SCV: Submitted on 05-03-2021 15:49:29 EDT for filing on 05-03-2021

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.

REPLY BRIEF OF APPELLANTS

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Appellants ("Residents") submit the following reply to those portions of the Consolidated Brief of Appellees ("CBr.") that address issues in this appeal.

ARGUMENT

I. The Governor's reliance on Code §2.2-2402 is without merit

The brief in opposition contends as an alternative basis for upholding the circuit court's judgment that the Governor can rely on Code §2.2-2402(A) for authority to remove the Lee Monument. CBr. 22-24.[1] The language of Code §2.2-2402(A) does not give the Governor the authority to remove a statue when construed with the more particular and controlling language of Code §2.2-2402(B), which prohibits the removal of an existing memorial structure.

The Governor's reading of §2.2-2402 fails for two other reasons. First, it would constitute an impairment of contract in violation of Article I, § 11 of the Constitution of Virginia and Article I, §10 of the U.S. Constitution. JA 41. Second, that general statutory provision cannot supersede the specific provisions in the

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[1]This is the first time in this case that the Governor has argued that Code § 2.2-2402(A) authorizes him to remove monuments contrary to valid restrictive covenants to which the Commonwealth is a party. Residents argued below that Code § 2.2-2402(B) prohibits the removal of a statue erected for memorial purposes. JA 40-42. The circuit court held that Residents did not have standing or a private right of action to enforce the statute but did not address whether § 2.2-2402(A) could override the restrictive covenants because that issue was not before him. Nor did the court address Residents' statutory construction argument. JA 210-12.

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restrictive covenant in the 1887 and 1890 Deeds, both of which prohibit removal. *Crawford v. Haddock*, 270 Va. 524, 530 (2005) ("[T]here is no indication that the General Assembly clearly intended the general to nullify the specific.")

II. The Governor fails to refute Residents' argument that the 2020 Budget Amendment violates Article IV, §14, ¶ 2

The Governor disregards the plain language of the Budget Amendment, which applies only to the Lee Monument. Because the legislation is limited to a single object, it is special legislation by definition. "Special law," BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 11th ed., West 2019) ("A law that pertains to and affects a particular case, person, place or thing, as opposed to the general public.").

In attempting to distinguish *Alderson v. County of Alleghany,* 266 Va. 333 (2003) and *City of Portsmouth v. City of Chesapeake,* 205 Va. 259 (1964) from this case (CBr. 31-32), the Governor makes Residents' point that legislation can be special without violating the Constitution. The Budget Amendment is not in violation of Article IV, §14, ¶ 2 simply because it is special legislation, but because it is special legislation that grants relief in this case.

By treating the Budget Amendment as if it establishes a classification in which the Lee Monument is the only participant, the Governor attempts to justify the applicability of the rational relationship test. CBr. 30-31. The Budget Amendment does not establish a classification but simply refers to the Lee

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Monument by name. *See Shelton v. Sydnor*, 126 Va. 625, 637 (1920) ("It was just such legislation as this the Constitution sought to prohibit…."). The Governor acknowledges that courts "are not at liberty to search for [the legislation's] meaning beyond the instrument." CBr. 34 (quoting *Town of South Hill v. Allen,* 177 Va. 154, 164 (1941)).[2]

The Governor's contention that legislation that repeals or amends a law or appropriates funds cannot be a special law (CBr. 28-29) is contrary to the decisions in *Benderson Dev. Co., Inc. v. Sciortino,* 236 Va. 136, 150 (1988) (legislation that amended prior law was special law) and *Shelton,* 126 Va. at 637 ("A clause or provision special in its character applying to particular individuals, particular places, or particular cases is none the less special because inserted in the most general of public acts."). Contrary to the Governor's contention, the Budget Amendment does not "merely repeal[] other legislative enactments and direct[] how public money will be spent." CBr. 29. It specifically directs the removal of the Lee Monument.

[E]Even if, as the Governor argues (CBr. 30-31), the Budget Amendment implicitly establishes a classification of Confederate monuments on Commonwealth property, the Lee Monument would not be the only monument covered. The Court may take judicial notice of the presence of at least three other monuments honoring Confederate figures on the grounds of the Capitol: Thomas J. "Stonewall" Jackson, William "Extra Billy" Smith, and Hunter Holmes McGuire. *https://www.virginiacapitol.gov.*

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The Budget Amendment is special legislation, but it does not violate Article IV, § 14, ¶ 2 unless it grants relief in this case. The very fact that the Governor urged the circuit court to rely upon the Budget Amendment in deciding the controversy demonstrates that it was intended to determine the outcome. JA 640. The Governor argued below that the Budget Amendment "changes the underlying legal framework in a way that we think is absolutely dispositive of this case" and "we think the budget amendment… just ends this case in our favor." JA 678.

The representation that the Governor has not requested any relief from the court below is inaccurate. CBr. 34. He repeatedly asked for relief. JA 68, 363, 401, 449, 646, and 679. Those were requests for "relief" as specified by Rules 1:1(b) and 3:19(b)(5) of the Rules of this Court. The final judgment is relief requested by the Governor. Under the Rules, relief can be granted to any party, not just a plaintiff.

It is now the Governor's position that the Budget Amendment does not grant relief in this case because it does not literally direct the circuit court to enter final judgment. CBr. 33-38. If that is the construction of Article IV, §14, ¶ 2 adopted by the Court, the General Assembly could readily decide the outcome of any pending case simply by avoiding the use of language explicitly directing a particular final judgment even though it otherwise unquestionably directs the end of the litigation.

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The Governor argues that, under Residents' view, Article IV, §14, ¶ 4(3) is rendered "largely duplicative." CBr. 37. Yet, he acknowledges that the grant relief language in Article IV, §14, ¶ 2 addresses only the ultimate act of granting relief, whereas the language of ¶ 4(3) deals with prejudgment matters. CBr. 38. Consequently, the Governor's argument that ¶ 2 is of no effect because it duplicates ¶ 4(3) is obviously without merit.

In suggesting that the reference to "other cases" in Article IV, §14. ¶ 2 should be disregarded because it also refers specifically to granting divorces, approving name changes, and selling estates (CBr. 35-37), the Governor ignores the rule of construction that every word in a constitutional or statutory provision must be given effect unless it leads to an absurd result. *Kopalchick v. Catholic Diocese of Richmond,* 274 Va. 332, 339 (2007)[3]; *see also Mandell v. Haddon,* 202 Va. 979, 990 (1961) (the catchall phrase "works of necessity or charity" not surplusage where the statute also listed dozens of specific items that are covered).

III. The Governor fails to refute Residents' claim that the Budget Amendment violates the separation-of-powers provisions of the Constitution of Virginia

The Governor challenges the very notion that the judiciary and the legislature are co-equal branches. CBr. 39. He argues that the General Assembly

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[3] The Governor also relies on *Kopalchick v. Catholic Diocese of Richmond,* 274 Va. 332 (2007) for the proposition that a constitutional provision must be read as a whole. CBr. 35. He ignores the rule that every word must be given effect.

has the power to say what the law *shall be*" and that the judiciary may not substitute its judgment. The judiciary, however, has the power to decide whether legislative enactments are constitutional. *See, e.g., County of Fairfax v. Fleet Indus. Park Ltd. P'ship,* 242 Va. 426, 432-34 (1991). While it is the province of the legislature to enact general standards to be applied by courts, it is the province of courts to decide particular cases. *See Bank Markazi v. Peterson,* 136 S. Ct.1310, 1317, 1326-27, 1332-33 (2016). Here, the legislation is plainly not general in nature.

IV. The Governor fails to refute Residents' contention that the Budget Amendment violates the Contract Clause

The brief in opposition argues that Residents' claim that the Budget Amendment violates the Contract Clause should be disregarded because it was not included in Residents' complaint. CBr. 46 n. 15. But the Budget Amendment was passed just days before the October 19, 2020 hearing, as the Governor acknowledges. CBr. 73. The July 23, 2020 temporary injunction hearing had nothing to do with this issue. Residents preserved the issue. JA 231~~,~~ 656.

The brief in opposition relies on *U.S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1 (1977). CBr. 46, 54. That decision invalidated legislation as violative of the Contract Clause despite the trial court's conclusion that the legislation was "a valid exercise of New Jersey's police power because repeal served important public interests in mass transportation, energy conservation, and environmental

protection." *Id.* at 21. The interest asserted by the Governor to justify the Budget Amendment is certainly no more significant than the interests justifying the legislation invalidated in *U.S. Trust Co. See also Citizen Mut. Bldg. Ass'n, Inc. v. Edwards,* 167 Va. 399 (1937) (legislation authorizing the State Corporation Commission to suspend payments of indebtedness violated the Contract Clause in both the Constitution of Virginia and the U.S. Constitution).

V. The Governor fails to address Residents' argument that an unconstitutional act cannot support the circuit court's judgment

The brief in opposition maintains implicitly that even if the Budget Amendment is unconstitutional, it supports the circuit court's judgment. CBr. 15-16, 57, 59. The circuit court appeared to adopt that same proposition. JA 412. But an unconstitutional act cannot establish public policy. *See Ex parte Siebold,* 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law."). And it cannot defeat Residents' right to enforce their restrictive covenants.

VI. The Governor misrepresents Residents' contention that the circuit court failed to consider Virginia's policy of preserving historic sites

Article XI, § 1 of the Constitution and legislation implementing that provision establish an unmistakable policy that historic sites should be preserved. *United States v. Blackman,* 270 Va. 68, 73 (2005). Residents have not contended, as the Governor suggests (CBr. 47), that such policy mandates the preservation of every historic site. Instead, they have argued that the circuit court was obligated to

consider the policy of preserving historic sites, along with any other public policies of the Commonwealth, in determining whether the order to remove the Lee Monument is contrary to overall public policy. OBr 33-35. It is well-established that the failure to consider a relevant factor in reaching such a decision is arbitrary and unreasonable. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42-43 (1983); *Landrum v. Chippenham & Johnston-Willis Hosps.*, 282 Va. 346, 352 (2011). It is arbitrary for a court to ignore an established policy while focusing on another, putative policy in reaching a decision whether an action is consistent with, or contrary to, the government's overall public policy.

VII. The Governor fails to show that the deed covenants are unenforceable

The brief in opposition asserts as an alternative basis for sustaining the circuit court's decision that the restrictive covenants are not enforceable. CBr. 48-55. In *Sonoma Development,* the Court held that a restrictive covenant may be enforced by injunction under the equitable remedy of specific performance of the bargain made by the parties. 258 Va. at 167-69. The circuit court in this case correctly ruled that the 1887 and 1890 Deeds contain valid and enforceable restrictive covenants that run with the land. JA 80-83. The court below could also have ruled that the restrictive covenants meet all of the requirements for equitable servitudes. *Barner v. Chappell,* 266 Va. 277, 280 (2003). The Governor argues that it is "difficult even to attach a name to the type of property right plaintiffs claim to

possess" and that it "is unknown to the common law." CBr. 49-50. Residents claim a beneficial interest in the restrictive covenants. Formerly, injunctive relief, being equitable in nature, was limited to equitable servitudes and was not available to enforce restrictive covenants "at law," which are also called "real covenants." That is no longer the rule in Virginia. *Barner,* 266 Va. at 285-86*; Sonoma,* 258 Va. at 169-70; *Sloan v. Johnson,* 254 Va. 271, 274-77 (1997). As one commentator has observed: "[I]t appears that the Supreme Court of Virginia uses 'covenants running with the land at law' and 'restrictive covenant' to encompass the traditional concepts of both real covenants and equitable servitudes." M. Hernandez, *Annual Survey of Property Law,* 34 U. RICHMOND L. REV. 981, 983 (2000).

Contrary to the Governor's argument (CBr. 50-51), the restrictive covenants created by the 1887 and 1890 Deeds predominantly fall within the category of negative easements.

> Easements are described as being "affirmative" easements when they convey privileges on the part of one person…to use the land of another…. Easements are described as being "negative" when they convey rights to demand that the owner…refrain from certain otherwise permissible uses of his own land.

Blackman, 270 Va. at 76.

It is not true, as the Governor maintains (CBr. 49-57), that the restrictive covenants are not of the kind previously recognized by this Court. On numerous occasions, the Court has cited the English case of *Tulk v. Moxhay,* 11 Beavan 570,

50 Eng. Rep. 937, 2 Phillips 774, 41 Eng. Rep. 1143, 1 Hall & Twells 105, 47 Eng. Rep. 1345 (1848) with approval.[4] *Tulk,* which involved a remarkably similar covenant, is the foundation for the doctrine of restrictive covenants in equity, also known as equitable servitudes. *See Cheatham v. Taylor,* 148 Va. 26, 37-38 (1927). In *Minner v. City of Lynchburg,* 204 Va. 180, 187 (1963), the Court described the doctrine: "[W]hen, on a transfer of land, there is a covenant or even an informal contract or understanding that certain restrictions in the use of the land conveyed shall be observed, the restrictions will be enforced by equity, at the suit of the party or parties intended to be benefited thereby…." *Tulk* was also cited in *Tardy v. Creasy,* 81 Va. 553, 562 (1886), which was decided before the 1887 and 1890 Deeds were executed.

VIII. The Governor has not demonstrated a change in conditions that would justify abrogation of the restrictive covenants

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[4] *Tulk* involved a covenant to maintain an equestrian statue, which read that "he, the said Charles Elms [grantee], his heirs and assigns, shall and will, from time to time and at all times hereafter, at his and their proper costs and charges, keep and maintain the said piece or parcel of ground and square garden, and iron railing around the same, in its present form, and in sufficient and proper repair, as a square garden and pleasure ground, in an open state and uncovered with any buildings, in a neat and ornamental order; *and shall not nor will will take down, nor permit or suffer to be taken down, or defaced, at any time hereafter, the equestrian statue now standing or being in the centre of said square garden,* but shall and will continue and continue and keep the same in present situation, as it now is;…." 11 Beav. 570, 571-72, 50 Eng. Rep. 937, 938-39 (1848) (emphasis added).

The brief in opposition confuses two distinct legal doctrines: the doctrine that a restrictive covenant can be void if it contravenes public policy and the separate doctrine that a restrictive covenant may become unenforceable because of radically changed conditions. CBr. 59-64. Residents have explained why the restrictive covenants do not contravene public policy. OBr. 21-24. The Governor does not cite any established public policy that is violated by the restrictive covenants.[5] The pastiche of separate actions described in the brief in opposition (CBr. 62-64), which do not address or even acknowledge the legislatively authorized 1890 Deed, do not establish public policy and cannot abrogate the restrictive covenants created by the 1887 and 1890 Deeds. Indeed, the Governor was selective in choosing the various actions that he argues establish public policy. He omits the fact that the Virginia Department of Motor Vehicles issues license plates that represent government speech, including a plate in honor of General Robert E. Lee that displays his image, the image of the Lee Monument, and the

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[5] The Governor misrepresents the record in claiming that "the Allen heirs agreed to donate the land for the monument – so long as they could develop the area for upscale suburban residences in a new, whites-only neighborhood." CBr. 4. There is no evidence that any racial restrictions were ever included in the deeds to the Allen Addition or that lots there were advertised as "whites-only." The only evidence of racial restrictions was a 1928 advertisement for lots located miles away from the Allen Addition. JA 607-08, 685. It had no connection to the Allen Addition.

words “The Virginia Gentleman.”

https://www.dmv.virginia.gov/vehicles/#splates/category.asp.

Professor Ayers acknowledged that he was expressing his “personal views about the monument.” JA 591. Furthermore, neither he nor Professor Gaines testified that there is a consensus among historians that the Lee Monument should be removed. JA 555, 580. A court’s view of the personal opinions of experts cannot establish the public policy of the Commonwealth. JA *See Tvardek v. Powhatan Vill. Homeowners Ass’n,* 291 Va. 269, 280 (2016) (“[T]he legislature, not the judiciary, is the sole ‘author of public policy.’”).

There has been no radical change in conditions that would abrogate the restrictive covenants. *River Heights Assoc. P’ship v. Batten,* 267 Va. 262, 268-69 (2004). A change must render enforcement “inequitable and oppressive.” *Ault v. Shipley,* 189 Va. 69, 77 (1949). The Monument itself and the character of the Allen Addition have not changed since 1890. Only the views of some that the Monument should be removed has changed. As the Court noted in *River Heights:*

> To ignore the conditions within the subdivision and to hold the covenant unenforceable solely because of changed conditions elsewhere would deny the lot owners the protection to which they are entitled according to the solemn covenant voluntarily made, and that would be grossly unfair.

267 Va. at 275.

Professor Ayers stated that the purpose of erecting the Monument was to establish a "symbol of defiance to Reconstruction." JA 501, 513-17. The Governor argues – while the statements at the Monument's dedication (JA 223-24, 688-704) sharply challenge his argument -- that the Monument was erected as a message of "white supremacy." CBr. 6, 61-62. Whatever the purpose, *it has not changed since 1890*. Professor Gaines testified (JA 584) that the change in public attitude about the Monument occurred

> a few years before the recent controversies and the incidents of violence that really sort of created a flash point around the presence of Confederate monuments and Confederate regalia. I'm sure you could find a diversity of opinion on these issues.

Professor Ayers did not testify that the Lee Monument should be removed. Instead, he expressed the view that "there needs to be that kind of consultative community discussion, community-wide discussion, that would deal with questions of whether to remove the monument…." JA 591. In addition, as recently as 2018, a commission appointed by the Richmond mayor recommended that only the Jefferson Davis monument be removed. JA 414. In November 2020, six ballot measures seeking removal of Confederate courthouse memorials were rejected. *https://www.results.elections.gov/vaelections/2020%20November%20General/Site/Referendums.html*.

IX. The General Assembly does not have plenary authority to abrogate a restrictive covenant

Contrary to the Governor's assertion, the General Assembly does not possess unlimited authority to nullify a restrictive covenant. CBr. 25. This Court has repeatedly acknowledged that legislative power to abrogate covenants and other property rights is limited. *E.g., Heublein, Inc. v. Dep't of Alcoholic Beverage Control,* 237 Va. 192, 196 (1989); *Working Waterman's Ass'n v. Seafood Harvesters, Inc.,* 227 Va. 101, 110 (1984); *Ault,* 189 Va. at 75. Such abrogation is justified only in the exercise of an essential attribute of sovereignty, *U.S. Trust Co.,* 431 U.S. at 21, and through a general regulatory measure. *Exxon Corp. v. Eagerton,* 462 U.S. 176, 190 (1985). Abrogation is not justified in this case.

X. The Governor's contention that Residents have no right of action for Counts I, II and III is contrary to the holdings in *Gray* and *Lewis*

The Governor mischaracterizes the decision in *Gray v. Va. Sec'y of Transp.,* 276 Va. 93, 105-06 (2008). CBr. 71. The complaint in *Gray* asserted that the acts of the Secretary of Transportation were *ultra vires* because they exceeded or were contrary to authorization granted by state statutes. JA 129-52. The Court concluded that plaintiffs in *Gray* enjoyed a right of action. 276 Va. at 106.

XI. Residents have standing in Counts I, II and III

The Governor ignores Residents' evidence of their close proximity to the Lee Monument, which they submitted in support of their motion for summary

judgment, and the title reports admitted at trial. CBr. 68-70. The Governor's failure to assert *facts,* as opposed to legal arguments, that demonstrate a disputed fact on standing defeats his contention about standing in Counts I, II, and III. OBr. 35-37.

XII. The Governor does not dispute that the Commonwealth can transfer the Lee Monument if it no longer wishes to be associated with the message it conveys

Included in Residents' discussion of the Governor's asserted alternative grounds for sustaining the circuit court's dismissal of their complaint that the restrictive covenants impermissibly bound the Commonwealth was their contention that the Commonwealth could transfer the Lee Monument. OBr. 46. The restrictive covenants cannot prohibit the alienation of property in perpetuity. *Hamm v. Hazelwood,* 292 Va. 153, 159-60 (2016). And the restrictive covenants do not purport to do so. The Commonwealth, then, is free to transfer the Lee Monument and Lee Circle to another party. The Governor does not dispute this proposition. He merely complains that the market may be limited. CBr. 53 n. 16. Accordingly, his contention that the Commonwealth is bound to be associated with the "message" conveyed by the Lee Monument until the end of time is without merit.

CONCLUSION

The Court should reverse the October 27, 2020 judgment of the circuit court and permanently enjoin the removal of the Robert E. Lee Monument.

Dated May 3, 2021

Respectfully submitted,

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I hereby certify that on May 3, 2021, I caused the foregoing reply to be filed electronically with the Court. I emailed a true copy to Toby J. Heytens, Solicitor General, at 202 North Ninth Street, Richmond, Virginia 23219. I emailed a true copy to:

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I certify that this brief complies with Rule 5:26 of the Rules of this Court and does not exceed 15 pages.

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