IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 1639-22-2

LAYLA H. by her next friend Maria Hussainzadah, *et al.*,
Appellants,

v.

COMMONWEALTH OF VIRGININA, *et al.*,
Appellees.

BRIEF OF APPELLEES

JASON S. MIYARES
Attorney General

STEVEN G. POPPS (#80817)
Deputy Attorney General

THOMAS J. SANFORD (#95965)
Assistant Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7704 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

ANDREW N. FERGUSON (#86583)
Solicitor General

ERIKA L. MALEY (#97533)
Principal Deputy Solicitor General

GRAHAM K. BRYANT (#90592)
Deputy Solicitor General

ANNIE CHIANG (#94703)
Assistant Solicitor General

Counsel for Appellees

May 19, 2023

TABLE OF CONTENTS

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT 3
ASSIGNMENTS OF ERROR 9
STANDARD OF REVIEW 10
SUMMARY OF ARGUMENT 10
ARGUMENT 13
I. Sovereign immunity bars Plaintiffs' suit 13
A. Sovereign immunity bars Plaintiffs' *jus publicum* claims 13
B. Sovereign immunity bars Plaintiffs' claims under Article I, Section 11 23
1. Sovereign immunity applies to claims for equitable remedies 24
2. Article I, section 11 is not self-executing as to Plaintiffs' substantive due process claims 28
II. Fundamental separation of powers principles and Plaintiffs' lack of standing also defeat their claims 38
A. The separation of powers bars Plaintiffs' suit 39
B. Plaintiffs lack standing 45
CONCLUSION 53
CERTIFICATE 54

TABLE OF AUTHORITIES

Page(s)

Cases

Afzall v. Commonwealth,
273 Va. 226 (2007) 21, 25

Aji P. v. State,
480 P.3d 438 (Wash. Ct. App. 2021) .... *passim*

Alden v. Maine,
527 U.S. 706 (1999) 21

Alec L. v. Jackson,
863 F. Supp. 2d 11 (D.D.C. 2012) 43

Alliance to Save the Mattaponi v. Commonwealth,
270 Va. 423 (2005) 25

Am. Elec. Power Co. v. Connecticut,
564 U.S. 410 (2011) 42

Animal Legal Def. Fund v. United States,
404 F. Supp. 3d 1294 (D. Or. 2019) 33

Aronow v. State,
No. A12-0585, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012) 8

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 37, 38

Bd. of Pub. Works of City of Richmond v. Gannt,
76 Va. 455 (1882) 13, 17

Bruce Farms, Inc. v. Coupe,
219 Va. 287 (1978) 42

Burns v. Bd. of Sup'rs of Fairfax Cnty.,
218 Va. 625 (1977) 18

Chandler v. Routin,
63 Va. Cir. 139 (Norfolk 2003) 28, 29, 30

Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Sup'rs,
285 Va. 87 (2013) 51, 52

Chernaik v. Brown,
475 P.3d 68 (Or. 2020) 8

Cherrie v. Virginia Health Servs.,
292 Va. 309 (2016) 23

City of Boerne v. Flores,
521 U.S. 507 (1997) 36

City of Newport News v. Woodward,
104 Va. 58 (1905) 16

The Civil Rights Cases,
109 U.S. 3 (1883) 36

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 45

Clean Air Council v. United States,
362 F. Supp. 3d 237 (E.D. Pa. 2019) .... *passim*

Commonwealth v. Luzik,
259 Va. 198 (2000) 13

Corp. Exec. Bd. v. Va. Dep't of Taxation,
96 Va. Cir. 287 (Arlington 2017) 45

Ctr. For Biological Diversity v. United States DOI,
563 F.3d 466 (D.C. Cir. 2009) 33, 47, 50

Daily Press, LLC v. Office of the Exec. Sec'y,
293 Va. 551 (2017) 39

Daniels v. Mobley,
285 Va. 402 (2013) 25

Debroux v. Commonwealth,
32 Va. App. 364 (2000) 38

Delk v. Moran,
No. 7:16cv00554, 2019 WL 1370880 (W.D. Va. Mar. 26, 2019) 28

DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,
489 U.S. 189 (1989) 34

DiGiacinto v. Rector & Visitors of George Mason Univ.,
281 Va. 127 (2011) .... *passim*

Doe v. Obama,
641 F.3d 157 (4th Cir. 2011) 50

Doe v. Rector & Visitors of George Mason Univ.,
132 F. Supp. 3d 712 (E.D. Va. 2015) 28, 30, 35

Dr. William E.S. Flory Small Bus. Dev. Ctr., Inc. v. Commonwealth,
261 Va. 230 (2001) 25

Elizabeth River Crossings OpCo, LLC v. Meeks,
286 Va. 286 (2013) 40, 44

Ellis v. Kennedy,
No. CL19-03, 2020 Va. Cir. LEXIS 244 (Loudoun May 22, 2020) 29, 31

Ely v. Velde,
451 F.2d 1130 (4th Cir. 1971) 33

Fines v. Rappahannock Area Cmty. Servs. Bd.,
__ Va. __, 876 S.E.2d 917 (2022) 24

French v. Virginia Marine Res. Comm'n,
64 Va. App. 226 (2015) 34

Friends for Ferrell Parkway, LLC v. Stasko,
282 F.3d 3135 (4th Cir. 2002) 50

Goldman v. Landsidle,
262 Va. 364 (2001) 50

Gray v. Rhoads,
55 Va. Cir. 362 (Charlottesville 2001)...30

Gray v. Virginia Sec'y of Trans.,
276 Va. 93 (2008) .... *passim*

Greco v. Commonwealth,
2014 WL 1301858 (Va. Ct. App. Apr. 1, 2014) 33

Halberstam v. Commonwealth,
251 Va. 248 (1996) 15

Hallmark Personnel Agency, Inc. v. Jones,
207 Va. 968 (1967) 41

Hans v. Louisiana,
134 U.S. 1 (1890)...22

Hawkins v. Commonwealth,
65 Va. App. 101 (2015)...38

Hinchey v. Ogden,
226 Va. 234 (1983) 14, 15, 24

Howell v. McAuliffe,
292 Va. 320 (2016) 41

Infants v. Va. Hous. Dev. Auth.,
221 Va. 659 (1980) 39, 40, 44

Iowa Citizens for Cmty. Improvement & Food & Water Watch v. State,
962 N.W.2d 780 (Iowa 2021).. 5, 42, 51, 52

Jones v. City of Danville,
No. 4:20-cv-20, 2021 WL 3713063 (W.D. Va. Aug. 20, 2021)...31

Juliana v. United States,
947 F.3d 1159 (9th Cir. 2020) 5, 51

K.I.D. v. Jones,
No. CL14-51, 2016 Va. Cir. LEXIS 103 (Richmond Cnty.
June 8, 2016) 31

Kocher v. Campbell,
282 Va. 113 (2011) 45

Ligon v. County of Goochland,
279 Va. 312 (2010) 21

Maddox v. Commonwealth,
267 Va. 657 (2004) 17

McClary v. Jenkins,
299 Va. 216 (2020) 45

Messina v. Burden,
228 Va. 301 (1984) 14, 15, 21

Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways,
298 Va. 616 (2020) 22

Montalla, LLC v. Commonwealth,
No. 0127-22-2, 2023 WL 3061976 (Va. Ct. App. Apr. 25,
2023) 25

Morgan v. Bd. of Supervisors of Hanover Cnty.,
__ Va. __, 883 S.E.2d 131 (2023) 45, 46, 47, 50

Nat'l Sea Clammers Ass'n v. New York,
616 F.2d 1222 (3d Cir. 1980) 32, 33

North Carolina, ex rel. Cooper v. Tennessee Valley Authority,
615 F.3d 291 (4th Cir. 2010) 51

Palmer v. Atl. Coast Pipeline, LLC,
293 Va. 573 (2017) (McCullough, J., concurring) 32

PPL Montana, LLC v. Montana,
565 U.S. 603–04 (2012) 5

Quigley v. McCabe,
No. 2:17-cv-70, 2017 WL 3821806 (E.D. Va. Aug. 30, 2017) .. 28, 30, 31

Raines v. Byrd,
521 U.S. 811 (1997) 46

Rector and Visitors of the Univ. of Va. v. Carter,
267 Va. 242 (2004) 2, 15

Reynolds v. State of Florida,
316 So. 3d 813 (Fla. Dist. Ct. App. 2021) 5, 44

Reynolds v. State of Florida,
No. 2018-CA-819, 2020 WL 3410846 (Fla. Cir. Ct. June 10, 2020), *aff'd*, 316 So.3d 813 (Fla. Dist. Ct. App. 2021) 43, 44

Robb v. Shockoe Slip Foundation,
228 Va. 678 (1985) .... *passim*

Sagoonick v. State,
503 P.3d 777 (Alaska 2022) .... *passim*

Seabolt v. Cnty. of Albemarle,
283 Va. 717 (2012) 13

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 21, 37

Sossamon v. Texas,
563 U.S. 277 (2011) 21

Spencer v. Commonwealth,
68 Va. App. 183 (2017) 38

State v. Rendleman,
603 N.E.2d 1333 (Ind. 1992) 22

Svitak v. State,
178 Wash. App. 1020, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013) 5, 43, 44

Va. Marine Res. Comm'n v. Chincoteague Inn,
287 Va. 371 (2014) .... *passim*

Virginia Beach Beautification Com. v. Board of Zoning Appeals,
231 Va. 415 (1986) 46

Washington v. Glucksberg,
521 U.S. 702 (1997) 33

Wiecking v. Allied Medical Supply Corp.,
239 Va. 548 (1990) 17

Wilkins v. West,
264 Va. 447 (2002) 46

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 37

Wood v. Bd. of Supervisors,
236 Va. 104 (1988) 1, 40

XL Specialty Ins. Co. v. Commonwealth, Dep't of Transp.,
47 Va. App. 424 (2006) 26

Young v. City of Norfolk,
62 Va. Cir. 307 (Norfolk 2003) 29, 30

Ex parte Young,
209 U.S. 123 (1908) 25

Statutes

42 U.S.C. § 1983 37

Code § 8.01-192 18

Code § 10.1-1183 3

Code § 45.2-102 ... 3

Code § 45.2-1602 ... 4

Code § 45.2-1614 ... 4

Other Authorities

Jessica Aizarani, *Global Natural Gas Production 1998–2022*, Statista, https://tinyurl.com/4defej2r (last visited May 19, 2023) ... 49

Jessica Aizarani, *Global Oil Production 1998–2021*, Statista, https://tinyurl.com/ck36ks42 (last visited May 19, 2023) ... 49

Natural Gas, Va. Dep't of Energy, https://tinyurl.com/4j2hbmcp (last visited May 19, 2023) ... 49

Oil, Va. Dep't of Energy, https://tinyurl.com/3wacf466 (last visited May 19, 2023) ... 49

Report of the Commission on Constitutional Revision, The Constitution of Virginia, H. Doc. No. 1, 1969 Exec. Sess ... 36

Rule 5A:1(f) ... 26

United Nations, *Climate Action* (last visited May 19, 2023), https://tinyurl.com/wvjz52p4 ... 48, 49

Va. Const. art. I, § 5 ... 39

Va. Const. art. I, § 8 ... 27

Va. Const. art. I, § 11 ... 29, 32

Va. Const. art. III, § 1 ... 39

Va. Const. art. IV, § 1 ... 39

Va. Const. art. V ... 39

Va. Const. art. XI, § 1 ... 19

INTRODUCTION

Plaintiffs should present their arguments to the General Assembly; they do not belong in court. Plaintiffs demand sweeping changes to the Commonwealth's energy and environmental policies. But "it is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests, and to devise standards." *Wood v. Bd. of Supervisors*, 236 Va. 104, 115 (1988). Justiciability doctrines exist precisely to guard against dragging courts into policy disputes that should be decided by the people through their elected legislators. For these reasons, courts from Alaska to Florida have rejected similar climate-change lawsuits as invalid efforts to nullify the political process. See pp. 4–5 n.1, *infra*. The circuit court came to the same correct result here, and this Court should affirm.

The circuit court correctly applied well-established principles to hold that sovereign immunity bars Plaintiffs' claims. The *jus publicum* is a narrow doctrine providing that the public may "move and transport goods" over navigable tidal waterways. *Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 387 (2014). As the Supreme Court has explained, it is a "matter of Virginia common law subject to the

Constitution of Virginia and the General Assembly's modification by statute." *Id* at 383. Sovereign immunity bars all common-law claims against the Commonwealth "[a]bsent an express statutory or constitutional provision waiving sovereign immunity." *Rector and Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244 (2004). It is undisputed that no provision expressly waives sovereign immunity for *jus publicum* claims, and the suit is therefore barred.

Plaintiffs attempt to avoid the clear sovereign immunity bar by recasting their environmental claims as substantive due process claims under Article I, section 11 of the Virginia Constitution. But they cannot evade sovereign immunity by hypothesizing the existence of a novel unenumerated right. Sovereign immunity bars constitutional claims if the provision at issue is not self-executing. As every court to have considered the question has held, section 11 is not self-executing for such claims. The Due Process Clause is silent as to environmental protection and sets forth no rule of decision for a court to determine how to regulate oil and gas development or greenhouse gas emissions. Sovereign immunity therefore applies.

Finally, while there is no need for this Court to look beyond sovereign immunity, Plaintiffs' suit also suffers from several other jurisdictional defects, including the separation-of-powers doctrine and Plaintiffs' lack of standing. This Court should join the host of other courts across the country in rejecting Plaintiffs' end run around self-governance and the political process.

STATEMENT

The General Assembly has set forth the Commonwealth's public policy on the complex, interlocking issues of energy, the environment, natural resources, and conservation in an extensive statutory regime spanning six titles of the Code of Virginia. See, *e.g.*, Code titles 10.1, 28.2, 29.1, 45.2, 62.1, 67. Those statutes entrust the Virginia Department of Environmental Quality (DEQ), Virginia Department of Energy (DOE), and other expert regulatory bodies with implementing that regime. Code § 10.1-1183 (establishing DEQ), § 45.2-102 (establishing DOE). The agencies have issued extensive administrative regulations that occupy two titles of the Administrative Code. See Va. Admin. Code titles 4, 9.

The General Assembly enacted the Gas and Oil Act of 1990 in chapter 16 of Title 45.2 to serve multiple purposes. Relevant here, the General Assembly provided that the Act shall be "construed" and "administer[ed]" to "provide a method of gas and oil conservation for maximizing exploration, development, production, and utilization of gas and oil resources," Code §§ 45.2-1602(2), 45.2-1614(A)(1), (A)(2), as well as coal resources in certain circumstances, Code §§ 45.2-1602(5), 45.2-1614(A)(4). In serving these purposes, the General Assembly stated that the Act must be construed "[t]o protect the citizens and the environment of the Commonwealth from the public safety and environmental risks associated with the development and production of gas or oil," Code § 45.2-1602(6), as well as to "promote the safe and efficient exploration for and development, production, utilization, and conservation of the Commonwealth's gas and oil resources," Code § 45.2-1602(1).

Plaintiffs are thirteen Virginia children represented by Our Children's Trust—an organization that has filed unsuccessful suits raising the same legal theories in federal and state courts across the country.[1]

[1] See, *e.g.*, *Sagoonick v. State*, 503 P.3d 777, 782 (Alaska 2022) (affirming dismissal of youth plaintiffs' climate change case seeking

Plaintiffs sued the Commonwealth of Virginia, Governor Glenn Youngkin, DOE, DOE Director Will Clear, DEQ, and DEQ Director Michael Rolband in the Circuit Court for the City of Richmond.

Plaintiffs purport to state claims under the *jus publicum* or "public trust" doctrine, a common law doctrine providing that the Commonwealth owns the submerged land under navigable tidal waters in "trust" for the public. *Chincoteague Inn*, 287 Va. at 387; see *PPL Montana, LLC v. Montana*, 565 U.S. 603–04 (2012) ("[T]he States retain residual power to determine the scope of the public trust over waters within

---

declaratory and injunctive relief based on substantive due process and public trust doctrine claims); *Aji P. v. State*, 480 P.3d 438, 444–45 (Wash. Ct. App. 2021) (affirming dismissal of youth plaintiffs' climate change case seeking declaratory and injunctive relief based on substantive due process and public trust doctrine claims); *Iowa Citizens for Cmty. Improvement & Food & Water Watch v. State*, 962 N.W.2d 780, 785, 799 (Iowa 2021) (ordering dismissal of a complaint based on the public trust doctrine); *Reynolds v. State of Florida*, 316 So. 3d 813 (Fla. Dist. Ct. App. 2021) (dismissing youth plaintiffs' climate change case seeking declaratory and injunctive relief); *Juliana v. United States*, 947 F.3d 1159, 1170–75 (9th Cir. 2020) (instructing district court to dismiss youth plaintiffs' climate change case seeking declaratory and injunctive relief); *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 253 (E.D. Pa. 2019) (rejecting substantive due process and public trust doctrine claims in climate change case); *Svitak v. State*, 178 Wash. App. 1020, 2013 WL 6632124, at *1–3 (Wash. Ct. App. Dec. 16, 2013) (dismissing complaint based on the public trust doctrine seeking declaratory and injunctive relief).

their borders, while federal law determines riverbed title"). The *jus publicum* creates a common-law "right to navigate the Commonwealth's waters" in order "to move and transport goods." *Chincoteague Inn*, 287 Va. at 387 (quoting *City of Newport News*, 158 Va. at 550). As a "matter of Virginia common law," the *jus publicum* is "subject to the Constitution of Virginia and the General Assembly's modification by statute." *Id.* at 383.

Plaintiffs' claims rest on a massive expansion of the doctrine, which they contend creates a "right to use an atmosphere, lands, and waters protected from pollution, impairment, or destruction," under both the common law and the Virginia Constitution. R. 67, 70, 74 (Compl. ¶¶ 180, 193, 209). They challenge the Gas and Oil Act as well as the Commonwealth's alleged "policy and practice of exercising [its] statutory discretion in favor of permitting fossil fuel infrastructure," R. 9 (Compl. ¶ 12), for impairing their claimed *jus publicum* rights, see R. 63–67, 68–69, 71–73 (Compl. ¶¶ 166–77, 182–89, 198–205), and thereby also violating their claimed "substantive due process rights in the Virginia Constitution," see R. 66–67, 69–71, 73–75 (Compl. ¶¶ 178–81, 190–97, 206–13).

Plaintiffs allege that they have experienced numerous injuries as a consequence of global climate change. Among other things, they allege that "rising temperatures caused by climate change," R. 12–13, 14, 17, 21 (Compl. ¶¶ 23, 28, 38, 49), interfere with their outdoor and recreational activities, R. 17, 51–52, 54 (Compl. ¶¶ 38, 135, 142), and have led to additional pollen affecting allergies, R. 22, 58 (Compl. ¶¶ 52, 148). They also allege that climate change has "alter[ed] insect populations," including "ticks" that carry disease, R. 17, 52, 54 (Compl. ¶¶ 38, 136, 142), and has made gardening more "difficult," R. 13 (Compl. ¶ 23).

Plaintiffs further allege that global climate change has led to "ocean acidification," which in turn has led to "higher costs in purchasing local shellfish." R. 50 (Compl. ¶ 133). And they allege that their knowledge of climate change, see, *e.g.*, R. 12, 19–20 (Compl. ¶¶ 21, 46), has led to "anxiety about climate change," R. 11–12, 15 (Compl. ¶¶ 20, 31), and harmed their asserted "religious and spiritual connection to Virginia's environment," R. 11 (Compl. ¶ 20).

Plaintiffs seek a declaratory judgment that Virginia's existing regulatory framework is unconstitutional and a violation of the *jus publicum* because it is insufficient to prevent global climate change. R.75–76.

They also seek unspecified "injunctive relief," R. 9–10, 69, 71, 73, 75 (Compl. ¶¶ 12, 14, 189, 197, 205, 213); see also R. 75.[2]

Defendants filed a demurrer and plea of sovereign immunity. These responsive pleadings raised several reasons Plaintiffs' complaint should be dismissed, including that sovereign immunity barred their claims; that the claims violated the separation of powers; that Plaintiffs lacked standing; and that they failed to state a claim on the merits because the *jus publicum* does not apply to greenhouse gas emissions, and the Virginia Constitution creates no substantive due process right to an unimpaired atmosphere or environment. R. 127–47.

---

[2] Although Plaintiffs do not specify what injunctive relief they are seeking in this case, the injunctive relief that Our Children's Trust has unsuccessfully sought in other cases regarding the same claims is informative. *See*, *e.g.*, *Aji P. v. State*, 480 P.3d 438, 446 (Wash. Ct. App. 2021) (requesting that the court order the State "to develop and submit to the Court . . . an enforceable state climate recovery plan," and that it "[r]etain jurisdiction . . . to approve, monitor and enforce compliance" with that plan); *Chernaik v. Brown*, 475 P.3d 68, 72 (Or. 2020) (seeking "an injunction ordering the state to . . . implement a carbon reduction plan . . ., which the court would supervise to ensure enforcement."); *Aronow v. State*, No. A12-0585, 2012 WL 4476642, at *1 (Minn. Ct. App. Oct. 1, 2012) (requesting the court to "compel respondents to take the necessary steps to reduce the State's carbon dioxide output by at least 6% per year, from 2013 to 2050" (cleaned up)).

The circuit court agreed that the Plaintiffs' claims could not proceed. After reviewing the briefing and hearing extensive oral argument, the circuit court held "that the Commonwealth of Virginia has sovereign immunity from Plaintiffs' allegations and . . . that Virginia Constitution Article I, § 11, in this instance, is not self-executing." R. 215; see R. 273–74. The circuit court accordingly dismissed Plaintiffs' complaint. R. 215. Plaintiffs appealed. R. 216–22.

ASSIGNMENTS OF ERROR

Plaintiffs raise four assignments of error:

1. The Circuit Court erred in dismissing Plaintiffs' case on sovereign immunity grounds, thereby rendering substantive due process rights under the Constitution of the Commonwealth of Virginia, and common law *jus publicum* rights, unenforceable.

2. The Circuit Court erred in expanding the doctrine of sovereign immunity to apply to constitutional claims seeking equitable relief.

3. The Circuit Court erred in finding that Virginia Constitution Article I § 11 in this instance, is not self-executing, even when Plaintiffs' Complaint requests equitable relief and not damages.

4. The Circuit Court erred in implicitly finding that Virginia's *jus publicum* is not self-executing even when Plaintiffs' Complaint requests equitable relief and not damages.

Opening Br. 9.

STANDARD OF REVIEW

Whether sovereign immunity applies is a question of law this Court reviews de novo. See *Gray v. Virginia Sec'y of Trans.*, 276 Va. 93, 97, 101 (2008).

SUMMARY OF ARGUMENT

The circuit court correctly held that sovereign immunity bars Plaintiffs' suit. Sovereign immunity bars common-law claims against the Commonwealth unless there is a statutory provision expressly waiving immunity for the claim. Plaintiffs' *jus publicum* claim is a common-law claim. No statute expressly waives sovereign immunity for *jus publicum* claims. Sovereign immunity therefore applies.

Sovereign immunity also bars constitutional claims unless the provision at issue is self-executing. To the extent Plaintiffs raise a claim under Article XI, section 1, the Supreme Court has already held that provision is not self-executing because it merely sets forth policy goals for the General Assembly to implement and creates no judicial rules of decision. *Robb v. Shockoe Slip Foundation,* 228 Va. 678, 682–83 (1985).

Plaintiffs' attempt to avoid immunity by recasting their *jus publicum* claim as a matter of substantive due process under Article I,

section 11 likewise fails. A constitutional provision is self-executing only if it "supplies a sufficient rule by means of which the right given may be employed and protected," and "is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 138 (2011).

Article I, section 11 is not self-executing for substantive due-process claims under the Due Process Clause. For such claims, the clause plainly does not "lay[] down rules by means of which those principles may be given the force of law." *Id.* Indeed, the Supreme Court has never held that the Due Process Clause of section 11 has a substantive component at all, and the provision certainly does not set forth what—if any—substantive rights it encompasses, much less a rule for determining when any such rights are infringed. Thus, the provision is not self-executing as to Plaintiffs' claims.

Finally, although this Court need not look beyond sovereign immunity, the circuit court lacked jurisdiction for additional reasons. Plaintiffs' claims violate the separation-of-powers doctrine because they

ask the Court to intrude into the General Assembly's authority to set energy and environmental policy on behalf of the Commonwealth.

Plaintiffs also lack standing because their alleged injuries are not particularized; every person in the Commonwealth could similarly assert that they are in some way affected by the climate. Plaintiffs' alleged injuries are also neither fairly traceable to Defendants' challenged actions, nor redressable by the requested relief. Global climate change is a global phenomenon; climate change in Virginia is caused by all sources of emissions occurring everywhere in the world. Any causal chain between the challenged regulatory regime and Plaintiffs' injuries is exceedingly attenuated at best, and their requested relief of declaring the regulatory regime invalid would have no measurable impact on global climate change or their alleged injuries.

ARGUMENT

I. Sovereign immunity bars Plaintiffs' suit

A. Sovereign immunity bars Plaintiffs' *jus publicum* claims

The circuit court faithfully applied longstanding principles of sovereign immunity in dismissing Plaintiffs' complaint. Sovereign immunity bars common-law claims, such as Plaintiffs' *jus publicum* claims, unless a statute expressly waives immunity. There is no such statute here. And the Supreme Court has already held that Article XI, section 1 is not self-executing. Sovereign immunity therefore bars any claims brought under that provision.

"It is an established principle of sovereignty, in all civilized nations, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission." *Bd. of Pub. Works of City of Richmond v. Gannt*, 76 Va. 455, 461 (1882). A circuit court should "first consider [a] claim of sovereign immunity" before addressing other grounds for dismissal, "because it is jurisdictional." *Seabolt v. Cnty. of Albemarle*, 283 Va. 717, 719 (2012); see *Commonwealth v. Luzik*, 259 Va. 198, 206 (2000) (holding that, absent a waiver of sovereign

immunity, "the courts of this Commonwealth do not have the necessary jurisdictional authority to entertain" an action against the Commonwealth).

Sovereign immunity serves a host of purposes, including "protect[ing] the state from burdensome interference with the performance of its governmental functions," and "preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation." *Messina v. Burden*, 228 Va. 301, 308 (1984) (quoting *Hinchey v. Ogden*, 226 Va. 234, 240 (1983)); see *id.* at 307–08 (listing additional purposes such as "preserv[ing] its control over state funds, property, and instrumentalities," "protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, [and] assuring that citizens will be willing to take public jobs" (cleaned up)).

"[B]ecause the Commonwealth can act only through individuals, the doctrine applies not only to the state, but also to certain government officials." *Gray*, 276 Va. at 102. The government officials protected by sovereign immunity include the "Governor[]," as well as "other high

level governmental officials," such as the agency heads named as Defendants in this action. *Messina*, 228 Va. at 309.

"Absent an express statutory or constitutional provision waiving sovereign immunity, the Commonwealth and its agencies are immune from liability." *Rector and Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244 (2004). Any waiver of sovereign immunity must be "explicit[]" and "express[]"; "waiver of immunity cannot be implied from general statutory language or by implication." *Hinchey*, 226 Va. at 241 (quoting *Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 457 (1961)). Further, express waivers "must be strictly construed." *Halberstam v. Commonwealth*, 251 Va. 248, 250 (1996).

For equitable claims based on the Virginia Constitution, the key question is whether the provision at issue is "self-executing." *DiGiacinto*, 281 Va. at 137. "[S]overeign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia." *Id.* A constitutional provision is self-executing when it "supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles,

without laying down rules by means of which those principles may be given the force of law." *DiGiacinto*, 281 Va. at 138 (quoting *Gray*, 276 Va. at 103–04); see also *City of Newport News v. Woodward*, 104 Va. 58, 61 (1905) (concluding that a provision is self-executing "if the nature and extent of the right [it] confer[s] . . . is fixed by the provision itself, so that the same can be determined by the examination and construction of its own terms").

The circuit court correctly applied these settled sovereign-immunity principles in holding that sovereign immunity bars Plaintiffs' *jus publicum* claims. The *jus publicum* is a common-law doctrine providing that "the title to and dominion over subaqueous bottomland is 'an essential attribute' of the Commonwealth's state sovereignty." *Chincoteague Inn*, 287 Va. at 381 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997)). The Commonwealth's ownership of these lands submerged beneath waterways is "for the benefit of the people," and includes a public "right to navigate the Commonwealth's waters." *Id.* at 383, 387. Virginia's "public trust doctrine has never been applied to the atmosphere." *Aji P.*, 480 P.3d at 457; see *Chincoteague Inn*, 287 Va. at 387 ("[T]he public right inherent to the *jus publicum,* is

'the right to *move* and transport goods *from place to place over* the great natural highways provided by *the navigable waters* of the State." (quoting *City of Newport News*, 158 Va. at 550)).

"[W]hether an activity is a right of the people inherent to the *jus publicum* is a matter of Virginia common law subject to the Constitution of Virginia and the General Assembly's modification by statute." *Chincoteague Inn*, 287 Va. at 383; see generally *City of Newport News*, 158 Va. at 539–44. The rule that "a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission" applies to all common-law claims against the Commonwealth and its agencies unless the General Assembly has expressly waived immunity by statute. *Gannt*, 76 Va. 455, 461 (1882); see *Maddox v. Commonwealth*, 267 Va. 657, 661 (2004) (addressing tort cases); *Wiecking v. Allied Medical Supply Corp.*, 239 Va. 548, 553 (1990) (addressing contract claims); see generally pp. 14–15, *supra*. Plaintiffs cite no precedent holding that a common-law doctrine itself waives sovereign immunity without an express statutory waiver, and the Commonwealth is aware of none.

Plaintiffs appear to assert that sovereign immunity does not bar their claims because the *jus publicum* doctrine is "self-executing." Opening Br. 36–38. Plaintiffs contend that the *jus publicum* doctrine satisfies the test for whether a provision is self-executing because it is "negative in character," and it "is 'declaratory of common law' because it is of common law." Opening Br. 37. This argument fundamentally misapprehends sovereign immunity doctrine: the self-execution analysis applies *only* to provisions of the Virginia Constitution, not to common-law doctrines. *Cf. Burns v. Bd. of Sup'rs of Fairfax Cnty.*, 218 Va. 625, 627 (1977) (comparing immunity analysis for tort and constitutional claims). Rather, sovereign immunity bars common-law claims against the Commonwealth and its agencies unless the General Assembly passes a statute expressly abrogating immunity for the claim. See pp. 14–15, *supra*; Code §§ 8.01-195.1 *et seq.* (tort claims); Code § 8.01-192 (contract claims). Because there is no express waiver here, the circuit court correctly held the claim is barred.

Plaintiffs' attempt to link their *jus publicum* claims to Article XI, section 1 does nothing to support their sovereign immunity arguments. See Opening Br. 33 ("Article XI, Section 1 . . . defines the scope of

[Plaintiffs'] *jus publicum* rights"). That section provides that "it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth." Va. Const. art. XI, § 1. Again, sovereign immunity bars constitutional claims unless the provision at issue is self-executing. See pp. 15–16, *supra*. The Supreme Court has held that "Va. Const. art. XI, § 1, is not self-executing," because it "lays down no rules by means of which the principles it posits may be given the force of law" and "its language invites crucial questions of both substance and procedure." *Robb*, 228 Va. at 682–83. Plaintiffs concede that "this Court is bound by *Robb*'s holding that Article XI, Section 1 is not a self-executing constitutional provision." Opening Br. 33. Thus, they apparently do not challenge the circuit court's holding that sovereign immunity bars their claims under Article XI, section 1.

Plaintiffs nevertheless assert that *Robb* is not dispositive here because it "was not a common law *jus publicum* case and it did not address sovereign immunity." Opening Br. 33. But again, to the extent that Plaintiffs are raising common-law *jus publicum* claims, sovereign

immunity bars those claims because there is no express statutory waiver. See p. 17, *supra*. And to the extent they are raising claims under Article XI, section 1, *Robb* makes clear that sovereign immunity bars those claims as well. Although *Robb* rejected claims under Article XI, section 1 for lack of a cause of action, its holding that the provision is not self-executing applies with equal force in the sovereign-immunity analysis. The "dispositive issue" in determining whether sovereign immunity bars constitutional claims is "whether these constitutional provisions are self-executing." *Gray*, 276 Va. at 102. If the provisions "are not self-executing, then the[] claims . . . are barred by the doctrine of sovereign immunity." *Id.* Thus, whether Plaintiffs bring their *jus publicum* claims under common law or under Article XI, the claims are barred by sovereign immunity.

Plaintiffs argue that "[s]overeign immunity cannot bar [their] *jus publicum* claims because the *jus publicum* is inherent in the sovereignty of the people of Virginia and is a judicially enforceable restraint on the Commonwealth's powers." Opening Br. 28. But sovereign immunity itself is an "inseparable incident[] . . . of the sovereignty of the State." *Id.* (emphasis omitted) (quoting *Commonwealth v. City of Newport News*,

158 Va. 521, 546 (1932)); see, *e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . ." (quoting The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton))).

Nevertheless, Plaintiffs assert "[t]here *must* be an equitable judicial remedy available," because "a right 'implies a cause of action for interference with that right.'" Opening Br. 31–32 (quoting *Wyatt v. McDermott*, 283 Va. 685, 693 (2012)); see *id.* at 32 (quoting *Carrington v. Goddin*, 54 Va. (13 Gratt.) 587, 600 (1857)). But *Wyatt* and *Carrington* were not suits against the Commonwealth and involved no questions of sovereign immunity. Sovereign immunity is a feature of Virginia law and the federal Constitution. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 748–49 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55–56 (1996); *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007); *Messina*, 228 Va. at 307–08. It cannot be overcome by waving a hand toward the *ubi jus* maxim. Indeed, the very nature of the doctrine is to bar claims against the sovereign even when, unlike here, the plaintiff has suffered an otherwise cognizable common-law injury. See *Ligon v. County of Goochland*, 279 Va. 312, 316 (2010) ("[T]he Commonwealth is

immune . . . from suits."); see also, *e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 20 (1890) ("[T]he obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court."); *State v. Rendleman*, 603 N.E.2d 1333, 1334–35 (Ind. 1992) (holding that sovereign immunity applied to bar the plaintiff's claim even though it "precluded [him] from obtaining a remedy for his personal injury and property damage" and that this application of sovereign immunity was consistent with a state constitutional provision guaranteeing that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law"); *cf.* *Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways*, 298 Va. 616, 618 (2020) (observing that to infer a private cause of action, "[i]t simply is not enough that the plaintiff has 'a personal stake in the outcome of the controversy,' or that 'the plaintiff's rights will be affected by the disposition of the case'").

In any event, Plaintiffs' contention that they cannot have a right without a remedy begs the question: no Virginia precedent recognizes the amorphous and sweeping rights Plaintiffs assert, and it is thus

unsurprising that they cannot identify any immunity waiver to pursue such claims. Indeed, *Robb* concluded that Article XI, section 1 does *not* create any privately enforceable right. *Robb*, 228 Va. at 683. Rather, it is a declaration of "public policy," and "instruct[s] the General Assembly to enact statutes whereby the public policy . . . could be executed." *Id.* And Plaintiffs' contention that they have a "right" to an atmosphere and environment that has not been "impair[ed]" by global climate change, R. 75, is far afield from any *jus publicum* doctrine the Supreme Court has recognized. See pp. 16–17, *supra*; see *Cherrie v. Virginia Health Servs.*, 292 Va. 309, 315 (2016) (rejecting claim where plaintiffs failed to "assert any historically recognized common-law right of action").

Because neither the constitution nor any statute waives the Defendants' sovereign immunity to the purported common-law *jus publicum* claims, this Court should affirm the circuit court's judgment dismissing them.

B. Sovereign immunity bars Plaintiffs' claims under Article I, Section 11

Plaintiffs recast their common-law *jus publicum* claims as "substantive due process" claims under Article I, section 11 in an attempt to avoid the sovereign immunity bar. But Article I, section 11 is not self-

executing as to Plaintiffs' claims because the provision sets forth no rules for determining the existence or scope of any such unenumerated substantive due process rights.

1. Sovereign immunity applies to claims for equitable remedies

Plaintiffs assert that there is a bright-line exception to sovereign immunity for all "cases implicating the Bill of Rights that seek equitable remedies," including claims brought under Article I, section 11. Opening Br. 11. But this argument is contrary to Supreme Court precedent, which makes clear that there is no such bright-line exception. Rather, sovereign immunity applies absent an express statutory waiver or a self-executing constitutional provision.

The basic rule that the Commonwealth may not be sued in its own courts without consenting to that suit applies across all types of litigation and remedies. See, *e.g.*, *Fines v. Rappahannock Area Cmty. Servs. Bd.*, __ Va. __, __, 876 S.E.2d 917, 922 (2022) ("Undoubtedly, the Commonwealth is entitled to sovereign immunity."). The Supreme Court has held in numerous cases that "as a general rule, the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from acting or to compel it to act." *Hinchey*,

226 Va. at 239 (citing *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, *reh'g denied*, 338 U.S. 840 (1949)); see also, *e.g.*, *Afzall*, 273 Va. at 231; *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 455 (2005).

Far from being "confusi[ng]" "dicta" as Plaintiffs assert, Opening Br. 13, these holdings set forth Virginia's black-letter sovereign immunity doctrine. There is no general sovereign-immunity exception for injunctive relief against state officers. The Supreme Court has declined to adopt any generalized equitable exception to sovereign immunity akin to the federal exception recognized in *Ex parte Young*, 209 U.S. 123 (1908), for claims under Virginia law. *Alliance to Save the Mattaponi*, 270 Va. at 455–56.

Instead, the Supreme Court and this Court have repeatedly held that sovereign immunity applies to suits seeking injunctive relief and declaratory relief that would effectively "enjoin the Commonwealth from acting." *Daniels v. Mobley*, 285 Va. 402, 412 (2013); see, *e.g.*, *Gray*, 276 Va. at 102; *Dr. William E.S. Flory Small Bus. Dev. Ctr., Inc. v. Commonwealth*, 261 Va. 230, 237 (2001); *Montalla, LLC v. Commonwealth*, No. 0127-22-2, 2023 WL 3061976, at *6 (Va. Ct. App. Apr. 25,

2023) ("In short, numerous cases confirm that the Commonwealth is immune to suits in equity.") (collecting cases).[3] As with any other suit against the Commonwealth, suits for equitable remedies are "barred by sovereign immunity" absent consent. *XL Specialty Ins. Co. v. Commonwealth, Dep't of Transp.*, 47 Va. App. 424, 434 (2006) (holding that "waiver of sovereign immunity for contractual suits" does not extend "to equitable remedies absent an [additional] explicit statutory waiver").

Likewise, there is no bright-line immunity exception for equitable claims arising from the Bill of Rights. Rather, for all equitable claims arising under the Virginia Constitution, the key question is whether the provision at issue is "self-executing." *DiGiacinto*, 281 Va. at 137. Contrary to Plaintiffs' assertions, there is no blanket rule that language "[i]mplicating the Bill of Rights" is "conclusively . . . self-executing." Opening Br. 11, 21. Rather, the Supreme Court has held that a constitutional provision is self-executing when it "supplies a sufficient rule," and "is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the

[3] Unpublished decisions of this Court are cited as "informative," but are not binding. Rule 5A:1(f).

force of law." *DiGiacinto*, 281 Va. at 138 (quoting *Gray*, 276 Va. at 103–04).

The Supreme Court considers several factors in determining whether a provision is self-executing. Constitutional provisions that "expressly so declare[]" their self-executing nature are, of course, self-executing. *Robb*, 228 Va. at 681; see Va. Const. art. I § 8 ("The provisions of this section shall be self-executing."). Courts also consider whether the provision at issue is part of the Bill of Rights or is "merely declaratory of common law," either of which favors a finding that the provision is self-executing. *Gray*, 276 Va. at 103. Likewise, "provisions which specifically prohibit particular conduct" are often considered self-executing. *Robb*, 228 Va. at 681.

Although a provision's inclusion in the Bill of Rights is relevant to the self-execution analysis, there is no rule that *every* provision in the Bill of Rights is necessarily self-executing. Instead, the crux of the analysis is whether the provision sets forth a rule by which "the principles it posits may be given the force of law." *Id.* at 682. Accordingly, provisions in the Bill of Rights—including Article I, section 11—that do not meet this standard have been held not to be self-executing. See pp. 28–31 &

n.4, *infra*; see, *e.g.*, *Chandler v. Routin*, 63 Va. Cir. 139, 141 (Norfolk 2003) ("Although Article I, § 1, is part of the Bill of Rights . . . [it] is not self-executing and does not support a private cause of action."); *Delk v. Moran*, No. 7:16cv00554, 2019 WL 1370880, at *4 (W.D. Va. Mar. 26, 2019) ("Va. Const. art. I § 9 states only the principle that cruel and unusual punishment ought not to be inflicted, without any attendant rules'; therefore, '§ 9 is not self-executing." (quoting *Quigley v. McCabe*, No. 2:17-cv-70, 2017 WL 3821806, at *5 (E.D. Va. Aug. 30, 2017))). Plaintiffs' claims do not satisfy this test.

2. Article I, section 11 is not self-executing as to Plaintiffs' substantive due process claims

Article I, section 11 "is not self-executing and does not support a private cause of action" with respect to claims for liberty interests. *Chandler*, 63 Va. Cir. at 141. Every court to have considered the question agreed with the circuit court here that claims under section 11 are not self-executing because the provision "states a principle without a remedy." *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 735 (E.D. Va. 2015).

Section 11 is an expansive section containing, among other things, the Contracts Clause, Due Process Clause, a guarantee of jury trials in

civil cases, and provisions for just compensation for government takings of private property. Section 11's takings provisions are comprehensive, addressing in detail the meaning of "just compensation," setting forth limitations on how much private property can be taken to achieve a public use, providing for recovery of lost access and lost profits, and establishing who bears the burden of proving that a taking is for a public use. Va. Const. art. I, § 11. In contrast, the Due Process Clause states, in its entirety, "[t]hat no person shall be deprived of his life, liberty, or property without due process of law." *Id.*

Because the takings provision sets forth a "sufficient rule by means of which the right given may be employed and protected," but the due process provision "merely indicates principles, without laying down rules by means of which those principles may be given the force of law," *DiGiacinto*, 281 Va. at 138 (quoting *Gray*, 276 Va. at 103–04), "only the provisions of Section 11 'governing the taking or damaging of private property for public use have been held to be "self-executing."'" *Chandler*, 63 Va. Cir. at 141 (citing *Young v. City of Norfolk*, 62 Va. Cir. 307, 312 (Norfolk 2003)); *see also Ellis v. Kennedy*, No. CL19-03, 2020 Va. Cir. LEXIS 244, at *33 (Loudoun May 22, 2020) ("Article I, § 11 . . .

is only self-executing regarding the takings clause."); *Quigley*, 2017 WL 3821806, at *5–6 (same).

"The reason" for this distinction "is obvious." *Gray v. Rhoads*, 55 Va. Cir. 362, 368 (Charlottesville 2001). Section 11 "expressly provides a remedy for takings of property," and sets forth distinct rules of decision. *Id.* "If the drafters had intended to provide similar rights and remedies for deprivation of life and liberty, they could have done so by including such language in that provision. They did not." *Id.*

For these reasons, courts have consistently held that while the takings provision of section 11 is self-executing, the due-process provision concerning asserted liberty interests is not. *Chandler*, 63 Va. Cir. at 141; *Doe*, 132 F. Supp. 3d at 728 (dismissing plaintiff's "allegation of a Virginia Constitution due process violation" with "regard to liberty interests" because "the due process provision of the Virginia Constitution is 'self-executing' . . . only . . . with regard to property deprivation"); *Young*, 62 Va. Cir. at 312 ("Article I, § 11, of the Constitution of Virginia embraces many objects, but only its provisions governing the taking or damaging of private property for public use have been held to be 'self-executing.'"); *Rhoads*, 55 Va. Cir. at 368 (holding that Article I, § 11

is not self-executing with respect to the "deprivation of life and liberty").[4]

Plaintiffs bring substantive claims for deprivation of asserted liberty interests, not a takings claim. See, *e.g.*, R. 66–67 (Compl. ¶¶ 178–80) ("[T]here are certain liberty interests protected by the Due Process Clause"). Specifically, they assert that the Due Process Clause creates a substantive "right to use an atmosphere, lands, and waters protected from pollution, impairment, or destruction for their benefit, enjoyment, and general welfare." R. 67 (Compl. ¶ 180). The circuit court thus correctly held that section 11 is not self-executing in this context.

---

[4] See also, *e.g.*, *Jones v. City of Danville*, No. 4:20-cv-20, 2021 WL 3713063, at *11 (W.D. Va. Aug. 20, 2021) (dismissing "plaintiff's state constitutional claim [] for failure to reference a relevant self-executing provision of the Virginia Constitution" because "Article 1, Section 11 'is Virginia's Due Process Clause and is self-executing "only in the context of claims of damages to or takings of property."'") (quoting *Delk*, 2019 WL 1370880, at *4); *Ellis*, 2020 Va. Cir. LEXIS 244, at *33 ("Article I, § 11 is not universally self-executing, but is only self-executing regarding the takings clause."); *Quigley*, 2017 WL 3821806, at *5–6 (same); *K.I.D. v. Jones*, No. CL14-51, 2016 Va. Cir. LEXIS 103, at *31 (Richmond Cnty. June 8, 2016) ("[C]ase law holds that other than for a claim against the government for depriving an individual of property without just compensation, the rights referred to [in Article I, § 11] are not self executing.").

The amorphous nature of Plaintiffs' substantive due process claim further demonstrates section 11's lack of "rules by means of which" the provision "may be given the force of law," confirming that it is not self-executing here. *Robb*, 228 Va. at 682–83. The text of the Due Process Clause, of course, does not expressly provide any right to an unimpaired atmosphere or environment, much less set forth rules defining the parameters of such claims or how they are to be enforced. See Va. Const. art. I, § 11.

Indeed, no Virginia court has recognized any such constitutional right, under the Due Process Clause or otherwise. See pp. 16–17, 22–23, *supra*. The text of the Due Process Clause says nothing whatsoever about oil and gas permitting, or how the Commonwealth should balance its interests in energy and resource development with its interests in environmental protection or concerns regarding global climate change. And the Supreme Court has never held that Virginia's Due Process Clause "include[s] a substantive component" at all. *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 585 (2017) (McCullough, J., concurring).

Further, courts across the country have rejected parallel claims under the federal Due Process Clause. *E.g.*, *Nat'l Sea Clammers Ass'n*

v. New York, 616 F.2d 1222, 1238 (3d Cir. 1980) ("[T]here is no constitutional right to a pollution-free environment."); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (finding no constitutional right to a healthy environment); *Animal Legal Def. Fund v. United States*, 404 F. Supp. 3d 1294, 1302 (D. Or. 2019) ("[C]ourts have consistently held that there is no fundamental right to a particular type of environment or environmental conditions.") (collecting cases); see *Greco v. Commonwealth*, 2014 WL 1301858, at *1 n.2 (Va. Ct. App. Apr. 1, 2014) ("[T]he corresponding provisions of the Virginia Constitution go no further than their federal counterparts."). Plaintiffs' asserted unenumerated substantive due process right is clearly not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

The lack of defined rules for Plaintiffs' due process claim is particularly glaring given the highly "tenuous . . . causal link between their allegations of climate change and [Defendants'] action." *Ctr. For Biological Diversity v. United States DOI*, 563 F.3d 466, 478 (D.C. Cir. 2009). Although Defendants "act to regulate . . . third parties" under the Gas and Oil Act, "Defendant agencies and officers do not [themselves]

produce greenhouse gases" under the challenged act. *Clean Air Council*, 362 F. Supp. 3d at 249. Plaintiffs thus assert that Defendants violated their due process rights by failing to prevent private third-party oil and gas companies from harming them. But "a State's failure to protect an individual against private [conduct] simply does not constitute a violation of the Due Process Clause," even if the "failure to do so [is] . . . calamitous in hindsight." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197, 202 (1989); see *French v. Virginia Marine Res. Comm'n*, 64 Va. App. 226, 234 (2015) (Kelsey, J.) (holding "the Constitution restrains only state action—not the actions of private individuals" and rejecting claim that "issuance of [a bridge building] permit, by itself, has the legal effect of" violating plaintiff's "property rights" because the government agency "issued the permit but did not build the bridge" and "[a]s a matter of law . . . the bridge may or may not affect such rights, but the permit does not.").

In short, for substantive due process claims such as Plaintiffs', section 11 does not "suppl[y] a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced." *DiGiacinto*, 281 Va. at 138. Thus, as to such claims, section

11 is a classic example of a constitutional provision that "merely indicates principles"—that the Commonwealth must provide due process before depriving people of liberty—"without laying down rules by means of which those principles may be given the force of law." *Id.* "[T]here is no language rendering Article I, § 11, self-executing, and the provision states a principle without a remedy." *Doe*, 132 F. Supp. 3d at 735. The circuit court therefore correctly held that the provision is not self-executing.

Indeed, Plaintiffs fail to identify *a single case* supporting their position that section 11 is self-executing with respect to their substantive due process claims. Devoid of any supportive authority, Plaintiffs contend that section 11 must be self-executing because it "is contained in the Bill of Rights and is negative in character." Opening Br. 22. But again, Plaintiffs' argument that all provisions in the Bill of Rights are necessarily self-executing fails. See pp. 26–31 & n.4, *supra*. Similarly, there is no bright-line rule that every "negative" provision of the Bill of Rights is necessarily self-executing. *Robb*, 228 Va. at 681–82; see p. 26, *supra*. And while provisions that "*specifically* prohibit *particular*

conduct" are often self-executing, that standard is not met here. *Robb*, 228 Va. at 681.[5]

Plaintiffs also argue that section 11 is self-executing because some federal cases have described the Fourteenth Amendment as "self-executing" under federal law. See Opening Br. 22–24. These citations are wholly misplaced. Plaintiffs' complaint is devoid of any federal claims, rendering cases regarding federal law inapposite.

The federal cases are also inapposite because they have nothing to do with sovereign immunity. The question in both *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *The Civil Rights Cases*, 109 U.S. 3 (1883), was the extent of Congress's power to enforce the provisions of the Fourteenth Amendment, a question that is obviously not at issue here. And

[5] Plaintiffs' reliance on the 1969 Report of the Commission on Constitutional Revision to explain why section 11 does not have a declaration of self-execution hurts rather than helps them. Opening Br. 21 n.10. The Commission explained that the express language was necessary for Article I, section 8 "only because of decisions holding some of section 8's provisions not to be self-executing." Report of the Commission on Constitutional Revision, The Constitution of Virginia, H. Doc. No. 1 at 92, 1969 Exec. Sess. But a host of decisions have held that the Due Process Clause is not self-executing as to claimed liberty interests, even while finding the takings provisions are self-executing. See pp. 29–31, *supra*. Thus, the Commission's logic dictates that an express declaration of self-execution is equally necessary here.

differences between federal and Virginia sovereign-immunity law mean that no relevant conclusions can be drawn from these holdings. The self-execution question is irrelevant to sovereign immunity under federal law because the U.S. Supreme Court has excepted claims for injunctive relief against state officials from the reach of sovereign immunity. *Seminole Tribe*, 517 U.S. at 74, 76.

Moreover, Congress has created a private cause of action against individual officers who violate the Fourteenth Amendment. See 42 U.S.C. § 1983. The General Assembly has not created an analogous cause of action to enforce provisions of the Virginia Constitution. And the U.S. Supreme Court held that section 1983 does *not* abrogate sovereign immunity for Fourteenth Amendment claims against States, their agencies, or state officials in their official capacities. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (holding that "[t]he language of § 1983 . . . falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'" (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234,

242 (1985))). Thus, to the extent federal precedent is relevant at all here, it cuts decisively against Plaintiffs.

This Court should affirm the circuit court's dismissal of Plaintiff's claims under section 11.

II. Fundamental separation of powers principles and Plaintiffs' lack of standing also defeat their claims

This Court need not go beyond sovereign immunity to decide this case, as the circuit court correctly held that it bars all of Plaintiffs' claims. Plaintiffs' suit, however, also suffers from multiple other jurisdictional defects which Defendants raised in their demurrer. Although the circuit court did not reach these issues, they provide additional grounds on which this Court could choose to affirm. See *Spencer v. Commonwealth*, 68 Va. App. 183, 190 (2017) ("'An appellate court's authority to affirm a trial court's judgment on grounds other than those relied upon by the trial court is widely accepted.'" (quoting *Hawkins v. Commonwealth*, 65 Va. App. 101, 118 n.11 (2015) (Petty, J., concurring) and *Debroux v. Commonwealth*, 32 Va. App. 364, 371–72 (2000))). Plaintiffs advocate for sweeping changes to Virginia's environmental and energy policy; their arguments belong before the General Assembly, not the judiciary. Virginia's strict separation of powers and standing

doctrines provide additional grounds to affirm the circuit court's dismissal.

A. The separation of powers bars Plaintiffs' suit

First, the separation-of-powers doctrine bars Plaintiffs' suit. The Constitution provides the "legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others." Va. Const. art. III, § 1; see also Va. Const. art. I, § 5 (same); Va. Const. art. IV, § 1 ("The legislative power . . . shall be vested in a General Assembly."); Va. Const. art. V (vesting "executive power" in the executive branch). In such "a regime of separated powers that assigns to the legislature the responsibility for charting public policy, [the judiciary's] function is limited to adjudicating a question of law." *Daily Press, LLC v. Office of the Exec. Sec'y*, 293 Va. 551, 557 (2017).

"[M]atters of economics, sociology and public policy" accordingly "belong exclusively in the legislative domain." *Infants v. Va. Hous. Dev. Auth.*, 221 Va. 659, 671 (1980). "[I]t is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests, and to devise standards for

implementation." *Wood v. Bd. of Supervisors*, 236 Va. 104, 115 (1988). Courts therefore "may not" "second-guess the lawmakers on [those] matters." *Infants*, 221 Va. at 671; see also *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 309 (2013) ("[P]olicy decisions are subject to, and properly evaluated by, the political will of the people, and [the courts] have no authority to override such political decisions.").

Plaintiffs urge this Court to run roughshod over these clear constitutional boundaries. They ask this Court to conjure a new and unenumerated constitutional right; to rely on that new right to strike down provisions of the Gas and Oil Act governing the Commonwealth's permitting process; to overrule an alleged long-standing practice of expert agencies on when permits should be issued; and to assume the responsibility of announcing and implementing the Commonwealth's environmental and energy policies. See, *e.g.*, R. 75–76.

If the separation of powers means anything, it surely forbids this Court from relying on unenumerated rights to become an energy-policy super-legislature. Plaintiffs' request for relief essentially "seek[s] to impose ad hoc judicial natural resources management based on case-by-case adjudications of individual fundamental rights." *Sagoonick v.*

State, 503 P.3d 777, 796 (Alaska 2022). It would require courts to "wad[e] into the waters of what policy approach to take, what economic and technological constraints exist, and how to balance all implicated interests to achieve the most beneficial outcome" with respect to energy and environmental concerns. *Aji P.*, 480 P. 3d at 448–49. But the judiciary is least well equipped to engage in such sensitive and complex policymaking. Courts decide limited legal questions only the basis of facts presented to them by the parties. See *Howell v. McAuliffe*, 292 Va. 320, 326 (2016) ("The role of the judiciary is a restrained one"—"not to judge the advisability or wisdom of policy choices" and "not to express [its] opinion on policy" but "to interpret law"); *Hallmark Personnel Agency, Inc. v. Jones*, 207 Va. 968, 971 (1967) ("[A]ppellate courts do not sit to give opinions on . . . abstract matters, but only decide actual controversies injuriously affecting the rights of some party to the litigation.").

The General Assembly, by contrast, has the resources to balance carefully the complicated tradeoffs involved in ensuring that all Virginians have reliable access to energy and a clean and healthy environment. *E.g.*, *Howell*, 292 Va. 320, 326 (2016) ("The dominant role in articulation of public policy in the Commonwealth of Virginia rests with

the elected branches. . . . The Executive and Legislative Branches are directly accountable to the electorate, and it is in those political venues that public policy should be shaped."); *Bruce Farms, Inc. v. Coupe*, 219 Va. 287, 293 (1978) (explaining that "legislative machinery is specially geared" to resolve an issue that "involves a multitude of competing economic, cultural, and societal values which courts are ill-equipped" to resolve). Similarly, an "expert agency" in the executive branch, exercising authority delegated by the General Assembly, is "surely better equipped" to regulate "emissions . . . than individual [] judges issuing ad hoc, case-by-case injunctions." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). This Court therefore should not "infring[e] on an area constitutionally committed to the legislature, and disrespect[] . . . coordinate branches of government by supplementing their policy judgments with [the Court's] own normative musings about the proper balance of development, management, conservation, and environmental protection." *Sagoonick*, 503 P.3d at 796.

Courts routinely invoke these concerns about separation of powers and judicial competency to dismiss nearly identical suits as "nonjusticiable political question[s]." See, *e.g.*, *Iowa Cit. for Cmty. Improvement &*

Food & Water Watch v. State, 962 N.W.2d 780, 785, 798 (Iowa 2021) (collecting cases); see also, *e.g.*, *Sagoonick*, 503 P.3d at 796 (affirming dismissal of a parallel suit brought by youth plaintiffs against Alaska); *Aji P.*, 480 P.3d at 448–49 (holding that "the Youths' [climate] claims present a political question to be determined by the people and their elected representatives, not the judiciary"); *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012) (explaining that regulation of carbon emissions requires "determinations that are best left to the [executive] agencies that are better equipped, and that have a [legislative] mandate, to serve as the 'primary regulator of greenhouse gas emissions'" (quoting *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2539 (2011)); *Svitak*, 2013 WL 6632124, at *1 (affirming dismissal of complaint regarding "the public trust doctrine," "global warming," and "the pace and extent of greenhouse gas reduction" because it presented "a political question [that] under the separation of powers doctrine is within the purview of the legislature"); *Reynolds v. State of Florida*, No. 2018-CA-819, 2020 WL 3410846, at *1 (Fla. Cir. Ct. June 10, 2020) (dismissing parallel climate case brought by Our Children's Trust against Florida because plaintiffs' claims were "nonjusticiable" and amounted to

"inherently political questions that must be resolved by the political branches of government"), *aff'd*, 316 So.3d 813 (Fla. Dist. Ct. App. 2021).

Moreover, Plaintiffs' claims run headlong into the foundational principle that "it is not the role of the judiciary to second-guess the wisdom of the legislature," particularly "where the legislature has already acted." *Svitak*, 2013 WL 6632124, at *2; see also *Infants*, 221 Va. at 671; *Meeks*, 286 Va. at 309. Here, in addition to the extensive regulatory regime in place, Plaintiffs acknowledge that the Commonwealth has already reduced emissions and enacted legislation to further reduce emissions. See R. 37–38, 43–44, 62 (Compl. ¶¶ 96, 114, 161 (citing Code § 45.2-1706.1)). Plaintiffs want this Court "to rewrite a statute" in order "to accelerate the pace and extent [of] greenhouse gas reduction" to match their preferred policy approach. *Svitak*, 2013 WL 6632124, at *2. That is not a judicial function. *Id.*

At bottom, "Plaintiffs' disagreement with Defendants is a policy debate best left to the political process," *Clean Air Council*, 362 F. Supp. 3d at 251, and their complaint is essentially "a policy statement that, in Virginia, may be more appropriately addressed to the legislature"

because that branch "has the sole responsibility to enact the laws of the state." *Corp. Exec. Bd. v. Va. Dep't of Taxation*, 96 Va. Cir. 287, 300 (Arlington 2017). Adjudicating Plaintiffs' claims would force this Court to "usurp the authority and responsibility of the other branches," *Aji P.*, 480 P.3d at 449, in violation of Article III, section 1's prohibition on any branch "exercis[ing] the powers properly belonging to the others." The separation of powers therefore is another basis to affirm the circuit court's dismissal of Plaintiffs' suit.

B. Plaintiffs lack standing

For related reasons, the circuit court lacked jurisdiction because Plaintiffs lack standing. *McClary v. Jenkins*, 299 Va. 216, 221 (2020) (observing that standing is a threshold jurisdictional issue because an "action filed by a party who lacks standing is a legal nullity" (quoting *Kocher v. Campbell*, 282 Va. 113, 119 (2011))). The doctrine of "standing . . . is built on separation-of-powers principles [and] serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *Morgan v. Bd. of Supervisors of Hanover Cnty.*, __ Va. __, __, 883 S.E.2d 131, 137 (2023) ("In its constitutional dimension, the concept of

standing protects separation-of-powers principles and prevents the judicial process from being used to usurp the powers of the political branches.'" (cleaned up) (quoting *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 438 (2017))).

Therefore, claims "advancing a public right or redressing a public injury cannot confer standing." *Wilkins v. West*, 264 Va. 447, 458 (2002); see also *Virginia Beach Beautification Com. v. Board of Zoning Appeals*, 231 Va. 415, 419 (1986). Rather, "standing requires" that a plaintiff suffer a "particularized, 'concrete' harm." *Morgan*, 883 S.E.2d at 141–42 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8). 142. These standing principles protect the separation of powers by preventing a plaintiff from forcing a court to leave "its proper constitutional sphere," *Raines v. Byrd*, 521 U.S. 811, 819 (1997), to decide questions that are properly reserved for the political branches regarding injuries "suffered by the public generally," *Morgan*, 883 S.E.2d at 138. Here, Plaintiffs seek to advance a public right: the asserted *jus publicum* rights of *public* ownership.

Moreover, every injury Plaintiffs allege stems from general changes to the environment linked to global climate change. See pp. 7–

8, *supra*; Opening Br. 1–6 (pointing to generalized harms such as that "[c]limate change [is] causing temperatures to increase in Virginia"). "[C]limate change is a harm that is shared by humanity at large, and the redress that [Plaintiffs] seek—to prevent an increase in global temperature—is not focused any more on these [Plaintiffs] than it is on the remainder of the world's population." *Center for Biological Diversity*, 563 F.3d at 478. If the Complaints' allegations could support standing for these Plaintiffs, then they could support standing for literally anyone on the planet, as everyone is in some way personally affected by the climate. The alleged injuries are thus "too generalized to establish standing." *Id.*

Plaintiffs also fail to meet the "standing requirement" of "causality." *Morgan* 883 S.E.2d at 139–40 (2023). "[S]tanding requires particularized harm to 'be fairly traceable to the challenged action of the defendant.'" *Id.* (quoting *Mattaponi Indian Tribe v. Commonwealth*, 261 Va. 366, 376 (2001)). Plaintiffs fail to meet that standard here: they "rely on too tenuous a causal link between their allegations of climate change and [Defendants'] action." *Center for Biological Diversity*, 563 F.3d at 478.

For a typical example of Plaintiffs' causal theory, Plaintiffs allege that: (1) the challenged statutes inform Defendants' discretion in issuing permits for energy projects; (2) third parties engage in projects under those permits; (3) those projects result in greenhouse gas emissions; (4) those emissions incrementally contribute to global climate change; (5) global climate change results in higher temperatures locally; (6) those higher temperatures provide a more favorable environment for the emerald ash borer to infest ash trees; (7) additional ash trees are "gradually" rendered susceptible to falling; (8) Plaintiffs are allegedly injured by needing to avoid "the woods when it's windy." See R. 16, 18–19, 32–36, 51–52 (Compl. ¶¶ 35, 42, 44, 80-122, 135).

This alleged causal chain is far too attenuated to support standing. Global climate change, by Plaintiffs' own admission, is a *global* phenomenon, *e.g.*, R. 34 n.27 ("[A] rise in global temperatures caused by human combustion of fossil fuels could have disastrous effects on *the earth's* environment[.]" (emphasis added)); emissions from oil and gas developed in Virginia have no more effect on ambient temperatures in Virginia than emissions from any other source occurring anywhere in the world. See United Nations, *Climate Action* (last visited May 19,

2023), https://tinyurl.com/wvjz52p4 (explaining, in the context of climate change and global warming that, "[b]ecause the Earth is a system, where everything is connected, changes in one area can influence changes in all others"). Indeed, oil and gas development in Virginia is a miniscule fraction of worldwide fossil fuel development. Compare *Oil*, Va. Dep't of Energy, https://tinyurl.com/3wacf466 (last visited May 19, 2023) (reporting that Virginia produced a total of 6,116 barrels of oil in 2021), and *Natural Gas*, Va. Dep't of Energy, https://tinyurl.com/4j2hbmcp (last visited May 19, 2023) (reporting that Virginia produced a total of 96.1 billion cubic feet of natural gas in 2021), with Jessica Aizarani, *Global Oil Production 1998–2021*, Statista, https://tinyurl.com/ck36ks42 (last visited May 19, 2023) ("Global oil production amounted to 89.9 million barrels *per day* in 2021." (emphasis added)), and Jessica Aizarani, *Global Natural Gas Production 1998–2022*, Statista, https://tinyurl.com/4defej2r (last visited May 19, 2023) ("Global natural gas production amounted to some 4.09 *trillion cubic meters* in 2022, signifying a slight decrease compared to the previous year." (emphasis added)).

Thus, there is no reason to think that the permits Defendants issued have had any measurable effect on global climate change, or on Plaintiffs' alleged injuries. See *Morgan*, 883 S.E.2d at 139 ("[A]llegations of standing 'must be something more than an ingenious academic exercise in the conceivable.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 509 (1975))). Plaintiffs' alleged harms are clearly caused by "various different groups of actors not present in this case," and they therefore lack standing. *Center for Biological Diversity*, 563 F.3d at 479; *Clean Air Council*, 362 F. Supp. 3d at 249 (noting that greenhouse gases are produced by "innumerable businesses and private industries"); see also, *e.g.*, *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 3135, 323–24 (4th Cir. 2002); *Doe v. Obama*, 641 F.3d 157, 161 (4th Cir. 2011).

For similar reasons, Plaintiffs lack standing because they fail to show that their "rights will be affected by the disposition of the case." *Goldman v. Landsidle*, 262 Va. 364, 371 (2001). Because they cannot establish that their alleged injuries are caused by Defendants' actions, rather than the actions of numerous other governments and countless private parties across the globe, they equally cannot show that the relief they request against Defendants would redress their alleged injuries.

See, *e.g.*, *Iowa Citizens*, 962 N.W.2d at 793 (dismissing similar suit against Iowa "for lack of standing" because "[t]here is not enough here to demonstrate that a favorable outcome in this case is likely to redress the plaintiffs' alleged [injuries]"); *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020); *Clean Air Council*, 362 F. Supp. 3d at 248–50. Indeed, the Complaint provides no basis to believe that the requested relief would have any measurable effect on global climate change at all, much less on Plaintiffs' alleged injuries. See, *e.g.*, *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 302 (4th Cir. 2010) (explaining how "patchwork of . . . injunctions could well lead to increased air pollution"); *cf. Juliana*, 947 F.3d at 1170–71 (noting that plaintiffs' expert conceded in a similar lawsuit that requested injunction would not "stop catastrophic climate change or even ameliorate their injuries").

Plaintiffs likewise lack statutory standing under Code § 8.01-184 to pursue declaratory relief. A "declaratory judgment" is appropriate only if it will provide "specific relief through a decree of a conclusive character." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Sup'rs*, 285 Va. 87, 98 (2013). Yet Plaintiffs'

requested relief is an airy abstraction. See R. 75. As multiple courts rejecting similar requests for declaratory relief in parallel climate change cases have recognized, "[P]laintiffs are simply seeking broad, abstract declarations in this litigation" which "do not provide any assurance of concrete results, although they do herald long-term judicial involvement." *Iowa Citizens*, 962 N.W.2d at 792; *Aji P.*, 16 Wash. App. 2d at 196 (holding request for similar declaratory relief was nonjusticiable because it "would not be final or conclusive"); see *Sagoonick*, 503 P.3d at 802 (affirming "dismissal of [youth] plaintiffs' declaratory relief claims" regarding climate change and the public trust doctrine on similar grounds).

In short, Plaintiffs' policy arguments belong in the General Assembly, which bears responsibility for setting the Commonwealth's energy and environmental policies and is accountable to the people for the choices it makes in setting those policies. Plaintiffs' arguments have no place in a courtroom. This Court should affirm the circuit court's judgment dismissing the complaint for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

/s/ Graham K. Bryant
GRAHAM K. BRYANT (#90592)
Deputy Solicitor General

JASON S. MIYARES
Attorney General

STEVEN G. POPPS (#80817)
Deputy Attorney General

THOMAS J. SANFORD (#95965)
Assistant Attorney General

ANDREW N. FERGUSON (#86583)
Solicitor General

ERIKA L. MALEY (#97533)
Principal Deputy Solicitor General

ANNIE CHIANG (#94703)
Assistant Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7704 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

May 19, 2023

Counsel for Appellees

CERTIFICATE

1. I certify that on May 19, 2023, this document was filed electronically with the Court through VACES. Copies were transmitted by email to:

Isak J. Howell (Va. Bar No 75011)
Isak J. Howell, Attorney at Law
4227 Colonial Ave.
Roanoke, VA 24018
Telephone: (540) 998-7744
isak@howell-lawoffice.com

Nathan Bellinger*
Kimberly Willis*
Our Children's Trust
P.O. Box 5181
Eugene, OR 97405
Telephone: (413) 687-1668
nate@ourchildrenstrust.org
kimberly@ourchildrenstrust.org
*Pro Hac Vice

Counsel for Appellant

2. This brief complies with Rule 5A:19(a) because the portion subject to that Rule contains 10,499 words.

3. Appellees desire to present oral argument.

/s/ Graham K. Bryant
GRAHAM K. BRYANT (#90592)