Supreme Court of Virginia

Record No. 210113

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

v.

RALPH S. NORTHAM,
in his official capacity as Governor of Virginia, *et al.*,
Appellees.

On Appeal from the Circuit Court of the City of Richmond

Honorable W. Reilly Marchant, Judge

BRIEF OF AMICI CURIAE PROPERTY LAW PROFESSORS IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative Materials

Treatises

Other Authorities

STATEMENT OF INTEREST

Amici are law professors who have studied, taught, and produced extensive scholarship about property law and land use law, in many cases for decades. Our interest is in a predictable, logical set of property law doctrines that advance the law's goals while remaining consistent with both the common law of property and statutory directives. Because the issues raised in this appeal have significant implications for the development of the law of servitudes, amici specifically address those doctrines in urging the Court to affirm the decisions below.

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both a treatise and casebook on property law, as well as dozens of law review articles on property law. He received a B.A. from Williams College, an A.M. in political science from Harvard University, and a J.D. from Harvard Law School.

STATEMENT OF THE CASE AND FACTS

This case concerns the ability of the Commonwealth of Virginia to remove a statue of Robert E. Lee ("the Statue") from the traffic circle at the intersection of Monument Avenue and North Allen Avenue in the City of Richmond, Virginia ("the Circle"). On June 4, 2020, Governor Ralph Northam declared his intention to remove the statue. Thereafter, Virginia's General Assembly adopted a law further authorizing that removal. G.A. 112.[1] Plaintiff/Appellants contested the proposed removal in the trial courts on the grounds that the Commonwealth is bound by restrictive terms in the original conveyance of the statue and the land on which it sits. Those arguments were properly rejected below.

Apart from these events, two conveyances and two legislative acts furnish the background for this case:

The first conveyance is the *1887 Deed*. In 1887, the descendants of a landowner, William C. Allen, deeded the land that would become the Circle to the

[1] "G.A." will refer to the Appendix submitted in *Gregory v. Northam*, No. 201307. "T.A." will refer to the Appendix submitted in *Taylor v. Northam*, No. 210113.

Lee Monument Association. The 1887 Deed provided that the land would be put to "the following uses and purposes and none other, to wit, as a site for the Monument to General Robert E. Lee." T.A. 404.

The first legislative act is the *1889 Resolution*. This was a legislative enactment by the General Assembly that "authorized and requested" the Governor to accept "the Monument . . . of General Robert E. Lee" as a gift from the Lee Monument Association. The 1889 Resolution also provided a "guarantee of the state that it will hold said statute and pedestal and ground perpetually sacred to the monumental purpose to which they have been devoted." T.A. 404-05. That Resolution was repealed by the second legislative act, an act of the General Assembly in 2020, which provided that "[n]otwithstanding the provisions of [the 1889 Resolution], 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." Acts of Assembly 2020 Special Session I, Ch. 56, Item 79 subsection I.

The second conveyance is the 1890 Deed. This is the conveyance of the Circle from the Lee Monument Association to the Commonwealth. The 1890 Deed provided that it was "pursuant to the terms and provisions of" the 1889 Resolution, and that the Commonwealth "guarantee[d] 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. 405.

Appellants in each of the cases before the Court claim authority to enforce this promise against the Commonwealth, but on different grounds. Appellant Gregory claims that, as the great-grandson of the donors of the Circle, he is an "heir" with an "easement in gross" created by this language that entitles him to sue to prevent the Commonwealth from removing the statue. G.A. 134. Appellants Taylor, Massey, Heltzel, Hostetler, and Smith claim that this language created a restrictive covenant running with the land, burdening the Commonwealth as owners of the Circle to forever preserve the statue and benefitting them as the current holders of property along Monument Avenue. T.A. 422.

STANDARD OF REVIEW

The Circuit Court's sustaining of the demurrer is reviewed "under a de novo standard of review because it is a pure question of law." *Mark Five Const. ex rel. Am. Econ. Ins. Co. v. Castle Contr.*, 274 Va. 283, 287 (2007).

ARGUMENT

The appellants' legal claims rest on language in conveyances that are over 130 years old. That restrictive language in a deed or other conveyance imposes perpetual

obligations on future landowners for another's benefit is a claim that the common law of property treats with significant skepticism. Servitudes doctrine—the law that governs easements, equitable servitudes, and real covenants—places limits on the ability of parties to impose such restrictions on land for obvious reasons: the restrictions constrain future landowners without their consent, they undermine the free use and alienability of land, and they can entrench values and commitments that are no longer valid or appropriate. The law has thus generally required that the language in grants supposedly imposing restrictive terms be read narrowly and against imposing such restrictions, that only select parties can enforce such restrictions, and that any restriction be responsive to changes in public policy or surrounding circumstances.

Applying these basic principles leads to a number of inescapable conclusions: (1) the language in the grants establishing the Commonwealth's ownership of the Circle and the Lee statue does not clearly create a covenant; (2) this language, even if it creates an obligation, cannot be enforced by parties who have no interest in related property; and, (3) even if the original parties to the transactions intended to create a perpetual obligation, *affirmative* obligations of this sort—in this case a requirement to keep and maintain a statue in perpetuity—are strongly disfavored. Finally, (4) even if such affirmative obligations were to be recognized, those obligations can certainly be invalidated as contrary to public policy. The General

Assembly's 2020 instruction to the Governor is the clearest statement of public policy that the Commonwealth can make; even if the language in the conveyances created enforceable obligations (which they did not), the determination that the Lee statue violates public policy is all that is necessary to resolve this case.

That the Commonwealth's stated public policy ultimately governs in this case is important for another reason. Under the U.S. Supreme Court's First Amendment doctrine, statuary owned by the state on public lands is "government speech." The U.S. Supreme Court has been clear that while the government must remain neutral when it regulates private speech, it is not required to remain neutral when it speaks on its own behalf. And importantly, the government cannot be compelled by private parties to express certain viewpoints. Allowing private actors, enforcing ancient agreements made by parties long dead, to compel the Commonwealth to engage in speech it disfavors contravenes that doctrine.

Make no mistake: the small handful of appellants here are seeking to compel the Commonwealth to engage in speech that the Commonwealth has made clear, through its elected officials, that it disfavors. The justification for government speech is that it is responsive to political will exercised through the democratic process. A ruling in favor of the appellants here would upend government speech doctrine and permit private parties to dictate what the government says, essentially commandeering state property for private expressive purposes.

I. The Language in the Deeds Does Not Clearly Create a Servitude.

The language in the 1887/1890 conveyances does not fit the typical form that a servitude takes, either in modern law or at the time these conveyances were drafted. Servitudes were well known at the time, in use as a planning tool in the United States since at least the early nineteenth century. *See* Maureen E. Brady, *Turning Neighbors Into Nuisances*, 134 Harv. L. Rev. 1609, 1617–23 (2021). They commonly prescribed what sorts of buildings, structures, or uses were not permitted in residential subdivisions. *See Stevenson v. Spivey*, 132 Va. 115, 117 (1922) ("No building to be erected within twenty-five (25) feet of the front line of said lot."); *Whitehurst v. Burgess*, 130 Va. 572, 575 (1921) ("That two adjoining lots will constitute a building site for one residence only . . . ."); *Elterich v. Leicht Real Est. Co.*, 130 Va. 224, 227 (1921) ("No swine shall be kept upon the property hereby conveyed."). Covenants restricting the race of persons who could hold title were also known in Virginia in this period, and indeed, were used along Monument Avenue itself. T.A. 685; *see People's Pleasure Park Co. v. Rohleder*, 109 Va. 439, 441 (1908), *aff'd on reh'g*, 109 Va. 439 (1909) ("The title to this land never to vest in a person or persons of African descent . . . ."); *see* Richard Brooks & Carol Rose, *Saving the Neighborhood* 48–50 (2013). In addition, from their inception, a number of doctrines emerged enabling courts to decline to enforce covenants where their

enforcement would be inequitable. *See Clarke v. Miller*, 149 Va. 251, 252 (1928) (noting lower court's finding that "change in the character of the neighborhood . . . as to render the issuance of this injunction inequitable" had not occurred).

The typical conveyance with servitudes set forth the property being transferred "subject to certain conditions and restrictions," followed by a list of those restrictions. *See Elterich v. Leicht Real Est. Co.*, 130 Va. 224, 227 (1921) (drafted 1910); *Scott v. Albemarle Horse Show Ass'n*, 128 Va. 517, 522 (1920) (drafted 1916); *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 574 (1896) (drafted 1894). The conveyances at issue here do not use this standard covenant-creating language, T.A. 14-27, a glaring absence in light of this Court's instruction that "covenant[s] ought to be special and express, and so clear as to leave no doubt that [the covenantee] intended to take this duty or charge upon himself. Nothing should be left to vague inferences or doubtful construction." *Maggort v. Hansbarger*, 35 Va. 532, 538 (1837); *see also Spivey,* 132 Va. at 119 (1922) ("[Covenants] are not favored, and will not be aided or extended by implication").

The creation of a covenant by these conveyances is even less likely when one considers the late 19th century common law rule, in force in Virginia, that "the law will not permit a land-owner to create easements of every novel character and attach them to the soil." *Tardy v. Creasy*, 81 Va. 553, 557 (1886). The original parties would have been well aware that the law forbade them from "invent[ing] new modes

of holding and enjoying real property, and . . . impress[ing] upon their lands and tenements a peculiar character which should follow them into all hands, however remote." *Id.* at 558 (quoting 2 Mylne & Keen, page 535, case of *Keppell v. Bailey*).

Rather, the conveyances more closely resemble donative transfers. And conditions on donative transfers that are against public policy or "general as to time and person"—like the language at issue here—are "void." *See Hamm v. Hazelwood*, 292 Va. 153, 161 (2016) (quoting 3 Thompson on Real Property § 29.05, at 793 (David Thomas ed., 3d ed. 2012)); Restatement (Second) of Trusts § 381 (1959).[2]

II. Servitudes in Gross Are Strongly Disfavored.

Gregory claims that an "easement in gross" enables him to enforce the language from the Deeds. Servitudes tend to fall into two categories: some covenants and easements are appurtenant, or run with and benefit the owner of land, and others are in gross, or not tied to the ownership of land (and sometimes, inure to

[2] Importantly, even if construed as a donative transfer, this case would not be governed by *Canova Land and Investment Company v. Lynn*, No. 200476 (Va. Apr. 15, 2021). That case concerned the interpretation and validity of an express reverter clause. *Canova Land* relied on this express language, noting that the situation was one in which the "grantor clearly intends to create a limited estate," and the grant was "clearly intended as a defeasible fee." Op. at 4-5; The conveyances at issue here contain neither a reverter clause nor any of the accepted language for creating a limited estate. What's more, the public policy concerns that would flow from enforcing the covenant go far beyond the restraint of alienation discussed in *Lynn*. *See* Part IV, *supra*.

the benefit of the beneficiary personally). Restatement (Third) of Property (Servitudes) § 1.5 (2000). Historically, covenants with benefits in gross were entirely prohibited. This prohibition dates back to the Roman era, but it was adopted by English jurists, from whom it passed into American law. Restatement (Third) of Property (Servitudes) § 2.6 (2000). The rationale for this prohibition was concern that alienability would be unreasonably restricted. Early lawmakers were concerned that freely transferable rights to control the use of another's land held by an individual personally—not by a neighbor or another landowner—would fall into the hands of "fortune hunters and mischief makers," or more broadly, that the existence of these free floating encumbrances of unforeseeable scope on property would lock up commerce in property and prevent the market from functioning properly. Restatement (Third) of Property (Servitudes) § 8.1 (2000). Today, instead of being prohibited entirely, servitudes with benefits in gross are merely disfavored. Servitudes in gross can inure to the benefit of entities like homeowners' associations, but courts "have articulated resistance to enforcing benefits held in gross, at least when enforcement is not sought by and against an original party to the servitude." Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 Iowa L. Rev. 615, 649–50 (1985). Indeed, part of the reason that states across the country—including this Commonwealth—have enacted legislation authorizing conservation easements, including easements for the purpose

of historic preservation, is to "remove any doubt that the servitudes are valid even though the benefits are held in gross," doubt that would exist under the common law. Restatement (Third) of Property (Servitudes) § 2.6 (2000). The Court has recognized this history, holding that "[a]t common law, easements in gross were strongly disfavored because they were viewed as interfering with the free use of land." *United States v. Blackman*, 270 Va. 68, 77 (2005). The expression of this disfavor is the modern rule that "[f]or an easement to be treated as being in gross, the deed or other instrument granting the easement must plainly manifest that the parties so intended." *Id.*

Read against this common law back drop, the Deeds that contain the covenant asserted here do not create a servitude in gross. Neither the word "benefit" nor any heirs of the grantors are explicitly mentioned in either of the Deeds. Without such a discussion, there is no way in which the "instrument granting the [covenant can] plainly manifest" that a servitude in gross was intended. *Id.* Indeed, this case is a mirror image of the case of *Orenberg v. Horan*, in which the Supreme Judicial Court of Massachusetts was asked to discern whether a deed provision requiring a grantee "to keep the tower clock [of Harvard church] in its present position or substantially so or to erect it in some other public and conspicuous place in Charlestown to be approved by the City of Boston" would be enforceable against the successors of the original grantee of the deed. 168 N.E. 794, 795 (1929). The court determined that

"the agreement concerning the clock imposed no more than a personal obligation," in part because the purported beneficiary had "no other land to which the promise concerning the clock could be annexed mak[ing] it unenforceable either at law or in equity against any successor in title." *Id.* at 795–96. Likewise, this Court has found that a deed restriction that permitted a real estate developer to maintain a "subdivision sign" on a homeowner's property "was not contemplated or intended . . . as a burden in perpetuity upon the full use and enjoyment of the lot conveyed," in part because the promise provided the developer only "an advertising medium" with which to advertise their other lots, not a benefit in connection with use or enjoyment of land. *Reed v. Dent*, 194 Va. 156, 162 (1952). Here, Gregory has no land to anchor the Commonwealth's supposed promise and no evidence from the Deeds that the parties intended the benefit to run to the heirs of the grantors of the Circle.

III. Affirmative Covenants Are Disfavored.

In contrast to appellant Gregory, the remaining appellants allege that the Deeds created a covenant appurtenant—one running with the land and benefitting them as holders of adjacent properties. Specifically, they are asserting that it is an *affirmative* covenant, one that "call[s] for the payment of money, the supply of goods or services, or *the performance of some other act*." Restatement (Third) of Property (Servitudes) § 1.3 (2000) (emphasis added). According to Taylor and the other

appellants, the covenant in the Deeds does not simply ask that the Commonwealth refrain from taking certain actions. Rather, it imposes the affirmative burden of "guard[ing]" and "protect[ing]" the Circle. The interpretation and enforceability of the covenant must therefore be reviewed under the exacting scrutiny imposed by courts on affirmative covenants.

A. Affirmative Covenants Pose Social, Economic, and Legal Harms.

The common law of property has long recognized that covenants "pose substantial risks to the value and alienability of land, to competition, and to other social values." Restatement (Third) of Property (Servitudes) § 3.1 (2000). This Court has held that covenants are hostile to the "common-law premise that the 'absolute right' to property 'consists in the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution.'" *Sainani v. Belmont Glen Homeowners Ass'n* , 297 Va. 714, 723 (2019) (*quoting* 1 William Blackstone, Commentaries 138). In recognition of these substantial risks, and "in keeping with our common-law traditions, Virginia courts have consistently applied the principle of strict construction to restrictive covenants." *Tvardek v. Powhatan Vill. Homeowners Ass'n* , 291 Va. 269, 275 (2016); *see also Scott v. Walker*, 274 Va. 209, 213 (2007) ("[Covenants] are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions.") (quoting *Schwarzschild*

v. Welborne, 186 Va. 1052, 1058 (1947)); *Chesterfield Meadows Shopping Center Assoc. v. Smith*, 264 Va. 350, 357 (2002) (same).

Affirmative covenants are uniquely risky in this regard because, unlike negative covenants, "performance requires resources in addition to those needed to acquire the burdened property, and liability for failure to perform usually persists until the burdened property is transferred to another." Restatement (Third) of Property (Servitudes) § 3.1 (2000). For this reason, "[a]ffirmative covenants . . . have always raised significant concerns over their potential to interfere with productive use of land." Restatement (Third) of Property (Servitudes) § 7.12 (2000); *see also id.* at § 3.1 (2000) (discussing historical recognition by courts of the "unacceptable risks of social harm" posed by affirmative covenants); 68 A.L.R.2d 1022 (Originally published in 1959) ("The considerations which have caused misgivings about permitting the burden of real covenants to run with the land are especially strong where affirmative covenants are concerned.").

The concern with affirmative covenants is especially salient when such covenants involve expressive activity. While reasonable covenants restricting uses may dictate time, place, and manner restrictions on the exercise of expressive activity, *see, e.g.*, *Linn Valley Lakes Prop. Owners Ass'n v. Brockway*, 824 P.2d 948, 951 (Kan. 1992); *Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060, 1064 (N.J. 2007), courts have found restrictions that constrain

specific *types* of speech more troubling. *See Gerber v. Longboat Harbor North Condo.*, 724 F. Supp. 884, 886 (M.D. Fla. 1989), *order adhered to in relevant part on reconsideration*, 757 F. Supp. 1339 (M.D. Fla. 1991) (invalidating covenant which "den[ied] Plaintiff his Constitutionally guaranteed right to display the American Flag"); *Providence Const. Co. v. Bauer*, 494 S.E.2d 527, 530 (Ga. App. 1997) (finding that a restrictive covenant that forbid landowners from opposing developer's attempts to secure variances or changes to zoning ordinances was an unenforceable restriction on owners' free speech rights); *Bd. of Managers of Old Colony Vill. Condo. v. Preu*, 80 Mass. App. Ct. 728, 733 (2011) (First Amendment protection for certain signs posted in condo's common areas in violation of condominium master deed and by-laws); *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 46 A.3d 507, 510 (N.J. 2012) (restrictive covenants that "banned all residential signs except 'For Sale' signs" deemed unenforceable under the state constitution's First Amendment analogue).

The covenant at issue here goes much farther than speech restriction. The language in the deeds at issue purports to *affirmatively require* the landowner to maintain the Lee statue and thus to engage in a specific expressive activity. It is axiomatic that the compelling of speech is equally alien to First Amendment doctrine as the restricting of specific speech. "[T]he right to refrain from speaking" is protected with just as much ardor as the "the right to speak." *Wooley v. Maynard*,

430 U.S. 705, 714 (1977). Furthermore, because "public parks can accommodate only a limited number of permanent monuments," *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478 (2009), the compelled preservation of one monument necessarily restricts the erection of others.

Applied to a private party, enforcing a covenant requiring a landowner to maintain a statue or engage in other viewpoint-specific activities would raise serious First Amendment concerns. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 4 (1948). Consider any number of potential hypotheticals—for example, a covenant that requires a landowner to endorse a political party, fly a certain flag, or maintain an objectionable sign. A favorable decision for the appellants in this case would open the door to such conditions on land ownership and use, allowing private parties to control the speech of current and future property owners through servitudes doctrine. Courts should be extremely wary of this type of "speech control" servitude and should not hesitate to conclude that they constitute an unreasonable restraint on use and alienation when they trench on important First Amendment interests.

B. Affirmative Covenants Have Been Subject to Strict Requirements.

In light of the risks that affirmative covenants pose, the traditional, English common law rule regarding affirmative covenants was that they were entirely invalid or unenforceable. *See, e.g.*, *Enforcement of Affirmative Covenants Running with the*

Land, 47 Yale L.J. 821 (1938); Restatement (Third) of Property (Servitudes) § 5.2 (2000) ("affirmative covenants were not traditionally enforceable in equity"); *id.* at § 7.12 ("courts have traditionally . . . prohibited [affirmative covenants] altogether"). But more recently, American courts have replaced this blanket prohibition with a more nuanced approach, allowing affirmative covenants for things like "private-governance structures and property based financing arrangements." *Id.* at § 3.1. Virginia courts today, for example, treat affirmative covenants as enforceable in some circumstances. *See Norfolk S. Ry. Co. v. E.A. Breeden, Inc.*, 287 Va. 456, 466 n.8 (2014).

Even though there is no longer a total prohibition on enforcing affirmative covenants, the policy concerns associated with them are still valid, and strong precedent remains for subjecting them to heightened judicial scrutiny in at least two ways. First, "[c]ovenants which impose affirmative obligations on property owners are strictly construed." 21 C.J.S. Covenants § 37 (*citing McGinnis Point Owners Ass'n, Inc. v. Joyner*, 522 S.E.2d 317, 319 (N.C. Ct. App. 1999)). Second, "[t]he requirements for a covenant to run [with the land] are to be more strictly applied to affirmative covenants than negative covenants." *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, Inc.*, 652 S.E.2d 378, 385 (N.C. Ct. App. 2007); *Eagle Enterprises, Inc. v. Gross*, 349 N.E.2d 816, 820 (N.Y. 1976); *see also, e.g.*, 20 Am. Jur. 2d Covenants, Etc. § 7 (Feb. 2021 update).

C. Application of the Rule of Strict Construction.

Applying the rule of strict construction, courts have been quick to hold that provisions of affirmative covenants are "too vague to be enforceable." *Snug Harbor Prop. Owners Ass'n v. Curran*, 284 S.E.2d 752, 755 (N.C. Ct. App. 1981). For example, in *Snug Harbor*, the court held that an affirmative covenant requiring payment by the property owner towards "[m]aintenance and improvement of Snug Harbor and its appearance, sanitation, easements, recreation areas and parks" was too vague to be enforced under the rule of strict construction. *Id.* at 203-04.

Compare that "vague" language with the nineteenth-century locutions at issue here. The 1890 Deed purports to place on the Commonwealth the affirmative burden of "hold[ing] said Statue and Pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted," and "faithfully guard[ing] it and affectionately protect[ing] it." 1890 Deed. This language is just as vague, if not more so, than the language at issue in *Snug Harbor*. In fact, the language of the Deed, with its invocations of "sacred[ness]," "faithful[ness]," and "affection[]" are more in the nature of rhetorical exhortations than enforceable legal promises. In reviewing the language of the covenant asserted in this case, the Court should keep in mind the rule of strict construction of affirmative covenants.

D. Stricter Requirements to Run with the Land.

Any covenant that does not "run with the land" is only "binding between the original parties." *Oliver v. Hewitt*, 191 Va. 163, 167 (1950). One of the requirements for a covenant to run with the land is that the benefit or the burden of the covenant must "touch and concern" the land. *Beeren & Barry Invs., LLC v. AHC, Inc.*, 277 Va. 32, 37 (2009). For *affirmative* covenants, this requirement is "more strictly applied." 20 Am. Jur. 2d Covenants, Etc. § 7. If it is not met, the covenant here does not run with the land and cannot be enforced by anyone other than the original parties.

In *Eagle Enterprises v. Gross*, for example, the court applied the heightened "touch and concern" analysis to an affirmative covenant that obligated the landowner to purchase water from an adjoining parcel on a seasonal basis. 349 N.E.2d at 818-19. The court held that this obligation did not "touch and concern" the land because it "resemble[d] a personal, contractual promise." *Id.* at 819. Other property owners would not be affected if one owner refused to buy the water; no other lot would benefit, only the water provider's business. Further, the landowner refused the water service because he had dug his own well to ensure year-round service, revealing again how the covenant was simply a personal business obligation that did not sufficiently connect to the use of the land. *Id.* at 818. In so holding, the court distinguished *Neponsit Property Owners' Association v. Emigrant Industry*

Savings Bank, 15 N.E.2d 793 (N.Y. 1938), an earlier case enforcing an affirmative covenant. *Neponsit* was inapplicable because the landowner of the property, who was obliged by the covenant to pay for the upkeep of the subdivision's common areas, "received [in exchange] an easement in common to utilize [those common areas]; this interest was in the nature of a property right attached to their respective properties." *Eagle Enterprises*, 349 N.E. at 819. The language here more closely resembles the unenforceable covenant from *Eagle Enterprises* than one that attaches a property right to a nearby parcel in exchange for the promise relating to a different parcel.

Another precedent from this Court suggests that a promise to display a particular message does not "touch and concern" land. In *Reed v. Dent*, this Court concluded that a deed restriction requiring a homeowner to display a subdivision sign for its real estate developer was not appurtenant to land because "the natural uses and enjoyment of land retained by complainants are not benefited or affected by the restriction." 194 Va. 156, 162 (1952). Instead, the promise was "an advertising medium to help them in the development and sale of their subdivision property," "not contemplated or intended" as a permanent burden. *Id.* at 161. *Reed* suggests that agreements to display signs or other forms of speech on one's property generally confer a personal benefit, since they do not relate to the "uses and enjoyment of" other land. The Court declined to read the restriction in *Reed* as

creating a permanent burden touching and concerning the land even though a subdivision sign arguably increases the value of the remaining land by advertising it. Likewise, while the Monument may have served as a marketing tool in 1890 to sell Monument Avenue properties, its connection to the use or enjoyment of the remaining land in 2021 is extraordinarily remote. *See Beeren & Barry Invs.*, 277 Va. at 39 (citing *Carneal v. Kendig*, 196 Va. 605, 611 (1955), for the proposition that a "restriction on use of land for conducting certain business is personal covenant that binds only original parties").

Put simply, the affirmative covenant at issue likely fails under a heightened "touch and concern" standard. Under the terms of the covenant, the Commonwealth is obligated to "protect" and "guard" the Statue and the area of land on which it sits. These types of duties, as in *Eagle Enterprises*, "resemble[] a personal, contractual promise." 349 N.E.2d at 819. After all, the guarding and maintaining of statues are routinely the subject of contracts. The appellants seek to require the Commonwealth to engage in an affirmative act that benefits them only distantly, or at best, as members of the public, rather than an act that benefits them directly in the use of their land. *Cf. Norfolk S. Ry. Co.*, 287 Va. at 460 (enforcing a covenant where the burden was the building of a bridge and the benefit was an easement to use that bridge attached to an adjoining parcel).

IV. Covenants Against Public Policy Are Invalid.

Even if this Court determines that the language in the conveyances creates either an easement in gross or an affirmative covenant appurtenant, the appellants' claims still fail, because it is well settled that a court should not enforce a covenant against public policy. That the Commonwealth must be permitted to decide without restriction how it speaks and what it says is consistent with the general proposition that the legislature determines in the first instance what public policy is. In property law, public policy's capacity to terminate outmoded covenants reflects the simple recognition that things change. *Chesterfield Meadows Shopping Center Assoc.*, 264 Va. at 356 (covenant terminated due to "radical change" in circumstances). And as things change, property arrangements must change also, lest the dead hand of past generations grip too tightly. The rule that covenants against public policy are invalid balances the reasonable expectations of the past against the desires of the present, as expressed and interpreted by legislatures and courts.

A. State Legislatures Directly Set Public Policy.

The power of state legislatures to decide which covenants may continue to be enforced and which are terminated is so well established as to be beyond question. It is a truism to say that "the freedom of landowners to construct [covenants] as they wish may not exceed limits set by legislation." Restatement (Third) of Property (Servitudes) § 3.1 (2000); *see also Tvardek v. Powhatan Vill. Homeowners Ass'n,*

Inc., 291 Va. 269, 279–80 (2016). And it is uncontroversial that "[m]any federal, state, and local statutes and other governmental regulations prohibit or restrict the use of [covenants]." Restatement (Third) of Property (Servitudes) § 3.1 (2000). *See, e.g.*, Va. Code Ann. § 36-96.6 ("Certain restrictive covenants void"); Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631 (1988); Cal. Civ. Code § 4725, 4751 (rendering deed restrictions that purport to ban pets, satellite dishes, and accessory dwelling units void).

Virginia has decisively set public policy against the covenant at issue here. In the 2020 session, the General Assembly expressly repealed the 1889 Resolution that authorized the Governor to take possession of the Circle and maintain the Statue there. Acts of Assembly 2020 Special Session I, Ch. 56, Item 79 subsection I. The same provision directs the Department of General Services and the Governor to "remove . . . the Robert E. Lee Monument." *Id*. This provision plainly states the Commonwealth's intent to invalidate whatever requirement the covenant imposed to keep the Statue in place. The Court has "no constitutional authority to judge whether a statute is unwise, improper, or inequitable, because the legislature, not the judiciary, is the sole author of public policy." *Tvardek*, 291 Va. at 279–80 (internal citations removed); *see also* Restatement (Third) of Property (Servitudes) § 3.1 (2000) (The Court "may not refuse to apply policies manifested by legislation in situations to which it clearly applies.").

B. The Covenant Is Against Public Policy Generally.

Even absent the authoritative pronouncement of the political branches of the Commonwealth's government, the covenant would be invalid as contrary to public policy in a broader sense. While legislative enactments are the acme of public policy, "judicial opinion" can also be a key determinant. *Cf. Moreland v. Moreland*, 108 Va. 93, 97 (1908) (acknowledging "judicial opinion" as controlling "public policy" in family law). *See also* Restatement (Third) of Property (Servitudes) § 3.1 (2000) ("Historically, courts have played an active role in determining the permissible contours of property interests, refusing to give effect to private arrangements perceived to threaten [public policy]."); *id*. ("Policies may [also] be purely the product of judicial development."). So too may public policy be divined from the "sentiments and morals of society." *Radosevic v. Virginia Intermont Coll.*, 633 F. Supp. 1084, 1087 (W.D. Va. 1986). And it is broadly recognized that public policies can change over time. *Cf. Moreland*, 108 Va. at 97 (1908) (acknowledging a "change [in] public policy" in family law). *See also* Restatement (Third) of Property (Servitudes) § 3.1 (2000) ("Because policies change to meet changing conditions of society, it is not practicable to predict the policy assessments judges will make in the future.").

It is patently obvious that Virginia's public policy has "radical[ly] change[d]" since the late 19th century, when these conveyances were made. *See Chesterfield*

Meadows Shopping Center Assoc., 264 Va. at 356. Racial segregation and subordination, Virginia's public policy at the time of the conveyances, are no longer the public policy of the Commonwealth. *See, e.g.*, Virginius Dabney, *Richmond: The Story of a City* 258 (2d ed. 1990) (segregation as Virginia policy in 1890s); A. E. Dick Howard, 1 *Commentaries on the Constitution of Virginia* 229-43 (1974) (no longer the policy). The Commonwealth's adoption of a policy correcting the evils of racial subordination is well demonstrated, both by public bodies and by the "sentiments and morals" of civil society in Virginia.

The most salient example is Virginia Code Section 36-96.6, which declares as against public policy those restrictive covenants "purporting to restrict occupancy or ownership of property on the basis of race, color, religion, national origin, sex, elderliness, familial status, sexual orientation, gender identity, status as a veteran, or disability." This code section is both an incontrovertible example of the legislature's power to determine which covenants are and are not valid and a powerful testament to the way in which the Commonwealth's public policy regarding race has shifted since 1890.

Indeed, an argument can be made that on the basis of this statute alone, a covenant mandating that the Commonwealth continue to maintain a symbol of racial superiority is against public policy, as "[c]ourts may apply the policies manifested

by legislation more broadly than the legislation provides." Restatement (Third) of Property (Servitudes) § 3.1 (2000).

Another legislative manifestation of the Commonwealth's new public policy with respect to racial issues is the Commission to Examine Racial Inequity in Virginia Law. The Commission has comprehensively studied the Commonwealth's statute books and identified those lingering traces of racism, which the General Assembly has been quick to extirpate. The Commission to Examine Racial Inequality in Virginia Law, "Interim Report" (Nov. 15, 2019)[3]; *e.g.* S.B. 600, 2020 Session of the General Assembly (signed by Governor Mar. 12, 2020) (eradicating discriminatory language in education law); S.B. 850, 2020 Session of the General Assembly (signed by Governor Apr. 10, 2020) (eradicating discriminatory language in health law).

The "sentiments and morals" of Virginia's civil society have matched this commitment to a policy of exorcising the traces of racial discrimination. *E.g.* Northern Virginia Chamber of Commerce, "Inclusivity Statement" (June 17, 2020).[4] This evidence is more than sufficient to sustain this Court's finding that the

[3] Available at https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Interim-Report-From-the-Commission-to-Examine-Racial-Inequity-in-Virginia-Law.pdf

[4] Available at https://novachamber.org/inclusivity-statement/

restriction in the Deeds is against public policy as expressed by the legislative acts of this state. Indeed, long before the passage of the laws cited here and even the Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631 (1988), several judges and courts determined that racial restrictions were against public policy because the Constitution and other laws illustrated the invidiousness of racial discrimination. *See, e.g.*, *Gandolfo v. Hartman*, 49 F. 181 (Cir. Ct. S.D. Cal. 1892) (invalidating as against public policy a deed restriction purporting to prevent rental "to a Chinaman"); *Title Guarantee & Tr. Co. v. Garrott*, 183 P. 470, 473 (Cal. Ct. App. 1919) (invalidating as against public policy a condition providing buyer would not "lease or sell any portion of said premises to any person of African, Chinese, or Japanese descent"); *Hurd v. Hodge*, 162 F.2d 233, 235 (D.C. Cir. 1947) (Edgerton, J., dissenting), *rev'd*, 334 U.S. 24 (1948) ("The court holds that perpetual deed covenants forbidding sale of homes to Negroes are valid and enforceable by injunctions cancelling sales, evicting Negroes from homes that they have bought, and preventing sales to other Negroes. . . . The covenants are void as unreasonable restraints on alienation. They are void because contrary to public policy.").

This Court has ample bases for finding that a covenant requiring the Commonwealth to maintain the Statue would violate public policy even absent the decisive actions taken by the political branches with respect to the Statue specifically.

V. The Commonwealth Cannot Be Compelled to Speak by Private Parties

Government speech doctrine places a final barrier to the enforcement of the asserted deed restrictions in this case. The Lee statue is clearly government speech under Supreme Court precedent. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009). In *Pleasant Grove*, the Court rejected a challenge to the display of a Ten Commandments monument in a city park. The petitioners asserted that the city had engaged in viewpoint discrimination by accepting the privately donated Ten Commandments monument but refusing to accept their own memorial describing the Summum's "Seven Aphorisms." *Id.* The Court held that because the Ten Commandments monument was accepted and owned by the city it was "government speech" and thus that the Summum could not assert a claim of viewpoint discrimination. *Id.* The Court further held that the Summum were not entitled to compel the city to accept its monument, as the city was free to decide what it wished to say and whether it wished to speak at all. *Id.*

Appellants here make a similar demand to assert control over the content of government speech, one that should also be rejected. Permitting a private party to dictate the speech of the government in perpetuity is alien to the government speech doctrine and its underlying commitment to political control of the government's expressive activities. As the U.S. Supreme Court has stated, "[w]hen the government speaks, for instance to promote its own policies or to advance a

particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000). "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id*. *Summum* and *Southworth* require that the government be free to change its mind about what it says.

The use of servitudes to require the government to continue speaking at the behest of a small group of citizens violates this basic political and legal principle. The government cannot agree to accept and maintain a particular memorial "forever"—just as one legislature cannot bind a future legislature to maintain laws with which it disagrees and would overturn. To assert otherwise would contravene the basic justification for and undermine the legitimacy of government speech's freedom from First Amendment challenge. Indeed, a different conclusion would permit private parties to essentially commandeer public property for their own private expression, despite changing norms and contrary to democratic will.

Permitting a speech-based property restriction that binds the government is particularly troubling when that restriction is being deployed to prevent the government from rectifying hateful, harmful, or stigmatizing speech. Unlike private speech, the government's stigmatizing speech "might raise heightened concerns because we think that the government's messages are more influential, that they can induce people to undertake acts that will do harm, or that the government will

exercise its power to the material detriment of those citizens who are tagged with disrespectful messages." Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 Arizona L. Rev. 1, 17 (2021). "Government messages . . . are understood to be powerful," *id.* at 27 (discussing *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 615 (2014)), and thus the exercise of that power must be responsive to democratic checks.

Here, the Commonwealth's decision to remove the Lee statue was and continues to be motivated by the desire to rectify the material and symbolic injustices perpetrated by previous Virginia governments—those that adopted and perpetuated Jim Crow. At the time of the conveyances at issue in this case, the Circle and the Lee Monument were embraced by a community committed to the policies of racial inferiority and racial exclusion. T.A. 411. The Lee statue had originally been erected as a symbol of white supremacy. *Id.* The rejection of that message—previously endorsed by the Commonwealth, but now repudiated—is precisely what the government speech doctrine contemplates.

Such repudiation can only occur if the political community controls the content of government speech. As the General Assembly's enactment makes plain, this is a case in which "the citizenry objects" to the continued display of the Statue and "newly elected officials" have sought to "espouse some different or contrary position," in line with the expectations of government speech doctrine. *Southworth*,

529 U.S. at 235. Should this issue be resolved through application of the covenant, the will of the "electorate" and the "newly elected officials" will be frustrated. So, too, the basic justification for the government speech doctrine would be subverted.

***

While appellants assert that the language in conveyances made more than a century ago binds the Commonwealth in perpetuity, common law doctrines say otherwise. Those doctrines look skeptically at any perpetual restriction on land and especially on perpetual restrictions that appear to benefit non-landowners, that are not clearly defined and delineated, and that require affirmative acts on the part of future landowners.

The doctrine of servitudes is intended to achieve certain goals. In order to maintain an efficient, fair, and equitable market for property, the needs of current generations must be balanced against the expectations of past ones. Property must be alienable; it must be usable; it must be capable of being put to the purposes the market and society require. These policy aims are particularly important when considered alongside the traditional American solicitude of free speech. Covenants should not be transformed into an end run around the First Amendment's prohibition on restricting or compelling speech. And they certainly should not be distorted into devices capable of binding governments and the voters those governments represent to speak a particular message for all eternity.

In light of these uncontroversial principles of property law, this Court should affirm the judgments below.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 5:30, I hereby certify that this brief complies with the requirements of Rule 5:26 and contains 7,973 words, exclusive of the parts of the brief exempted by Rule 5:26(b). This brief complies with the type style requirements of Rule 5:6(a)(2) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

Dated: April 19, 2021

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(e), I hereby certify that on April 19, 2021 I caused the foregoing Brief to be filed with the Clerk of the Court for the Supreme Court of Virginia by using the Virginia Appellate Courts Electronic System (VACES) and to be served by email to:

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