IN THE SUPREME COURT OF VIRGINIA

Record No. 201307

WILLIAM C. GREGORY,
Appellant,

v.

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

Record No. 210113

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

v.

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

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INTRODUCTION

In 1890, the then-Governor of Virginia accepted a statue from a nominally private organization of which that same Governor was also, simultaneously, the president. More than 130 years later, a different Governor decided that the statue—a piece of Commonwealth-owned property—should be relocated from one area of Commonwealth ownership and control to another. The General Assembly has agreed. That should be the end of the matter.

In these two cases, however, a handful of private individuals claim a judicially enforceable right to veto the shared decision of the political branches. As plaintiffs see it, the people of 2021 may not take down a divisive symbol that those who held power in 1890 decided to put up.

That cannot possibly be right. It is axiomatic that government officials are neither obligated to continue the policies of their predecessors nor capable of preventing their successors from making a different choice. And because *even Constitutions* may be amended as times change or circumstances warrant, it is clear that the claim plaintiffs assert is alien both to the law and the ability of future generations to create "a more perfect Union." U.S. Const. pmbl.

There are two independent routes for affirming the circuit court's decisions in these cases. *First*, as the circuit court correctly held in *Taylor v. Northam*, legislation enacted by the General Assembly in 2020 defeats all of plaintiffs' claims. *Second*, as the Commonwealth has consistently maintained, all of plaintiffs' claims failed even before that law was enacted. Accordingly, the judgments of the circuit court should be affirmed and the injunction pending appeal should be dissolved.

STATEMENT

A. Factual background

1. Proposing and building the Lee Monument

The end of the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments initially brought hope that the newly freed would enjoy the full benefits of citizenship and that the horrors of slavery would be consigned to the dustbin of history. T.A. 495–501.[1] But that promise proved elusive, as efforts soon began to curtail Black political power and bring forth a new era where the basic structures of slavery would persist in practice, if not in name. *Id.*

[1] This brief cites the joint appendix and record in *Taylor v. Northam* as "T.A." and "T.R." and the joint appendix and record in *Gregory v. Northam* as "G.A." and "G.R."

As part of that effort, various commentators embarked on a deliberate campaign to recast the object of Southern secession away from the actual reason secessionists had given at the time: the preservation of slavery.[2] "The whole point of" this quickly developing "Lost Cause" mythology was "to clothe everything in a language of home, of sacrifice, of loss, of valor, of glory, of religion; everything *except* the explicit thing that precipitated the severing of the United States." T.A. 551–52 (emphasis added); see also T.A. 577–78.

Less than two weeks after Robert E. Lee's death in 1870, former Confederate General Jubal Early—"the prototypical unreconstructed Rebel," T.A. 330—called on Confederate veterans to join him in Richmond to plan a "suitable and lasting memorial" to "manifest to the world" that they were "not now ashamed of the principles for which Lee fought and Jackson died." T.A. 692. The next month, the Lee Monument

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[2] See, *e.g.*, T.A. 507 (testimony of Dr. Edward Ayers: "If you go back and look at what the Confederates said when they seceded, they are saying that Negro slavery is the cornerstone of our purpose."); accord Address of Alexander H. Stephens (Mar. 21, 1861) (stating that the Confederacy's "corner-stone rests . . . upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition"), available at https://www.battlefields.org/learn/primary-sources/cornerstone-speech.

Association (LMA) met for the first time, with Early serving as Chair and Jefferson Davis delivering an address in Lee's honor. T.A. 693, 699.

By the late 1880s, enough money had been raised to build a monument, and the LMA selected a location then well outside the developed part of Richmond. T.A. 513. One reason for choosing that location was because it stood on higher ground than Capitol Square, meaning Lee's statue would overshadow the one of George Washington that already stood at the other end of Franklin Street. G.A. 247.

The land on which the Lee Monument sits came to be owned by the Commonwealth through two separate transactions. When the site was originally selected, both it and much of the surrounding property were owned by the children of William C. Allen. T.A. 73, 377. The Allen heirs agreed to donate land for the monument—so long as they could develop the area for upscale suburban residences in a new, whites-only neighborhood. T.A. 288, 292, 377, 513. And so, in July 1887, the Allen heirs conveyed the circle of land on which the Lee Monument now sits to the LMA. T.A. 373–82.

The next step was transferring ownership from the LMA to the Commonwealth. In 1889, the General Assembly adopted a joint

resolution "authoriz[ing] and request[ing]" the Governor to accept the statue, pedestal, and land for the monument from the LMA. T.A. 385–86 (1889-90 Va. Acts ch. 24) (1889 Joint Resolution)). Consistent with that request, in March 1890—with the "approval and consent" of the Allen heirs, who had never owned the statue or pedestal and had already donated the land to the LMA three years earlier—the LMA conveyed the statue, pedestal, and land to "the State of Virginia." T.A. 388–96. The same individual, P.W. McKinney (himself a former Confederate officer), signed the deed for both sides of the transaction—first, as President of the LMA, T.A. 394, and then as Governor of Virginia, T.A. 396.

On May 29, 1890, the Lee Monument was unveiled in a ceremony attended by as many as 150,000 people—one of the largest public events in Richmond history. T.A. 516–17. A "mammoth Confederate flag" was draped over City Hall, T.A. 705, and approximately 20,000 uniformed former Confederate soldiers marched through downtown Richmond, T.A. 517. The event was a both "display of . . . uncompromised devotion to the Confederacy" and "a demonstration of the solidarity and power of white people" in the South. T.A. 516–17, 563.

Even in 1890, not everyone in Richmond felt pride in the unveiling of the Lee Monument. A Black-owned newspaper edited by prominent businessman and politician John Mitchell, Jr., for example, criticized the spectacle as "handing down . . . a legacy of treason and blood." T.A. 706; see T.A. 511–12, 596–97 (expert testimony about Mitchell and his newspaper, *The Richmond Planet*). Mitchell's paper noted that many of those who attended carried "emblems of the 'Lost Cause'" with an "enthusiasm" that was "astound[ing]." T.A. 705. By "rever[ing] the memory of its chieftains" in this way, the paper argued, the "celebration . . . forge[d] heavier chains with which to be bound." *Id.*

2. The Lee Monument's role in entrenching white supremacy

With the Lee Monument in place, "the momentum of segregation" continued to "build[]." T.A. 515. In 1902—12 years after the Lee Monument was unveiled and just one year after the first house was completed on Monument Avenue—Virginia's new Constitution mandated racial segregation in schools and disenfranchised Black voters. Va. Const. arts. II & IX (1902). In 1911, Richmond adopted a residential segregation ordinance—later upheld by this Court—restricting Black residents to certain city blocks. See *Hopkins v. City of*

Richmond, 117 Va. 692, 694 (1915). Real estate companies drew on Monument Avenue's symbolism to attract affluent white residents as the city expanded, advertising race-based restrictions under which "[n]o lots [could] ever be sold or rented . . . to any person of African descent." T.A. 685. These efforts made "explicit" that "th[e] purpose was to claim this part of the city as for white people only." T.A. 514. By the time the infamous Racial Integrity Act was adopted in 1924, see 1924 Va. Acts ch. 371, segregation had "become[] part of the very fabric of" Virginia life, T.A. 515, 563.

In no uncertain terms, the inequality enshrined in law continued the legacy of the Lee Monument and others built to valorize Lee and the Lost Cause. The race-based violence inherent in slavery also persisted after the defeat of the Confederacy, as the Jim Crow era was marked by "racial terror and lynchings" throughout the South. T.A. 570. The year after *Brown v. Board of Education*, 347 U.S. 483 (1954), for example, a Black man named Robert Leon Bacon wrote to the then-Governor to describe the segregated society that had taken hold in Virginia, specifically referencing "Monument Ave[nue]" and the "fear" that he would be "'lynched' or beaten up or arrested or electrocuted" if he were

to visit that whites-only neighborhood. T.A. 711–14. "Virginia is no place for a colored citizen like me to live in," Bacon explained, because "[i]t is the home of white supremacy." *Id.*; see T.A. 518.

3. Recent controversy surrounding Confederate monuments

During the last several years, Richmond's Lee Monument and other Confederate monuments have become ever-greater hotbeds for controversy. In August 2017, "white supremacist extremist organizations" descended on Charlottesville for the "Unite the Right" rally—a now-infamous demonstration opposing the City's decision to remove a different Lee statue—as both "a show of force" and an attempt to "lay[] exclusive claim . . . to public space [and] to the streets of Charlottesville." T.A. 566–67. The demonstration turned violent, with "armed men menacing peaceful protestors" and "a contingent of faith leaders" threatened with "physical harm." T.A. 567. Three people died, dozens were injured, and countless more were traumatized. *Id.*

In response to the events in Charlottesville and elsewhere, the General Assembly amended the Code of Virginia during its 2020 session to give localities more control over government-owned monuments on government-owned property, specifically repealing previous language

that had prohibited "disturb[ing] or interfer[ing]" with certain monuments. 2020 Va. Acts ch. 1100. During the same session, the General Assembly also eliminated a state holiday "honor[ing] Robert Edward Lee," 2020 Va. Acts ch. 418, and created a Commission for Historical Statues to determine whether to replace a different statue of Lee that was then one of Virginia's two submissions in Statuary Hall in the United States Capitol, see 2020 Va. Acts ch. 1098, 1099.

The killing of George Floyd on May 25, 2020, sparked massive protests against police brutality and systemic racism throughout the Nation, including in Virginia. T.A. 568–69, 594–95. On June 4, 2020—10 days later—Governor Northam announced that he would exercise his authority as the Commonwealth's chief executive to relocate "the statue of Robert E. Lee" that sits atop the Lee Monument from one area of Commonwealth control to another. T.A. 335. "[G]enerations ago," the Governor explained, "Virginia made the decision not to celebrate unity, but to honor the cause of division"—a decision that "was wrong then" and "is wrong now." *Id.* The Department of General Services prepared a plan to remove the statue, which was unanimously approved by the Art and Architectural Review Board. T.A. 75; T.R. 148.

Since the Governor's announcement, the groundswell of opposition to Confederate monuments has continued to grow. In early July, the City of Richmond removed all city-owned Confederate statues along Monument Avenue, leaving only the Lee statue standing. T.A. 409. Weeks later, the Speaker of the House of Delegates removed a life-sized statue of Lee and seven busts depicting other ex-Confederates from the Capitol's Old House Chamber. *Id.* On July 24, the Commission on Historic Statues voted unanimously in favor of removing the Lee statue from the United States Capitol. *Id.*[3]

The General Assembly has also addressed the Lee Monument. On November 18, 2020, the Governor signed a bill stating "the Department of General Services, in accordance with the direction and instruction of the Governor, shall remove and store the Robert E. Lee Monument or any part thereof." 2020 Spec. Sess. I, Va. Acts ch. 56, ¶ 79(I) (attached as Addendum A) (2020 Law). The law also states that this instruction applies "[n]othwithstanding the provisions of" the 1889 Joint Resolution, "which is hereby repealed." *Id.*

[3] The statue was removed on December 21, 2020. See Gregory S. Schneider, *Gen. Robert E. Lee statue removed from U.S. Capitol*, Wash. Post. (Dec. 21, 2020), available at https://tinyurl.com/7pmdnd34.

B. These suits

Multiple lawsuits have been filed to block the Governor's decision. None has succeeded, including the two now pending before this Court.[4]

1. Gregory v. Northam (Record No. 201307)

On June 8—four days after the Governor's announcement—plaintiff William C. Gregory filed suit to stop the Governor from moving the Lee statue. G.A. 1–18. Asserting that he was the great-grandson of and an "heir at law" to two of the people who gave the underlying land to the LMA in 1887, Gregory claimed the statue's removal would cause him "irreparable harm" because "[h]is family has taken pride for 130 years in this statue resting upon land [formerly] belonging to his family and transferred to the Commonwealth." G.A. 2, 5. The same day, Gregory scheduled an *ex parte* hearing at which he obtained a temporary injunction before Attorney General Mark Herring or the Governor were even notified that suit had been filed. G.A. 81; G.R. 31.

The Commonwealth demurred and moved to dissolve the injunction. G.A. 81. On June 18, 2020, the circuit court sustained the

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[4] The other two cases are *Davis v. Northam*, No. 3:20-cv-403 (E.D. Va.), which was dismissed on July 24, 2020, and *Gregory v. Stoney et al.*, No. CL20003436-00, which involves a different Gregory and remains pending in the Circuit Court for the City of Richmond.

demurrer, but nonetheless kept the injunction in place. G.A. 81. Twenty days later, Gregory filed an amended complaint. G.A. 30–64. As relevant here, Gregory alleged that the 1887 and 1890 deeds created a perpetual covenant prohibiting removal of the Lee statue, which he had a right to enforce as an heir to the original land donors. G.A. 36.[5]

On July 23, 2020, the circuit court held a combined hearing on a renewed demurrer and the merits. G.A. 135–278. Two weeks later, the court sustained the demurrer and dismissed Gregory's complaint. While concluding that Gregory had "general" standing, G.A. 115–17, the court held that his claims failed as a matter of law because the deeds would have created—at most—an easement appurtenant enforceable by owners of the adjoining properties rather than an easement in gross enforceable by the heirs to the original donors, G.A. 117–19.

2. Taylor v. Northam (Record No. 210113)

In contrast to Gregory's family-based claims, the *Taylor* plaintiffs assert a power to veto the Governor's decision because of where they live. Two plaintiffs contend they have such rights by virtue of owning

[5] Gregory also asserted that moving the Lee statue would violate Code § 2.2-2402(B). See G.A. 34–35. The circuit court dismissed that count, G.A. 114–15, and Gregory has not assigned error to that ruling.

real property within the Monument Avenue Historic District. T.A. 2. The other plaintiffs assert such rights based on ownership of real property that was once part of the same plot of land from which the monument site was severed in 1887. *Id.*

The *Taylor* plaintiffs filed the first iteration of their suit 11 days after the Governor's announcement. See No. 20-2489 (Richmond City Cir. Ct.). After the Commonwealth removed that case to federal court, the *Taylor* plaintiffs voluntarily dismissed the suit and filed a second one, this time asserting only state law claims. See No. 3:20-cv-440 (E.D. Va.); No. 20-2624 (Richmond City Cir. Ct.). A month later—on the same day as a scheduled motions hearing—the *Taylor* plaintiffs took a nonsuit and dismissed their second case. See No. 20-2624 (Richmond City Cir. Ct.). The *Taylor* plaintiffs re-filed for a third and final time on July 21, 2020, T.A. 1–9, and almost immediately sought a temporary injunction barring the Governor from taking actions announced more than six weeks prior, T.A. 33–52, 71. The circuit court granted a temporary injunction on August 3, 2020, the same day it dissolved the temporary injunction in *Gregory*. T.A. 71; G.A. 122.

The essence of the *Taylor* claims, however, has remained unchanged throughout the various complaints. In short, plaintiffs assert that the Governor's decision to move the Lee statue exceeds his authority and violates the 1889 Joint Resolution, the deeds conveying the land to the LMA and then to the Commonwealth, or both.[6]

The circuit court held a full trial on October 19, 2020. None of the plaintiffs testified—nor did plaintiffs call any witnesses—during their case in chief. See T.A. 458 (confirming that plaintiffs had no "live witnesses"). The only evidence that the *Taylor* plaintiffs introduced during their own case were title reports for one property owned by plaintiffs Heltzel and Hostetler and one owned by the Evan Morgan Massey Revocable Trust. T.A. 406–07, 470.

In contrast, the Commonwealth offered extensive testimony from Dr. Edward Ayers and Dr. Kevin Gaines about the Civil War, the post-war era, Confederate monuments, and the civil rights movement, as well as historical records documenting the history and legacy of the Lee

[6] As in *Gregory*, the *Taylor* plaintiffs also asserted a claim under Code § 2.2-2402(B). T.A. 7–8. The circuit court dismissed that count, T.A. 360, and plaintiffs have not assigned error to that ruling.

Monument. T.A. 491–609 (testimony); T.A. 685–714 (exhibits).[7] The court also took judicial notice of various facts, including the removal of all other Confederate statues from Monument Avenue, the elimination of a state holiday honoring Lee and the addition of one commemorating the end of slavery, and the General Assembly's then-recent passage of bills that ultimately culminated in the 2020 Law. T.A. 409.

Eight days later, the circuit court ruled for the Commonwealth in all respects. T.A. 403–17. After "[c]onsidering and weighing the evidence"—including "the lack of any evidence from the Plaintiffs on the issue of the public policy of the Commonwealth"—the circuit court concluded that "the Commonwealth ha[d] carried its burden of proving by clear and certain evidence that enforcement of the restrictive covenants in the Deeds of 1887 and 1890 would be in violation of the current public policy of the Commonwealth of Virginia." T.A. 414–15.

In so concluding, the circuit court emphasized two types of evidence. First, it found that the Commonwealth had "overwhelmingly established" the desire of white Southerners "to establish a monument

[7] Dr. Ayers also testified during the evidentiary hearing in *Gregory*. See G.A. 241–72.

to their 'Lost Cause,' and to some degree their whole way of life, including slavery," and that "[i]t was out of this backdrop that the erection of the Lee Monument took place." T.A. 411. The court specifically noted Dr. Gaines' testimony "that today the monument stands as a contradiction to present societal values." T.A. 412.

Second, the court emphasized recent on-point actions by the General Assembly. "[P]erhaps the most significant evidence offered by the Commonwealth," the court concluded, was the General Assembly's passage of the 2020 Law, which "clearly indicate[s] the current public policy of the . . . Commonwealth . . . to remove the Lee Monument from its current position on the state-owned property on Monument Avenue." T.A. 412; see T.A. 414 (rejecting plaintiffs' arguments "that these very recent legislative enactments are unconstitutional special legislation").

SUMMARY OF ARGUMENT

The Governor has determined that a Commonwealth-owned statue should be relocated from one area of Commonwealth ownership and control to another. The General Assembly has agreed. That should be the end of the matter.

In contrast, the assertion at the heart of these cases is staggering.

Plaintiffs insist that those who held power in Virginia more than 130 years ago made a binding promise that a massive monument to the Lost Cause must remain in its current location forever and that any number of people may enforce that promise in perpetuity by way of an injunction. Plaintiffs identify no decision from any court that has ever recognized such an extraordinary restriction against any property owner—much less against the sovereign. And with good reason: plaintiffs' arguments are deeply flawed and profoundly anti-democratic.

I. The most straightforward way of resolving these cases is how the circuit court resolved *Taylor*: by holding that the 2020 Law defeats every single claim brought by both sets of plaintiffs.

All of plaintiffs' arguments stem from one of three premises: (i) the Governor lacks authority to move the Lee statue; (ii) the General Assembly has forbidden the Governor from moving the Lee statue; and/or (iii) the 1887 and 1890 deeds create a permanent and judicially enforceable obligation against moving the Lee statue.

The 2020 Law forecloses those arguments. That law confirmed the Governor's preexisting authority over the Lee Monument and repealed the previous enactment (the 1889 Joint Resolution) that formed the

basis for plaintiffs' claims that the General Assembly had forbidden the Governor's actions. The 2020 Law also extinguished any deed-based claims. It is black-letter property law that restrictions on land that violate public policy are unenforceable, and the 2020 Law "clearly indicate[s] the current public policy of the . . . Commonwealth [is] to remove the Lee Monument from its current position on the state owned property on Monument Avenue." T.A. 412.

Plaintiffs' various challenges to the validity of the 2020 Law and its impact on the Lee Monument are without merit. The General Assembly's authority is plenary and includes the authority to terminate the sort of property restrictions plaintiffs assert here. The 2020 Law does not violate the separation of powers because it is not special legislation, nor did it "grant relief" in these cases or any others. The 2020 Law does not violate the Contracts Clause because: (i) any conceivable rights that plaintiffs may have possessed would have been a *property* right arising from a deed; and (ii) it is well-settled that no contract may preclude the sovereign from exercising its police power to protect the public comfort, health, and welfare in the future. Finally, this Court has already held that the historic preservation provisions of

the Virginia Constitution are not self-executing and that their implementation is left to the General Assembly's discretion.

II. Plaintiffs' claims lacked merit even before the 2020 Law and the Court could also affirm on those grounds.

A. Plaintiffs' deed-based claims fail for multiple overlapping reasons. An affirmative promise to maintain a specific fixture on a specific piece of real property in perpetuity represents precisely the sort of significant restraint that should neither be lightly assumed nor deemed enforceable by private parties. But the problems for plaintiffs only get worse from there because government-owned monuments on government-owned land are core government speech, and plaintiffs are seeking to use the equitable powers of the courts to force the government of 2021 to continue saying things it no longer wishes to say. Finally, recent events confirm that—even apart from the 2020 Law—any covenant requiring the Lee statue to remain in its current location forever has been defeated by changed circumstances and is void as against current public policy.

B. The *Taylor* plaintiffs' non-deed claims also failed even before the 2020 Law. Although this Court has repeatedly confirmed that

standing must be established on a claim-by-claim basis, the *Taylor* plaintiffs presented no evidence to support their standing to bring their constitutional claims. The *Taylor* plaintiffs also did not identify any private right of action to assert their non-deed claims, and their suggestion that no right of action is needed because they seek to enforce self-executing constitutional provisions would eviscerate the private right of action requirement. Thus, even if plaintiffs were somehow able to prevail in challenging the 2020 Law, they still would not be entitled to the relief sought.

III. Upon deciding these cases, the Court should promptly dissolve the injunction pending appeal entered by the circuit court. By the time of argument, the Commonwealth will have been enjoined for more than a year despite prevailing in every challenge. Despite the *Taylor* plaintiffs' late-breaking (and forfeited) arguments under the Federal Constitution, these cases are overwhelmingly about state law, and it should be plaintiffs' burden to convince the U.S. Supreme Court to grant a further injunction if they seek to prolong this litigation beyond the Commonwealth's highest Court.

ARGUMENT

In these cases, a handful of private individuals assert a right to veto the shared judgment of the Governor and the General Assembly that a divisive piece of Commonwealth-owned statuary should be removed from a place of honor on Commonwealth-owned real property. The circuit court correctly rejected that proposition, and this Court should affirm for one of two independent reasons. *First*, the 2020 Law defeats all of plaintiffs' claims, and the *Taylor* plaintiffs' various challenges to the validity or effect of that law all fail. See Part I, *infra*. *Second*, plaintiffs' claims always lacked merit and would have failed even absent the 2020 Law. See Part II, *infra*. Accordingly, the Court should affirm the decisions of the circuit court and promptly dissolve the injunction pending appeal in *Taylor*. See Part III, *infra*.[8]

I. The 2020 Law defeats all of plaintiffs' claims

What the 2020 Law means and whether it is constitutional raise issues of law, which this Court decides de novo. See *Spratley v.*

[8] Any arguments not addressed in the proceedings below are covered by the rule that an appellee may "defend its judgment on any ground supported by the record." *Robert & Bertha Robinson Family, LLC v. Allen*, 295 Va. 130, 141 (2018); see Opp'n to Mot. to Strike at 1–2, *Taylor v. Northam* (filed Feb. 1, 2021).

Commonwealth, 298 Va. 187, 193 (2019); *Toghill v. Commonwealth*, 289 Va. 220, 227 (2015).

A. The 2020 Law confirms the Governor is authorized to move the Lee statue and that it is the public policy of the Commonwealth to do so

All of plaintiffs' various claims boil down to an assertion that the Governor has not been granted the authority to remove the Lee statue or that some other document (the 1889 Joint Resolution, the deeds, or both) forbids him from ever doing so. Those claims always failed—and the 2020 Law simply confirms it.

1. The first paragraph of Code § 2.2-2402(A)—which long predates this litigation—specifically recognizes the Governor's ultimate authority over Commonwealth-owned "work[s] of art." Va. Code Ann. § 2.2-2402(A). The first sentence addresses how the Commonwealth may come to own such items, stating that "[n]o work of art shall become" Commonwealth property until both a description and proposed location "have been submitted to and approved by the Governor." *Id.* The second sentence addresses the process for placing such items on Commonwealth-owned real property, providing that no "work of art" may be "placed in or upon or allowed to extend over any property

belonging to the Commonwealth" until its acquisition and placement have been "approved by the Governor." *Id.* The third sentence addresses the removal, relocation, or alteration of such items, stating that "[n]o existing work of art owned by the Commonwealth shall be removed, relocated or altered in any way without submission to the Governor." *Id.*

As the Commonwealth has maintained from the beginning, see G.R. 71, 411–12, these provisions authorized the Governor to move the Lee statue even before the 2020 Law was enacted. The Code of Virginia defines "work of art" to include "*all* . . . statues, . . . monuments, . . . or other structure[s] of a permanent character intended for ornament or commemoration," Va. Code Ann. § 2.2-2401(B) (emphasis added)—a sweeping definition that plainly includes the Lee Monument and the statue that sits atop it. See *Bailey v. Loudoun Cty. Sheriff's Off.*, 288 Va. 159, 174 (2014) ("The word 'all' is an unrestrictive modifier that is generally considered to apply without limitation" (quotation marks and alteration omitted)). Accordingly, Code § 2.2-2402(A) permits the Lee statue to be "relocated" upon "submission to the Governor." See p. 9, *supra* (noting that the Art and Architectural Review Board has unanimously approved the Department of General Services' plan to

move the statue previously submitted to the Governor).

2. To the extent there was ever any doubt on this point, the 2020 Law removes it. That law confirms the Governor's authority by stating that "the Department of General Services, in accordance with the direction and instruction of the Governor, shall remove and store the Robert E. Lee Monument or any part thereof." 2020 Spec. Sess. I, Va. Acts ch. 56, ¶ 79(I). The 2020 Law also removes any impediment that may have been created by the 1889 Joint Resolution by providing that its directive applies "[n]otwithstanding the provisions of Acts of Assembly 1889, Chapter 24, which is hereby repealed." *Id.* Finally, as the circuit court correctly recognized, the 2020 Law "clearly indicate[s] the current public policy of the . . . Commonwealth to remove the Lee Monument from its current position on the state owned property on Monument Avenue," T.A. 412, meaning that any purported covenant against doing so is now void as "contrary to public policy." *Hercules Powder Co. v. Continental Can Co., Inc.*, 196 Va. 935, 939 (1955); see *City of Charlottesville v. DeHaan*, 228 Va. 578, 583 (1984) (emphasizing that the "best indications of public policy are to be found in the enactments of the Legislature").

B. Plaintiffs' challenges to the 2020 Law are without merit

1. The General Assembly has plenary authority to decide whether enforcing any purported covenant would be against public policy

The *Taylor* plaintiffs insist that the 2020 Law violates "the longstanding rule . . . that a legislative act does not invalidate a restrictive covenant unless it is demanded by the public health, comfort or welfare." Taylor Br. 31. That argument fails twice.

For one thing, the 2020 Law plainly represents a legislative judgment that leaving the Lee statue in its present location is, in fact, inconsistent with public comfort, welfare, and even health. As the circuit court noted, Dr. Gaines explained why the continued presence of a massive monument to the Lost Cause in the heart of the Commonwealth's capital city "stands as a contradiction to present societal values" and "that there is a 'consensus that the monuments are a troubling presence.'" T.A. 412. There are also dangers to public health and safety. As the circuit court noted, "during June 2020, protestors toppled [a] Confederate monument in the City of Richmond," T.A. 409—an act that could easily have led to injuries or even death. See T.R. 115 (noting that a man suffered life-threatening injuries in Portsmouth when part of a statue of a Confederate soldier struck him as protestors

attempted to knock it down). Nor is today's General Assembly bound by the views of a previous one about what actions promote public health, comfort, and welfare. Quite the contrary: one of the basic ideas behind democratic government is that laws can be changed to reflect "shifts in public attitudes." Taylor Br. 31.

Plaintiffs' argument also fundamentally misapprehends the scope of the General Assembly's authority. "The Constitution of [Virginia] is not a grant of legislative powers to the General Assembly," and "except as to matters ceded to the federal government" or restricted by specific constitutional provisions, "the legislative powers of the General Assembly are without limit." *Harrison v. Day*, 201 Va. 386, 396 (1959). Plaintiffs identify nothing in either the Federal or Virginia Constitutions that limits the General Assembly's power to impact restrictive covenants to those affecting public health, comfort, and welfare, and the only cases plaintiffs cite involved ordinances enacted by localities—entities that, unlike the General Assembly, are constrained by Dillon's Rule and thus "have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers

which are essential and indispensable." *City of Virginia Beach v. Hay*, 258 Va. 217, 221 (1999); see Taylor Br. 31 (citing *Ault v. Shipley*, 189 Va. 69, 75 (1949), and *RECP IV WG Land Investors LLC v. Capital One Bank (USA), N.A.*, 295 Va. 268, 289 (2018) (*RECP IV*)).

2. The 2020 Law is neither unconstitutional special legislation nor violates the separation of powers

Both Article I, § 5 and Article III, § 1 of the Virginia Constitution state that the "legislative, executive, and judicial departments" are to "be separate and distinct." One reflection of that principle is stated in the second paragraph of Article IV, § 14, which reads:

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

Va. Const. art. IV, § 14, para. 2 (Grant Relief Clause).

Plaintiffs insist that the 2020 Law violates these provisions because it is special legislation that grants relief in this case by directing the Department of General Services to remove the Lee Monument. See Taylor Br. 10–20; see also *id.* at 24–26 (relying on Professor Howard's discussion of the Grant Relief Clause as support for a two-page argument that the 2020 law also violates more general

separation of powers principles). The circuit court properly rejected that argument, and plaintiffs identify no basis for reversal.

a. The 2020 Law is not "special legislation"

By its terms, the Grant Relief Clause applies only to "special legislation." Va. Const. art. IV, § 14, para. 2. The 2020 Law, however, is not special legislation.

i. The provision to which plaintiffs object does two things: (1) "repeal[s]" a previous legislative enactment (the 1889 Joint Resolution); and (2) directs a state agency to use funds appropriated by the same act to comply with "the direction and instruction of the Governor" about a piece of Commonwealth-owned property, 2020 Spec. Sess. I, Va. Acts ch. 56, ¶ 79(I), over which the Governor already had authority under a law of general applicability. See Part I(A)(1), *supra*.

Plaintiffs cite no authority for the striking proposition that laws repealing other laws or directing how government funds should be spent are constitutionally suspect "special laws," and it is difficult to see how government could function were that the case. See *Holly Hill Farm Corp. v. Rowe*, 241 Va. 425, 430 (1991) (*Holly Hill*) (noting that legislation "[r]outinely . . . pertains to specific classifications of persons,

places, or property").[9] To the contrary, this Court has long emphasized that it is up to "the Legislature" to "make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good." *City of Richmond v. Pace*, 127 Va. 274, 288 (1920).

ii. Even if legislation that merely repeals other legislative enactments and directs how public money will be spent could be considered "special" in certain contexts, the 2020 Law would not be such a law. Because "[t]he constitutional provisions prohibiting special legislation do not proscribe classifications," "[t]he test for statutes challenged under the special-laws prohibitions in the Virginia Constitution is" whether the decision to regulate some matters but not others "bear[s] a reasonable and substantial relation to the object sought to be accomplished by the legislation." *Jefferson Green Unit Owners Ass'n, Inc. v. Gwinn*, 262 Va. 449, 459 (2001) (*Gwinn*) (citing

[9] See also, *e.g.*, 2019 Va. Acts ch. 854 (repealing several provisions); 2019 Va. Acts ch. 854, ¶ 34(C) (appropriation for "development of the Women's Monument on Capitol Square"); 2019 Va. Acts ch. 854, ¶126(J) (appropriation for "an incentive to establish nonstop air service between Indira Gandhi International Airport and Washington Dulles International Airport").

Martin's Ex'rs v. Commonwealth, 126 Va. 603, 612 (1920)).

The 2020 Law comfortably satisfies that standard. The Lee Monument is unique in numerous respects, including that it:

- is owned directly by the Commonwealth and sits on a small island of Commonwealth-owned property in the middle of a traffic circle, T.A. 172–75;
- was accepted pursuant to a resolution of the General Assembly that itself specifically referenced only the Lee Monument, T.A. 385–86;
- became owned by the Commonwealth through a highly unusual transaction in which the same individual signed a deed on behalf of both sides, T.A. 392–96;
- was until recently surrounded by four other Confederate statues on Monument Avenue, all of which had been removed by the time the 2020 Law was enacted, T.A. 409; and
- has been the site of substantial civic unrest, including in the months before the 2020 Law was signed, T.A. 409, 594–95.

Because plaintiffs have identified no other piece of Commonwealth-owned property remotely comparable to the Lee Monument, they have

failed to meet their "burden of establishing that" the decision to address only the Lee Monument "does not rest upon a reasonable basis, and is essentially arbitrary.'" *Gwinn*, 262 Va. at 459 (citing *Holly Hill*, 241 Va. at 431).

iii. Plaintiffs' contrary arguments are without merit. For example, plaintiffs insist that the rational-relationship test set forth in *Gwinn*, *Holly Hill*, and numerous other cases for determining whether a given law is "special" does not apply here because they bring a challenge under the second paragraph of Article IV, § 14. See Taylor Br. 12. But that argument puts the cart before the horse by confusing "the threshold question" of whether a challenged law *is* special legislation, 2 Sutherland Statutory Construction § 40:4 (7th ed.), with the later question of whether a particular piece of special legislation is or is not constitutional. Cf. Taylor Pet. 13 (acknowledging that "[a]ll special legislation does not violate the Constitution").

Plaintiffs' reliance on *Alderson v. County of Alleghany*, 266 Va. 333, 337 (2003), and *City of Portsmouth v. City of Chesapeake*, 205 Va. 259, 263 (1964), see Taylor Br. 11, likewise falls flat. For one thing, both decisions rejected claims that the challenged statutes were

unconstitutional special legislation, see *Alderson*, 266 Va. at 342; *City of Portsmouth*, 205 Va. at 263, which makes them unpromising candidates for the start of an argument that the 2020 Law is such a law. More importantly, there does not appear to have been any dispute in either *City of Portsmouth* or *Alderson* that the challenged laws were special legislation, see Br. of Appellee at *11, *Alderson v. County of Alleghany*, 2003 WL 24303454 (acknowledging that "Chapter 78 is a special act"), and in neither decision did the Court discuss how such determinations are to be made when the issue is contested.[10]

Plaintiffs also cite the second sentence of Article IV, § 15, which states that "[a]ny general law shall be subject to amendment or repeal, but the amendment or partial repeal thereof shall not operate directly

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[10] The 2020 Law is also plainly distinguishable from the laws at issue in *Alderson* and *City of Portsmouth*. Whereas the Court has long recognized that "the charter of [a] city . . . is a special act," *City of Portsmouth*, 205 Va. at 263, plaintiffs identify no decision even suggesting that laws repealing other laws or directing how certain money be spent constitute special legislation. This Court has also repeatedly noted that "[t]he constitutional prohibitions against special laws are directed at economic favoritism," *R.G. Moore Bldg. Corp. v. Committee for the Repeal*, 239 Va. 484, 492 (1990)—a description far more applicable to the locality-specific tax laws at issue in *Alderson* than the General Assembly's decision to repeal its own joint resolution and take action regarding a piece of Commonwealth-owned statuary.

or indirectly to enact, and shall not have the effect of enactment of, a special, private, or local law." Va. Const. art. IV, § 15; see Taylor Br. 16. That provision does not apply here because the 2020 Law did not "amend[] or partial[ly] repeal" any legislation. Rather, it "repeal[ed]" the 1889 Joint Resolution *in its entirety*.

In fact, the provision plaintiffs cite only underscores why their argument is self-defeating. That provision applies *only* to the amendment or partial repeal of "general law[s]." Va. Const. art. IV, § 15, second sentence. And there can be no serious argument that the 2020 Law is a "special" law but the 1889 Joint Resolution (which addresses the same subject and is every bit as specific) is "general."

b. The 2020 Law does not "grant relief"

Plaintiffs' arguments under the Grant Relief Clause also fail for a second and independent reason. The Grant Relief Clause applies *only* to legislation that "grant[s] relief in . . . cases of which the courts or other tribunals may have jurisdiction," Va. Const. art. IV, § 14, para. 2, and the 2020 Law is not such a law.

i. Nothing in the 2020 Law purports to "grant relief" in this case or any other. The Commonwealth is not the plaintiff in either of

these cases, and it did not request (or obtain) any form of "relief" from the circuit court. That should be the end of the matter.

ii. Plaintiffs do not assert this case is covered by the text of the Grant Relief Clause. Instead, plaintiffs focus on "[t]he ultimate benefit" that the 2020 Law "is intended to provide," insisting that ruling against them would "frustrate [the Grant Relief Clause's] obvious purpose by converting a substantive limitation on legislative authority into an easily circumvented technical requirement." Taylor Br. 17. That argument has two fatal problems.

First, plaintiffs' decision to ignore the actual language of the Grant Relief Clause in favor of its perceived "purpose," Taylor Br. 17, violates the longstanding principle that constitutional interpretation starts with the text and that "when the text . . . is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." *Town of South Hill v. Allen*, 177 Va. 154, 164 (1941). Indeed, just weeks ago this Court rejected a similar argument in a different case involving Confederate monuments, emphasizing that courts must focus on "the actual words used" rather than "conception[s] of the intent" that motivated a given provision. See

City of Charlottesville v. Payne, No. 200790, 2021 WL 1220822, at *8 (Va. Apr. 1, 2021) (*Payne*).[11]

Second, plaintiffs' arguments repeatedly violate the maxim that constitutional provisions—like statutes—must be "read as a whole." *Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 338 (2007). To hear plaintiffs tell it, the Grant Relief Clause establishes a sweeping rule "prevent[ing] the legislature from interfering to affect the outcome in pending litigation on a case-by-case basis." Taylor Br. 17. Not only is that not what the Grant Relief Clause says—it also would create oddities throughout Article IV, § 14.

Plaintiffs' entire argument rests on two general words lodged near the end of a single 55-word sentence. The first portion of the Grant Relief Clause instructs the General Assembly to "confer on the courts power" to do three things the legislature had previously sometimes done itself: "grant divorces, change the names of persons and direct the sales of estates belonging to infants and other persons under legal

[11] As Professor Howard's amicus brief explains, plaintiffs have misread two sentences in his two-volume treatise as supporting their interpretation of the Grant Relief Clause. See Taylor Br. 17, 24–25 (quoting Professor Howard).

disabilities." Va. Const. art. IV, § 14, para. 2; see, *e.g.*, 1819-20 Va. Acts ch. 131 ("An act divorcing Barbara W. Pettus from Hugh M. Pettus her husband"). The language that follows confirms the exclusivity of the courts' role, stating that the General Assembly "shall not, by special legislation, grant relief in these or other cases of which the courts or other tribunals may have jurisdiction." Va. Const. art. IV, § 14, para. 2.

The decision to limit the General Assembly's power in this matter makes perfect sense. As this Court has explained, a major reason for the Constitution's various prohibitions on special laws "was to correct the perception that the General Assembly, in the nineteenth century, devoted an excessive amount of its time to the furtherance of private interests." *Bendersen Dev. Co., Inc. v. Sciortino*, 236 Va. 136, 147 (1988). But plaintiffs have identified no evidence that the inclusion of the words "or other" was intended to impose a sweeping additional limit on the General Assembly's powers that goes far beyond the types of limits imposed by the rest of the Grant Relief Clause—which forbid the General Assembly from *actually* "grant[ing]" divorces, "chang[ing]" peoples' names, or "direct[ing]" the sales of specific estates. Va. Const. art. IV, § 14, para. 2. And plaintiffs' attempt to extrapolate such a rule

from the "vague terms" of an "ancillary provision[]" ignores the maxim that drafters rarely "hide elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

The problems with plaintiffs' argument only continue from there. Were this Court to adopt plaintiffs' atextual reading of the Grant Relief Clause, it would render a nearby provision—Article IV, § 14, para. 4(3) (Paragraph 4(3))—largely duplicative, thus violating the principle that "[t]he constitution must be viewed and construed as a whole, and every section, phrase and word given effect and harmonized if possible." *Carlisle v. Hassan*, 199 Va. 771, 776 (1958).

Unlike the Grant Relief Clause, the text of Paragraph 4(3) expressly limits the General Assembly's authority to indirectly influence pending cases. In particular, it states that the legislature "shall not enact any local, special, or private law":

> Regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before the courts or other tribunals, or providing or changing the methods of collecting debts or enforcing judgments or prescribing the effect of judicial sales of real estate.

Va. Const. art. IV, § 14, para. 4(3).

Although plaintiffs never mention Paragraph 4(3), its existence

confirms they have misread the Grant Relief Clause. If the Grant Relief Clause *already* prevented the General Assembly from "interfering to affect the outcome in pending litigation on a case-by-case basis," Taylor Br. 17, why would the same constitutional provision then go on to *specifically* forbid it from "[r]egulating the practice in" courts or altering "the rules of evidence in any judicial proceeding or inquiry before the courts or other tribunals"? Va. Const. art. IV, § 14, para. 4(3); see *Commonwealth v. Hines*, 221 Va. 626, 628–30 (1980) (law creating a rebuttable presumption that hypertension was an "occupational disease" implicated Paragraph 4(3) by "shifting the evidentiary burden from the claimant-plaintiff to the employer-insurer-defendants"). In contrast, the two provisions fit together like hand and glove once it is recognized that the Grant Relief Clause addresses only the ultimate act of "grant[ing] relief" whereas Paragraph 4(3) imposes additional limits on the General Assembly's ability to regulate cases before judgment.

c. The 2020 Law does not violate the separation of powers

Like the United States Constitution, the Constitution of Virginia provides that courts have exclusive authority "to say what the law is" and how it applies in particular cases. *Fitzgerald v. Loudoun Cty.*

Sheriff's Off., 289 Va. 499, 505 (2015) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). At the same time, however, it is emphatically the province of the General Assembly "to say what the law *shall be*," *Commonwealth v. Tate*, 3 Leigh 802, 809 (Va. 1831) (emphasis added), and "[t]he judiciary is not to substitute its own judgment in place of the General Assembly's," *Payne*, 2021 WL 1220822 at *8. Thus, as the circuit court recognized, the General Assembly is always free to "amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." T.A. 414 (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016)).

That is what happened here. The General Assembly has "amend[ed] the law" by: (1) repealing the 1889 Joint Resolution; (2) confirming the Governor's authority over the Lee Monument; and (3) directing a state agency to use appropriated funds to comply with the Governor's instructions. *Bank Markazi*, 136 S. Ct. at 1713; accord Taylor Br. 25–26 (describing the 2020 Law as "*changing the law* for the Lee Monument" (emphasis added)). For that reason, the circuit court correctly rejected plaintiffs' claims that the General Assembly has "unconstitutionally interfer[ed] with this litigation." T.A. 414; accord

R.G. Moore Bldg. Corp., 239 Va. at 492 (legislation did not "grant relief" under Article IV, § 14 merely because it affected matters over which circuit courts have jurisdiction).

Plaintiffs also misread the circuit court's opinion. Plaintiffs insist that the court "understood" the 2020 Law as "directing" it "to grant" judgment in favor of the Commonwealth, "which the court proceeded to do." Taylor Br. 17; see *id.* at 26 (same). That is not what the circuit court said or did. Instead, the court considered various pieces of evidence of changing public policy—including but not limited to the General Assembly's recent passage of bills that ultimately became the 2020 Law—and concluded "that the Commonwealth ha[d] carried its burden of proving by clear and certain evidence that enforcement of the restrictive covenants in the Deeds of 1887 and 1890 would be in violation of the current public policy of the Commonwealth." T.A. 415. Far from understanding the 2020 Law as usurping its authority "to say what the law is" in this case, *Marbury*, 5 U.S. at 177, the circuit court simply (and appropriately) understood the 2020 Law as particularly "significant evidence" on that question. T.A. 412.

3. The 2020 Law does not violate the Contracts Clauses

Article I, § 10 of the Federal Constitution and Article I, § 11 of the Virginia Constitution forbid "law[s] impairing the obligation of contracts." Plaintiffs insist that the 2020 Law violates these provisions and thus "cannot establish the public policy of the Commonwealth." Taylor Br. 26 (formatting omitted). There are two problems with that claim: it is forfeited and it is wrong.

a. As plaintiffs acknowledge, the circuit court never considered whether "the Budget Amendment violated the Contract Clause." Taylor Br. 26. The reason is not hard to fathom: plaintiffs made no such argument below, and their "failure to obtain a ruling by the circuit court on this matter means" they have "waived the issue on appeal." *Morva v. Commonwealth*, 278 Va. 329, 340 (2009) (citing Va. S. Ct. R. 5:25).[12]

Plaintiffs' complaint neither mentions nor seeks any relief under the federal or state Contracts Clause. See T.A. 1–9. Indeed, plaintiffs dismissed their first suit after it was removed to federal court, and, at

[12] Although the brief in opposition did not raise this waiver issue, this Court "ha[s] never before held that an appellee waives any argument, either procedural or on the merits, by failing to . . . assert it in response to a petition." *Meyers v. Commonwealth*, No. 150962, 2017 WL 123922 at *4 (Va. Jan. 12, 2017) (citation omitted).

the very first hearing in their third (and final suit), plaintiffs' counsel specifically stated: "There . . . [n]ever has been a federal claim in this case."[13] Now, on appeal, plaintiffs assert that they preserved the issue in two places—the memorandum in support of their motion for summary judgment and their oral argument in opposition to the Commonwealth's renewed motion to strike. See Taylor Br. 26 (citing T.A. 226, 656–67). Neither is sufficient.

The cursory argument that plaintiffs made in their summary judgment briefing was not that the 2020 Law would violate the Contracts Clause. Instead, plaintiffs asserted that "both the U.S. and Virginia Constitutions include public policies supporting the enforcement of the deed covenants," T.A. 225 (formatting omitted), and that the Contracts Clauses "reflect a strong policy at both the national

[13] The statement quoted in the text was made during an on-the-record hearing on July 23, 2020. Although a court reporter was present and a transcript prepared, plaintiffs neglected to file that transcript as part of the circuit court record. But see Va. S. Ct. R. 5:11(a)(1) (stating that "[i]t is the obligation of the petitioner/appellant to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error," and when an "appellant fails to" do so "any assignments of error affected by the omission will not be considered"). Counsel for appellees would be happy to file a copy of that transcript with the circuit court and/or this Court as the Court directs.

and state levels in favor of the enforceability of contractual agreements," T.A. 226. Plaintiffs' passing arguments at the hearing were even less specific, stating only that "[t]he Commonwealth can't simply enter into a contract and then later on decide we're going to abrogate that contract unless there's specific bases for that." T.A. 656–57. That simply is not enough to preserve a constitutional objection to a duly enacted law of the General Assembly, particularly in the absence of a ruling from the circuit court. See *Judicial Inquiry & Rev. Comm'n v. Bumgardner*, 293 Va. 588, 605 (2017) (emphasizing "that a fundamental tenet of the well-established doctrine of judicial restraint is that unnecessary adjudication of a constitutional issue should be avoided" (citation omitted)).

b. Plaintiffs' Contracts Clause claims also fail on the merits for at least two reasons.

First, as their name implies and their terms make clear, the Contracts Clauses restrict the "impair[ment]" of "contracts." U.S. Const. art. I, § 10; Va. Const. art. I, § 11. But contracts impose personal obligations on specific parties, and there is not—and never has been—any contract between the Commonwealth and any of the *Taylor*

plaintiffs. See *NC Fin. Sols. of Utah v. Commonwealth ex rel. Herring*, 854 S.E.2d 642, 646 (Va. 2021) ("It goes without saying that a contract cannot bind a nonparty." (citation omitted)).

Instead, plaintiffs assert that the 2020 Law is invalid because it "impair[s] . . . the obligation of . . . restrictive covenants." Taylor Br. 29. But restrictive covenants are created by *deeds* and governed by the law of *property*, and plaintiffs cite no decision from any court that has ever held that legislation terminating a restrictive covenant violated the Contracts Clauses. Cf. *Meagher v. Appalachian Elec. Power Co.*, 195 Va. 138, 145 (1953) (stating that "restrictive covenants create a valuable right in *property*" whose termination may be subject to scrutiny under the Takings Clause (emphasis added)). Rather, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the U.S. Supreme Court held that judicial enforcement of racially restrictive covenants violated the Equal Protection Clause without even mentioning the Contracts Clause.

The only binding decision that plaintiffs claim supports their view—*Edwards v. Kearzey*, 96 U.S. 595 (1877)—involved neither a restrictive covenant nor any obligation arising from a deed. Instead, *Edwards* held that a provision of the North Carolina Constitution

violated the federal Contracts Clause by shielding certain real and personal property from execution to satisfy certain "debts" that had been "*contracted* for" before the provision took effect. *Edwards*, 96 U.S. at 598 (emphasis added); see *id.* at 599 (framing issue as whether the new provision "was valid as regards *contracts* made before the adoption of the Constitution of 1868" (emphasis added)).[14]

Second, even if plaintiffs had identified a contractual right and the 2020 Law were subject to scrutiny under the Contracts Clause, it would easily pass. "[I]t is well-settled that a contract . . . must be considered as containing an implied condition that it is subject to the exercise of the State's regulatory police power," *Haughton v. Lankford*, 189 Va. 183, 190 (1949), including "the reserved power of the state to amend the law or enact additional laws for the public welfare," *Smith v.*

[14] Even the two out-of-state decisions that plaintiffs cite simply assumed that interests arising from a deed can implicate the Contracts Clause before ultimately concluding that the challenged laws satisfied any such scrutiny. See *Severns v. Union Pac. R.R. Co.*, 125 Cal. Rptr. 2d 100, 114 (Cal. App. 2002) (holding that "the Marketable Record Title Act does not violate the contract clause of either the state or federal Constitution"); *Overlook Farms Home Ass'n, Inc. v. Alternative Living Servs.*, 422 N.W.2d 131, 132, 136 (Wis. App. 1988) (rejecting constitutional challenge to law "authoriz[ing] group homes in residential neighborhoods despite . . . private restrictive covenants").

Commonwealth, 286 Va. 52, 58 (2013). That is precisely what happened here. The General Assembly has enacted an additional law specifically authorizing and directing the Lee statue's removal—a condition to which any purported "contract" would necessarily be subject. *Id.*

In contrast, in plaintiffs' view, once the Commonwealth accepted the Lee Monument in its current location in 1890, it forever forfeited its sovereign authority to reconsider that decision through legislation or other means. This Court has already rejected that argument, explaining that "[the] sovereign power of the government to protect the general welfare of the people of the State is paramount to any rights which may be acquired by individuals by virtue of . . . contracts." *Haughton*, 189 Va. at 190. Indeed, under the Federal Constitution, "a State is *without power* to enter into binding contracts not to exercise its police power in the future." *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 n.20 (1977) (emphasis added); see pp. 54–56, *infra*.[15]

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[15] The Court should ignore plaintiffs' late-breaking suggestion that, if the alleged covenants are unenforceable, "Lee Circle and Monument still belong to the grantors." Taylor Br. 21, 42 n.6. Neither complaint requests that form of relief, T.A. 8; G.A. 6, nor has any plaintiff assigned error related to a claimed reversionary interest, as required under Rule 5:17(c)(1)(i). See G.R. 418 (disclaiming any such

4. The 2020 Law does not violate the constitutional provisions regarding historic preservation

Plaintiffs also insist that termination of any restrictive covenant would be contrary to the public policy favoring historic preservation set forth in Article XI, § 1 of the Constitution of Virginia. As plaintiffs acknowledge, however, see Taylor Br. 34, this Court has already held that Article XI, § 1 "is not self-executing" and that the numerous questions raised by its broad and open-ended text "beg statutory definition," including whether "the policy of conserving historical sites [is] absolute," and, if not, "what facts or circumstances justify an exception." *Robb v. Shockoe Slip Found.*, 228 Va. 678, 682–83 (1985). And to the extent that the *Taylor* plaintiffs suggest that the 2020 Law conflicts with other statutes involving historic preservation, see Taylor Br. 34–35, that argument is answered by the principle that "the specific controls the general," particularly where, as here, "there is no indication that the General Assembly clearly intended the general to nullify the specific." *Crawford v. Haddock*, 270 Va. 524, 530 (2005).

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interest); G.R. 76–80 (explaining why any such claim would lack merit). For that reason, the Court's recent decision in *Canova Land & Inv. Co. v. Lynn*, Record No. 200476 (Apr. 15, 2021), is not on point because that case involved a "reverter clause." Slip. op. at 2.

II. Plaintiffs' claims also failed before the 2020 Law

Because the 2020 Law defeats all of plaintiffs' claims, there is no need to consider whether any of those claims were valid before that law was enacted. Should the Court reach that issue, however, it should affirm for one of any number of reasons. See note 8, *supra* (noting that an appellee may defend its judgment on any ground supported by the record). Plaintiffs' deed-based claims always failed under well-settled principles of both the common law of property and federal constitutional law. See Part II(A), *infra*. And the *Taylor* plaintiffs' non-deed-based claims fail because plaintiffs neither pleaded nor proved standing, nor have they identified a valid private right of action. See Part II(B), *infra*.

A. Deed-based claims

The nature of plaintiffs' real property claim is so extraordinary it bears repeating. According to plaintiffs, the person who held the office of Governor in 1890 was not merely authorized to accept a gift of land, a statue, and a pedestal from a nominally private organization of which that same Governor was also, simultaneously, the president. Rather, plaintiffs insist that, in doing so, that long-dead Governor saddled the Commonwealth with a never-ending obligation that neither the Governor's successors nor the General Assembly may change. See

Taylor Br. 21 (analogizing the General Assembly of 1890 to a private company's "board of directors" and arguing that the General Assembly of 2021 "cannot withdraw its authorization"). That assertion is profoundly anti-democratic. It is also wrong under both traditional principles of property law, see Part II(A)(1) & (3), *infra*, and those applicable to government decision-making and government speech in particular, see Part II(A)(2).

1. The 1890 Deed neither created nor incorporated a restrictive covenant mandating the perpetual display of the Lee statue in its present location

The right plaintiffs claim is unknown to the common law. English courts had "a highly skeptical view of restrictions running with the land that limited the free use of property." *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 274 (2016). Although the types of permissible restrictions have increased over time, see *United States v. Blackman*, 270 Va. 68, 75–78 (2005), this Court has continued to reaffirm that "the law will not permit a land-owner to create easements of every novel character and attach them to the soil," *Tvardek*, 291 Va. at 275 (quoting *Tardy v. Creasy*, 81 Va. 553, 557 (1886)).

a. The sort of restriction plaintiffs assert is not only novel—it

appears to be literally unprecedented. In this Court's longstanding terminology, plaintiffs claim to have an "easement"—"a privilege" that allows one party to require a property owner "to suffer, or refrain from doing something on his own tenement for the advantage of" the benefited party. *Stevenson v. Wallace*, 68 Va. 77, 87 (1876). But plaintiffs do not seek to enforce any kind of right previously recognized by this Court, which traditionally involved things like "regulat[ing] the style and costs of buildings to be erected on a tract that is being sold in parcels for building lots," "restrict[ing] their location to certain distances from the street," and "prevent[ing] buildings in a locality from being put up or used for any other than residential purposes." *Cheatham v. Taylor*, 148 Va. 26, 38 (1927).

Indeed, it is difficult even to attach a name to the type of property right plaintiffs claim to possess. It is not a traditional affirmative easement because plaintiffs do not assert an entitlement "to travel physically upon the servient tract, which is the feature common to *all* affirmative easements." *Blackman*, 270 Va. at 76 (emphasis added). But neither is it a traditional negative easement—"also known as [a] servitude[]"—because plaintiffs seek far more than a mere "veto power"

over a particular "use of the servient tract by its owner." *Id.*; accord *Easement*, Black's Law Dictionary (11th ed. 2019) ("Negative easements . . . consist essentially of the right to prevent something being done; examples are the right to the flow of air through defined aperture, the right to receive light for a building, the right to the support of a building, and (possibly) the right to require a neighbouring landowner to repair fences."). Instead, plaintiffs claim that they possess something that could perhaps most accurately (but paradoxically) be called an "affirmative negative easement": a right to compel the government to use land that it owns in one single way in perpetuity. Plaintiffs identify no case in which such a purported agreement has ever been enforced against any Virginia property owner—much less against the sovereign.

b. This Court need not decide, however, whether this sort of novel right could ever exist. "[C]ourts of equity" will only enforce restrictions on an owner's free use of land "where the intention of the parties is clear and the restrictions are reasonable." *Scott v. Walker*, 274 Va. 209, 212–13 (2007). Neither requirement is satisfied here.

i. "Virginia courts have consistently applied the principle of strict construction to restrictive covenants," *Tvardek*, 291 Va. at 276,

which will only be enforced if the words "carry a certain meaning by definite and necessary implication," *Shepherd v. Conde*, 293 Va. 274, 288 (2017). "Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property." *Anderson v. Lake Arrowhead Civic Ass'n, Inc.*, 253 Va. 264, 269–70 (1997).

Nothing in the 1890 Deed suggested that the Commonwealth was taking title subject to a sweeping restriction that could be judicially enforced by private parties. Rather, the 1890 Deed stated that the Commonwealth executed the deed "in token of her acceptance of the gift and of her guarantee that she will hold said Statue and pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted and that she will faithfully guard it and affectionately protect it." T.A. 15. By presenting no evidence on this point at trial, plaintiffs failed to establish—based on historical evidence, customary language use, or real property law—that those precatory (and inherently ambiguous) words indefinitely bind the Commonwealth "by definite and necessary implication." *Shepherd*, 293 Va. at 288.

ii. Regardless of the clarity of the words, moreover, "courts of equity" will only enforce restrictions on the use of land where "the

restrictions are reasonable." *Scott*, 274 Va. at 212–13; see *Stevenson v. Spivey*, 132 Va. 115, 119 (1922) (same). There too, plaintiffs fall short.

Plaintiffs do not seek to forbid certain categories of conduct ("any building taller than five stories" or "commercial uses") or even to require that the property be used for a single general purpose ("as a public park"). Instead, plaintiffs insist that they have a legally enforceable right to compel a property owner to maintain a *specific* fixture in the *same* location *forever*. That sort of dramatic restriction on an owner's "free use of property," *Tvardek*, 291 Va. at 274, can hardly be deemed "reasonable," *Scott*, 274 Va. at 213, and plaintiffs cite no authority for the proposition that it is.[16]

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[16] The *Taylor* plaintiffs' suggestion that the Commonwealth could simply "convey the Lee Circle and the Monument to another owner," Taylor Br. 46, is belied by the complaint, which seeks an injunction requiring it to "hold said Statue and pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted" and to "faithfully guard [the Monument] and affectionally protect it." T.A. 6–7, 8. At any rate, one reason for the law's skepticism of restrictive covenants is because of their effect on alienability, and the market for a small plot in the middle of a traffic circle that must contain a massive monument to the Lost Cause in perpetuity would be limited at best. And plaintiffs' (entirely new) assertion that the Commonwealth could move the Lee statue by "paying the beneficiaries to surrender their rights, or by condemnation proceedings," Taylor Br. 47, is nothing but a bootstrap because it simply assumes that plaintiffs have a legally protected property right in the first place.

2. The officials of the past had no ability to preclude the Commonwealth of today from making a different choice about a matter of core government speech

As just explained, the right plaintiffs assert would not bind even a private landowner. But the Commonwealth is not just any landowner, and the display of government-owned monuments on government-owned property involves matters of core government speech. Accordingly, regardless of whether the sort of right that plaintiffs assert would be valid against a private party, it cannot prevent the Commonwealth of today from choosing a different course.

a. Under the Federal Constitution, "a state government may not contract away" either "'the police power of [the] State'" or "'an essential attribute of its sovereignty.'" *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (plurality opinion) (quoting *Stone v. Mississippi*, 101 U.S. 814, 817 (1880), and *United States Trust*, 431 U.S. at 23)). For that reason, "the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable *even by express grant*." *Atlantic Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548,

557 (1914) (emphasis added).[17]

In Virginia, that principle is expressed by the familiar maxim that "except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.'" *FFW Enters. v. Fairfax Cty.*, 280 Va. 583, 593 (2010) (quoting *Harrison v. Day*, 201 Va. 386, 396 (1959)). For that reason, neither a joint resolution passed by a previous General Assembly nor a deed executed by a long-dead Governor can preclude a future General Assembly from granting a future Governor the authority to relocate a piece of Commonwealth-owned property if the Governor concludes that doing so is necessary for the "health, safety, good order, comfort, or general welfare of the community." *Atlantic Coast Line R.R. Co.*, 232 U.S. at 558; accord 1 William Blackstone, Commentaries *90 (stating that "Acts of parliament derogatory from the power of subsequent parliaments bind

[17] As plaintiffs point out, *Winstar* held that the Federal Government was bound by the contracts into which it had entered. See *Winstar*, 518 U.S. at 910 (plurality opinion). Because that case involved only a request for damages, however, there was no issue of preventing the sovereign from adopting a new policy—the only issue was whether it would have to pay damages for having done so. Here, in contrast, neither set of plaintiffs has requested damages, but both seek an injunction. See T.A. 8; G.A.6.

not" because to conclude otherwise would render "the prior legislature" the "superior" of the current one).

b. All of that is doubly true here because the Lee Monument is not simply a piece of government-owned property: it is also a quintessential example of core government speech and the government always remains free to choose a different message.

It cannot seriously be disputed that "privately financed and donated monuments that the government accepts and displays to the public on government land" "speak for the government" by "convey[ing] some [government-sanctioned] thought or instill[ing] some feeling in those who see the structure." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–71 (2009) (*Pleasant Grove*). Like private parties, moreover, "[a] government entity has the right to speak for itself" and "say what it wishes," *id.* at 467, because "[i]t is the very business of government to favor and disfavor points of view," *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment).

Taken together, these observations lead to a straightforward conclusion: private citizens may not force the government to display in perpetuity on public land a monument that no longer represents "views

[the government] wants to express." *Pleasant Grove*, 555 U.S. at 468. As relevant here, the U.S. Supreme Court has specifically held that States cannot be compelled to create and sell a specialty license plate featuring the Confederate battle flag, see *Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. 200, 207–20 (2015), or display a large stone monument on government-owned real property, see *Pleasant Grove*, 555 U.S. at 464.

So too here. Like millions of others, the Governor and the General Assembly "disfavor" the glorification of the Lost Cause and the minimization of the horrors of slavery—precisely the "point of view" they believe is expressed by the Lee Monument. *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment). For that reason, no individual Virginian—whether living Monument Avenue residents or a descendant of long-dead land grantors—may force the Commonwealth of 2021 to retain the Lee Monument in its present location in perpetuity. See *Pleasant Grove*, 555 U.S. at 472 (emphasizing that monuments on government-owned land "play an important role in defining the identity that" the government "projects to its own residents and to the outside world"); accord T.A. 599 (noting that "[t]he Lee monument remains a

powerful symbol of a particular version of the history of Richmond and a particular version of our past").[18]

Two recent examples are especially telling. Although the General Assembly voted to prohibit license plates depicting the Confederate battle flag in 1999, see 1999 Va. Acts ch. 902, the Commonwealth was required to continue selling them for another 16 years because lower federal courts erroneously concluded that the First Amendment required such a result. See *Sons of Confederate Veterans v. Holcomb*, 129 F. Supp. 2d 941 (W.D. Va. 2001), aff'd, 288 F.3d 610 (4th Cir. 2002). And although the Charlottesville City Council voted to remove its own Lee statue in February 2017—six months *before* the now infamous Unite the Right rally—the City was wrongfully prevented from doing so for more than four years because a circuit court erroneously read former Code § 15.2-1812 as granting a handful of private citizens a veto over that decision. *Payne*, 2021 WL 1220822 at *1, *9.

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[18] Plaintiffs' assertions that they do not understand the Lee Monument to send such a message are irrelevant. Monuments may mean different things to different people and "[t]he 'message' conveyed by a monument may change over time." *Pleasant Grove*, 555 U.S. at 477. What matters is that where—as here—the government is the speaker, the government "is entitled to say what *it* wishes." *Id.* at 467 (citation omitted) (emphasis added).

The same is true here. The Governor and the General Assembly have decided that the Lee statue should be moved. And here, like in *Walker* and *Payne*, plaintiffs seek to use the judicial branch to force the Commonwealth of today to continue honoring Confederate icons where the people's representatives have decided otherwise. Such a result undermines "political accountability" by making it difficult for citizens who are pleased or displeased by the continued presence of the Lee Monument to know "who to credit or blame." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018).

3. Any conceivable covenant created by the 1890 Deed would have been defeated by changed circumstances and be void as against current public policy

It is well-settled that even a previously enforceable restriction on the use of property can become unenforceable because of changed circumstances or because it violates public policy. See *Duvall v. Ford Leasing Dev. Corp.*, 220 Va. 36, 45 (1979) ("Equity does recognize that a restriction, reasonable when imposed, may become unreasonable and, therefore, unenforceable because of a change of conditions."); *Hercules*, 196 Va. at 939 (public policy). Both conditions are present here. Accordingly, even if plaintiffs' predecessors in interest would have had

the ability to block the removal of the Lee statue in 1890, plaintiffs have no such power today.

a. To say that circumstances and Virginia public policy have changed since 1890 is, to put it mildly, a profound understatement. Over the last 130 years, the principles derived from the Reconstruction Amendments have led to the invalidation of many policies that were closely related to—and emerged contemporaneously with—the proliferation of Confederate monuments, including the Lee Monument.

In 1917, the U.S. Supreme Court held that an ordinance barring Black Americans from owning property in certain areas violated the Fourteenth Amendment, see *Buchanan v. Warley*, 245 U.S. 60, 82 (1917), which prompted this Court to overrule a previous decision upholding Richmond's residential segregation ordinance, see *Irvine v. City of Clifton Forge*, 124 Va. 781 (1918). In 1948, the Court unanimously ruled that judicial enforcement of racially restrictive covenants—like those advertised by developers near Monument Avenue—violate the Equal Protection Clause. See *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948). In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court unanimously struck down laws requiring segregation

of children in public schools—a policy mandated under Virginia's 1902 Constitution. See Va. Const. art. IX, § 140 (1902). In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court unanimously invalidated Virginia's anti-miscegenation law because it was "designed to maintain White Supremacy" and justified by "no legitimate overriding purpose independent of invidious racial discrimination." *Id.* at 11. And in 1971, the citizens of the Commonwealth repudiated the 1902 Constitution and replaced it with one that (among other things) expressly forbids governmental discrimination based on race. See Va. Const. art. I, § 11.

As the Commonwealth established at trial—and the circuit court specifically found—the Lee Monument is cut from the same cloth as and is inextricable from the racially restrictive covenants, segregation ordinances, and anti-miscegenation laws whose constitutional infirmity is beyond dispute today. As Dr. Ayers explained, the Lee Monument was erected as a symbol of defiance to Reconstruction, declaring that even though the Confederacy had been defeated in the Civil War, Lost Cause sympathizers were rapidly reclaiming their hold on power and would use that power to maintain their dominance. T.A. 501, 513–17. To Black Virginians, the Lee statue conveyed a message and a warning

that reverberates today: "be quiet" and abide by racist laws and policies enacted to disempower and disenfranchise people based solely on the color of their skin. G.A. 255. Like other vestiges of the Jim Crow era that have already been swept away, the Lee Monument's message of white supremacy cannot be reconciled with the "perfect equality of civil rights" promised by the Reconstruction Amendments. *Ex Parte Virginia*, 100 U.S. 339, 345 (1879).

b. The same conclusion holds if one artificially limits the analysis to commemorations of Robert E. Lee or the Confederacy more generally. The General Assembly has not simply repealed the 1889 Joint Resolution and designated funds for the Lee Monument's removal. Rather, the General Assembly has also taken numerous other actions over the last several years that reveal a public policy inconsistent with perpetual enforcement of a covenant to maintain a divisive Confederate monument on government-owned property at governmental expense.

In February 2019, the General Assembly amended the Code of Virginia to "create[] a process for [a] locality to remove war memorials situated on the locality's publicly owned property" and specifically eliminated the private right of action that formerly allowed individuals

to try to block such efforts. *Stoney v. Anonymous*, No. 200901, 2020 WL 5094625, at *3 (Va. Aug. 26, 2020) (citing 2020 Va. Acts ch. 1100). This change reflects two policy choices that are relevant here: first, that localities (under whose jurisdiction the vast majority of Confederate monuments fall) should not be required to expend money to maintain monuments that send messages they no longer wish to express, and, second, that scarce judicial resources should not be expended litigating private efforts to halt removal of Confederate monuments.

The General Assembly has taken other steps as well. Just last year, it eliminated a state holiday honoring Lee, see 2020 Va. Acts ch. 418, and added one memorializing Juneteenth "to commemorate the announcement of the abolition of slavery . . . and to recognize the significant roles and many contributions of African Americans to the Commonwealth and the nation," 2020 Spec. Sess. I, Va. Acts ch. 5. In this way too, the General Assembly made clear it no longer wishes to honor those who sought to preserve and expand the reach of slavery; instead, the Commonwealth of today commemorates the end of that disgraceful practice and celebrates the contributions of those who endured (and continue to endure) its painful legacy.

The legislature has also taken decisive action as to Confederate icons under its direct control. The Speaker of the House of Delegates exercised her authority over the Capitol building to remove a statue of Lee and busts of other Confederates from the Old House Chamber. T.A. 409. And the entire General Assembly created a commission that voted unanimously to replace a different Lee statue that had represented Virginia in the United States Capitol for 85 years. T.A. 409.[19]

c. Regardless of the motivations behind each of these individual events, together they establish a single, consistent point: permitting a handful of private landowners to use the courts to force the sovereign to continue displaying a massive statue of Robert E. Lee in a place of honor on Commonwealth-owned property would be *wildly* out of step with current public policy. And, for similar reasons, even if there had been an enforceable agreement in the past, changed circumstances

[19] The General Assembly's actions are consistent with those of other actors as well. For example, Congress recently voted to rename three military bases in Virginia, including one honoring Lee. See National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 370(a) (directing "remov[al]" of "all names . . . that honor or commemorate . . . any person who served voluntarily with the Confederate States of America"). The City of Richmond has likewise removed the other Confederate statues that previously accompanied the Lee statue on Monument Avenue. T.A. 409.

have so "destroyed[ed] the essential objects and purposes of the agreement," *River Heights Assocs. Ltd. P'ship v. Batten*, 267 Va. 262, 274 (2004), that its continued enforcement would be "inequitable and oppressive," *Ault v. Shipley*, 189 Va. 69, 77 (1949).

4. Gregory's deed-based claims fail for numerous additional reasons as well

Whether the circuit court correctly sustained the Commonwealth's demurrer raises issues of law that this Court reviews de novo. See *Wilburn v. Mangano*, 851 S.E.2d 474, 476 (Va. 2020). As the circuit court correctly held, Gregory's deed-based claims fail for even more reasons than those of the *Taylor* plaintiffs.

a. As this Court has explained, all easements are "classified as either 'appurtenant' or 'in gross,'" with the former possessing "both a dominant and a servient tract" and the latter being a burden "imposed upon land with the benefit thereof running to an individual." *Blackman*, 270 Va. at 77. Because Gregory claims no ownership interest in a dominant tract, the right he asserts must, necessarily, be an easement in gross. And because it is well-settled—both when the land was transferred to the Commonwealth and today—"that an easement is 'never presumed to be in gross when it [can] fairly be construed to be

appurtenant to land,'" *id.* (quoting *French v. Williams*, 82 Va. 462, 468 (1886)), the circuit court correctly held that any conceivable property right created by the 1887 and 1890 deeds would have been an easement appurtenant rather than an easement in gross. G.A. 117–19.

b. That straightforward conclusion defeats all of Gregory's assignments of error. The third fails because it incorrectly asserts that Gregory (like all other heirs of the original donors, presumably) has an easement in gross while the *Taylor* plaintiffs *simultaneously* have an easement appurtenant. See Gregory Br. 10–11. Gregory cites no decision where any court has ever recognized such dual rights restricting an owner's free use of real property, which would be contrary to the longstanding maxims that "easements in gross were strongly disfavored" and "that an easement is 'never presumed to be in gross when it [can] fairly be construed to be appurtenant to land.'" *Blackman*, 270 Va. at 77 (quoting *French*, 82 Va. at 468).

The fact that there was never an easement in gross also defeats Gregory's other assignments of error. The second fails because it is premised on the notion that Gregory's great-grandparents possessed rights in their *personal* capacities that could be inherited as opposed to

rights in their *property-owning* capacity that would only be transferred (if at all) to those who later acquired the relevant property. See Gregory Br. 8–9. And Gregory's first assignment of error fails because if there is no easement in gross, there is no principle of "substantive law" or "historic common-law principle[]" that allows him to seek an injunction to enforce a purported covenant of which he is not a beneficiary. *Cherrie v. Virginia Health Servs.*, 292 Va. 309, 314–15 (2016).

Gregory's reliance on this Court's unpublished order in *Marrs v. Northam*, Record No. 200573 (June 17, 2020), see Gregory Br. 7–8, fails because his reading of that order is incorrect. Unlike Gregory, the petitioner in *Marrs* alleged numerous causes of action under the Virginia Constitution. *Marrs* Order at 1–3. This Court did not reach the merits of those claims because it found that the petitioner lacked standing to bring them. *Id.* at 4–8. In short, Gregory's assignments of error fail both for the reasons the *Taylor* plaintiffs' claims fail and for additional reasons unique to Gregory.

B. Non-deed claims

Because each of Gregory's three assignments of error turn on rights allegedly conferred by the 1887 and 1890 deeds, the Court need

go no further to affirm the circuit court's dismissal of his case. In contrast, the *Taylor* plaintiffs continue to assert that the Governor's removal of the Lee statue would violate the 1889 Joint Resolution, the separation of powers, or both. In addition to being defeated by the 2020 Law, see Part I, *supra*, those claims also fail for lack of standing and lack of any private right of action.

1. Lack of standing

The *Taylor* plaintiffs have only ever asserted one theory of standing to support their non-deed claims: that "the aesthetic and sentimental values of the area in which they live will be lessened" if the Lee statue is removed. T.A. 350–51.[20] At trial, however, plaintiffs offered no evidence on this point—indeed, plaintiffs called no witnesses whatsoever during their case in chief. See T.A. 458 ("THE COURT: Do you have witnesses? Do you have live witnesses? MR. McSWEENEY: No."). And even if plaintiffs had presented such evidence, the type of

[20] The Commonwealth has not challenged the standing of three of the *Taylor* plaintiffs to assert their deed-based claim. But standing to raise a claim based on an alleged property right does not confer standing to allege violations of the Constitution or statutes. See *Park v. Northam*, No. 200767, 2020 WL 5094626, at *4–6 (Va. Aug. 24, 2020) (separately evaluating standing to assert each claim).

generalized harm that they asserted—but failed to prove—is not a "unique injur[y]" that is "separate from the public at large." *Lafferty v. School Bd. of Fairfax Cty.*, 293 Va. 354, 363–64 (2017); accord *Park*, 2020 WL 5094626 at *4 ("bald" assertions "cannot afford . . . standing"); *Lafferty*, 293 Va. at 364 (neither "history with" nor "zealous interest in [a] topic" is "sufficient to create standing").

Plaintiffs insist there was no need to offer evidence in support of their standing at trial because their motion for summary judgment had "*asserted* that among the undisputed, material facts was the fact that each of Residents would suffer aesthetic and sentimental injury because of the close proximity of their residences to the Lee Monument." Taylor Br. 36 (emphasis added). That claim is contrary to basic principles of civil procedure. Once the case reached trial, it was no longer enough for plaintiffs to make assertions—they were required to present *evidence*. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (explaining that standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof"); see T.A. 475–76 (counsel for the Commonwealth moving to strike plaintiffs' non-deed claims "because they have failed to offer any evidence whatsoever to

establish their standing to make their constitutional claims"); T.A. 638–39 (renewing motion to strike on same grounds). Plaintiffs' failure to present any evidence in support of their standing at trial forecloses them from demonstrating standing now.[21]

2. No private right of action

The essence of plaintiffs' non-deed claims is that the General Assembly had not granted (indeed, had withheld) authority to remove the Lee statue. See T.A. 106–07 (asserting that "any action by the Governor that conflicts with or is in excess of his legislative authorization and his authority to act under the Constitution of Virginia constitutes an *ultra vires* act"). That argument cannot survive the 2020 Law, which eliminates any possible conflict and specifically confirms the Governor's authority to proceed. See Part I(A), *supra*.

In any event, plaintiffs' arguments failed even before the 2020 Law. To be sure, this Court has held that various separation-of-powers

[21] This is not the first time plaintiffs have misunderstood their burden on the merits. See T.A. 467 (circuit court rejecting plaintiffs' argument that summary judgment papers relieved them of their obligation to present evidence at trial); T.A. 618 (circuit court reminding plaintiff that attaching documents to summary judgment briefing "doesn't make them admitted into evidence" at trial); T.A. 627 (same).

provisions of the Virginia Constitution "are self-executing . . . and thereby waive the Commonwealth's sovereign immunity." *Gray v. Virginia Sec'y of Transp.*, 276 Va. 93, 106 (2008). But this Court has never held that a plaintiff who asserts that an executive branch official has acted contrary to—or in excess of their authority under—a *statutory* provision may overcome the lack of a private right of action under the relevant statute by asserting that the same official's conduct is also, necessarily, a *constitutional* violation of separation of powers. With good reason: to do so would eviscerate the private right of action requirement by providing "any aggrieved claimant" with "a roving . . . private right of action" any time a public official allegedly "violat[ed] any statute." *Cherrie*, 292 Va. at 315–17 (rejecting similar argument with respect to the Declaratory Judgment Act).[22]

III. This Court should vacate the injunction pending appeal in *Taylor*

An "appellate court having jurisdiction over [an] appeal" may always "modif[y] or vacate[]" any injunction pending appeal entered by a trial court. Va. Code Ann. § 8.01-631(D). Upon resolving these cases,

[22] Although the complaint repeatedly references the 1889 Joint Resolution, see T.A. 3, 4, 5, 8, plaintiffs have never asserted that it created a private right of action.

this Court should exercise that authority and vacate the injunction entered by the circuit court in *Taylor*.

The circuit court's order states that the injunction will remain in "full force and effect during the period the appeal is pending." T.A. 420. Given that language, questions could easily arise about when that injunction will terminate—specifically, whether it will happen immediately upon issuance of this Court's decision or whether the injunction will remain in effect during the month-long period plaintiffs would have to seek rehearing, see Va. S. Ct. R. 5:37(d), the months-long period plaintiffs would then have to seek review by the U.S. Supreme Court, and the even longer period that Court would take to rule on any such request, see U.S. S. Ct. R. 13.1, 13.3 & 13.5 (stating that the deadline for filing a petition for a writ of certiorari is "90 days after" the later of the "entry of judgment" or "the denial of rehearing" and may be extended for an additional period "not exceeding 60 days").

This Court should take care to forestall any such questions. By the time this case is argued, the Commonwealth will have been enjoined for more than a year and that period will continue to expand during the time it takes for the Court to rule. Despite plaintiffs' late-breaking

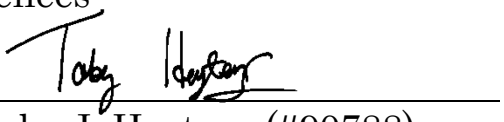
arguments under the federal Contracts Clause—which are conspicuously absent from plaintiffs' complaint and arose only as a response to the Commonwealth's argument that the 2020 Law defeats plaintiffs' claims, see T.A. 1–9 (complaint)—these cases are and always have been overwhelmingly about issues of Virginia law. If plaintiffs want to continue their fight beyond the Commonwealth's own highest court, it should be their burden to convince the U.S. Supreme Court to grant a further injunction. Accordingly, the Court should—in addition to affirming the circuit court's judgments on the merits—make it unambiguously clear that the *Taylor* injunction is immediately dissolved and that the Commonwealth may, finally, remove the Lee statue from its current location in the heart of its capital city.

CONCLUSION

The judgments of the Circuit Court for the City of Richmond should be affirmed, and the injunction pending appeal in *Taylor v. Northam* should be immediately dissolved.

Respectfully submitted,

RALPH S. NORTHAM, *et al.*
Appellees

By: 

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April 19, 2021

CERTIFICATE OF SERVICE AND FILING

I hereby certify that, on April 19, 2021, this brief was filed electronically with the Court. Copies have also been emailed and mailed to counsel for appellants in both cases at the following:

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I further certify that this brief complies with the Court's order of March 17, 2021, which granted appellees' motion to file a single consolidated brief not exceeding the longer of 75 pages or 13,125 words.

Toby J. Heytens

Addendum A

EXCERPT

2020 SPECIAL SESSION I

VIRGINIA ACTS OF ASSEMBLY

CHAPTER 56

An Act to amend and reenact Chapter 1289 of the 2020 Acts of Assembly, which appropriated funds for the 2020-22 Biennium and provided a portion of revenues for the two years ending, respectively, on the thirtieth day of June, 2021, and the thirtieth day of June, 2022.

Approved November 18, 2020

***available online*:**
https://budget.lis.virginia.gov/get/budget/4283/HB5005/

2020 RECONVENED SPECIAL SESSION I

CHAPTER 56

An Act to amend and reenact Chapter 1289 of the 2020 Acts of Assembly, which appropriated funds for the 2020-22 Biennium and provided a portion of revenues for the two years ending, respectively, on the thirtieth day of June, 2021, and the thirtieth day of June, 2022.

[H 5005]

Approved November 18, 2020

Be it enacted by the General Assembly of Virginia:

1. That Items 43, 50,52, 57, 61, 69, 79, 83, 84, 111, 112, 113, 114, 127, 128, 131, 135, 141, 144, 145, 152, 214, 221, 247, 274, 275, 282, 292, 299, 300, 309, 312, 313, 315, 320, 322, 349, 350, 354, 356, 357, 359, 373, 374, 377, 378, 383, 391, 402, 403, 404, 406, 408, 427, 429, 430, 436, 443, 444, 477, 479, 479.10, C-12.10, C-42, C-61.50, C-66, C-69, C-72.10, C-73, C-74, C-75, §3-1.01, § 3-2.03, § 3-4.01, § 3-5.19, § 3-5.21, §4-0.01, § 4-5.07, § 4-5.11, § 4-8.01 and § 4-14 of Chapter 1289 of the 2020 Acts of Assembly, be hereby amended and reenacted and that the cited chapter be further amended by adding Items 262.80, 482.20 and C-76.10, and that the cited chapter be further amended by striking therefrom Items 42.10, 48.10, 51.10, 75.10, 82.10, 87.10, 106.10, 107.10, 112.10, 118.10, 123.10, 126.10, 128.10, 130.10, 134.10, 143.10, 146.10, 155.10, 159.10, 163.10, 167.10, 170.10, 174.10, 178.10, 182.10, 186.10, 190.10, 195.10, 202.10, 206.10, 213.10, 219.10, 225.10, 230.10, 235.10, 236.10, 240.10, 241.10, 244.10, 248.10, 249.10, 252.10, 253.10, 255.10, 256.10, 257.10, 258.10, 259.10, 260.10, 261.10, 262.10, 262.60, 279.10, 287.10, 293.10, 307.10, 317.10, 321.10, 322.10, 328.10, 338.10, 346.10, 348.10, 361.10, 369.10, 375.10, 380.10, 386.10, 390.10, 402.10, 409.10, 414.30, 417.10, 418.10, 428.10, 429.10, 466.10, 473.10, 482.10, and 497.10.

~~1~~*2.*§1. The following are hereby appropriated, for the current biennium, as set forth in succeeding parts, sections and items, for the purposes stated and for the years indicated:

A. The balances of appropriations made by previous acts of the General Assembly which are recorded as unexpended, as of the close of business on the last day of the previous biennium, on the final records of the State Comptroller; and

B. The public taxes and arrears of taxes, as well as moneys derived from all other sources, which shall come into the state treasury prior to the close of business on the last day of the current biennium. The term "moneys" means nontax revenues of all kinds, including but not limited to fees, licenses, services and contract charges, gifts, grants, and donations, and projected revenues derived from proposed legislation contingent upon General Assembly passage.

§ 2. Such balances, public taxes, arrears of taxes, and monies derived from all other sources as are not segregated by law to other funds, which funds are defined by the State Comptroller, pursuant to § 2.2-803, Code of Virginia, shall establish and constitute the general fund of the state treasury.

§ 3. The appropriations made in this act from the general fund are based upon the following:

	First Year	**Second Year**	**Total**
Unreserved Beginning Balance	~~$1,185,284,382~~	$0	~~$1,185,284,382~~
	$2,874,058,799		*$2,874,058,799*
Additions to Balance	~~$120,137,243~~	~~($500,000)~~	~~$119,637,243~~
	($1,284,491,604)	*$29,850,000*	*($1,254,641,604)*
Official Revenue Estimates	~~$22,687,832,509~~	~~$23,538,284,514~~	~~$46,226,117,023~~
	$21,353,132,509	*$22,185,484,514*	*$43,538,617,023*
Transfer	~~$655,758,189~~	~~$666,158,189~~	~~$1,321,916,378~~
	$610,436,934	*$612,358,189*	*$1,222,795,123*
Total General Fund Resources Available for Appropriation	~~$24,649,012,323~~	~~$24,203,942,703~~	~~$48,852,955,026~~
	$23,553,136,638	*$22,827,692,703*	*$46,380,829,341*

The appropriations made in this act from nongeneral fund revenues are based upon the following:

	First Year	Second Year	Total
Balance, June 30, 2020	$7,596,232,598	$0	$7,596,232,598
Official Revenue Estimates	~~$38,801,241,971~~	$39,604,200,895	~~$78,405,442,866~~

	$39,404,473,571		*$79,008,674,466*
Lottery Proceeds Fund	$657,959,397	$666,104,670	$1,324,064,067
Internal Service Fund	$2,115,253,639	$2,231,861,108	$4,347,114,747
Bond Proceeds	~~$2,478,004,162~~ *$2,479,504,162*	$195,123,500	~~$2,673,127,662~~ *$2,674,627,662*
Total Nongeneral Fund Revenues Available for Appropriation	~~$51,648,691,767~~ *$52,253,423,367*	$42,697,290,173	~~$94,345,981,940~~ *$94,950,713,540*
TOTAL PROJECTED REVENUES	~~*$76,297,704,090*~~ *$75,806,560,005*	~~*$66,901,232,876*~~ *$65,524,982,876*	~~*$143,198,936,966*~~ *$141,331,542,881*

§ 4. Nongeneral fund revenues which are not otherwise segregated pursuant to this act shall be segregated in accordance with the acts respectively establishing them.

§ 5. The sums herein appropriated are appropriated from the fund sources designated in the respective items of this act.

§ 6. When used in this act the term:

A. "Current biennium" means the period from the first day of July two thousand twenty, through the thirtieth day of June two thousand twenty-two, inclusive.

B. "Previous biennium" means the period from the first day of July two thousand eighteen, through the thirtieth day of June two thousand twenty, inclusive.

C. "Next biennium" means the period from the first day of July two thousand twenty-two, through the thirtieth day of June two thousand twenty-four, inclusive.

D. "State agency" means a court, department, institution, office, board, council or other unit of state government located in the legislative, judicial, or executive departments or group of independent agencies, or central appropriations, as shown in this act, and which is designated in this act by title and a three-digit agency code.

E. "Nonstate agency" means an organization or entity as defined in § 2.2-1505 C, Code of Virginia.

F. "Authority" sets forth the general enabling statute, either state or federal, for the operation of the program for which appropriations are shown.

G. "Discretionary" means there is no continuing statutory authority which infers or requires state funding for programs for which the appropriations are shown.

H. "Appropriation" shall include both the funds authorized for expenditure and the corresponding level of full-time equivalent employment.

I. "Sum sufficient" identifies an appropriation for which the Governor is authorized to exceed the amount shown in the Appropriation Act if required to carry out the purpose for which the appropriation is made.

J. "Item Details" indicates that, except as provided in § 6 H above, the numbers shown under the columns labeled Item Details are for information reference only.

K. Unless otherwise defined, terms used in this act dealing with budgeting, planning and related management actions are defined in the instructions for preparation of the Executive Budget.

§ 7. The total appropriations from all sources in this act have been allocated as follows:

BIENNIUM 2020-22

	General Fund	**Nongeneral Fund**	**Total**
OPERATING EXPENSES	~~$48,210,719,520~~ *$46,078,617,618*	~~$87,561,122,474~~ *$88,155,431,265*	~~$135,771,841,994~~ *$134,234,048,883*
LEGISLATIVE DEPARTMENT	$212,883,582	$8,050,998	$220,934,580
JUDICIAL DEPARTMENT	$1,068,689,563	~~$70,735,744~~ *$74,735,744*	~~$1,139,425,307~~ *$1,143,425,307*

EXECUTIVE DEPARTMENT	~~$46,915,591,881~~	~~$85,426,164,830~~	~~$132,341,756,711~~
	$44,783,489,979	*$86,016,473,621*	*$130,799,963,600*
INDEPENDENT AGENCIES	$13,554,494	$2,056,170,902	$2,069,725,396
STATE GRANTS TO NONSTATE AGENCIES	$0	$0	$0
CAPITAL OUTLAY EXPENSES	~~$20,956,290~~	~~$3,279,347,625~~	~~$3,300,303,915~~
	$0	*$3,280,847,625*	*$3,280,847,625*
TOTAL	~~$48,231,675,810~~	~~$90,840,470,099~~	~~$139,072,145,909~~
	$46,078,617,618	*$91,436,278,890*	*$137,514,896,508*

§ 8. This chapter shall be known and may be cited as the "2020 Special Session I Amendments to the 2020 Appropriation Act."

ITEM 75.10.	Item Details($) First Year FY2021	Item Details($) Second Year FY2022	Appropriations($) First Year FY2021	Appropriations($) Second Year FY2022
~~Additional funding for Statewide Automated Victim Network System (SAVIN)~~		~~$600,000~~		~~$600,000~~
~~Adjust salary for circuit court clerks~~		~~$1,820,339~~		~~$1,985,824~~
~~Adjust entry-level salary increases for regional jail officers~~		~~$2,668,059~~		~~$2,910,609~~
~~Adjust salary of constitutional office staff based on increases in locality population~~		~~$260,230~~		~~$260,230~~
~~**Agency Total**~~		~~**$10,929,053**~~		~~**$12,493,747**~~
Total for Compensation Board			**$745,264,213**	~~**$749,100,297**~~ ***$746,550,297***
General Fund Positions	20.00	20.00		
Nongeneral Fund Positions	1.00	1.00		
Position Level	21.00	21.00		
Fund Sources: General	$728,657,985	~~$732,494,069~~ *$729,944,069*		
Trust and Agency	$8,003,370	$8,003,370		
Dedicated Special Revenue	$8,602,858	$8,602,858		

§ 1-7. DEPARTMENT OF GENERAL SERVICES (194)

76. Not set out.

77. Not set out.

78. Not set out.

79.	Physical Plant Management Services (74100)		~~$56,751,163~~ *$57,834,163*	$57,668,843
	Parking Facilities Management (74105)	$5,468,350	$5,468,350	
	Statewide Building Management (74106)	~~$45,215,900~~ *$46,298,900*	$46,389,195	
	Statewide Engineering and Architectural Services (74107)	$5,484,480	$5,228,865	
	Seat of Government Mail Services (74108)	$582,433	$582,433	
	Fund Sources: General	~~$1,666,623~~ *$2,749,623*	$1,316,623	
	Special	$5,468,350	$5,468,350	
	Internal Service	$49,616,190	$50,883,870	

Authority: Title 2.2, Chapter 11, Articles 4, 6, and 8; § 58.1-3403, Code of Virginia.

A.1. Out of this appropriation, $44,645,792 the first year and $45,819,087 the second year for Statewide Building Management represent a sum sufficient internal service fund which shall be paid from revenues from rental charges assessed to occupants of seat of government buildings controlled, maintained, and operated by the Department of General Services and fees paid for other building maintenance and operation services provided through service agreements and special work orders. The internal service fund shall support the facilities at the seat of government and maintenance and operation of such other state-owned facilities as the Governor or department may direct, as otherwise provided by law.

2. The rent rate for occupants of office space in seat of government facilities operated and maintained by the Department of General Services, excluding the building occupants that currently have maintenance service agreements with the department, shall be $17.51 per square foot the first year and $18.24 the second year.

ITEM 79.	Item Details($) First Year FY2021	Item Details($) Second Year FY2022	Appropriations($) First Year FY2021	Appropriations($) Second Year FY2022

3. On or before September 1 of each year, the Department of General Services shall report to the Chairmen of the House Appropriations and Senate Finance Committees, the Secretary of Administration, and the Department of Planning and Budget regarding the operations and maintenance costs of all buildings controlled, maintained, and operated by the Department of General Services. The report shall include, but not be limited to, the cost and fund source associated with the following: utilities, maintenance and repairs, security, custodial services, groundskeeping, direct administration and other overhead, and any other operations or maintenance costs for the most recently concluded fiscal year. The amount of unleased space in each building shall also be reported.

4. Further, out of the estimated cost for Statewide Building Management, amounts estimated at $2,424,879 the first year and $2,424,879 the second year shall be paid for Payment in Lieu of Taxes. In addition to the amounts for Statewide Building Management, the following sums, estimated at the amounts shown for this purpose, are included in the appropriations for the agencies identified:

	FY 2021	**FY 2022**
Alcoholic Beverage Control Authority	$79,698	$79,698
Department of Motor Vehicles	$196,017	$196,017
Department of State Police	$639	$639
Department of Transportation	$186,030	$186,030
Department for the Blind and Vision Impaired	$4,630	$4,630
Science Museum of Virginia	$17,904	$17,904
Virginia Employment Commission	$57,662	$57,662
Virginia Museum of Fine Arts	$158,513	$158,513
Virginia Retirement System	$42,920	$42,920
Veterans Services	$135,180	$135,180
Workers' Compensation Commission	$64,116	$64,116
TOTAL	**$943,309**	**$943,309**

B.1. Out of this appropriation, $4,970,398 the first year and $5,064,783 the second year for Statewide Engineering and Architectural Services provided by the Division of Engineering and Buildings represent a sum sufficient internal service fund which shall be paid from revenues from fees paid by state agencies and institutions of higher education for the review of architectural, mechanical, and life safety plans of capital outlay projects.

2. In administering this internal service fund, the Division of Engineering and Buildings (DEB) shall provide capital project cost review services to state agencies and institutions of higher education and produce capital project cost analysis work products for the Department of Planning and Budget. DEB shall collect fees, consistent with those fees authorized above in paragraph B.1, from state agencies and institutions of higher education for completed capital project cost review services or work products.

3. The hourly rate for engineering and architectural services shall be $150.00 the first year and $154.00 the second year, excluding contracted services and other special rates as authorized pursuant to § 4-5.03 of this act.

4. Out of the amounts appropriated in this Item, $164,082 the first year and $164,082 the second year from the general fund is provided for the Division of Engineering and Buildings to support the Commonwealth's capital budget and capital pool process for which fees authorized in this paragraph cannot otherwise be assessed.

C. Interest on the employee vehicle parking fund authorized by § 4-6.04 c of this act shall be added to the fund as earned.

D. The Department of General Services shall, in conjunction with affected agencies, develop, implement, and administer a consolidated mail function to process inbound and outbound mail for agencies located in the Richmond metropolitan area. The consolidated mail function shall include the establishment of a centralized mail receiving and outbound processing location or locations, and the enhancement of mail security capabilities within these

ITEM 79.	Item Details($) First Year FY2021	Item Details($) Second Year FY2022	Appropriations($) First Year FY2021	Appropriations($) Second Year FY2022

location(s).

E. All new and renovated state-owned facilities, if the renovations are in excess of 50 percent of the structure's assessed value, that are over 5,000 gross square feet shall be designed and constructed consistent with energy performance standards at least as stringent as the U.S. Green Building Council's LEED rating system or the Green Globes rating system.

F. Effective July 1, 2009, the total service charge for the property known as the General Assembly Building and the State Capitol Building shall not exceed $70,000 per fiscal year.

G. The Director of the Department of General Services shall work with the Commissioner of the Department of Transportation and other agencies to maximize the use of light-emitting diodes (LEDs) instead of traditional incandescent light bulbs when any state agency installs new outdoor lighting fixtures or replaces nonfunctioning light bulbs on existing outdoor lighting fixtures as long as the LEDs lights are determined to be cost effective.

H. Out of this appropriation, $350,000 the first year from the general fund is designated for the Department of General Services (DGS), with the cooperation of the Department of Behavioral Health and Developmental Services (DBHDS), to review the DBHDS capital outlay, maintenance reserve, maintenance and operations and real estate activities across the DBHDS agency. DGS shall develop system-wide recommendations that are cost effective and promote operational efficiency. DGS shall report its findings and recommendations to the Governor and Chairs of the House Appropriations and Senate Finance and Appropriations Committees no later than October 1, 2021.

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

80. Not set out.

81. Not set out.

82. Not set out.

~~82.10~~ ~~Notwithstanding the provisions set forth in this Act, the amounts listed below associated with increased general fund spending within this agency shall be immediately unallotted upon enactment of these appropriations from the applicable Items of this agency and any other relevant Item of this act. Further, notwithstanding the provisions of this Act, any language associated with the spending listed below shall not be applicable unless, after such unallotment, a base amount of funding remains to which such language would be applicable or unless such language previously appeared in Chapter 854, 2019 Acts of Assembly. Any amounts referenced within any other Items of this Act that reflect or include the spending amounts listed below shall have no effect. These amounts shall remain unallotted until re-enacted by the General Assembly after acceptance of a revenue forecast that confirms the revenues estimated within this Act. No agency shall spend, commit, or otherwise obligate the amounts listed below from any source of funds for any of the purposes stated below or any other funds that may be unallotted.~~

	~~FY 2021~~	~~FY 2022~~
~~DGS review of DBHDS capital outlay operations~~	~~$350,000~~	~~$0~~
~~**Agency Total**~~	~~**$350,000**~~	~~**$0**~~

Total for Department of General Services.....			~~**$264,962,491**~~ ***$266,045,491***	**$266,335,604**
General Fund Positions.....	248.50	248.50		

Status of any exemptions by the State Council of Higher Education to policy which prohibits use of funds in this act for the operation of any academic program by any state institution of higher education, unless approved by the Council and included in the Governor's recommended budget, or approved by the General Assembly (see § 4-5.05 b 2).

g. Standard State Agency Abbreviations:

The Department of Planning and Budget shall be responsible for maintaining a list of standard abbreviations of the names of state agencies. The Department shall make a listing of agency standard abbreviations available via electronic means on a continuous basis to the Chairmen of the House Appropriations and Senate Finance Committees, the State Comptroller, the Director, Department of Human Resource Management and the Chief Information Officer, Virginia Information Technologies Agency, and the public.

h. Educational and General Program Nongeneral Fund Administrative Appropriations Approved by the Department of Planning and Budget:

The Secretary of Finance and Secretary of Education, in collaboration with the Director, Department of Planning and Budget, shall report in December and June of each year to the Chairmen of the House Appropriations and Senate Finance Committees on adjustments made to higher education operating funds in the Educational and General Programs (10000) items for each public college and university contained in this budget. The report shall include actual or projected adjustments which increase nongeneral funds or actual or projected adjustments that transfer nongeneral funds to other items within the institution. The report shall provide the justification for the increase or transfer and the relative impact on student groups.

§ 4-8.02. Not set out.

§ 4-8.03. Not set out.

§ 4-9.01. Not set out.

§ 4-9.02. Not set out.

§ 4-9.03. Not set out.

§ 4-9.04. Not set out.

§ 4-11. Not set out.

§ 4-12. Not set out.

§ 4-13. Not set out.

§ 4-14.00 EFFECTIVE DATE

This act is effective ~~on July 1, 2020~~ *on its passage as provided in § 1-214, Code of Virginia*.

ADDITIONAL ENACTMENTS

~~2~~3. That the authority and responsibilities of the Secretary of Technology included in the Code of Virginia shall be executed by the Secretary of Administration and the Secretary of Commerce and Trade pursuant to Item 66 and Item 111 of this act. Any authority or responsibilities of the Secretary of Technology not referenced in Item 66 and Item 111 of this act shall be executed by either the Secretary of Administration or the Secretary of Commerce and Trade as determined by the Governor.

~~3~~4. That any authority or responsibilities of the Innovation and Entrepreneurship Investment Authority and the Center for Innovative Technology not referenced in Item 135 of this Act shall be executed by the Virginia Innovation Partnership Authority and the non-profit entity established in legislation to be considered by the 2020 General Assembly.

~~4~~5. That § 16.1-69.48:2 of the Code of Virginia is amended and reenacted as follows:

§ 16.1-69.48:2. Fees for services of district court judges and clerks and magistrates in civil cases.

Fees in civil cases for services performed by the judges or clerks of general district courts or magistrates in the event any such services are performed by magistrates in civil cases shall be as provided in this section, and, unless otherwise provided, shall be included in the taxed costs and shall not be refundable, except in case of error or as herein provided.