that had not been enacted at the time. JA 225-65. The circuit court heard arguments on October 19 on the summary judgment motions and took those motions under advisement. JA 430-55.

The trial then proceeded on October 19 with the submission of title examinations of the deeds of the Allen Addition Residents, which were admitted without objection. JA 471, 715-833. The court took judicial notice of numerous matters, as identified in its October 27, 2020 letter opinion. JA 407-08, 601-03, 611-12. After Residents rested, the Governor moved to strike Residents' complaint, which the court denied. JA 409-10, 638.

The Governor offered the testimony of historians Edward Ayers and Kevin Gaines; several exhibits related to the Lee Monument and Monument Avenue; and numerous documents, which the court judicially noticed, reflecting actions of the General Assembly and the Speaker of the House of Delegates, the toppling by protestors of a Confederate monument to Jefferson Davis on Monument Avenue during June 2020, and the removal by the City of Richmond of three other monuments along Monument Avenue during July 2020. JA 491-601.

In rebuttal, Residents offered the testimony of Teresa Roane, the archivist of the United Daughters of the Confederacy (JA 604-13), and Alexander Wise, former Director of the Virginia Department of Historic Resources and Founding President of the American Civil War Center. JA 614-37.

At the conclusion of the receipt of evidence, the Governor again moved to strike Residents' claims, which the court denied. JA 409-10, 638.

The circuit court issued a letter opinion on October 27, 2020. JA 272-84.

On the same day, the court entered an Order noting that the parties' respective motions for summary judgment and Defendants' motion to strike Plaintiffs' evidence were denied; finding that enforcement of the restrictive covenants would be contrary to current public policy, as established by the Virginia General Assembly; dissolving the temporary injunction entered on August 3, 2020; incorporating the findings and rulings in its letter opinion of the same day; suspending execution of the Judgment Order pending the resolution of a properly perfected appeal; and waiving the requirement of any suspending bond. JA 285-86.

The circuit court entered an order that amended its October 27, 2020 Order by entering final judgment in favor of the Governor, restoring its August 3, 2020 injunction for the period during which the appeal is pending, and waiving the requirement of a suspending bond or irrevocable letter of credit. JA 289. On the following day, October 30, the court entered an Order clarifying and adding to its October 29, 2020 Order that the August 3, 2020 injunction is not only restored but extended throughout the pendency of Residents' appeal. JA 290.

Residents filed their notice of appeal on October 29, 2020. JA 287-88. On November 9, 2020, the Governor filed a petition for review pursuant to Code of Virginia § 8.01-626 and a motion to vacate the injunction or, in the alternative, to expedite proceedings. Plaintiffs filed an opposition to each. On December 18,

2020, the Court entered orders refusing the petition for review, denying the motion to vacate, and taking the request to expedite under advisement.

STATEMENT OF FACTS

The Robert E. Lee Monument was erected for two purposes. The first was to honor Lee and the men he led in battle. JA 576. The second was to attract buyers to a real estate development just beyond the boundary of the City of Richmond. JA 153, 161, 203.

The Lee Monument, consisting of a statue and pedestal, was unveiled on May 29, 1890, early 20 years after his death in 1870. JA 175. Before the erection of the Monument could be undertaken, numerous obstacles had to be overcome. Two competing organizations that had been formed for the purpose of pursuing the project were eventually consolidated as the Lee Monument Association ("the Association"). JA 156-57. Fundraising was difficult because the Civil War had impoverished the Commonwealth. A dispute over the choice of a sculptor was finally resolved by the selection of Marius-Jean-Antonin Mercié, one of the most prominent sculptors of his day. JA 153, 155. The most difficult issue was the choice of a site for the Monument. JA 157.

Among the sites considered by the Association were Hollywood Cemetery, Capitol Square, Libby Hill, Gamble's Hill and Monroe Park. The Association chose a 57-acre parcel of flat, open land at the end of Franklin Street, just beyond

the city limits, which was owned by Otway S. Allen, his sisters, and their spouses ("the Allen family"). *Id*. The appeal of the site lay in the setting that the Allen family promised to create. A circle of land 200 feet in diameter, which would become known as the Lee Circle, would be conveyed to the Association at the intersection of two grand avenues to be built by the Allen family and dedicated as public streets. JA 22, 29.

The advantages of the Allen site, although controversial at the time, persuaded the Association to choose the site. In return for agreeing to convey the Lee Circle, the Allen family received a centerpiece for their planned residential development that was of "outstanding artistic quality and design" (JA 178) and is "the culmination of a beautiful composition and urban amenity." JA 176.

The agreement between the Allen family and the Association, and subsequently between the Association, the Allen family, and the Commonwealth, was incorporated in covenants in two deeds. JA 14-29, 107-12, 123-31, 241-51. The covenants, of course, could have been included in freestanding agreements and not in the deeds. However, by including the covenants in the deeds, the parties insured that they would "run with the land." JA 61-62. The first of the two deeds, by which the Allens conveyed the Lee Circle to the Association in 1887, provided that the Association would:

> hold the said property or "Circle," to the following uses and purposes and none other, towit, as a site for the Monument to General Robert E. Lee which it is the end and object of the Monument Association to erect. And said Association also executes this conveyance, in testimony of its approval thereof, its recognition of the use and purpose to which the said piece of land is to be held, and its agreement and covenant to carry out the said purpose, and to hold the said property only for said use.

JA 25.

In 1889, the General Assembly adopted a joint resolution authorizing and requesting the Governor, on behalf of the Commonwealth, to agree:

> to accept, at the hands of the Lee monument association, the gift of the monument or equestrian statue of General Robert E. Lee, including the pedestal and circle of ground upon which said statue is to be erected, and to execute any appropriate conveyance of the same, 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.

JA 255.

The second deed was executed in 1890 between the Association (party of the first part), the Allen family (party of the second part), and the Commonwealth providing that:

> The 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 before mentioned [*i.e.,* the 1889 Joint Resolution] 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.

Monument Avenue has been developed, as the parties envisioned, in accordance with the subdivision plat identified in the 1890 and 1887 Deeds. JA 251, 261. The Monument Avenue Historic District was later established and was placed on the Virginia Landmarks Register in 1969 and on the National Register of Historic Places in 1970. JA 133-49. In 1997, the Monument Avenue Historic District was designated a National Historic Landmark, which is a designation given to fewer than 3% of all designated Historic Places. JA 620:22-621:5. In 2006, the Lee Monument itself was designated as a Virginia Landmark and, in 2007, registered on the National Register of Historic Places on the basis of its historic significance and high artistic value. JA 171-91.

On Thursday, June 4, 2020, at a press conference, Governor Northam announced that he had ordered the Department of General Services to remove the Lee statue "as soon as possible." JA 75.

During the proceedings below, the 2020 Special Session of the General Assembly enacted a Budget Bill, introduced on August 18, 2020 and signed by the Governor on November 18, 2020, which included provisions repealing the 1889 Joint Resolution and directing the Department of General Services, "in accordance with the direction and instruction of the Governor," to remove the Lee Monument ("the Budget Amendment"). HB 5005, Item 79.I. (2020 Special Session, Va.

General Assembly ch. 56).

budget.lis.virginia.gov/item/2020/HB5005/Chapter/1/79/.

ASSIGNMENTS OF ERROR

1. The circuit court erred as a matter of law in concluding that enforcement of the restrictive covenants in the 1887 and 1890 Deeds would be contrary to current public policy as established by the Virginia General Assembly in its 2020 special session because the Budget Amendment on which the circuit court relied for that conclusion is special legislation that grants relief in this case in violation of Article IV, § 14 of the Constitution of Virginia and, therefore, cannot establish the public policy of the Commonwealth. (JA 434-36) (reviewed *de novo; Palmer v. Atlantic Coast Pipeline, LLC,* 293 Va. 573, 577 (2017)).

2. In denying Plaintiffs' motion for summary judgment and dissolving the temporary injunction, the circuit court erred as a matter of law by declining to rule on Plaintiffs' contention that the Budget Amendment violates the prohibition against impairment of the obligation of contracts in Article I, § 11, Clause 2 of the Constitution of Virginia and Article I, § 10, Clause 1 of the United States Constitution and, therefore, it cannot establish the public policy of the Commonwealth. (JA 226, 656) (reviewed *de novo; Palmer*).

3. The circuit court erred as a matter of law in concluding that enforcement of the restrictive covenants in the 1887 and 1890 Deeds would be contrary to current public policy as established by the Virginia General Assembly in its 2020 special session because the Budget Amendment on which the circuit court relied for that conclusion violates the separation-of-powers provisions in Article I, § 5 and Article III, § 1 of the Constitution of Virginia and, therefore, cannot establish the public policy of the Commonwealth. (JA 435) (reviewed *de novo; Palmer*).

4. In denying Plaintiffs' motion for summary judgment and dissolving the temporary injunction, the circuit court erred as a matter of law by declining to rule on Plaintiffs' contention that the Budget Amendment violates the rule established by this Court that a legislative act generally cannot abrogate a valid restrictive covenant unless it is demanded by the public health, comfort or

welfare and, therefore, it cannot establish the public policy of the Commonwealth. (JA 431, 450, 657) (reviewed *de novo; Parikh v. Family Care Ctr., Inc.,* 273 Va. 284, 288-89 (2007)).

5. The circuit court erred as a matter of law in declining to grant summary judgment to Plaintiffs because there was no material fact in dispute and Plaintiffs had established the grounds in law and fact for a grant of summary judgment in their favor. (JA 213-320) (reviewed *de novo; Mount Aldie, LLC v. Land Trust of Va., Inc.,* 293 Va. 190, 197 (2017); *Amin v. Cnty. of Henrico*, 286 Va. 231, 235 (2013)).

6. In denying Plaintiffs' motion for summary judgment and dissolving the temporary injunction, the circuit court abused its discretion by declining to consider and rule on Plaintiffs' contention that invalidation of the restrictive covenants in the 1887 and 1890 Deeds would be contrary to the public policy of the Commonwealth regarding historic preservation, as expressed in Article XI, §§ 1 & 2 of the Constitution of Virginia, as implemented by the Virginia General Assembly in Code of Virginia §§ 10.1-1700 *et seq*., 10.1-2202.3, 10.1-2205, 10.1-2206.1, 10.1-2206.2, 10.1-2207 and 10.1-2212. (JA 226-27) (reviewed *de novo; Palmer*).

STANDARD OF REVIEW

The standard of review for each assignment of error is *de novo.*

ARGUMENT

I. THE BUDGET AMENDMENT VIOLATES ARTICLE IV, § 14 OF THE CONSTITUTION OF VIRGINIA AND CANNOT ESTABLISH A BASIS FOR REPEALING THE 1889. JOINT RESOLUTION. (Assignment No. 1 – *de novo* review)

A. Legislation that applies to a single object is always special legislation.

Residents challenged the Budget Amendment as violating the second paragraph of Article IV, §14 of the Constitution. JA 413, 434-36. Legislation that

by its terms applies only to a single object, such as the Lee Monument, is necessarily special legislation. *Alderson v. Cnty. of Alleghany,* 266 Va. 333, 337 (2003) (Legislation limited in application to a single municipality "most assuredly is special legislation."); *City of Portsmouth v. City of Chesapeake,* 205 Va. 259, 263 (1964) (A charter provision "of course is a special act."). The Budget Amendment addresses the Lee Monument and nothing else.

In deciding that the Budget Amendment constituted general rather than special legislation, the circuit court applied an erroneous test based on a misreading of *Holly Hill Farm Corp. v. Rowe,* 241 Va. 425 (1991) and *Laurels of Bon Air, LLC v. Medical Facilities of Amer. LIV Ltd. P'ship,* 51 Va. App. 583 (2008). JA 413. Relying improperly on *Holly Hill,* it decided that Residents had failed to produce evidence that the Budget Amendment was "not rationally related to the current legislative desire to remove the Lee Monument." *Id*. The rational relationship test does not apply to legislation that is obviously confined to a single object. Both *Holly Hill* and *Laurels* involved a challenge to the constitutionality of a *classification*, which be its nature distinguishes a category of objects from all other objects. The Budget Amendment does not purport to establish – and by its very nature could not establish – any classification because it is confined to a single object.

Neither *Holly Hill* nor *Laurels* involved a challenge under the second paragraph of Article IV, § 14 of the Constitution of Virginia, which provides: "The General Assembly…shall not, by special legislation, grant relief in these or other cases of which the courts or other tribunals have jurisdiction." Both *Holly Hill* and *Laurels* addressed a challenge under Article IV, 14(18) and Article IV, § 15, which provide fundamentally different prohibitions than does the second paragraph of Article IV, § 14. Article IV, § 14(18) provides in relevant part: "The General Assembly shall not enact any special, or private law in the following cases: *** (18) Granting to any private corporation, association, or individual any special or exclusive right, privilege or immunity." Article IV, § 15 provides in relevant part: "In all cases enumerated in the preceding section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws."

Holly Hill concerned a provision of the Virginia division fence law, which applies to owners of "land used for industrial or commercial purposes, or subdivided into lots or parcels, adjoining land used for agricultural purposes…." 241 Va. at 426. The law applies to all such owners throughout the Commonwealth. The challenge was based on the claim that the law was unconstitutional special legislation as applied to owners of subdivision lots. The Court held that the division fence law is general, not special, because the classification is reasonable

and not arbitrary and applies to all persons similarly situated as well as to all parts of Virginia where like conditions exist. *Id.* at 430-31.

The Court of Appeals in *Laurels* also held that the challenged classification in that case was constitutional because it was not arbitrary. 51 Va. App. at 599. The legislation exempted a class of nursing homes from an administrative process that other nursing homes were obligated to follow. The issue was whether the differential treatment of the exempt class favored a privileged few. The test applied in *Laurels* was whether the classification in that case complied with the "minimum rationality requirements employed by the longstanding due process and equal protection doctrines." *Id.* at 597. That test is appropriate to determine the constitutionality of a legislative classification that separates persons into different categories, but it has no applicability to a review to determine whether legislation that is limited to a single object is special legislation. It is always special legislation by its nature.

The rational relationship test that the circuit court applied would have been inappropriate even had the Budget Amendment established a classification. The court concluded that "there is no evidence that these presumptively constitutional enactments are not rationally related to the current legislative desire to remove the Lee Monument." JA 413. This formulation is illogical because it assumes the conclusion that all legislation that is related to the desire of the body that enacts it

is rational. Of course, every law that a legislative body enacts is prompted by, and rationally related to, its desire. It is difficult to imagine a law of any kind that does not have a rational relationship to the desire of the legislators who voted to enact it. The circuit court's test was not a proper test at all; it was simply a truism.

The Governor suggested in a footnote in his Opposition to the Petition for Appeal that the rational relationship test should apply here because the Lee Monument is in a category of state-owned monuments that have become controversial. Opp. Br. at 15-16 n. 5. That suggestion must be rejected out of hand because the Budget Amendment does not purport to establish such a classification.

B. Whether legislation is special or general does not depend on the legislative vehicle that is chosen.

The Governor advances an additional argument why the Budget Amendment is not a special law. He contends that it is not special because it is part of a larger piece of legislation, the Budget Bill, which addresses a wide variety of government projects and initiatives. Br. Op. Pet. App. 14-15. He cites no authority for this theory. Although the distinction between special and general laws has been extensively litigated in this court, no previous litigant appears to have advanced this argument. It is easy to see why. It would effectively nullify the provisions of Article IV, §§ 14 and 15 of the Virginia Constitution concerning special laws. Any time the General Assembly wished to enact what otherwise would be a special law, the constitutional limitations on special laws could easily be circumvented by

simply attaching it to another bill. The prohibitions of Article IV, §§ 14 and 15 would become nothing more than a minor technical inconvenience.

A constitutional provision should not be interpreted in a way that thwarts its purpose. "An evasion of the [special laws] prohibition 'by dressing up special laws in the garb and guise of general statutes' will not be permitted." *Martin's Ex'rs,* 126 Va. 603, 612 (1920) (quoting 1 DILLON ON MUNICIPAL CORPORATIONS (5th ed.) § 147 *et seq*., and 1 LEWIS' SUTHERLAND ON STATUTORY CONSTRUCTION (2d ed.) § 200); *see also License Acquisitions, LLC v. Debary Real Estate Holdings, LLC*, 155 So. 3d 1137, 1143 (Fla. Sup. Ct. 2014) ("A special law, however, is not converted into a general law by the Legislature's treating it and passing it as a general law.") It is common for courts to strike down unconstitutional provisions of a general law while leaving the remainder of the general law intact. *E.g., Benedetti v. Cimarex Energy Co.,* 415 P.3d 43 (Okla. 2018) ("we find 85 O.S. 2011 § 302(H) is an unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution, and it shall be severed from the remainder of that provision.").

C. Laws repealing existing laws or appropriating funds may be special laws

The Governor also contends that laws repealing existing laws or directing how government funds should be spent cannot be special laws. Br. Op. Pet. App. 15. They cite no authority in support of this startling contention. The Constitution

of Virginia does not exclude acts repealing laws or appropriations bills from the ambit of special laws, and doing so would eviscerate Article IV, § 14. It is also explicitly forbidden by Article IV, § 15, which provides that "Any general law shall be subject to amendment or repeal, but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of enactment of, a special, private, or local law." This Court has considered the difference between special and general laws many times and has never given any indication that whether a provision was part of a larger bill or was contained in an appropriations bill has any relevance. *See generally Riddleberger v. Chesapeake Western Ry.,* 229 Va. 213, 218-19 (1985) (discussing previous Virginia cases concerning special laws). If legislation repealing a law could not be special legislation, then the legislature could enact a tax that applied to all businesses and later repeal the tax except as applied to a single company, thereby accomplishing the purpose of special legislation. Similarly, the legislature could fund a category of organizations and then repeal all of the legislation except the funding for a single organization.

D. The Budget Amendment granted relief in this case by determining the outcome of pending legislation.

The Governor also argues that the Budget Amendment does not "grant relief" in this case. Br. Opp. Pet. App. 16-17. The plain language of the Budget Amendment defeats that argument:

> Notwithstanding the provisions of Acts of Assembly 1889, Chapter 24, which is hereby repealed, the Department of General Services, in accordance with the direction of the Governor, shall remove the Robert E. Lee Monument or any part thereof.

budget.lis.virginia.gov/item/202/HB5005/Chapter/1/79/.

The ultimate benefit that the Commonwealth is seeking through the enactment of that provision is to be allowed to remove the Lee Monument and to be free of any obligations to the Residents under the 1877 and 1890 Deeds. That is plainly the relief that the Budget Amendment is intended to provide. It was understood by the circuit court as directing the court to grant exactly that relief, which the court proceeded to do. JA 413, 415. The Governor contends that the Budget Amendment merely "amended the law" and made it clear that "it is the policy of the Commonwealth to remove the Lee statue" without referring to this case or purporting to direct the result. The Governor is asking this Court to interpret a constitutional provision in a way that would ignore reality and frustrate its obvious purpose by converting a substantive limitation on legislative authority into an easily circumvented technical requirement. The second paragraph of Article IV, § 14 was intended to prevent the legislature from interfering to affect the outcome in pending litigation on a case-by-case basis. "Thus any case over which a court has asserted jurisdiction becomes a judicial matter, and the result may not be affected by special legislation." I A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINA 539-40 (1974) (hereinafter "HOWARD").

The legislature can amend the law and make the change applicable to pending cases, but only when it does so by enacting general legislation, not special legislation. By arguing that the Budget Amendment clarifies a "policy," the Governor attempts to put it in the category of a general law. Policies are "general principles by which government is guided in its management of public affairs." "Policy," BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 11th ed., West 2019). The Budget Amendment did not create, modify, repeal, or even clarify a general principle. It simply singled out a particular monument for removal, which is not a policy. This accepted meaning of the term "policy" has not changed for at least the past 130 years. Accord, BLACK'S LAW DICTIONARY 908-09 (Henry Campbell Black, 1st ed., West 1891) ("The general principles by which a government is guided in its management of public affairs, or the legislature in its measures.") The Governor argues that the Budget Amendment does not grant relief because it does not reference this case, even though it is obvious, and the Governor cannot plausibly deny, that it was inserted in the Budget Bill for the specific purpose of affecting this case. If the Governor's interpretation of the words "grant relief" is accepted, the legislature will be given license to evade the purpose of Article IV, § 14 whenever it wishes to do so.

In arguing that the Budget Amendment does not grant relief, Defendants rely on two cases, *Bank Markazi v. Peterson,* 136 S. Ct. 1310 (2016) and *R.G. Moore*

Bldg. Corp. v. Comm. for the Repeal, 239 Va. 484 (1990). Neither case supports their argument.

Bank Markazi involved the construction of Article III and the separation-of-powers provisions of the U.S. Constitution. It concerned a challenge to federal legislation, 22 U.S.C. § 8772, that made available for post-judgement execution a set of assets controlled by Bank Markazi, the central bank of Iran. 136 S. Ct. at 1316. More than 1,000 victims of terrorist acts sponsored by Iran had obtained judgments against Iran. *Id*. It turned on the question "Does § 8772 violate the separation of powers by purporting to change the law for, and directing a particular result in, a single pending case?" *Id.* at 1317. *Bank Markazi* is inapplicable to the "special law" issue in this case, as the circuit court recognized. JA 413. The U. S. Constitution does not include counterparts to the specific prohibitions of special laws that Article IV, §§ 14 and 15 contain. However, *Bank Markazi* is, as the circuit court concluded, instructive on the issue of separation of powers. *Id.,* n. 5. Its relevance to that issue is addressed *infra* at pages 25-26.

The decision in *R. G. Moore* concerned "the applicability and validity, vis-a-vis state and local zoning laws, of a municipal charter provision subjecting city ordinances to a referendum…." 239 Va. at 486. The plaintiff argued that the charter of the City of Chesapeake, which provided that a zoning ordinance could be amended or repealed by referendum, was special legislation "granting relief."

Id. at 492. However, the involvement of the trial court in the referendum was purely ministerial. *Id*. The Court, which earlier in its opinion had held that the referendum was a legislative act, held that the referendum provision in the charter did not "grant relief" in a case as contemplated by Article IV, § 14. *Id*. Neither the facts nor the holding in *R. G. Moore* concerned an attempt by the General Assembly to change the outcome of a particular case pending before a court. It has no relevance to the issues in this case.

E. Enactment of an unconstitutional law does not establish the Commonwealth's public policy.

The circuit court recognized that at the time the opinion was written, the Budget Amendment had not been signed into law, but nevertheless concluded that "these acts of the General Assembly clearly indicate public policy of the General Assembly, and therefore the Commonwealth, to remove the Lee Monument…." JA 412. The circuit court was mistaken. This case concerns "public policy" in a specific context, as it applies to deed covenants. A covenant in a deed may be void because it is against a public policy. *Heublein, Inc. v. Dep't of Alcoholic Beverage Control,* 237 Va. 192, 199 (1989). However, a deed covenant need not be in furtherance of a particular public policy. If it meets formal requirements, it is presumptively valid. *See RECP IV WG, LLC v. Capitol One Bank (USA), N.A.,* 295 Va. 268, 289 (2018).

The 1889 Joint Resolution, in authorizing Governor McKinney to sign the 1890 deed on behalf of the Commonwealth, functioned in exactly the same way as a corporate board resolution authorizing its president to sign an agreement on behalf of the corporation. It was unnecessary to establish a formal public policy concerning the Lee Monument in order for the deed covenants to be valid. Three sources of public policy have been recognized in Virginia -- constitutions, laws, and legal precedents. *Brown v. Speyers*, 61 Va. 296, 310-11 (1871). Just as a board of directors, after the company president has entered into an agreement pursuant to such a resolution, cannot withdraw its authorization, so the General Assembly should not be allowed in the circumstances of this case to withdraw Governor McKinney's authority to sign the 1890 Deed by repealing the 1889 Joint Resolution. However, if it did, that would mean that the repeal rendered the deed invalid *ab initio*, and the Lee Circle and Monument still belongs to the grantors.[2]

The Constitution of the United States and the Constitution of Virginia include policies against impairment of contracts and in favor of historic

[2] Rescission or cancellation of a deed may be ordered when that which was undertaken to be performed in the future was "so essentially a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract or so indispensable a part of what the parties bargained for that the contract would not have been made without it." *Easterling v. Ferris*, 651 P.2d 677, 1982 OK 99 (Okla. 1982) (citing *Wright v. Fenstermacher,* 270 P.2d 625, 627 (Okla. 1954)).

preservation. U. S. Const. art. I, § 10; Const. of Va., art. XI, § 1. Virginia laws that establish public policies, *i.e.*, general principles for the management of public affairs, include Va. Code § 40.1-54.1 ("It is hereby declared to be the public policy of the Commonwealth that hospitals shall be free from strikes, and work stoppages."); Code § 6.2-306 ("Any agreement or contract in which the borrower waives the benefits of this chapter or releases any rights he may have acquired under this chapter shall be deemed to be against public policy and void."); Code § 17.1-1001 ("The provisions of this chapter shall not be waived or otherwise modified. Any waiver or modification is contrary to public policy and is void and unenforceable."); and Code § 56-260.1 ("No contract for an easement of right-of-way for a pipeline, power or telephone line, sewer, main or similar works shall contain any provision which purports to exempt the corporation erecting, laying or installing the same from liability for injuries sustained by any person or property by reason of the laying, constructing, maintaining, operating, repairing, altering, replacing or removal of, or any failure or defect in, such line, sewer, main or works. Any such provision in any such contract is hereby declared to be against public policy and shall be null and void and unenforceable;….."). The General Assembly knows how to establish valid public policies when it wishes to do so. Finally, public policy can be found in established judicial doctrines, such as the public policies against deed restrictions that unreasonably restrain alienation or

trade. *See, e.g., Edwards v. Bradley*, 227 Va. 224, 228 (1984); *Tardy v. Creasy*, 81 Va. 553, 558-59 (1886); *see also Roller v. Murray*, 107 Va. 527, 59 S.E. 421 (1907) (contract which violates common-law rule against champerty is void as against public policy).

This Court has been long been reluctant to recognize new judge-made public policies. *Wallihan v. Hughes*, 196 Va. 117, 82 S.E.2d 553, 558-59 (1954) ("The law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes. Public policy has its place in the law of contracts, -- yet that will-o'-the-wisp of the law varies and changes with the interests, habits, need, sentiments and fashions of the day, and courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain."); *Brown*, 61 Va. at 310 ("[T]he courts are very averse to holding contracts illegal upon grounds of public policy, unless the question is free from all doubt."). *Old Dom. Trans. Co. v. Hamilton*, 146 Va. 594, 131 S.E. 850 (1926) ("As Sir James Burroughs wisely observed [public policy] is 'a very unruly horse.'").

Public policy is not, contrary to the holding of the circuit court, created by the passage of unconstitutional legislation, nor, as the Governor argues, is it established by a judge based upon the opinions of academic historians or by a subjective assessment of the current sentiments of certain groups within society.

"Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany et al. v. United States. Andrews et al. v. Same*, 324 U.S. 49, 66 (1945), citing *Vidal v. Mayor*, *etc., of Philadelphia*, 2 How. 127, 197, 198 (1844). *See* RESTATEMENT (THIRD) OF PROPERTY § 3.1 Validity of Servitudes: General Rule (June 2020 Update) (listing five categories of public policies which may invalidate a servitude, none of which are applicable here).

II. THE BUDGET AMENDMENT VIOLATES THE SEPARATION-OF-POWERS PROVISIONS OF THE CONSTITUTION OF VIRGINIA AND CANNOT ESTABLISH THE PUBLIC POLICY OF THE COMMONWEALTH.

(Assignment No. 3 – de novo review)

Residents argued that the Budget Amendment violated the separation of powers. JA 435. By intervening to grant relief in a pending case, the Budget Amendment violates the separation-of-powers provisions of the Virginia Constitution in Article III, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others,….") and Article VI, § 1 ("The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish.“), even if the specific prohibition of special laws that grant such relief is ignored. I HOWARD at 540. ("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….").

The language of Article VI, § 1 is basically the same as the corresponding language of Article III of the U.S. Constitution. Accordingly, the separation-of-powers analysis in *Bank Markazi* is pertinent, although not directly controlling. The Court held that § 8772 did not violate the separation of powers because it did not in fact grant relief in a single pending case. 136 S. Ct. at 1317. The Court pointed out that § 8772 covered "a *category* of post-judgment execution claims filed by numerous plaintiffs who, in multiple civil actions, obtained evidence-based judgments against Iran together amounting to billions of dollars." (Emphasis added). *Id*. The Court also relied on the argument that § 8772 created a "new legal standard" to be applied by the courts. *Id.* at 1326. The Budget Amendment does not create a new legal standard. It would simply revoke a law authorizing the Commonwealth's acceptance of the Lee Monument in 1890 and direct the Governor to remove it. No new standard or policy is created. Both 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. *Id.* at 1317, 1326-27, 1132-33. Thus, if this case were before the U.S. Supreme Court, and the Court applied the reasoning of *Bank Markazi*, the Budget Amendment would be held to violate the separation of powers, by changing the law for the Lee

Monument alone and directing the outcome in this single case. The separation-of-powers provisions in Article III, § 1 and Article VI, § 1 of the Constitution of Virginia are at least as strong as those in the U.S. Constitution.

III. THE BUDGET AMENDMENT VIOLATES THE CONTRACT CLAUSE IN ARTICLE I § 11 OF THE CONSTITUTION OF VIRGINIA AND ARTICLE 1 § 10 OF THE U.S. CONSTITUTION AND CANNOT ESTABLISH THE PUBLIC POLICY OF THE COMMONWEALTH. (Assignment No. 2 – *de novo* review)

Article I, § 11 of the Constitution of Virginia provides that "the General Assembly shall not pass any law impairing the obligation of contracts." Article I, § 10 of the U. S. Constitution contains virtually identical language. Each provision is referred to as "the Contract Clause." Although the Contract Clause does not negate the Commonwealth's police power, it nevertheless "does impose some limits upon the State's power to abridge existing contracts in the exercise of its otherwise legitimate police power." *Heublein,* 237 Va. at 196; *see Working Waterman's Ass'n v. Seafood Harvesters, Inc.,* 227 Va. 101, 110 (1984) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 242 (1978)).

Residents argued below that the Budget Amendment violated the Contract Clause. JA 226, 656-58. The circuit court failed to address that argument. JA 403-15.

In *Heublein,* legislation that retroactively terminated at-will contracts was invalidated as an unconstitutional impairment of the obligation of contract on the

grounds that the legislation was not the proper exercise of the police power because it was an effort to protect a small group of wine wholesalers from economic loss. 237 Va. at 197.

Chief Justice Marshall observed in *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518, 645 (1819) that "the words [of the Contract Clause] were introduced to give stability to contracts." The provision "recognizes the vital function that 'the claim to promised advantages' plays in any developed economic order." I HOWARD at 202 (quoting III ROSCOE POUND, JURISPRUDENCE at 162-63 (St. Paul, MN. 1959)).

Dartmouth College held that an enactment of the New Hampshire legislature that revised the charter granted to the college by King George III violated the Contract Clause. *Id.* at 654. That decision has been limited by *Atlantic Coast Line R. Co. v. City of Goldsboro,* 232 U.S. 548 (1914) and *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934). The Court held in the former case that the railroad charter issued by the State was a contract subject to the State's power to regulate as "reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community." 232 U.S. at 558. In *Blaisdell,* the Court concluded that the Depression presented an emergency that the Framers could not have foreseen and that "the economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with

contracts." 290 U.S. at 437. In both *Atlantic Coast Line* and *Blaisdell,* the state government was exercising its regulatory police power.

Spannaus qualified the broad dictum in *Atlantic Coast Line R. Co.* opinion. It acknowledged that legislative prerogative is limited in certain instances by the Contract Clause. 438 U.S. at 242.

The U.S. Supreme Court has distinguished *Blaisdell* on two separate and independent grounds. The first distinction is between legislation that negatively affects a contract only temporarily and conditionally, as in *Blaisdell,* and legislation that impairs the obligation of a contract permanently and unconditionally. *United States Trust Co. v. New Jersey,* 431 U.S. 1, 28-29 (1977); *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56, 63 (1935). The second distinction is between legislation that imposes a generally applicable rule of conduct and legislation that targets a single activity or object. *Spannaus,* 438 U.S. at 249.

In *United States Trust Co.*, the repeal of a covenant between the State of New Jersey and bondholders was invalidated as a violation of the Contract Clause because the permanent impairment was unreasonable and unnecessary. *Id.* at 22, 28-29, 32. In *Spannaus,* the Court said that where the legislation does not impose "a generally applicable rule of conduct designed to advance 'a broad societal interest,'" the legislation likely violates the Contract Clause. 438 U.S. at 249. That distinction was affirmed in *Exxon Corp. v. Eagerton,* 462 U.S. 176, 191 (1983).

Accord, Amer. Fed. of St., Cnty. & Mun. Employees v. City of Benton, 513 F.3d 874, 882 (8th Cir. 2008); *Lipscomb v. Columbus Mun. Separate Sch. Dist.,* 269 F.3d 494, 504 (5th Cir. 2001).

In *Citizens Mut. Bldg. Ass'n, Inc. v. Edwards,* 167 Va. 399 (1937), this Court declined to adopt an exception to the prohibition of the Contract Clause. It held that a statute authorizing the State Corporation Commission to suspend payment of indebtedness by a building association violated the Contract Clause in both the Virginia and U.S. Constitutions. It drew the distinction between the Minnesota statute at issue in *Blaisdell,* which had a conditional and temporary impact, and the Virginia statute, which permanently and unconditionally impaired the obligation of the contract in that case. *Id.* at 408-09. The Court also acknowledged the rule stated in *Kavanaugh* that the rights of the party claiming a violation of the Contract Clause are to be determined by the law in force at the time the contract was made. *Id.* at 404 (citing *Kavanaugh,* 295 U.S. at 60).

The Budget Amendment obviously constitutes a permanent and unconditional impairment of the obligation of the restrictive covenants. It is limited to the nullification of the restrictive covenants that guaranteed the preservation of the Lee Monument. It bears no resemblance to "a generally applicable rule of conduct designed to advance 'a broad societal interest.'" *Spannaus,* 438 U.S. at 249. Its singular purpose is to relieve the Commonwealth of its contractual obligation to

these Plaintiffs. The Budget Amendment, therefore, violates the Contract Clause in Article I, § 11 of the Constitution of Virginia and the Contract Clause in Article I, § 10, Clause 1 of the United States Constitution.

The Governor contended for the first time in his Brief in Opposition to the Petition for Appeal that the Contract Clause does not apply here because the restrictive covenants are not contracts. The law is well-established that when the terms of a deed are negotiated and a bargain agreed to, the deed is a contract and the restrictive covenant in the deed is a part of the contract. *RECP,* 295 Va. at 271, 283; *see also Sonoma Development, Inc. v. Miller,* 258 Va. 163, 166 (1999); *Sloan v. Johnson,* 254 Va. 271, 275 (1997); *Tardy,* 81 Va. at 558.

The Contract Clause applies here because of the dual nature of the 1887 and 1890 Deeds. *See Edwards v. Kearzey,* 96 U.S. 595, 599-600 (1877); *Severns v. Pacific Railroad Co.,* 101 Cal.App.4th 1209, 125 Cal.Rptr. 2d 100 (2002) (Deed was both a conveyance of a property interest and a contract.); *Overlook Farms Home Ass'n, Inc. v. Alternative Living Servs.,*143 Wis.2d 485, 422 N.W.2d 131 (Wis. App. 1988) (Contract Clause applied in case involving a restrictive covenant in a deed that was also a contract.).

Unconstitutional legislation cannot establish a basis for the circuit court's decision that the public policy of the Commonwealth established by the 1889

joint resolution has been repealed and replaced by a different public policy purportedly established by the Budget Amendment. JA 435, 447, 653.

IV. THE BUDGET AMENDMENT VIOLATES THE GENERAL RULE THAT A LEGISLATIVE ACT DOES NOT INVALIDATE A RESTRICTIVE COVENANT UNESS REQUIRED BY THE PUBLIC HEALTH, COMFORT OR WELFARE AND, THEREFORE, CANNOT ESTABLISH THE PUBLIC POLICY OF THE COMMONWEALTH. (Assignment No. 4 – *de novo* review)

The circuit court erred as a matter of law by failing to address Plaintiffs' contention below (JA 431, 450) that the longstanding rule in Virginia, as in a majority of other jurisdictions, that a legislative act does not invalidate a restrictive covenant unless it is demanded by the public health, comfort or welfare. JA 403-15. *See Ault v. Shipley,* 189 Va. 69, 75 (1949); *RECP IV WG, LLC v. Capital One Bank (USA), N.A.,* 295 Va. 268, 289 (2018). There was no basis in the record for an abrogation of Residents' restrictive covenants that was demanded by public health, comfort or welfare. A denial of property rights cannot be predicated on shifts in public attitudes. There must be a substantial threat to public health, comfort or welfare. Enforcement of the restrictive covenant must be "inequitable and oppressive." *Ault,* 189 Va. at 72.

Invalidation of a valuable property right established by an agreement with the Commonwealth cannot be justified merely because a legislature subsequently

chooses to send the public a different message. If that is to be the law, then no restrictive covenant and, indeed, no promise of the Commonwealth will be secure.

V. THE CIRCUIT COURT ERRED BY NOT GRANTING SUMMARY JUDGMENT TO RESIDENTS. (Assignment No. 5 – *de novo* review)

Residents moved for summary judgment before trial. JA 213-320. In the Governor's opposition to Residents' motion for summary judgment, he contended that whether the restrictive covenants were void as against public policy was a factual issue that could be resolved only after evidence was heard. JA 342-45. The evidence that the Governor proposed to offer at trial was the testimony of Edward Ayers and Keven Gaines as purported experts on the Commonwealth's public policy. The Governor represented that Dr. Ayers would testify that the presence of the Lee Monument from the date of its erection was contrary to the public policy of the Commonwealth, and that Dr. Gaines would testify as to current public policy regarding monuments. JA 313-16.

Residents objected to the receipt of testimony regarding the public policy of the Commonwealth on the grounds that such testimony would be irrelevant. JA 227-29. The determination of what is the public policy of Virginia is a legal issue. The testimony of the Governor's witnesses did not concern issues of fact regarding the validity and enforceability of the restrictive covenants. The opinion of a witness could not establish, modify or negate the public policy articulated in

Constitution of Virginia, legislation adopted by the General Assembly or judicial precedent. *See* discussion at pages 21-25, *supra.*

There was also no factual dispute as to the standing of any of the Residents. *See* discussion at page 36-38, *infra.*

Rule 3:20 of the Rules of this Court mandates that a circuit court grant summary judgment where there are no disputed issues of material fact and the movant has shown that it is entitled to judgment as a matter of law. In denying Plaintiffs' motion for summary judgment, the circuit court erred as a matter of law. *Carwile v. Richmond Newspapers, Inc.* 196 Va. 1, 5-6 (1954). The circuit court's duty to grant Residents' motion for summary judgment was not obviated by the Governor's filing of a cross-motion for summary judgment. *Town of Ashland v. Ashland Inv. Co.,* 235 Va. 150, 154-55 (1988).

VI. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER THE COMMONWEALTH'S PUBLIC POLICY REGARDING HISTORIC PRESERVATION IN DETERMINING WHETHER THE RESTRICTIVECOVENANTS ARE VALID AND ENFORCEABLE. (Assignment No. 6 – *de novo* review)

In the proceedings below, Residents argued that the adoption of Article XI of the Constitution of Virginia and subsequent enactment of implementing legislation regarding historic preservation compelled the conclusion that the removal of the Lee Monument was contrary to the public policy of the

Commonwealth. JA 226-27. The circuit court failed to address that argument. JA 403-15.

One of the significant features of the 1971 Constitution of Virginia, which Virginians ratified in 1970, is the inclusion, for the first time in the Commonwealth's fundamental law, of provisions establishing the policy of conserving natural resources and historic sites. Article XI, § 1. Although this Court held in *Robb v. Shockoe Slip Found.,* 228 Va. 674, 676-77 (1985) that this provision is not self-executing, it unquestionably declares the public policy of the Commonwealth, as this Court observed in *United States v. Blackman,* 270 Va. 68, 73 (2005). Since the decision in *Shockoe Slip Foundation,* the General Assembly has enacted extensive legislation implementing that general policy. *E.g.,* Code of Virginia §§ 10.1-1700 *et seq.* (expressly including historic sites), 10.1-2202.3, 10.1-2205, 10.1-2206.1, 10.1-2206.2, 10.1-2207 and 10.1-2212. These and other statutes "evince a strong public policy in favor of land conservation and preservation of historic sites and buildings." *Blackman,* 270 Va. at 73. *Accord,* II HOWARD at 1144-45 ("This statement of public policy [*i.e.,* the language of Article XI, § 1] becomes a mandate directing all arms of the State to consider the impact of proposed actions upon the Commonwealth's environment.").

The failure of the circuit court to consider the Commonwealth's public policy established by Article XI, § 1 and the statutes implementing the historic

preservation elements of that provision as it relates to the Lee Monument is an error of law.

ALTERNATIVE GROUNDS

The Governor has asserted that there are four alternative grounds, not accepted by the circuit court, for affirming the judgment below. Br. Op. Pet. App. 20-25. The first is that Residents, despite having standing to maintain their deed-based claims, nevertheless lack standing to assert constitutional claims. Second, that the Residents have no private right of action to pursue their non-deed claims. Third, that the language of the deeds, because it is precatory and ambiguous, is insufficient to establish a restrictive covenant. And fourth, that the deed covenants, if mandatory, are void because they require the Commonwealth "to engage in unwanted expressive conduct until the end of time." *Id*. at 24.

A. Residents have established standing.

This Court has adopted the standing jurisprudence followed by the United States Supreme Court and inferior federal courts. *Lafferty v. School Board,* 293 Va. 354, 360-61 (2017). The test applied by federal courts was articulated in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). The circuit court correctly ruled in denying the Governor's demurrer that all Residents had standing under the applicable test to assert their claims in Counts I, II and III (JA 209) and that the

Allen Addition Residents also had standing to assert their deed-based claim in Count IV. JA 210. The Governor has conceded standing to pursue Count IV. JA 476; Br. Op. Pet. App. 21, n. 7.

Residents' Motion for Summary Judgment asserted that among the undisputed, material facts was the fact that each of Residents would suffer aesthetic and sentimental injury because of the close proximity of their residences to the Lee Monument and the unavoidable negative impact on them of the removal of this irreplaceable statue. JA 220-21. No additional evidence is required. The dispute is over whether did not challenge Residents' assertion in their Opposition. JA 338-54. For that reason, there was no reason for Residents to introduce testimony to that effect. They were entitled to a grant of summary judgment or, at the very least, partial summary judgment on the standing issue.

The Governor argues that, as to Counts I, II and III ("the constitutional claims"), Residents have no individualized injury separate from the public at large, citing *Lafferty* and *Park v. Northam,* Rec. No. 200767, 2020WL5094626 (Aug. 24, 2020). Br. in Opp. to Pet. for App. at 21. This case has no resemblance to either of those cases. *Lafferty* involved an allegation of fear and distress over "a purely speculative fact." 293 Va. at 361. The injuries asserted in *Park* were based on Park's "general and conclusory speculation" and on the vague concern by Tigges that his customers might be less satisfied with services because of Governor's face-

covering requirements. 2020 WL 5094626, *4. Residents, on the other hand, will suffer definite and particularized injury if the Lee Monument is removed because they reside in a neighborhood that has been identified with the Lee Monument for 130 years. The property of the Allen Addition Residents is located in the block immediately adjacent to Lee Circle. The loss of this internationally acclaimed monument will cause them immeasurable sentimental injury. *See Levisa Coal,* 276 Va. at 59 (injury may be potential and as yet unrealized).

Residents' Motion for Summary Judgment asserted that among the undisputed, material facts were that each of Residents would suffer aesthetic and sentimental injury because of the close proximity of their residences to the Lee Monument and the unavoidable negative impact on them of the removal of this irreplaceable work of art. JA 220-21. The Governor's response was essentially that such undisputed facts are insufficient as a matter of law. JA 350-52. If Residents' factual predicate satisfied the applicable legal test, there was no reason for Residents to introduce testimony. They had established their standing.

B. Residents have constitutional rights of action.

Under fundamental principles of constitutional law, an act by a governmental official that is *ultra vires* violates the Constitution of Virginia. *Lewis v. Whittle,* 77 Va. 415, 419-20 (1883) ("Under our system of government, the government has and can rightly exercise no power except such as may be bestowed

upon him by the constitution and the laws."); *Cochran v. Fairfax County Board of Zoning Appeals,* 267 Va. 756, 765 (2004) ("Under fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals to the rule of law.").[3]

In this case, the right of action to assert Counts I, II and III is based upon Article I, § 5, Article III, § 1, Article IV, § 1 and Article V, § 1. *See Gray v. Va. Sec'y of Transp.,* 276 Va. 93, 105-06 (2008). It is also compelled by Article I, § 2, which provides: "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." If that provision is given its intended effect, it must mean that governmental officials are accountable to those they injure by *ultra vires* acts by resort to the judiciary for vindication of their rights and not simply through political means. *Kamper v. Hawkins,* 3 Va. (1 Va. Cas.) 20, 30 (1793) (Nelson, J.) ("[W]hen the cases of individuals [charging violations of the Constitution] are brought before them judicially, they are bound to decide.").

The right of the Allen Addition Residents to assert Count IV was not challenged by the Governor below. JA 476. It is well-established that a person may

[3] The Governor acknowledged that the Dillon Rule is derived from the same principle: "Localities have the power, under the Dillon Rule, that the Constitution and the General Assembly give them." Tr. 60.

sue to enforce a restrictive covenant in a deed. *Levisa Coal Co. v. Consolidation Coal Co.,* 276 Va. 44, 60-61 (2008). If an injury to a property right is sufficient to create standing to enforce a deed covenant, it follows that such injury is also sufficient to meet the more relaxed standing requirement for constitutional claims.

C. The Deeds establish a restrictive covenant.

The circuit court rejected the Governor's argument that the language of the 1887 and 1890 Deeds failed to establish a restrictive covenant. JA 79-83, 210. The meaning of the language is determined by the customary understanding of the words chosen by the parties to the Deeds. *Shepherd v, Conde,* 293 Va. 274, 288 (2017). Generally, extrinsic evidence is inadmissible to guide a court in deciding the meaning of a written instrument. *Langman v. Alumni Ass'n of U. Va.,* 247 Va. 491, 498 (1994). The Governor argues for the first time on appeal that the Deeds are not restrictive covenants because Residents did not present evidence regarding the meaning of the Deeds. Br. at 24. Evidence was necessary, the Governor argues, because the language is "precatory (and inherently ambiguous)." *Id.* The language itself defeats that argument.

The last clause of the 1887 Deed states that the land was conveyed by the Allen family to the Lee Monument Association "[t]o have and to hold the said property or 'Circle,' to the following uses and purposes and none other, towit, as a site for the Monument to General Robert E. Lee which it is the end and object of

the Monument Association to erect." The 1887 Deed provided that the covenant between the Allen family and the Association "was a contract and arrangement between them" and was executed in "recognition of the use and purpose to which the said piece of land is to be held, and its agreement and covenant to carry out the said purpose, and to hold said property only for the said use." JA 25.

The 1890 Deed between the Association and the Commonwealth, with the Allen family joined as a party, referred to the 1889 legislative authorization "to execute any appropriate conveyance of the same in token of such acceptance [of the gift of the Monument] and of the guarantee of the State herein being set out." JA 14. The guarantee itself, as described in paragraph 5 of the 1890 Deed, is that the Commonwealth "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.

The foregoing language of the Deeds is not precatory, meaning "requesting, recommending, or expressing a desire for action, but usually in a nonbinding way." "Precatory," BLACK'S LAW DICTIONARY 1195 (West 7th ed. 1999). Moreover, the words "guarantee," "hold," "guard" and "protect" are terms of commitment.

The Governor fail s to point to any word or phrase in the Deeds that is ambiguous. The plain meaning of the language of each Deed belies his assertion

that there was any "inherent ambiguity." *See Eure v. Norfolk Shipbuilding & Drydock,* 263 Va. 624, 632 (2002).

D. The Restrictive Covenants do not contract away the Commonwealth's sovereign powers or require unwanted expressive conduct until the end of time.

The Governor argues that the restrictive covenant was void from the outset because his predecessor was prohibited from executing a deed to acquire the Lee statue, the pedestal and the circle of land on which they would be situated. That prohibition, the Governor contended, is based upon the principle that the Commonwealth cannot bind itself by contract not to exercise its sovereign powers, specifically the right to "say what it wishes." JA 197-99, 341; *see also* Br. Op. Pet. App. at 25. He cited no Virginia decision in support, relying instead on decisions of the U.S. Supreme Court. *United States v. Winstar Corp.,* 518 U.S. 839, 888 (1996),[4] *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) and *Walker v. Texas Division, Sons of Confederate Veterans,* 576 U.S. 200 (2015).

The 1890 Deed is an agreement reflecting the bargain made between the Commonwealth, the Lee Monument Association, and the Allen family in which the grantors deeded the land, the statue and the pedestal and the land to the Commonwealth in return for a promise that the Lee Monument would be preserved

[4] The decision on which *Winstar* relied, *U.S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 23 (1977), rejected the argument that the contract in that case could be abrogated.

for the benefit of the owners in the Allen Addition.[5] JA 15. For 130 years, the parties, including the purchasers of lots in the Allen Addition and the Commonwealth, have honored the restrictive covenants. In 2006, the Commonwealth sought and obtained the 2007 designation of the Lee Monument by the U.S. Department of the Interior in its National Register of Historic Places and had previously obtained the designation of the Monument Avenue Historic District as a National Historic Landmark in 1997, in large part because of the presence of the Lee Monument. JA 267.

It was not until 2020 that any Virginia official contended that the 1890 Deed was void from the date of its execution. Instead, the Commonwealth stood by silently for 130 years as lots were transferred in reliance upon the restrictive covenant, and accepted the benefits of having a major historic landmark and tourist attraction in its capitol. The Governor now claims the prerogative to disavow the commitment made by the Commonwealth in 1890.[6]

The Governor principally relies for his position that the restrictive covenants are void *ab initio* because they limit expressive conduct on the decision in *Winstar.*

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[5] Even if the 1890 Deed did not contain restrictive covenants, the Commonwealth would still be bound to comply with the equally explicit covenants in the 1887 Deed, as successor to the Lee Monument Association. *Supra*, 39.

[6] Even if the Governor had the right to abrogate the contract, the effect of abrogation should be the restoration of the *status quo ante.* The land and the monument would not remain in the possession of the Commonwealth. *See footnote* 2, *supra.*

But the plurality opinion and the concurring opinions in *Winstar* compel the opposite result. The plurality noted: "The sovereign act doctrine balances the Government's need for freedom to legislate with its obligation to honor its contracts." *Id.* at 840. It did not, as the Governor argued, establish or confirm a rule that governments cannot enter contracts that are binding indefinitely. The plurality opinion stated:

> Even if FIRREA were to qualify as a 'public and general' act, the sovereign act doctrine cannot excuse the Government's breach here. Since the object of the doctrine is to place the Government as contractor on par with a private contractor in the same circumstances [citation omitted], the Government, like any other defending party in a contract action, must show that passage of the statute rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed, and ultimately, that the language or circumstances do not indicate that the Government should be liable in any case.

Id. at 841. The concurring Justices did not disagree.

When the government acts in its own self-interest, for example, by acquiring land or to attempt to retain the land while abrogating the agreement pursuant to which the land is acquired, the rule that it cannot bind itself does not apply. *See id.,* at 896-98. In that situation it is just like any other party to a deed. When a government abrogates its own agreement, there is heightened scrutiny of the legality of its abrogation. *See U. S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 26 (1977). The legislative measure to justify the abrogation must be "public and general." *Winstar,* 518 U.S. at 892-95 (citing *Horowitz v. United States,* 267 U.S.

460, 461 (1925)). The Court had granted review in *Winstar* "to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the government contracts at issue here." *Id.* at 860.

Justice Scalia's concurring opinion in *Winstar,* which was joined by Justices Thomas and Kennedy, relied heavily on *Perry v. United States,* 294 U.S. 330 (1935) and *Lynch v. United States,* 292 U.S. 571 (1934). *Id.* at 924. Each of those decisions held that the government had entered a contract that it could not abrogate.

In *Fletcher v. Peck,* 11 U.S. 87 (1810), Chief Justice John Marshall wrote: "[I]f an act be done under a law, a succeeding legislature cannot undo it." *Id.* at 135. He concluded that such a repudiation would violate the Contract Clause. *Id.* at 135-36. That holding and the subsequent decision in *Trustees of Dartmouth College* was later limited by two distinct concepts. The first is the "reserved powers" doctrine. *E.g., West River Br. Co. v. Dix,* 58 U.S. 507 (1848). The second is the canon of construction governmental obligations in public contracts are not implied. *E.g., Charles River Bridge v. Warren Bridge,*11 Pet. 420 (1837).

The Governor conflates the principle that the Commonwealth cannot be compelled under the First Amendment's Free Speech Clause to erect a particular monument to which it objects on public land with the principle that the Commonwealth cannot contract away its essential sovereign powers. The former

principle does not apply when the Commonwealth agrees at the outset to erect the monument. Here, the Commonwealth was not compelled in 1890 to erect the Lee Monument. It agreed to do so in exchange for its acquisition of the land and the monument. The decisions of the U.S. Supreme Court in *Pleasant Grove City* and *Walker* on which Defendants rely are Free Speech cases and are plainly inapposite. Neither involved a situation, as in this case, in which the government had agreed to display a particular "message" and the issue of whether such an agreement could be abrogated.

Nearly every governmental action "sends a message" of some kind, and if every agreement that the Commonwealth enters is subject to broad rule advocated by the Governor, which would make each contract subject to potential abrogation, the effect would be detrimental to the ordinary conduct of business by the Commonwealth. It would adversely affect the Commonwealth's ability to secure necessary goods and services essential to its governmental functions. *Id.* at 885 ("Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." (quoting Brandeis, J., in *Lynch,* 292 U.S. at 580)), and *id.* at 885 n. 29. The rule must be clearly established that abrogation is limited to contracts involving the exercise of essential sovereign powers. In *Winstar,* the special and self-interested exercise of the government's regulatory power over financial institutions was not a justification for nullifying

the agreements with the petitioners. 518 U.S. at 899-904. There is even less justification for nullifying the commitment made by the Commonwealth in this case.

In addition, the brief in opposition to the petition for appeal makes a series of specific claims which require specific responses.

First, the Governor maintains that a covenant "purporting to require a sovereign Commonwealth to engage in unwanted expressive conduct *until the end of time* would be void." Br. Op. Pet. App. 23 (emphasis added). He cites no authority for this claim, but let us assume, arguendo, that it is correct. "[E]xpressive conduct until the end of time" by the Commonwealth is not what the 1890 deed covenants require. They contain no restrictions on alienation. If the Commonwealth does not wish to be associated with what it considers to be the message sent by the Lee Monument, it is free to convey the Lee Circle and the Monument to another owner. It has made no effort to do so. It is attempting to retain ownership of the land and Monument while disavowng the promises it made to obtain them.

Even if the Commonwealth maintains ownership, it is still untrue that the deed covenants must last "until the end of time." The law recognizes that restrictive covenants may be modified or rendered unenforceable when conditions have radically changed. "In a cause of action to have a restrictive covenant

declared void, a party must prove that changed conditions have defeated the purpose of the restrictions, and the change must be 'so radical as practically to destroy the essential objects and purposes of the agreement.'" *Smith v. Chesterfield Meadows Shopping*, 259 Va. 82, 83 (2000), quoting *Booker v. Old Dominion Land Co.,*188 Va. 143, 148 (1948). The Governor has not proven that such a change has occurred. Deed covenants can of course be extinguished by the simple expedient of paying the beneficiaries to surrender their rights, or by condemnation proceedings when taken for a public use. The Governor apparently prefers to take away Resident's property rights by executive fiat and without compensation, but that is not his only option.

The Governor contends that "the assertion at the heart of this case is staggering." Br. Op. Pet. App. 24. What the Residents are asserting is that the state cannot arbitrarily take away their property rights, or remove a historic landmark, in violation of the Constitution of Virginia. If the Governor finds this assertion staggering, it can only be because he has an unlimited vision of governmental power. The state must comply with its contractual obligations, just like private citizens. *Wiecking v. Allied Medical Supply Corp.,* 239 Va. 553, 551-52 (1990).

This Court has addressed the prohibition on attempts by governmental officials and agencies to bind the government in the exercise of its sovereign power in *Elizabeth River Crossings, LLC v. Meeks,* 286 Va. 286, 321-24 (2013). It

concluded that contracts having the potential to impact the future prerogatives of the government are permissible when the General Assembly has explicitly authorized such contracts. *Id.* at 321-24. That is what the General Assembly did in the 1889 Joint Resolution authorizing the then-governor to contract with the Lee Monument Association and the Allen family. JA 251-52.

The Governor mischaracterize the proposition that Residents are asserting ("Plaintiffs insist that a handful of private individuals may rely on a deed executed by a long-dead Governor . . . to *perpetually* veto the shared decision of the current Governor and the current General Assembly about what should happen to a massive piece of Commonwealth-owned artwork that currently sits in a place of prominence on Commonwealth-owned property.") and then complains that the Residents have not cited any decision endorsing that proposition. Br. Op. Pet. App. 24. To Residents' knowledge, there are no reported cases concerning the right of a state government to remove a public monument in violation of a deed covenant. Perhaps no other state has ever attempted to do so. But Residents have cited substantial authority in support of their right to enforce their rights as beneficiaries of the deed covenants. *E.g.,* JA 47-50, 96-102. The cases cited by the Governor for the proposition that monuments on public land "speak for the government," *Pleasant Grove City* and *Walker*, say nothing about the government's power to

contractually bind itself to "speak" by maintaining a public monument. Br. Op. Pet. App. 25.

Finally, the Governor asserts that "perhaps most significantly" Residents' claims "ignore the shameful history that gave rise to the Lee Monument and the ongoing pain caused by forcing the Commonwealth of 2021 to leave it up one moment longer." *Id*. Residents strongly disagree with the characterization of the history that gave rise to the Lee Monument as "shameful," and briefly indicated why in their Memorandum in Support of Their Motion for Summary Judgment. JA 223-25. However, Residents claims are legal claims based on deed covenants and constitutional rights. It is unnecessary that they "win" legally irrelevant historical debates about the Civil War, Robert E. Lee, and the motivations of those who erected the Lee Monument in order to show that they are entitled to prevail in this case. As for the "ongoing pain" allegedly caused by the continuing existence of the Lee Monument, if the Governor is sincerely concerned about pain, he should not be indifferent to the pain and sadness that a great many people will feel if the Lee Monument comes down.

CONCLUSION

The Court should reverse the judgment of the circuit court and enter an order permanently enjoining Appellees-Defendants from removing the Lee Monument.

Respectfully submitted,

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CERTIFICATE

I certify that on March 24, 2021, I emailed a true copy of the foregoing Opening Brief of Appellants to Toby J. Heytens, Solicitor General, at *theytens@oag.state.va.us*.

I have complied with Rule 5:26 of the Rules of the Supreme Court of Virginia.

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