

No. \_\_-\_\_\_\_

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**In the Supreme Court of the United States**

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JANET HELTZEL AND  
GEORGE D. HOSTETLER,

*PETITIONERS,*

v.

GLENN A. YOUNGKIN, in his official capacity as  
the Governor of Virginia,  
DIRECTOR, VIRGINIA DEPARTMENT OF  
GENERAL SERVICES, in his official capacity, and  
DIRECTOR, VIRGINIA DIVISION OF  
ENGINEERING & BUILDING,  
in his official capacity,

*RESPONDENTS.*

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**On Petition for Writ of *Certiorari* to the  
Supreme Court of Virginia**

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**PETITION FOR WRIT OF *CERTIORARI***

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### **QUESTIONS PRESENTED**

The Commonwealth of Virginia agreed in 1890 to accept a circle of land in the City of Richmond and a monument to Robert E. Lee from the Lee Monument Association upon a condition reflected in a deed restriction to which Petitioners are beneficiaries that the Commonwealth would guarantee the preservation of the land and monument for the purpose of memorializing Lee. Notwithstanding that agreement, on June 4, 2020, former Governor Ralph S. Northam ordered the removal of the statue. Petitioners' challenge was rejected by the circuit court, and the Supreme Court of Virginia affirmed the circuit court's judgment. Governor Northam directed the removal and dismemberment of the Lee statue. The court below denied a petition for rehearing. The Governor then conveyed the pieces of the Lee statue and the circle of land to the City of Richmond.

1. Does the Obligation of Contracts Clause of Article I, Section 10 of the Constitution prohibit the abrogation of the Commonwealth's agreement to preserve a monument based upon the unilateral determination of an executive official of the Commonwealth that a change in public opinion justifies the abrogation?
2. Is it a violation of due process and an uncompensated taking of a restrictive covenant in violation of the Due Process Clause of the Fourteenth Amendment for the Commonwealth to assert continuing possession, control and ownership of property after abrogating the restrictive covenant for which purpose the grantor conveyed the property to the Commonwealth?

**PARTIES TO THE PROCEEDING**

The caption lists all parties to the appellate proceeding.

**RELATED CASES**

The following cases relate directly to this case for purposes of this Court's Rule 14.1(b)(iii): *William C. Gregory v. Northam*, 862 S.E.2d 273 (Va. Sept. 2, 2021) (Rec. No. 201307).

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**PETITION FOR WRIT OF *CERTIORARI***

Janet Heltzel and George D. Hostetler respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Virginia.

**OPINIONS BELOW**

The final opinion of the Supreme Court of Virginia is reported at 862 S.E. 2d 458 (Va. 2021). App. 1-\_\_\_.

**JURISDICTION**

The Supreme Court of Virginia published its original opinion on September 2, 2021. Petitioners petitioned for rehearing, which was denied on October 21, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

**CONSTITUTIONAL PROVISIONS  
INVOLVED**

The Obligation of Contract Clause (also referred to as the Contract Clause) of Article I, § 10 of the United States Constitution provides in relevant part: “No State ...shall pass any Law Impairing the Obligation of Contracts....”

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides “nor shall any State deprive any person of life, liberty, or property, without due process of law....” The Due Process Clause of the Fourteenth Amendment incorporates the Takings Clause of the Fifth Amendment, which provides “nor shall private property be taken for public use without just compensation.”

## **STATEMENT OF THE CASE**

### **A. Presentation of Federal Questions**

Petitioners enjoy the protection of the Obligation of Contracts Clause of Article I, § 10 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The challenged actions of former Virginia Governor Ralph S. Northam, which were approved and sanctioned by the Supreme Court of Virginia, deprived Petitioners of their contract rights in property in violation of those constitutional provisions.

### **B. Factual Background**

The determination to erect a monument to Robert E. Lee originated with the Hollywood Memorial Association within hours of his death on October 27, 1870. A competing organization, the Lee Monument Association, was founded to raise funds for the monument in November 1870. The two organizations merged in March 1886.

According to a 2006 statement by the Virginia Department of Historic Resources in support of its successful nomination of the Robert E. Lee Monument for inclusion by the National Park Service of the United States Department of the Interior in the National Register of Historic Places (in the record below at JA 290), the image of Lee after 1885 was perceived

less as the archenemy of the United States or foremost military leader of the South and more as an American hero, comparable to George Washington, one whose exemplary character, particularly as a civilian after the War, helped bind the nation's wounds and reunite the country.

See <https://www.dhr.virginia.gov/historic-registers/127-0181>.<sup>1</sup>

At a session held in the Virginia House of Delegates following the laying of the cornerstone for the Lee Monument on October 27, 1887, a studied comparison of Lee with Washington pervaded the ceremony. The same parallel was drawn during the 1890 ceremony when the equestrian statue of Lee was brought to the site where it was to be erected.

On July 18, 1887, Otway S. Allen, a prominent Richmond businessman, conveyed a circle of land on the edge of the City of Richmond to the Lee Monument Association to be dedicated as the site of a monument to Lee. The deed contained a restrictive covenant ensuring that the land would be held for the sole purpose of serving as a site for the Lee Monument. That deed has been referred to in this proceeding as the “1887 Deed.” The land and the monument were to be the centerpiece of a residential subdivision, which Allen accomplished by putting to record the subdivision plat for the Allen Addition subdivision in

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<sup>1</sup> For 130 years, the Lee Monument has been the most prominent feature of the Monument Avenue Historic District, which the National Park Service designated as a National Historic Landmark, a distinction reserved to only 3 percent of historic sites on the National Register. In 2006, the Virginia Department of Historic Resources designated the Lee Monument as a Virginia Historic Landmark. <https://www.dhr.virginia.gov/historic-registers/127-0174>.

1889 in the Circuit Court for the County of Henrico, the locality in which the land was located at the time.

At its 1889 session, the General Assembly of Virginia enacted a Joint Resolution, Acts of Assembly 1889 c. 24 (December 19, 1889):

Resolved by the senate (the house of delegates concurring), Whereas it has been brought to the notice of the general assembly that the Lee monument association proposes, as the most graceful and appropriate disposition of the equestrian statue of General Robert E. Lee, about being completed in the city of Paris, and of the monument of which it is to form a part, to present the same to the commonwealth; and whereas the patriotic purpose is highly appreciated and approved by the general assembly,

1. Be it therefore resolved by the general assembly of Virginia, That the governor be, and he is hereby authorized and requested, in the name and in behalf of the commonwealth, to accept, at the hands of the Lee monument association, the gift of the monument or equestrian statue of General Robert E. Lee, including the pedestal and circle of ground upon which said statue is to be erected, and to execute any appropriate conveyance of the same, in token of such acceptance, and of the **guarantee of the state** that it will hold said statue and pedestal and ground **perpetually sacred to the monumental purpose to which they have been devoted.**

(Emphasis added).

In March 1890, Governor P. W. McKinney executed such a deed and accepted the properties from the Lee Monument Association. That deed has been

referred to in this proceeding as the “1890 Deed.” The statue of Lee on horseback was unveiled on May 29, 1890, at the ceremony attended by a crowd estimated at 150,000. <https://www.dhr.virginia.gov/historic-registers/127-0174>.

On June 4, 2020, then Governor Ralph Northam unilaterally ordered that the Lee statue be removed from its pedestal. <https://www.governor.virginia.gov/newsroom/all-releases/2020/June/headline-857181-en.html>. The removal order was announced only days after George Floyd was killed in Minneapolis, Minnesota, which led to widespread and frequently violent protests in the United States, including the City of Richmond. [en.wikipedia.org/wiki/Robert\\_E.\\_Lee\\_Monument\\_\(Richmond,\\_Virginia\)](https://en.wikipedia.org/wiki/Robert_E._Lee_Monument_(Richmond,_Virginia)). In his announcement of the removal order, Governor Northam linked his decision to remove the Lee statue to the incident in Minneapolis.

Days after the September 2, 201, decision of the Supreme Court of Virginia that affirmed the judgment of the circuit court and after Petitioners had filed their Notice of Intent to Apply for Rehearing and a Motion to Clarify that the circuit court injunction remained in effect but before the rehearing petition was filed and the injunction was dissolved, Governor Northam ordered the removal and dismemberment of the Lee statue. <https://bbc.com/news/world-us-canada-58491967>. Governor Northam then announced that he would transfer Lee Circle and the pieces of the Lee statue to the City of Richmond. <https://politico.com/news/2021/12/05/virginia-robert-lee-statue-pedestal-523773>. He later announced in a statement joined by the Mayor of the City that the statue would be transferred to the Black Museum and

Cultural Center of Virginia.  
<https://www.npr.org/2021/12/30/1069081021/richmonds-robert-e-lee-statue-will-move-to-the-citys-black-history-museum>.

### **C. Procedural History**

A descendant of Otway S. Allen, William C. Gregory, filed an action on June 8, 2020, challenging the removal order and was granted a temporary injunction prohibiting the removal.<sup>2</sup> Petitioners filed a separate action on July 21, 2020. They also applied for a preliminary injunction, which the circuit court granted on August 3, 2020.

Governor Northam's demurrer to the complaint was overruled on August 25, 2020. App. 8. As the case was proceeding to trial, the General Assembly enacted a Budget Amendment at its 2020 special session that purported to repeal the 1889 Joint Resolution and direct the removal of the Lee Monument. Acts of Assembly 2020 c. 24. Petitioners challenged the constitutionality of that legislation in their motion for summary judgment. Governor Northam filed a cross-motion for summary judgment. The circuit court took both motions under advisement. A trial was conducted on October 19, 2020, during which the court overruled the cross motions for summary judgment. App. 10, 25. On October 27, 2020, the circuit court dismissed Petitioners' complaint based on its conclusion that enforcement of the restrictive covenants in the 1887 and 1890 Deeds would be in violation of the public policy of the Commonwealth as

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<sup>2</sup> *Gregory v. Northam*, Case No. 20-2441, was dismissed by the Circuit Court for the City of Richmond. On appeal, that judgment was affirmed. 862 S.E. 2d 273 (Va. 2021).

reflected in the Budget Amendment enacted at the 2020 special session of the General Assembly. App. 13, 15.

Petitioners filed their notice of appeal on October 29, 2020. App. 15. Governor Northam filed a petition for review of the circuit court's order granting Petitioner an injunction pending the disposition of the appeal in the Supreme Court of Virginia and a motion to vacate the injunction granted by the circuit court, both of which the Supreme Court of Virginia denied on December 18, 2020. Petitioners filed a petition for appeal, which was granted on February 12, 2021.

Following briefing, the Supreme Court of Virginia heard oral argument on June 8, 2021. In an opinion published on September 2, 2021, the court affirmed the decision of the Circuit Court for the City of Richmond on several grounds: (1) the restrictive covenants violated the public policy of the Commonwealth; (2) changed circumstances since 1890 justified Governor Northam's removal order and abrogation of the restrictive covenants; and (3) the 1889 Joint Resolution and the 1890 Deed impermissibly bound "future administrations' exercise of government speech." App. 33. The opinion did not address the constitutionality of the Budget Amendment and based the court's decision on Governor Northam's authority to decide whether the restrictive covenant violated public policy. App. 19, 34.

On September 7, 2021, Petitioners filed a Notice of Intent to Apply for Rehearing and a Motion for Clarification requesting that the court resolve a difference between Petitioners and Governor Northam regarding the meaning of language in the September 2, 2021, opinion regarding the dissolution

of the circuit court injunction. Petitioners contended that the injunction would be dissolved under applicable statute and the Rules of the Supreme Court of Virginia only upon the certification by the Clerk of the appellate court of the mandate to the circuit court, which would not occur until the petition for rehearing was disposed of. That construction was consistent with Code of Virginia § 8.01-685, which provides that the circuit court “shall enter the decision of the appellate court as its own, and execution or other appropriate process may issue thereon accordingly.”

Petitioners filed a petition for rehearing on September 29, 2021, which the court denied on October 21, 2021. App. 56-57. On the same date, the court entered a separate order affirming the judgment of the Circuit Court of the City of Richmond and dissolving the injunctions imposed by the circuit court pending final resolution of the appeal. App. 1-2.

### **REASONS TO GRANT THE WRIT**

#### **I. THE OPINION BELOW IMPERMISSIBLY EVADED THE CONTRACT CLAUSE AND IS IN CONFLICT WITH DECISIONS OF THIS COURT APPLYING THE CONTRACT CLAUSE.**

The removal of the Lee Monument from Lee Circle in the City of Richmond received national attention.<sup>3</sup>

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<sup>3</sup> *E.g.*, <https://www.apnews.com/article/robert-e-lee-statue-time>;  
<https://www.pbs.org/newshour/nation/virginia-is-set-to-remove-richmonds-lee-statue-on-wednesday>;  
[https://www.washingtonpost.com/local/virginiapolitics/robert\\_e\\_lee\\_statue\\_re](https://www.washingtonpost.com/local/virginiapolitics/robert_e_lee_statue_re)



The impact of the decision of the Supreme Court of Virginia affirming Governor Northam's removal order will be widespread and significant. The September 2, 2021, opinion makes a travesty of the provision in Article I, § 10 of the United States Constitution that prohibits States from impairing the obligation of contracts. If this Virginia decision is followed, every contract entered into by a state government can be abrogated when a governor or a court – not the legislature – decides that the contract violates public policy. This would leave those who contract with state governments at the mercy of judges and executive or administrative officials who have no legitimate role in setting the Commonwealth's public policy.<sup>4</sup>

State legislatures must observe the well-defined limitations on the exercise of their police power when they abrogate contracts. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242, 249 (1978); *United*

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moval/2021/09/08/1d9564ee-103d-11ec-9cb6-bf9351a25799\_story.html.

<sup>4</sup> Deed restrictions can be contractual in nature where the conveyance was conditioned, as here, on a guarantee to preserve the properties' future use. See *Edwards v. Kearzey*, 96 U.S. 595, 599-600 (1877); *RECP IV WG LLC v. Capital One Bank (USA), NA*, 295 Va. 268, 272, 811 S.E.2d 817, 819 (2018); *Severns v. Pacific R. Co.*, 101 Cal. App. 4<sup>th</sup> 1209, 1221-22, 125 Cal. Rptr.2d 100, 110 (2002); *Overlook Farms Home Ass'n, Inc. v. Alternative Living Servs.*, 143 Wis. 2d 485, 496, 422 N.W.2d 131, 135 (1988); see *Minner v. City of Lynchburg*, 204 Va. 180, 187, 129 S.E.2d 673, 678 (1963).

*States Trust Co. v. New Jersey*, 431 U.S. 1, 28-29 (1977). Abrogation must be justified by a “generally applicable rule of conduct designed to advance ‘a broad societal interest.’” *Spannaus*, 438 U.S. at 249. No such generally applicable rule justifies the abrogation of the restrictive covenants that guaranteed the use of Lee Circle for the sole purpose of honoring Lee.

Asserting the Contract Clause, Petitioners challenged the Budget Amendment enacted by the General Assembly as the case was going to trial in circuit court. That legislation repealed the 1889 Joint Resolution and established new public policy. The circuit court rejected the challenge and dismissed the complaint relying on the Budget Amendment. The Supreme Court of Virginia affirmed the judgment of the circuit court but not on the basis of the Budget Amendment. It held that Governor Northam possessed the authority to set the public policy of the Commonwealth and invalidate the restrictive covenant as being in violation of that new policy. That holding was inconsistent with the established precedents of that court and enabled the court to avoid addressing the Contract Clause challenge. This case provides this Court with an opportunity to consider whether it should qualify its rule that the Contract Clause applies only to legislation. *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). Petitioners urge the Court to modify the rule to prevent States from evading the prohibition of the Contract Clause, as the Supreme Court of Virginia has attempted to do in this case. App. 19.

Under this Court’s precedents, a State may cancel its contractual obligation only where the cancellation is “reasonable and necessary.” *E.g., United States*

*Trust Co.* at 22. In this case, it was unnecessary to remove the Lee Monument in order for the Commonwealth to disassociate itself from any message that the Governor contended was against public policy. The Commonwealth had the legal right – and duty – to convey the Lee Monument to another party who would be bound by the restrictive covenant. As in other States, Virginia prohibits restraints on the alienation of property. *Hamm v. Hazelwood*, 292 Va. 153, 159-60, 787 S.E.2d 144, 147 (2016). Not only was the removal order unnecessary, but it also violated the restrictive covenant because the obligation of that contract required the conveyance by the Commonwealth to another party instead of removal of the monument. In that regard, the decision below established a novel and dangerous precedent because it failed to apply and meet the “reasonable and necessary” requirement. In unilaterally repudiating the restrictive covenant, Governor Northam violated the Contract Clause.

This Court has acknowledged the substantial difference between contractual impairments that are temporary and conditional and those that are permanent and unconditional. *Compare Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 447 (1934) *with Eagerton*, 462 U.S. at 191 and *United States Trust Co.*, 431 U.S. at 22, 28-29, 32. The latter are not favored. Governor Northam’s removal order was of the second type – a permanent and unconditional abrogation of the restrictive covenants. *See Citizens Mut. Bldg Ass’n, Inc. v. Edwards*, 167 Va. 399, 408-09, 189 S.E. 453, 457 (1937) (Virginia statute authorizing the suspension of payments of indebtedness violated the obligation of contracts

provision of Article I, § 10 because the impairment was permanent and unconditional).

The court below affirmed the lower court's judgment on three grounds. None constitutes a justification for impairing the obligation of the restrictive covenants that the Commonwealth agreed to enforce in 1890.

The first was that Governor Northam's removal order was authorized by his unilateral determination that the Lee Monument violated public policy. App. - 19. The court acknowledged that "the legislature, not the judiciary, is the sole 'author of public policy.'" (quoting *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 280, 784 S.E.2d 280, 285 (2018)). App. 27. Yet, there was no public policy properly established by the legislature at the time that would allow Governor Northam to ignore the restrictive covenant in the 1890 Deed and remove the monument. Indeed, the only existing, legislatively authorized statement of public policy regarding the Lee Monument was in the 1889 Joint Resolution, which the court refused to apply because a joint resolution is not a law. There was no public policy justification for an abrogation of the restrictive covenant because Governor Northam had no authority to decide what the public policy of the Commonwealth was. If the 1889 Joint Resolution could not establish public policy because it was not a law, then the Northam removal order certainly could not set public policy because he has no authority whatsoever to make law. *Lewis v. Whittle*, 77 Va. 415, 420 (1883) ("[T]he governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws."). The action by Governor that cancelled the restrictive

covenant was an unconstitutional impairment of the obligation of Petitioners' contract with the Commonwealth.

The second alternative grounds for affirmance of the decision of the court below was that the restrictive covenants and the 1889 Joint Resolution violate the prohibition against actions, including the execution of contracts and the enactment of legislation, that bind future **executive branch officials**, and not future legislatures, in the exercise of their discretion. App. 33. That reasoning was not merely wrong but unprecedented. The prohibition against restricting the exercise of sovereign discretion does not apply to restrictions on the exercise of whatever limited discretion that governors and other executive branch officials possess. *See Lewis*, 77 Va. at 420. Rather, it is confined to restraints on the exercise of legislative discretion. *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 810, 814, 830, 14 S.E. 665, 666-67, 672 (1892). The court relied upon *Hercules Powder Co. v. Continental Can Co.*, 196 Va. 935, 940 (1955) and *Mumpower v. Housing Auth. of City of Bristol*, 176 Va. 426, 452, 11 S.E.2d 732, 742 (1940), while ignoring its subsequent holdings that significantly restrict the prohibition. Therefore, so long as the legislature retains the capacity to repeal an enactment that binds the future exercise of its sovereign authority, including its choice of what monuments the Commonwealth will allow, there is no unconstitutional violation of the rule relied upon by the court. *Elizabeth River Crossings Opco, LLC v. Meeks*, 286 Va. 286, 321, 749 S.E. 2d 176, 194 (2013); *Commonwealth v. Virginia Electric & Power Co.*, 214 Va. 457, 461, 201 S.E.2d 771, 774 (1974). The execution of the 1890 Deed by the Virginia Governor at the time could not restrict the future exercise of the

legislature's discretion. In this case, the General Assembly retained the ability to repeal the 1889 Joint Resolution and, in fact, attempted to do so. App. 19, 22. The restrictive covenant, therefore, continued to restrict Governor Northam and prohibit him from ordering the removal of the Lee Monument.<sup>5</sup> The reliance by the court below on this rationale as a justification for repudiating the restrictive covenant was unavailing.

The third alternative holding was that the abrogation of the restrictive covenant was justified because circumstances had changed since 1890. App. 29. This rationale was essentially the same as the first alternative grounds that the Governor's assertion of a new public policy justified the cancellation of the restrictive covenant. The Lee Monument had not changed since 1890. The Allen Addition subdivision developed as Otway S. Allen planned. The only change was in the opinion of some that the Commonwealth's continued display of the Lee Monument was at odds with the current values of the Commonwealth. Governor Northam responded to the mob that destroyed property and occupied Lee Circle and the area surrounding it, as well as certain politicians, who demanded removal of the monument. Those voices are not a substitute for the formal action of the General Assembly establishing a policy that reversed the 1889

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<sup>5</sup> The court below did not acknowledge the contradiction between its position that the 1889 Joint Resolution was unenforceable because it was not a law (App. 27-28) and its position that the Joint Resolution's binding effect unconstitutionally restricted the discretion of Governor Northam. App. 33.

legislative enactment.<sup>6</sup> The unilateral action of Governor Northam in ordering the removal of the monument based on his decision that a changed public policy required removal does not constitute a justification for the impairment of the restrictive covenants for purposes of the Obligation of Contracts Clause of Article I, § 10 of the Constitution.

The unfortunate precedent set by the Supreme Court of Virginia in this case, if not corrected, will have a profound, negative impact throughout the nation. The uncertainty that the decision of the court below creates is not confined to Civil War memorials but also affects conservation and preservation easements; development agreements between governments and private parties that include deed restrictions or other conditions; agreements related to donations to hospitals, universities, and charities; and virtually any state government contract whenever a government official or judge may decide unilaterally that a state contract offends public policy.

Arguably, every state contract conveys a message of some sort. The rationale adopted by the court below grants to a governor the prerogative to decide without

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<sup>6</sup> The violent and otherwise unlawful protests in Richmond during the spring and summer of 2020 were encouraged by the refusal of Governor Northam and other public officials charged with enforcement of applicable criminal and civil laws and regulations to take care that those laws were faithfully executed. *E.g.*, CODE OF VIRGINIA § 18.2-137 (criminal violation to damage or deface memorials such as the Lee Monument); 1 VAC 30-150 (regulation of activities at the Lee Monument).

legislative authorization whether a message offends public policy. A more far-reaching gubernatorial power would be difficult to find. The Supreme Court of Virginia is the same court that in 2016 noted in *Howell v. McAuliffe*, 292 Va. 320, \_\_\_, 788 S.E. 2d 706, 719 that the “concerns motivating the original framers in 1776 still survive in Virginia,” including their skeptical view of ‘the unfettered exercise of executive power.’ *Gallagher [v. Commonwealth]*, 284 Va. [444,] at 451, 732 S.E.2d [22,] at 25 [(2012)].”

Chief Justice Marshall observed that “the words of [the Contract Clause] were introduced to give stability to contracts.” *Trustees of Dartmouth College v. Woodward*, 17 U. S. 518, 645 (1819). A similar observation appeared in the opinion in *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996): “Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.” (quoting Brandeis, J., in *Lynch v. United States*, 292 U.S. 571, 580 (1934)). The decision below has produced substantial concern about the stability and enforceability of state government contracts.

The Commonwealth stood silent for 130 years while lots in the Allen Addition subdivision were bought and sold in reliance upon the restrictive covenants. The abrogation of those restrictive covenants must be justified by more than a change in popular opinion about the Lee Monument which was the basis for Governor Northam’s decision that the public policy of the Commonwealth was no longer reflected by the 1889 Joint Resolution or the 1890 Deed. For the reasons set out above, including especially the fundamental unfairness of Governor Northam’s abrupt abrogation of the restrictive



covenants, the decision below should be reversed. See *Wilmington & Weldon R. Co. v. King*, 91 U.S. 3, 4 (1875) (refusal to invalidate contract because “great injustice” would follow).

## II. THE OPINION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT APPLYING THE DUE PROCESS AND TAKINGS CLAUSES

The seizure of private property by a state government without payment of compensation is a violation of the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington & Quincey Railroad Co. v. City of Chicago*, 166 U.S. 226, 234-35 (1897) (incorporating the Takings Clause); see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). The effect of the September 2, 2021, decision of the Supreme Court of Virginia, its denial of Petitioners’ petition for rehearing, and the actions of Governor Northam in cutting the Lee statue into pieces and conveying it and the Lee Circle to the City of Richmond constitute a violation of due process and a taking of Petitioners’ property rights without compensation.

The court below did not invalidate the restrictive covenant in the 1887 Deed between Otway Allen and the Lee Monument Association, upon which petitioners also rely. Rather, it invalidated the restrictive covenant in the 1890 Deed between the LMA and the Commonwealth on the grounds that **the Commonwealth** cannot be forced to continue communicating a message that Governor Northam contended the Commonwealth no longer wished to be associated with and, further, that Governor McKinney in 1890 and the General Assembly in 1889

could not bind the discretion of future governors. Neither ground would invalidate the 1887 Deed or its restrictive covenant. There has been no radical change in circumstances that would support an abrogation of the 1887 restrictive covenant. *River Heights Assoc. P'ship. v. Batten*, 267 Va. 262, 274, 591 S.E.2d 683, 689 (2004).

The Commonwealth cannot repudiate or cancel a condition of a deed by which it obtained property and yet continue to assert the right to own and control that property. See *Transend Land Co. v. Virginia Holding Corp.*, 228 Va. 319, 325, 321 S.E. 2d 667, 670 (1984) (“Typically, where a covenant is breached, the offending party must respond in damages, but where a condition subsequent is violated the offending party stands to forfeit the property.”); *Strock v. MacNicholl*, 196 Va. 734, 746, 85 S.E. 2d 263, 270 (1955) (deed cancelled where material covenant was breached; property restored to grantor); see 26A C.J.S., Deeds §§ 402, 403, and 447 (2012). A restrictive covenant “must be construed to make the parties’ intention effective.” *Whitehurst v. Burgess*, 130 Va. 572, 577, 107 S.E. 630, 632 (1921). For the foregoing reasons, the invalidation of the restrictive covenant in the 1890 Deed *ab initio* left the Commonwealth in the position it occupied at the time of the failed conveyance.

The property rights in the restrictive covenants held by Petitioners and other lot owners in the Allen Addition subdivision could not be taken from them without compensation. Lee Circle and the Lee Monument were subject to the restrictions in the 1887 Deed and the 1890 Deed that Petitioners and other deedholders are entitled to enforce. *Minner v. City of Lynchburg*, 204 Va. 180, 187, 129 S.E.2d 673, 678 (1963) (“[W]hen, on a transfer of land, there is a

covenant or even an informal contract or understanding that certain restrictions in the use of the land conveyed shall be observed, the restrictions will be enforced by equity....”).

The 1890 Deed could not be rewritten by the Supreme Court of Virginia. *See Ehrhardt v. SustainedMED, LLC*, 865 S.E.2d 807, 810 (Va. 2021). It could only invalidate it entirely or strike a provision that is severable. By invalidating the restrictive covenant, the court below necessarily invalidated the conveyance to the Commonwealth because the restrictive covenant was not severable. *See Schuiling v. Harris*, 286 Va. 187, 193, 747 S.E.2d 833, 836 (2013) (provision integral to the agreement not severable). If the parties would not have made the contract without the provision, it cannot be severed. *Stewart Title Guarantee Co. v. Old Republic Nat. Title Ins. Co.*, 83 F.3d 735, 740-41 (5th Cir. 1996). Severability depends on the parties’ intention at the time the agreement was made. *See Bank of America, N.A. v. Jill P. Mitchell Living Trust*, 822 F.Supp.2d 505, 518, 528 (D. Md. 2011).

Governor Northam’s act of continuing to claim ownership and control of the properties it obtained in 1890 after abrogating the restrictive covenants that were integral to the agreement – even if the abrogation was lawful --was an uncompensated taking of valuable property belonging to Petitioners and other holders of deeds in the Allen Addition subdivision

### **CONCLUSION**

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

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Respectfully submitted,

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