

In the  
Supreme Court of Virginia

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Record No. 210113

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HELEN MARIE TAYLOR, ET AL.,

*Appellants,*

*v.*

RALPH S. NORTHAM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF  
VIRGINIA, ET AL.,

*Appellees.*

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**Brief for Virginia Student Groups as  
Amici Curiae**

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James J. O’Keeffe IV (VSB# 48620)  
MICHIEHAMLETT PLLC  
215 Market Street, Suite 201  
Roanoke, Virginia 24011  
Tel: 540-491-0634  
Fax: 434-951-7271  
[jokeeffe@michiehamlett.com](mailto:jokeeffe@michiehamlett.com)

*Counsel for Amici Curiae*

{00811876-1 }

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## INTERESTS OF AMICI CURIAE

The Virginia Bar Association Law School Council at the University of Virginia School of Law (“UVA VBA”) is both an officially recognized student organization at the University of Virginia School of Law and a Contracted Independent Organization with the University of Virginia. Membership is open to all current law students but consists mainly of those who have an affinity for Virginia and wish to keep learning, living, and working in the Commonwealth after graduation. The UVA VBA’s diverse, community-based programming helps nurture this affection for Virginia to develop its talented student members into the future leaders of Virginia.

Along with developing future leaders, the UVA VBA strives to be a leader in its own right. It is in this spirit of leadership that the UVA VBA feels called to join this brief. The UVA VBA believes it is time for Virginia to correct its past injustices and remove the Lee Monument. It is time for Virginia to abandon the cult of the Lost Cause, its idols, and the discriminatory messages they convey. It is time for Virginia to consign the Confederacy to the history books, not venerate it in the public square. In short, it is time for Virginia to chart a new course for

its future, one that leads toward a more productive, inclusive, and equitable society. The UVA VBA believes that this is the best possible future for all Virginians—one where the past is, in fact, past.

When Time Slows Down is a group of students at Virginia Commonwealth University who joined together to produce a podcast investigating disruptive art by looking at Monument Avenue. The group was inspired to record the podcast after witnessing the racial reckoning that happened not only in Richmond, but globally. People took to the streets during a worldwide pandemic, in the middle of their own loss and grief, to challenge institutions that have propagated racism for far too long. As students at VCU, When Time Slows Down thought it necessary to pull their listeners through a brief history of the Monument Avenue, a street adorned with multimillion-dollar homes and Confederate monuments.

Community Model UN, or ComMUN, is a group of middle- and high-school students from across the Roanoke Valley. Students regularly attend and compete in Model UN conferences, typically along the east coast, several times a year. In addition, high-school members host a training conference for middle school students each summer.

These students are leaders in their school and often serve on other committees, lead student organizations, and serve their school and local communities in a variety of ways. They will soon graduate high school graduates and decided whether to attend college in Virginia or elsewhere. As a group and as individuals, our ComMUN students value diversity, justice, and equitability.

### **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.
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.
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.

4. In denying Plaintiff's' 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.
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.
6. In denying the 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 the 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.

### **STATEMENT OF THE CASE**

Amici adopt the Governor's Statement of the Case.

### **STATEMENT OF FACTS**

Amici adopt the Governor's Statement of Facts.



## STANDARD OF REVIEW

The Appellants’ claims raise mixed questions of fact and law. The Court will defer to the trial court’s fact-findings<sup>1</sup> but it will review questions of constitutional or statutory interpretation de novo.<sup>2</sup> That said, the Court strictly construes restrictive covenants.<sup>3</sup>

## ARGUMENTS AND AUTHORITIES

### **1. Virginia’s unique history with equal protection gives it a special responsibility.**

As students, Amici know that Virginia’s contributions to the constitutional history of the United States are nothing short of magnificent. Virginia was “the home of many of the Founding Fathers.”<sup>4</sup> We revere James Madison as the “father of the Constitution”<sup>5</sup> and the “drafter”<sup>6</sup> of the Bill of Rights. The Bill of Rights included the Fifth

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<sup>1</sup> *Whitfield v. Commonwealth*, 265 Va. 358, 361 (2003).

<sup>2</sup> See, e.g., *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 577 (2017).

<sup>3</sup> *Tvardek v. Powhatan Vill. Homeowner’s Ass’n*, 291 Va. 269, 275 (2016).

<sup>4</sup> *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring).

<sup>5</sup> *Gonzales v. Raich*, 545 U.S. 1, 57 (2005).

<sup>6</sup> *Edwards*, 482 U.S. at 606 (Powell, J., concurring).

Amendment’s guarantee of “due process of law,”<sup>7</sup> a protection that implicitly prohibits the Federal Government from “denying to any person the equal protection of the laws.”<sup>8</sup> It followed in the tradition of the Virginia Declaration of Rights, in which George Mason wrote that “all men are by nature equally free and independent and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”<sup>9</sup> And Thomas Jefferson’s Declaration of Independence proclaimed the new nation’s commitment to the “self-evident” truth that “all men are created equal.”<sup>10</sup>

So Amici are rightly proud of the Commonwealth’s contributions to America’s exceptional form of democracy. Virginia gave the world a model of constitutional governance founded on the principle of equal protection under the law.

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<sup>7</sup> U.S. Const. amend. V.

<sup>8</sup> *United States v. Windsor*, 570 U.S. 744, 774 (2013) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)).

<sup>9</sup> 9 William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia* 109 (1821); see also 1 Robert A. Rutland, ed., *The Papers of George Mason* 274-91 (1970).

<sup>10</sup> The Declaration of Independence para. 2 (U.S. 1776).

And that makes its shortcomings all the more glaring.

For the equality-of-right principle that the Founders shared with the world and helped enshrine in our Constitution was not fully realized in their day, or in any day since. To be blunt: Washington, Jefferson, and Madison owned slaves. For centuries, Virginia's economy was based on a system of racialized chattel slavery; the American South represented the largest, most powerful system of slavery in the world, and Virginia was the American state with the largest number of enslaved people.<sup>11</sup> The Commonwealth served as "the great fountain that produced enslaved people that ... flooded the South, families here taken apart for generations, and sold in Shockoe Bottom to Mississippi, Alabama, Louisiana, Arkansas, and Texas."<sup>12</sup>

When that system was threatened, Virginia fought to preserve it. The Commonwealth seceded, purporting to repeal its ratification of the Constitution.<sup>13</sup> Slavery was not abolished until 1865, after a bitter civil war that killed about 25% of the military-aged white men in the

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<sup>11</sup> JA 495.

<sup>12</sup> JA 502-03.

<sup>13</sup> JA 503, Va. Ordinance of Secession (Apr. 17, 1861).

South.<sup>14</sup> Even then, State-sponsored segregation was not declared unconstitutional until 1954, when *Brown v. Board of Education*<sup>15</sup> overruled *Plessy v. Ferguson*.<sup>16</sup> The Commonwealth has too often found itself on the wrong side of the courtroom in equal-protection cases—as, for example, when it defended:

- Segregating public-school students in the companion case to *Brown v. Board of Education*;<sup>17</sup>
- Prohibiting interracial marriage in *Loving v. Virginia*;<sup>18</sup> and
- Excluding female cadets from the Virginia Military Institute in *United States v. Virginia*.<sup>19</sup>

Virginia invoked history and tradition to justify segregation and anti-miscegenation laws, arguing that those laws were acceptable to the

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<sup>14</sup> JA 531, 537.

<sup>15</sup> *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954).

<sup>16</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>17</sup> *Davis v. Prince Edward Cnty. Sch. Bd.*, No. 3 (U.S. 1954), *decided sub nom. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>18</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>19</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

Founders because they were commonplace when the Bill of Rights and the Fourteenth Amendment were ratified.<sup>20</sup>

This is not how a decent society treats its citizens.

Virginia thus holds a unique position in the history of American jurisprudence. It has much to be proud of and much to atone for. That gives it a special responsibility.

## **2. The Lee Monument was part of an effort to intimidate Black citizens and reassert Confederate might.**

This is the legal context into which we must place the powerful testimony that Dr. Edward Ayers and Dr. Kevin Gaines offered at trial. Dr. Ayers explained the history of the Lee Monument, erected 25 years after the emancipation, and the role it played in the White South's post-

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<sup>20</sup> Va. Br. *Prince Edward Cnty. Sch. Bd.*, 1954 U.S. Briefs at 31 (“The Congress that proposed the Fourteenth Amendment did not understand that it would be within the judicial power . . . to construe the Amendment as abolishing school segregation of its own force.”); Va. Br. *Loving v. Va.*, 1967 WL 93641, at \*5 (“[T]he legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes.”).

Reconstruction grab for political power.<sup>21</sup> He placed it alongside other tools like racially restrictive covenants, segregation ordinances, and anti-miscegenation laws.<sup>22</sup> Dr. Ayers outlined the steps the Conservative Party took to break the biracial Readjuster Party and Working Man's Party, as well as the White South's concomitant adoption of the Lost Cause narrative and its effort to segregate and limit Black spaces.<sup>23</sup> He pointed out that the Lee Monument was nothing less than a reassertion of Confederate might:

[T]he political turmoil of the 1880s, paralleled with that the idea of putting the largest Confederate monument in the United States, really a monument of the scale that few people in the United States had ever seen, sculpted by a famous sculptor in France, funded by donations, posted at the beginning of a new real estate development, sort of signaling the advance of Richmond, and that would portray General Lee as General Lee on horseback . . . signified that the white conservative South now controlled the landscape of Richmond and controlled the political landscape of Virginia. And so it was a monument to the reassertion of power that the white conservatives, former Confederates, had lost for 30 years.<sup>24</sup>

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<sup>21</sup> JA 491-559.

<sup>22</sup> JA 491-559, 550-51.

<sup>23</sup> JA 498-501, 506-08, 513-14.

<sup>24</sup> JA 510.

For his part, Dr. Gaines summarized the Lee Monument’s message as “kind of the exclamation point of a Jim Crow order that was founded upon [W]hite supremacy and [B]lack subordination.”<sup>25</sup>

Their views are hardly idiosyncratic. At the statue’s dedication, 20,000 former Confederate soldiers marched in uniform— “a display of the uncompromised devotion to the Confederacy 25 years after the United States had been reunited and ... also a demonstration of the solidarity and power of white people.”<sup>26</sup>

That message was received by its intended audience. When the Lee Monument was erected, Richmond City Council Member John Mitchell—a Black man born into slavery—wrote an editorial arguing, “The South may revere the memory of its chieftains. It takes the wrong steps in so doing, and proceeds to go too far in every similar celebration. It serves to retard its progress in the country and forge heavier chains with which to be bound.”<sup>27</sup>

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<sup>25</sup> JA 563.

<sup>26</sup> JA 517.

<sup>27</sup> JA 511-12.

Those heavier chains have carried down through the years. As Dr. Gaines explained, Confederate monuments do not exist in a vacuum. They are interpreted anew by each succeeding generation.<sup>28</sup> That includes the Amici, who comprise the next generation of Virginians.

None of this is to suggest that modern Virginia is some racist backwater. To the contrary, the best version of Virginia recognizes and owns up to its history, claiming its rightful place as a national leader on constitutional issues. We saw this recently, as Virginia led the way in removing Confederate symbols: Of the 168 Confederate symbols that were renamed or removed from public spaces in 2020 nationwide, Virginia took down 71.<sup>29</sup> Last October, the General Assembly established Juneteenth as a holiday “to commemorate the announcement of the abolition of slavery ... and to recognize the significant roles and many contributions of African Americans to the

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<sup>28</sup> JA 565-66.

<sup>29</sup> Southern Poverty Law Center, *SPLC Reports Over 160 Confederate Symbols Removed in 2020*, <https://www.splcenter.org/presscenter/splc-reports-over-160-confederate-symbols-removed-2020>.



Commonwealth and the nation.”<sup>30</sup> That followed its abolition of a state holiday honoring Lee.<sup>31</sup>

And on June 4, 2020, Governor Northam announced that he would relocate the Lee Monument. “[G]enerations ago,” the Governor explained, “Virginia made the decision not to celebrate unity, but to honor the cause of division.”<sup>32</sup> That decision “was wrong then, and it is wrong now.”<sup>33</sup> The General Assembly passed legislation directing the Department of General Services to follow the Governor’s lead.<sup>34</sup>

The circuit court’s injunction stopped this process. So with progress stalled in the courts, the Lee Monument found itself repurposed as something of a public-art installation as Virginians joined together to renounce and reframe its messages of intimidation and exclusion.<sup>35</sup>

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<sup>30</sup> JA 409.

<sup>31</sup> JA 409.

<sup>32</sup> JA 335.

<sup>33</sup> *Ibid.*

<sup>34</sup> 2020 Special Session I, Va. Acts ch. 56 (available at <https://budget.lis.virginia.gov/get/budget/4283/HB5005>).

<sup>35</sup> Ezra Marcus, *Will the Last Confederate Statue Standing Turn Off the Lights?* THE NEW YORK TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/06/23/style/statue-richmond-lee.html>.



Amici When Time Slows Down—comprising students at Virginia Commonwealth University, just down the road from the Lee Monument—produced [a podcast](#) about this transformation. That podcast was one of 10 finalists in NPR’s Student Podcast Challenge.<sup>36</sup>

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<sup>36</sup> Sequoia Carillo & Steve Drummond, *Best In Show: Our Favorite College Podcasts*, NPR (March 30, 2021), <https://www.npr.org/2021/03/30/982399681/best-in-show-our-favorite-college-podcasts>.

### **3. Maintaining the Lee Monument on State land contradicts fundamental Virginian values of equal protection.**

The Amici want to live in this latter version of Virginia: a state that treats all its citizens with decency, that takes responsibility for its mistakes, and that lives up to the promise of its history. The question presented is whether this version of Virginia can coexist with the Lee Monument—or with Appellants’ theory of the case, in which the political branches are forced to retain the Lee Monument on State land by the ancient signature of a long-dead Governor, spreading its divisive message in perpetuity.

It cannot.

To see why, consider the distinction between monuments and memorials.<sup>37</sup> Monuments commemorate events and embody the myths of beginnings, while memorials ritualize remembrance and mark the reality of endings.<sup>38</sup> Through monuments, a community honors people

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<sup>37</sup> Gary Shapiro, *The Meaning of Our Confederate ‘Monuments,’* THE NEW YORK TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/opinion/the-meaning-of-our-confederate-monuments.html>.

<sup>38</sup> *Ibid.*

or events for qualities it finds indispensable to its character.<sup>39</sup>

Memorials, by contrast, ensure that some events and people will never be forgotten, even if we remember them ambivalently.<sup>40</sup>

Consider, for example, the difference between the soaring Washington Monument and the somber Vietnam Memorial. We valorize George Washington as the father of our country, a triumphant general and a paragon of civic virtue.<sup>41</sup> Yet while we honor the individual sacrifices of the men who fought in Vietnam, we remain conflicted about the need for that war and the way we conducted it.<sup>42</sup>

With these definitions in mind, it's clear that Monument Avenue is no misnomer. The Lee Monument and its companion Confederate statuary are quite plainly monuments, not memorials. Drs. Ayers and Gaines pinned down precisely the myths the Lee Monument commemorated. Those myths and the values they embody clash with the notion of equal protection under the law. And there's the

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

conundrum, because we erect monuments to the people, ideas, and values that we want to carry with us into the future.

To be sure, the Confederate fallen deserved memorials. And they received them. Dr. Ayers pointed to the granite pyramid in Hollywood Cemetery, resting place of about 16,000 Confederate dead.<sup>43</sup> He also discussed efforts to repatriate bodies of fallen soldiers.<sup>44</sup> These efforts were decent and consistent with constitutional values. It is honorable to return the remains of fallen soldiers to their families, even if the cause they fell defending was wrong. It is appropriate to memorialize the South's astounding losses in the Civil War.

That is a far cry from building a massive statue of General Lee on horseback and inaugurating it with a march of 20,000 Confederate veterans in battle uniform, then using it to anchor a segregated real estate development.

It is no answer to say that removing monuments would be an affront to history. When the Lee Monument comes down, Virginia schools will continue to teach history. We will all remember who Robert

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<sup>43</sup> JA 498, 537-38.

<sup>44</sup> JA 538, 547.

E. Lee was. In any event, the Lee Monument itself isn't history. It's a work of art intended to convey a specific message: To honor the ahistorical Lost Cause narrative and to intimidate the political opponents of the Confederacy—which is to say, the proponents of equal protection.

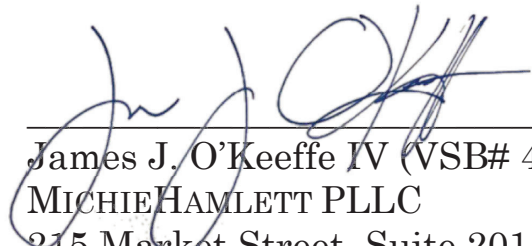
Nor would removing the Lee Monuments be the first step down a slippery slope leading to disavowal of the George Washington or Abraham Lincoln. We honor Washington, Jefferson, and Madison founding our nation. We honor Lincoln for fighting to preserve it. There is an obvious distinction between these accomplishments and fighting to repeal the Constitution, leave the Union, and preserve the institution of slavery.

## CONCLUSION

The Lee Monument is anathema to longstanding constitutional values of equal protection. Those values are Virginian values. The Amici and their contemporaries want to live in a Virginia that honors its past, not one that is controlled by it—not in the literal sense urged by Appellants, in which modern-day political branches are bound by the mistakes of centuries past, and not in the figurative sense, in which

Amici would be forced to raise their children and build their careers in Lee's shadow.

The political branches have spoken. They want the Lee Monument down. Amici ask the Court to honor that decision affirm the trial court's judgment.



James J. O'Keeffe IV (VSB# 48620)  
MICHIEHAMLETT PLLC  
215 Market Street, Suite 201  
Roanoke, Virginia 24011  
Tel: 540-491-0634  
Fax: 1-888-500-0778  
[okeeffe@johnsonrosen.com](mailto:okeeffe@johnsonrosen.com)

*Counsel for Amici Curiae*

## CERTIFICATE

I certify that and that on April 19, 2020, this amicus brief was filed electronically with the Supreme Court of Virginia through the VACES system and a copy was sent by email to all counsel of record, at the email addresses below:

JOSEPH E. BLACKBURN, JR.  
Blackburn, Conte, Schilling & Click, P.C.  
300 West Main Street  
Richmond, Virginia 23220  
[JoeBlackburn@BlackburnConte.com](mailto:JoeBlackburn@BlackburnConte.com)

*Counsel for Appellant Gregory*

PATRICK M. MCSWEENEY  
Attorney at Law  
3358 John Tree Hill Road  
Powhatan, Virginia 23139  
[pmcsweeney@protonmail.com](mailto:pmcsweeney@protonmail.com)

FRED D. TAYLOR  
Bush & Taylor, P.C.  
4445 Corporation Lane  
Virginia Beach, Virginia 23462  
[fred@bushtaylor.com](mailto:fred@bushtaylor.com)

JEREMIAH J. JEWETT, III  
J. J. JEWETT, III, PLLC  
700 South Center Street  
Ashland, Virginia 23005  
[jjewett3@verizon.net](mailto:jjewett3@verizon.net)

*Counsel for Taylor Appellants*



TOBY J. HEYTENS  
Solicitor General  
JESSICA MERRY SAMUELS  
Deputy Solicitor General  
Office of the Attorney General  
202 North Ninth St.  
Richmond, Virginia 23219  
[SolicitorGeneral@oag.state.va.us](mailto:SolicitorGeneral@oag.state.va.us)

*Counsel for Appellees*

I further certify that this brief complies with Rule 5:26.



James J. O'Keeffe IV

## Subsequent Pleading eCertificate

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