
IN THE
Supreme Court of Virginia

RECORD NO. 210113

HELEN MARIE TAYLOR, *et al.*,

Appellants,

v.

RALPH S. NORTHAM, *et al.*,

Appellees.

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

Cullen D. Seltzer (VSB 35923)
Cynthia E. Hudson (VSB 27623)
SANDS ANDERSON PC
1111 East Main Street
Post Office Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636
(804) 783-7291 (Fax)
cseltzer@sandsanderson.com

Counsel for Amicus Curiae
Virginia State Conference
National Association for the
Advancement of Colored People

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I. Introduction

The Virginia State Conference National Association for the Advancement of Colored People (“Virginia NAACP”) submits this amicus brief in support of the position of Appellee Governor Northam¹ in this appeal. In particular, the Virginia NAACP submits this brief to highlight the important public policy implications of removing the Lee Monument from Monument Avenue in Richmond, Virginia.²

Robert E. Lee’s role in American history, his personal ties to slavery, the historical context of his monument’s erection, and the enduring contempt and insult that the monument represents make the monument’s continued presence impossible to reconcile with a commitment to civil rights and an understanding of Black Virginians’ equal rights and equal dignity – legally and culturally. As importantly, the rule of law, and fidelity to democratic principles, require judicial deference to the policy choices of Virginia’s political branches.

The Lee Monument must come down. Every day it stands, towering over the Commonwealth’s capital’s most prominent boulevard, is another day of

¹ Appellees in this case include Governor Ralph Northam, the Director of the Department of General Services, and the Director of the Division of Engineering & Building. They are referred herein, collectively, as “Governor Northam,” “the Governor,” or “Appellees.”

² See Brief in Opposition for Respondents Ralph S. Northam, in his Official Capacity as Governor of Virginia, the Director of the Department of General Services, and the Director of the Division of Engineering & Building at 17, et seq., (General Assembly may permissibly decide public policy of the Commonwealth).

compelled speech by the Commonwealth that simultaneously contravenes Virginia's current public policy and celebrates an era of slavery and white supremacy in Virginia.

II. Argument and Discussion

This brief amicus curiae speaks to the public policy that warrants removal of the Lee Monument. Accordingly, it is germane to five of Appellants' six assignments of error each of which explicitly turns on questions of Virginia's public policy.³ This Court should review, *de novo*, the trial court's legal conclusions and should review any factual findings specific to the land conveyances in this case deferentially.⁴ In this case, those findings were not substantially in dispute.⁵

³ See Brief for Appellants Helen Marie Taylor, Evan Morgan Massey, Janet Hetzel, George D. Hostetler, and John-Lawrence Smith at 9-10 (Record No. 210113) (identifying the materiality of public policy on assignments of error 1, 2, 3, 4, and 6).

⁴ See, e.g., *Bowman v. Commonwealth*, 290 Va. 492, 496-497, 777 S.E.2d 851, 854-855 (2015).

⁵ Questions concerning events in Virginia and national history are not readily susceptible to final adjudication by courts, but facts related to Virginia history are susceptible, as the trial court periodically did, to judicial notice. See Va. Sup. Ct. R. 2:201 ("A court may take judicial notice of a factual matter not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned ... [and]... [j]udicial notice may be taken at any stage of the proceeding.")

A. Historical Context of the Lee Monument

To appreciate the cruelty of the Lee Monument, and how it contravenes Virginia public policy today, it is important to understand important truths about Lee and the circumstances that led to the erection of the monument that venerates his memory.

1. Robert E. Lee as Slaver, Traitor, and White Supremacist

Lee was a casually cruel owner of slaves. Although he promised to free the slaves he owned, he delayed doing so for as long as he could.⁶ He justified the evil of slavery by bizarrely insisting that, though it was evil, it was ultimately for Black humans' own good and ultimately God's will:

I think [slavery] however a greater evil to the white man than to the black race, & while my feelings are strongly enlisted in behalf of the latter, my sympathies are more strong for the former. The blacks are immeasurably better off here than in Africa, morally, socially & physically. The painful discipline they are undergoing, is necessary for their instruction as a race, & I hope will prepare & lead them to better things. How long their subjugation may be necessary is known & ordered by a wise Merciful Providence. Their emancipation will sooner result from the mild & melting influence of Christianity, than the storms & tempests of fiery Controversy.⁷

⁶ Allen C. Guelzo, *Lee, Robert E. and Slavery*, ENCYCLOPEDIA VIRGINIA, <https://encyclopediavirginia.org/entries/lee-robert-e-and-slavery/> (last visited Apr. 15, 2021).

⁷ Adam Serwer, *The Myth of the Kindly General Lee*, THE ATLANTIC (June 4, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-myth-of-the-kindly-general-lee/529038/>.

As a slave owner, Lee tortured and brutalized the human beings he owned if they had the temerity to attempt escape from bondage.⁸ Lee broke with his family traditions of respecting slave families and cruelly broke up the families of slaves he owned, hiring them off to other plantations.⁹ One of Lee's former slaves gave this account of Lee's de-humanizing cruelty:

Gen. Lee, who demanded the reason why we ran away; we frankly told him that we considered ourselves free; he then told us he would teach us a lesson we never would forget; he then ordered us to the barn, where in his presence, we were tied firmly to posts by a Mr. Gwin, our overseer, who was ordered by Gen. Lee to strip us to the waist and give us fifty lashes each, excepting my sister, who received but twenty; we were accordingly stripped to the skin by the overseer, who, however, had sufficient humanity to decline whipping us; accordingly Dick Williams, a county constable was called in, who gave us the number of lashes ordered; Gen. Lee, in the meantime, stood by, and frequently enjoined Williams to "lay it on well," an injunction which he did not fail to heed; not satisfied with simply lacerating our naked flesh, Gen. Lee then ordered the overseer to thoroughly wash our backs with brine, which was done.¹⁰

⁸ Allen C. Guelzo, *Lee, Robert E. and Slavery*, ENCYCLOPEDIA VIRGINIA, <https://encyclopediavirginia.org/entries/lee-robert-e-and-slavery/> (last visited Apr. 15, 2021).

⁹ Adam Serwer, *The Myth of the Kindly General Lee*, THE ATLANTIC (June 4, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-myth-of-the-kindly-general-lee/529038/>.

¹⁰ Ta-Nehisi Coates, *Arlington, Bobby Lee, and the 'Peculiar Institution'*, THE ATLANTIC (August 13, 2010), <https://www.theatlantic.com/national/archive/2010/08/arlington-bobby-lee-and-the-peculiar-institution/61428/>.

Even as the Confederacy's defeat in the Civil War became ever more likely, Lee continued to defend, on unadulterated grounds of white supremacy, the legitimacy and even desirability of slavery. As late as January of 1865, just months before the end of the Civil War, Lee demonstrated he had learned precious little about the villainy of the enslavement of Black Virginians: “[T]he relation of master and slave, controlled by humane laws and influenced by Christianity’ was ‘the best that can exist between the white and black races.’”¹¹

While Lost Cause advocates depict Lee as a man of high character and virtue, that characterization is dangerously wrong-headed. Lee was a traitor to the United States. There are instances when charges of treason are levied rhetorically or hyperbolically. This is not such an instance. The Constitution defines treason, in part, as “levying War against [the United States.]”¹² Lee did that for four terrible years.

¹¹ Allen C. Guelzo, *Lee, Robert E. and Slavery*, ENCYCLOPEDIA VIRGINIA, <https://encyclopediavirginia.org/entries/lee-robert-e-and-slavery/> (last visited Apr. 16, 2021).

¹² U.S. CONST. art. III, § 3. *See also* 18 U.S.C. § 2381 (providing criminal penalties for treason of no less than five years imprisonment and permitting capital punishment); *Cramer v. United States*, 325 U.S. 1, 34 (1945) (“The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy.”)(footnotes omitted); *Ex Parte Bollman and Swartwout*, 8 U.S. 75 (1807) (“Any assemblage of men for the purpose of revolutionizing by force the government established by the United

Before he led tens of thousands of men in armed combat against the United States, including killing, maiming, and wounding tens of thousands of loyal Americans, Lee was a commissioned officer in the United States Army. He was a product of the United States Military Academy at West Point. He had sworn to bear true allegiance to the United States of America and serve them against all their enemies or oppressors.¹³

Lee foreswore this oath and resigned his commission in the U.S. Army after Virginia seceded from the Union in 1861.¹⁴ Lee's treason to the United States resulted in unspeakable death, injury, destruction of property, and grief. That it was unnecessary and in service of the institution of slavery only compounds the scope of his betrayal.¹⁵ At the outset of the Civil War, President Lincoln offered

States in any of its territories, although as a step to or the means of executing some greater projects, amounts to levying war.”)(from Court’s syllabus).

¹³ U.S. Army Center of Military History, *Oaths of Enlistment and Oaths of Office*, <https://history.army.mil/html/faq/oaths.html> (last visited Apr. 16, 2021).

¹⁴ Roy Blount, Jr., *Making Sense of Robert E. Lee*, SMITHSONIAN MAGAZINE (July 2003), <https://www.smithsonianmag.com/history/making-sense-of-robert-e-lee-85017563/>.

¹⁵ President Lincoln knew the plain truth of the Confederacy’s purpose:

One eighth of the whole population were colored slaves not distributed generally over the union but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war. To strengthen perpetuate and extend this interest was the object for which

Lee command of the Union Army. Lee, proclaiming his fidelity to the cause of treason, refused. To be clear, Lee's commitment to Southern slavery was plain and explicit. Yale American History Professor David Blight has made clear: "Make no mistake, Lee fought for the Confederacy, and he knew that the Confederacy existed to preserve slavery—there is no question about that."¹⁶

the insurgents would rend the Union even by war while the government claimed no right to do more than to restrict the territorial enlargement of it. Neither party expected for the war the magnitude or the duration which it has already attained. Neither anticipated that the cause of the conflict might cease with or even before the conflict itself should cease. Each looked for an easier triumph and a result less fundamental and astounding. Both read the same Bible and pray to the same God and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces but let us judge not that we be not judged. The prayers of both could not be answered ~ that of neither has been answered fully. The Almighty has His own purposes.

Abraham Lincoln, *President Lincoln's Second Inaugural Address*, NATIONAL PARK SERVICE, LINCOLN MEMORIAL (March 4, 1865), <https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm> (last visited Apr. 16, 2021).

¹⁶ Becky Little, *How the Cult of Robert E. Lee Was Born*, HISTORY.COM (Aug. 14, 2017, updated, Aug. 31, 2018), <https://www.history.com/news/how-the-cult-of-robert-e-lee-was-born>. See also Virginia Ordinance of Secession, ENCYCLOPEDIA OF VIRGINIA (April 17, 1861), <https://encyclopediavirginia.org/entries/virginia-ordinance-of-secession-april-17-1861/> (last visited Apr. 16, 2021) (complaining that the United States "perverted [its Constitutional] powers, not only to the injury of the people of Virginia, but to the oppression of the Southern slaveholding States." (emphasis added)).

Lee's commitment to white supremacy included malice toward Black Americans during the war itself. This malice manifested itself in his army's kidnapping free Blacks from Pennsylvania and returning them to slavery. Lee's Army also slaughtered surrendering Black Union soldiers during the Battle of the Crater in Petersburg in 1864.¹⁷

After the Civil War, Lee was criminally indicted for his treason. He escaped prosecution only after the intercession of then General Ulysses Grant and then President Andrew Johnson. Lee's surrender to Grant at Appomattox Courthouse, when the Confederacy had all but lost the war, was conditioned on Grant's promise that Lee and his officers would not be prosecuted for their treason so long as they laid down their arms. Lee did at least that.¹⁸ Of course, the country was deprived of justice for Lee's treason, a deprivation that later allowed revisionists to cast Lee as a man of honor when, in fact, few American leaders have so deeply betrayed our country.

Importantly for contemporary views of Lee's contribution to the Civil War is an understanding that Lee's efforts were informed by his deep-seeded belief in

¹⁷ Adam Serwer, *The Myth of the Kindly General Lee*, THE ATLANTIC (June 4, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-myth-of-the-kindly-general-lee/529038/>.

¹⁸ RON CHERNOW, *GRANT* 553 (Penguin Books 2018).

white supremacy. He was an inveterate racist. Worse, he held a distorted and perverted view of Christianity that he insisted supported his racism:

The war was not about slavery, Lee insisted later, but if it were about slavery, it was only out of Christian devotion that white southerners fought to keep black people enslaved. Lee told a *New York Herald* reporter, in the midst of arguing in favor of somehow removing black people from the South (“disposed of,” in his words), *“that unless some humane course is adopted, based on wisdom and Christian principles, you do a gross wrong and injustice to the whole negro race in setting them free. And it is only this consideration that has led the wisdom, intelligence and Christianity of the South to support and defend the institution up to this time.”*¹⁹

Robert E. Lee survived only five years after the end of the Civil War, dying in 1870.²⁰ In that short time, though, Lee remained steadfast in advocating for the oppression of Black Americans. As President of then Washington College, later

¹⁹ Adam Serwer, *The Myth of the Kindly General Lee*, THE ATLANTIC (June 4, 2017) (emphasis added), <https://www.theatlantic.com/politics/archive/2017/06/the-myth-of-the-kindly-general-lee/529038/>.

²⁰ Some Lost Cause advocates have argued that Lee’s treachery in betraying the Union during the Civil War is outweighed by his purported nation-building efforts after the war. President Ulysses Grant harbored no such illusions about Lee’s contributions:

“Lee is behaving badly. He is conducting himself very differently from what I had reason, from what he said at the time of the surrender, to suppose he would. No man at the South is capable of exercising a tenth part of the influence for good that he is, but instead of using it, he is setting an example of forced acquiescence so grudging and pernicious in its effect as to be hardly realized.”

RON CHERNOW, *GRANT 573* (Penguin Books 2018).

Washington & Lee University, Lee was unequivocally opposed to both equal education for Black Virginians and Black Virginians' civil liberties:

[Lee opposed] Washington College become an instrument of free blacks "acquiring knowledge" by becoming racially integrated, and he was adamant in his personal opposition to proposals for equal civil rights for the freed people in the new Virginia state constitution. "The idea that the Southern people are hostile to the negroes, and would oppress them if it were in their power to do so, is entirely unfounded," Lee protested, but he opposed "any system of laws which would place the political power of the country in the hands of the negro race" because "*the negroes have neither the intelligence nor the qualifications which are necessary to make them safe depositories of political power.*"²¹

2. Erection of the Lee Monument as Part of Lost Cause Movement and Perpetuation of White Supremacy.

The public policy that would dismantle the Lee Monument is informed by a recognition that venerating Lee was not a disconnected historical footnote.

Venerating him was a means of venerating the Confederacy and of un-remembering the reality of chattel slavery's violence, murders, rapes, mutilations, and malice. Legitimizing Lee – a cruel traitor and bigot – facilitated the intellectual leap of legitimizing, among other things, segregated schools, racist

²¹ Allen C. Guelzo, *Lee, Robert E. and Slavery*, ENCYCLOPEDIA VIRGINIA (emphasis added), <https://encyclopediavirginia.org/entries/lee-robert-e-and-slavery/> (last visited Apr. 16, 2021). See also *id.* ("You will never prosper with the blacks," he warned his youngest son in 1868. 'I wish them no evil in the world—on the contrary, will do them every good in my power.' But it remained 'abhorrent to a reflecting mind to be supporting and cherishing those' whom Lee would always suspect of 'plotting and working for your injury, and all of whose sympathies and associations are antagonistic to yours.'")

insurance policies, bulldozed Black neighborhoods, and racial profiling in law enforcement. Today's public policy has connected those dots.

At the unveiling of the Lee monument in 1890, 15,000 men in Confederate military uniform attended the event. So, too, did 100,000 onlookers.²² The occasion was not one of contrition or regret for disloyalty or treason or the cruelty of slavery. It was, instead, a valedictory remembrance of both Lee and the Confederacy.²³

²² Joint Appendix at 705 *The Lee Monument Unveiling*, THE RICHMOND PLANET (May 31, 1890)(hours long parade at unveiling was accompanied by “artillery salute after salute,” Confederate soldiers joining in the “rebel yell,” and “fair women [who] waved handkerchiefs and screamed to do honor” all to “honor [Lee] and the cause for which he fought.”). See also Andrew Lawler, *The Origin Story of Monument Avenue, America's Most Controversial Street*, NATIONAL GEOGRAPHIC (July 27, 2020), <https://www.nationalgeographic.com/history/article/origin-story-monument-avenue-america-most-controversial-street#:~:text=A%20monument%20to%20Confederate%20General,Richmond's%20tree%2Dlined%20Monument%20Avenue>. See also Kevin M. Levin, *Richmond's Confederate Monuments Were Used to Sell a Segregated Neighborhood*, THE ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/its-not-just-the-monuments/612940/> (Confederate monuments advertised the racial segregation of Monument Avenue neighborhood).

²³ Roy Blount, Jr., *Making Sense of Robert E. Lee*, SMITHSONIAN MAGAZINE (July 2003), <https://www.smithsonianmag.com/history/making-sense-of-robert-e-lee-85017563/> (“After Lee’s death in 1870, Frederick Douglass, the former fugitive slave who had become the nation’s most prominent African-American, wrote, ‘We can scarcely take up a newspaper . . . that is not filled with *nauseating* flatteries’ of Lee, from which ‘it would seem . . . that the soldier who kills the most men in battle, even in a bad cause, is the greatest Christian, and entitled to the highest place in heaven.’”) See also Phillip Kennicott, *On Richmond's Evolving Monument Avenue, Myth and Ugly Lies Run Deep*, WASHINGTON POST (July 29,

The Hon. W. Reilly Marchant, of the Circuit Court for the City of Richmond, and the trial judge below, summarized expert testimony Dr. Edward Ayers and Dr. Kevin Gainse to precisely this effect:

Dr. Ayers and Dr. Gaines testified extensively about the conditions in the Commonwealth, and the South in general, during the period of 1865 through 1890 and beyond. Their testimony included discussion of the purposes for which the Lee Monument was erected in 1890. Although imprecise as to the sole cause and purpose, their testimony overwhelmingly established the need of the southern citizenry to establish a monument to their “Lost Cause,” and to some degree their whole way of life, including slavery. Their testimony described a post-war South where the White citizenry wanted to impose and state unapologetically their continued belief in the validity and honor of their “Lost Cause,” and thereby vindicate their way of life and their former Confederacy. It was out of this backdrop that the erection of the Lee Monument took place.²⁴

Importantly, by 1890 white Democrats in Virginia had substantially eroded the political rights and influence of Black Virginians. Erection of the Lee

2020), https://www.washingtonpost.com/entertainment/museums/on-richmonds-evolving-monument-avenue-myth-and-ugly-lies-run-deep/2020/07/28/03a2084a-d032-11ea-9038-af089b63ac21_story.html (“ By embracing the racist ideology of the Lost Cause, the makers of Monument Avenue also were partly neutralizing one of the few ideas that might have threatened them. Even as Richmond erected a statue to Lee in 1890, the old guard of Virginia was settling into an anti-modernism reaction, celebrating an ideal of Anglo-Saxon hegemony that was deeply nostalgic for a fictional, colonial past.”).

²⁴ See Joint Appendix at 411. (Dr. Edward Ayers, former President of the University of Richmond, was qualified and received without objection as an expert in the history of the American South and the Civil War and Confederate monuments.) See also Joint Appendix at 493 (Dr. Kevin Gaines, from the University of Virginia, was qualified and received without objection as an expert in African-American culture and history and the civil rights movement.); Joint Appendix at 562.

Monument was part and parcel of the repudiation of Black civil rights in the Commonwealth. White conservative leadership railed against the 1870 Constitution that enfranchised Black Virginians. Only twelve years after the Lee Monument was unveiled, the 1902 Constitution, which substantially disenfranchised Black voters was adopted.²⁵ Of course, that systematic disenfranchisement was, as noted above, entirely consistent with Lee's bigoted animus against Black enfranchisement even after the Civil War.

The hateful animus of white supremacy, legitimized and celebrated by the Lee Monument and the Lost Cause movement, fertilized *de facto* and *de jure* discrimination for many years afterwards in Virginia. Again, as Professor Blight observed: "By the 1890s, the Lost Cause arguments had become really a racial ideology, they had become a set of arguments for white supremacy," he says. The idea that slavery had been a gentle institution that benefitted

²⁵ Virginia Museum of History and Culture, *The Story of Virginia – Reconstruction - 1861-1876*, <https://www.virginiahistory.org/what-you-can-see/story-virginia/explore-story-virginia/1861-1876/reconstruction> (last visited Apr. 16, 2021). See also Constitutional Convention Virginia, ENCYCLOPEDIA VIRGINIA (1901-02), <https://encyclopediavirginia.org/entries/constitutional-convention-virginia-1901-1902/> (last visited Apr. 16, 2021) (1902 Constitution enshrined Jim Crow, disenfranchised Black voters, convention president decried Black suffrage in the 15th Amendment as not only "a stupendous blunder, but a crime against civilization and Christianity.").

both masters and slaves, and that freedmen could not handle their emancipation, was a foundation upon which Jim Crow laws were built.”²⁶

The stigmatization and oppression of Black Virginians was manifest in, among other ways, Jim Crow laws, the grossly disproportionate application of the death penalty against Black Virginians, risibly unequal school systems for Black and White Virginians, Massive Resistance to school integration, racist housing and employment policies, and systematic exclusion of Black Virginians from political and economic opportunity.²⁷

Lionization of Lee did not end in 1890. The veneration of Lee provided a useful legitimizing backdrop for continued discrimination against Black Virginians. White Virginia political leaders pressed the false narrative of Lee’s decency – his treason and bigotry notwithstanding – for more than a century after his death.

A relatively recent account of this whitewashing of Lee’s legacy provides an illustrative example. As noted above, although Lee narrowly escaped prosecution

²⁶ Becky Little, *How the Cult of Robert E. Lee Was Born*, HISTORY.COM (Aug. 14, 2017, updated, Aug. 31, 2018), <https://www.history.com/news/how-the-cult-of-robert-e-lee-was-born>.

²⁷ Indeed, the Lee Monument was explicitly built to help inaugurate a proudly bigoted and racist housing development. An advertisement, admitted in evidence at the trial of this matter, for the Monument Avenue Park housing development proudly proclaimed: “No lots can ever be sold or rented in MONUMENT AVENUE PARK to any person of African descent.” Joint Appendix at 685.

for treason in the years after the Civil War, President Andrew Johnson refused Lee's application for restoration of his citizenship. More than a hundred years after the Civil War, however, Virginia and national leadership granted Lee a posthumous restoration.

The effort, in 1975, was led by Virginia U.S. Senator Harry F. Byrd, Jr. Senator Byrd was, himself, a zealous opponent of racial integration in the public schools who supported "massive resistance" to the U.S. Supreme Court's decision in *Brown v. Board of Education*. So committed was Senator Byrd to segregation in education that he supported closing schools rather than permitting them to be racially integrated. In this regard, his dim view of equality for Black Virginians was the direct intellectual descendant of Lee's views. Like Lee, who thought Black people should wait for equality for a hundred years after the Civil War, Senator Byrd insisted that equality even in 1954 was still too soon.²⁸

²⁸ Associated Press, *Former Senator Harry Byrd, Jr. of Virginia Dies*, USA TODAY (July 30, 2013), <https://www.usatoday.com/story/news/politics/2013/07/30/harry-byrd-jr-dies/2599431/>. See also Joint Appendix at 563 (testimony of Dr. Gaines) ("The message of the Lee Monument was really sort of an affirmation or a consolidation of the values that prevailed in the U.S. South and in Virginia during the era of Jim Crow. And during the civil rights movement, you know, you saw, in the State of Virginia, a coordinated campaign called Massive Resistance in which the political establishment in Virginia wanted to prevent the desegregation of schools after the court order desegregation and any civil rights laws, any laws that would accrue to the rights of African-American people. And the Lee monument really, during the era of Jim Crow, I think, was kind of the exclamation point of a Jim Crow order that was founded on white supremacy and black subordination.")

The U.S. House of Representatives voted 407-10 in support of a resolution to restore Lee's citizenship.²⁹ President Ford, in signing the resolution restoring Lee's citizenship, described Lee as "a symbol of valor and of duty." These efforts continued to mythologize Lee as if his treason during the war, and his bigotry his entire life simply did not matter.

Presiding over all of that, legitimizing it and celebrating it, sits Lee's memorial, still. Cast in twelve tons of brass and twenty-one feet tall, Lee's statue sits atop a forty-foot pedestal.³⁰ His heroic presentation, in Confederate uniform and astride his horse, dominates the landscape literally as Lost Cause advocates hoped his hateful ideology would metaphorically.

The triumphal Lee monument is unmistakable to Black Richmonders who account for 47% of our capital city's population.³¹ That depiction of a triumphant Lee is no accident. The iconography of Lee's monument was never intended to be

²⁹ Andrew Glass, *House Restores Citizenship to Robert E. Lee, July 22, 1975*, Politico (July 22, 2010), [https://www.politico.com/story/2010/07/house-restores-citizenship-to-robert-e-lee-july-22-1975-040085#:~:text=On%20this%20day%20in%201975,\(D%2DVa.\)](https://www.politico.com/story/2010/07/house-restores-citizenship-to-robert-e-lee-july-22-1975-040085#:~:text=On%20this%20day%20in%201975,(D%2DVa.)).

³⁰ Steve Helber and Sarah Rankin, Associated Press, *Crews Inspect, But Won't Yet Remove, Richmond's Robert E. Lee Statue* (June 8, 2020), <https://www.wHSV.com/content/news/Crews-inspect-Richmonds-Lee-statue-ahead-of-planned-removal-571100661.html#:~:text=and%20heavy%20piece.-,The%20massive%20statue%20weighs%20approximately%2012%20tons%2C%20stands%2021%20feet,foot%20pedestal%20for%20130%20years>.

³¹ UNITED STATES CENSUS BUREAU, *Richmond City, Virginia Census Data* (Apr. 6, 2021), <https://www.census.gov/quickfacts/richmondcityvirginia>.

a passing thing. It was intended to remind Virginians that Lee and his Lost Cause were ever victorious and glorious, the results of the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution be damned.³²

It is difficult to imagine a more fawning encomium that did not otherwise lapse into parody. And where in this massive stone and metal veneration is there an ounce of contrition, a token of remorse, a passing nod of human feeling for the tragedy of millions in bondage, thousands slaughtered in senseless defense of slavery?³³ The Lee Monument blots out that ignominy and substitutes in its stead agitprop for the Lost Cause.³⁴

³² Joint Appendix *supra* note 21 at 510 (testimony of Dr. Ayers)(“[The Lee Monument] signified that the white conservative South now controlled the landscape of Richmond and controlled the political landscape of Virginia. And so it wa a monument to the reassertion of power that the white conservatives, former Confederates, had lost for 30 years.”)

³³ See Joint Appendix *supra* note 21 at 571-572 (testimony of Dr. Gaines)(“Well, I think it’s fair to say that the existence of the Lee Monument does not reflect values of equality, inclusion, and diversity. I think that it certainly validates one particular version of that history. And, you know, I think that we have to really be honest about what we are commemorating with these monuments to the Confederacy. We are commemorating a system of racial segregation that saw their sort of ... their origin. We are commemorating the Lost Cause narrative which is, as Professor Ayers said, an invasion [sic] of the reality of what slavery represented and what the cause of the Confederacy was fighting for.”)

³⁴ See Joint Appendix *supra* note 21 at 505-06 (testimony of Dr. Ayers)(“So the documentary record at the time [of the Civil War] is very explicit that what [the South] is doing is protect [its] rights to property and [to own] people. But immediately after the war, the story becomes that this had nothing to do with slavery; it was all about states’ rights or about the economic power of the North.”)

The Lee Monument does all of that as part of the official speech of the Commonwealth of Virginia. At this moment, at this writing, it is the Commonwealth of Virginia that owns and maintains this hateful memorial. Appellants would have the Commonwealth speak out this hate until the end of time.³⁵

B. Today’s Virginia Public Policy is Diametrically Opposed to the Values and Policy of the Lee Monument.

That insistence by Appellants – that Lee and the Lost Cause be glorified in our capital city forever – cannot be squared with Virginia’s diametrically opposed public policy. Consider the many ways that Virginians have determined to reject the Lost Cause and the legacy of Robert E. Lee.

So they obviate all of the evidence actually points out that it was about slavery.”) Compare German reconciliation with the atrocities of Nazi genocide with how Virginia has dealt with the shame of slavery, the cruelty of bondage, the cynical sabotage of Jim Crow. Germany keeps numerous memorials to the victims of the Holocaust, not honoring the men who kept them in bondage on the way to their deaths. See <https://www.deutschland.de/en/topic/politics/holocaust-memorials-in-germany-an-interactive-map>. Germany does have a relatively modest stone memorial to Field Marshal Erwin Rommel. It marks the site of his forced suicide after he was implicated in a plot to assassinate Adolf Hitler. See <https://www.landmarkscout.com/field-marshal-erwin-rommel-suicide-memorial-stone-blaustein-germany/>. General Lee undertook no remotely comparable act of sacrifice or atonement.

³⁵ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (“permanent monuments displayed on public property typically represent government speech,” “have the effect of conveying a government message,” and governments have been selective in choosing which monuments to accept and display.)

Virginia has extended the franchise to its Black citizens and recently expanded the opportunities for voting for all voters.³⁶ Virginia has rid itself of drivers' license suspensions for unpaid fines, a practice that disproportionately affected poor and minority Virginians in much the same way the reactionary 1902 Constitution discriminated against poor and minority voters.³⁷ Virginia's colleges and universities now accept Black applicants. The death penalty, once disproportionately and inequitably applied to Black Virginians was just in recent weeks abolished in large part because of concern about racial and class inequities that attended its implementation.³⁸

³⁶ *Governor Northam Signs Sweeping New Laws to Expand Access to Voting*, OFFICIAL WEBSITE OF GOVERNOR RALPH S. NORTHAM, <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856055-en.html> (last visited Apr. 16, 2021) (announcing Governor's signing of bills to allow early voting, repealing certain voter ID requirements, making Election Day a holiday, providing for certain automatic voter registration, expanding absentee voting timelines, extending in-person polling hours).

³⁷ See Chapter 965 of 2020 Acts of Assembly (amending numerous provisions of Title 19.2 (criminal procedure) and 46.2 (traffic) of the Code of Virginia to remove operators' license suspensions for operators' failure to pay certain fines and court costs); Nick Sibilla, *Virginia Finally Ends Unjust Driver's License Suspensions*, WASHINGTON POST (June 5, 2020).

³⁸ See *Virginia Abolishes Death Penalty*, EQUAL JUSTICE INITIATIVE (March 24, 2021), <https://eji.org/news/virginia-death-penalty-abolition/>, (“You’re more likely to get charged with a capital crime and found guilty of one if you’re a minority, suffer from mental illness, you’re low-income, you’ve got diminished intellectual capacity, or if you kill a White person and you’re not White.”)(quoting Sen. Scott Surovell).

This list is illustrative but hardly exhaustive. It is also true that the work to end white supremacy, to end racial abuse, to end bigotry is far from complete. As Dr. Martin Luther King observed, the arc of history is long, but it bends toward justice. And it has bent away from Robert E. Lee. It would be a legal and factual absurdity if Virginia could reject all that Lee and the Lee Monument represent, but was nevertheless obliged to venerate and glorify Lee himself forever.

Preserving the Lee Monument, notwithstanding the democratic preference of Virginians, is a rebuke to the rule of law. It tells Black Virginians that no matter how hard they work at democracy, no matter how diligently they scrape together governing coalitions, white supremacy, the Lost Cause, and the stinging legacy of slavery shall loom over them. This shadow of hate and oppression will, if Appellants have their way, literally never go away.

Neither the trial court nor this Court are called upon to agree, or not, with the public policy preferences of Virginia's political branches. The democratic principles that undergird our free elections and the popular election of legislators and a Governor promise that public policy is first and foremost a determination made by the people through their elected representatives. When the peoples'

elected representatives have made clear their policy choices, absent a Constitutional limitation, this Court is constrained to defer to those choices.³⁹

If Appellants succeed in preserving the bizarre and insulting glorification of Lee, notwithstanding the peoples' desire to turn away from that, white supremacists will be assured that every Black Virginian alive today and for another hundred generations will be reminded that the Commonwealth of Virginia is officially committed to the inferiority of Black Virginians. Black Virginians will be born, and go to school, and raise families, and work, and die, and every day of that time, so long as they remain in Richmond, will be under Lee's watchful and oppressive eye. Neither democracy nor legislation nor money will change that.⁴⁰

³⁹ The legislature is the "author of public policy." *Campbell v. Commonwealth*, 246 Va. 174, 184 n. 8, 431 S.E. 2d 648, 654 n. 8, 9 Va. Law Rep. 1505 (1993). "We can only administer the law as it is written." *Coalter v. Bargamin*, 99 Va. 65, 71, 37 S.E. 779, 781 (1901). The "best indications of public policy are to be found in the enactments of the Legislature." *City of Charlottesville v. DeHaan*, 228 Va. 578, 583, 323 S.E. 2d 131, 133 (1984) (*quoting Danville v. Hatcher*, 101 Va. 523, 532, 44 S.E. 723, 726 (1903)).

⁴⁰ There are, throughout Virginia, private memorials to Confederate war dead. The families and friends of those lost to that terrible war, on both sides of it, fairly grieve their losses. Removing the Lee Monument does not diminish those families' grief. It would not impair their ability to mourn. Nor would removal of the Lee Monument from Monument Avenue impair a private landowner from memorializing anyone she chose for any reason in a manner consistent with applicable land use requirements. Removal of the Lee Monument from Monument Avenue would signal, though, that the Commonwealth of Virginia no longer approves of the hateful ideology and deeply flawed men that brought about the Civil War.

Appellants’ position thus boils down to a rhetorical game of “heads-I-win-tails-you-lose.” Before the modern civil rights era, Black Virginians were excluded from economic and political power and thus could not successfully oppose racist homages to their oppressors. Now, having achieved some democratic success, Appellants nevertheless insist that Black Virginians must still be complicit in the public adulation of a treasonous white supremacist. Some portion of their tax dollars will be given over to glorification of their former oppressor and they shall be made to pay for that glorification forever – no election, no law passed by the General Assembly, no action by an elected Governor may ever afford them a moment’s relief.

C. The Virginia NAACP and its members have a particular interest in the outcome of this dispute.

Since 1935, the Virginia NAACP, like its national parent organization, has existed to secure the political, educational, social and economic equality of all and to eliminate race-based discrimination,⁴¹ with a particular focus on achieving that mission throughout the Commonwealth of Virginia. Accordingly, the matter at issue in this suit – the removal of one of the most recognizable and physically striking icons celebrating and honoring the confederacy and its recognized aim of

⁴¹ *About – Virginia NAACP*, NAACP, <https://naacpva.org/about/> (last visited Apr. 16, 2021).

maintaining white supremacy – strikes directly at the heart of the Virginia NAACP's mission and the hearts of its members.

The Virginia NAACP's stated history illustrates this interest in its opening language⁴²:

Racial discrimination mandated by law, [w]as rooted in the soil of colonial Virginia; and chattel slavery, like a creeping vine, permeated the social fabric for more than two centuries. The vine was consumed in the fires of the Civil War and to prevent its return, the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution. The roots, however, did not die. . . These were facts of life which impelled the organization of the Virginia State Conference of Branches of the National Association for the Advancement of Colored People.

Indeed, one need only consider one of the NAACP's earliest fights – a protest against the blatant and dehumanizing racism promoted as entertainment in the 1915 film *Birth of a Nation* and its White House screening – to appreciate the vital importance to the achievement of the NAACP mission of Governor Northam's decision to remove the Lee Monument from its storied perch. *Birth of a Nation* glorified the racial domination at the heart of the Confederacy just as much in its way as does the Lee Monument in its way. While today anyone who wishes to view *Birth of a Nation* certainly may do so, with personal intention and personal effort, no such effort – much less one aided by state support and maintenance – is

⁴² *History – Virginia NAACP*, NAACP, <https://naacpva.org/history/> (last visited Apr. 16, 2021).

required for NAACP members, supporters and others to be assaulted by the Lee Monument's prominent, towering physical representation of white supremacy on Monument Avenue in Virginia's capitol city.

Thus, the NAACP's, and by extension the Virginia NAACP's, interest in removal of Confederate iconography as government-sponsored speech in public spaces is not tangential or incidental, but critical to its work. As the national organization observed in 2017:

Confederate flags abound in 2017 America. Klansmen, neo-Nazis, and white nationalists defend them as an innocent representation of their "American Heritage", but we know that these symbols glorify treason and a hateful bigotry of white supremacy and black subjugation. In order for our country to move forward – to become a nation united and free from inequity and bigotry— we must remove Confederate symbols from parks, schools, streets, counties and military bases that define America's landscape and culture.⁴³

Like a steady drumbeat, the organization's efforts to eradicate such affronts to racial respect and equity have continued from 1915 to present day in the work of the Virginia NAACP and its branches in support of, for example, renaming Hanover County, Virginia public schools named for Robert E. Lee, Jefferson Davis

⁴³ NAACP – *When Heritage Means Hate*, NAACP (2017) <https://naacp.org/field-resources/confederate-symbols>.

and Stonewall Jackson⁴⁴ and the City of Charlottesville, Virginia's relocation of a Lee statue from a public park.⁴⁵

Virginia NAACP shares this tireless effort with its national organization and its sister organizations and their branches. Their work too is illustrated by too many recent examples that fall squarely into the mold of the Lee Monument removal decision at issue here, including:

- Partnering with the National Action Network in seeking the removal of the John C. Calhoun statue from Marion Square in Charleston, South Carolina;⁴⁶
- Joining the call for removal of Confederate monuments from a former county courthouse on Main Street in Lexington, Kentucky;⁴⁷
- Call to remove from a Chattanooga, Tennessee County courthouse the statue of a Confederate general;⁴⁸ and

⁴⁴ See *Hanover Cty. Unit of the NAACP v. Hanover Cty.*, 461 F.Supp 3d. (E.D. Va 2020).

⁴⁵ See *NAACP to Counter Virginia KKK Rally with Peace Rally*, ALBERMARLE-CHARLOTTESVILLE NAACP, <https://www.albemarle-cvillenaacp.org/tag/naacp/> (last visited Apr. 16, 2021).

⁴⁶ *NAACP – When Heritage Means Hate, Local NAACP Efforts to Remove Confederate Symbols*, NAACP, <https://naacp.org/field-resources/confederate-symbols/> (last visited Apr. 16, 2021).

⁴⁷ *Id.*

⁴⁸ *Id.*

- Publicized effort to remove from the Kentucky state capitol rotunda a statue of Confederate president Jefferson Davis.⁴⁹

The role and interest of the Virginia NAACP in carrying out the mission assigned to it by the national NAACP in policy development and direct action to achieve racial equity and promote human dignity and humane treatment of all persons without regard to race is indisputable and cannot be ignored. Its historic and impactful role in landmark, life-changing civil rights litigation, legislation and policy making compels that it speak loudly in support of not only the legal authority of Governor Northam to remove the Lee Monument from its state public space (as set forth by Appellees and fully endorsed by Virginia NAACP), but also moral obligation that Virginia government do so and do so as quickly as this Court's decision will permit.

Conclusion

For the foregoing reasons, the Virginia NAACP requests that the judgment of the trial court, below, be affirmed and that any injunctions restraining the Governor from removing the Lee Monument from Monument Avenue in Richmond, Virginia be dissolved.

⁴⁹ *Id.*

CERTIFICATE OF COMPLIANCE AND SERVICE

Pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia, counsel for *Amicus Curiae*, Virginia State Conference National Association for the Advancement of Colored People, certifies to the following:

- a. This brief, excluding portions exempt from the word count limitation, contains 6,672 words.
- b. On this 19th day of April, 2021, a copy of this Brief *Amicus Curiae* was filed with the Court using the VACES system.
- c. On this 19th day of April, 2021, a copy of the foregoing was sent by electronic mail to the following:

Patrick M. McSweeney, Esquire
ATTORNEY AT LAW
3358 John Tree Hill Road
Powhatan, Virginia 23139
Tel: 804-937-0895
Fax: 703-365-9593
pmcsweeney@protonmail.com
Counsel for Appellants

Fred D. Taylor, Esquire
BUSH & TAYLOR, P.C.
4445 Corporation Lane
Virginia Beach, Virginia 23462
Tel: 757-926-0078
Fax: 757-935-5533
fred@bushtaylor.com

Jeremiah J. Jewett, III, Esquire
J. J. JEWETT, III, PLLC
700 South Center Street
Ashland, Virginia 23005
Tel: 804-370-6059
Jjewett3@verizon.net

Of Counsel

Toby J. Heytens
Solicitor General
Jessica Merry Samuels
Assistant Solicitor General
OFFICE OF THE ATTORNEY
GENERAL
202 North Ninth Street
Richmond, Virginia 23219
Tel: 804-786-7240
Fax: 804-371-0200
SolicitorGeneral@oag.state.va.us

Counsel for Appellees

/s Cullen D. Seltzer

Cullen D. Seltzer, VSB No. 35923
Cynthia E. Hudson, VSB No. 27623
SANDS ANDERSON, PC
1111 East Main Street
Post Office Box 1998
Richmond, Virginia 23218-1998
Telephone: (804) 648-1636
Facsimile: (804) 783-7291
cseltzer@sandsanderson.com

*Counsel for Virginia State Conference
National Association for the Advancement
Of Colored People*

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Appellants,

v.

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

Appellees.

**BRIEF OF AMICI CURIAE
PROFESSORS THOMAS J. BROWN, W. FITZHUGH BRUNDAGE,
KAREN L. COX, HILARY N. GREEN, KIRK SAVAGE,
AND DELL UPTON IN SUPPORT OF APPELLEES**

Blake E. Stafford (VSB #92540)
Christine C. Smith (*pro hac vice* pending)
Briana M. Clark (*pro hac vice* pending)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

*Counsel for Amici Curiae
Professors Thomas J. Brown,
W. Fitzhugh Brundage, Karen L. Cox,
Hilary N. Green, Kirk Savage, and
Dell Upton*
