Attachment A:

Brief of *Amicus Curiae* Law Professors Erwin Chemerinsky, Noah Sachs, James May, Erin Daly, and Delegate Sam Rasoul in Support of Plaintiffs-Appellants

IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1639-22-2

LAYLA H. by her next friend Maria Hussainzadah; AMAYA T. by her next friend LaKiesha Cook; CLAUDIA SACHS; CEDAR B. by his next friend Shannon Bell; AVA L. by her next friend Margaret Schaefer Lazar; CADENCE R.-H. by her next friend Rebecca Rubin; TYRIQUE B. by his next friend Kiesha Preston; GIOVANNA F. by her next friend Mary Finley-Brook; ELIZABETH M. by her next friend Barbara Monacella; MARYN O. by her next friend Emily Satterwhite; KYLA H. by their next friend Jennifer Hitchcock; and KATERINA LEEDY.

Appellants;

v.

COMMONWEALTH OF VIRGINIA; GLENN YOUNGKIN, in his official capacity as Governor; VIRGINIA DEPARTMENT OF ENERGY; WILL CLEAR, in his official capacity as Director of the VIRGINIA DEPARTMENT OF ENERGY; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; and MICHAEL ROLBAND, in his official capacity as Director of the VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY.

Appellees.

BRIEF OF *AMICUS CURIAE* LAW PROFESSORS ERWIN CHEMERINSKY, NOAH SACHS, JAMES MAY, ERIN DALY, AND DELEGATE SAM RASOUL IN SUPPORT OF PLAINTIFFS-APPELLANTS

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"[L]aw is often but the tyrant's will, and always so when it violates the rights of the individual."[1]

Thomas Jefferson

I. STATEMENT OF IDENTITY AND INTERESTS OF AMICUS CURIAE

Amicus curiae are law professors and scholars who teach, research, and publish in the subject areas of constitutional and environmental law.

Professor Erwin Chemerinsky is Dean and the Jesse H. Choper Distinguished Professor at Berkeley Law, and teaches and writes in the area of constitutional law. Prior to joining Berkeley Law, from 2008-2017 he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law. He is the author of sixteen books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. He has written more than 200 law review articles, and is a contributing writer for the Opinion section of the Los Angeles Times, and writes regular columns for the Sacramento Bee, the ABA Journal, and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court. In 2016, Professor Chemerinsky was named a fellow of the

[1] Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819), *in Founders Online*.

American Academy of Arts and Sciences. In 2017, National Jurist magazine again named him as the most influential person in legal education in the United States. In 2022, he served as the President of the Association of American Law Schools.

Professor Noah Sachs is Director of the University of Richmond Law School's Robert R. Merhige, Jr. Center for Environmental Studies and teaches and writes in the areas of environmental law, torts, and administrative law. His scholarship, which focuses on climate change, toxic substance and hazardous waste regulation, and transboundary pollution, has appeared in the *UCLA Law Review*, *Vanderbilt Law Review*, and *University of Illinois Law Review*, among other venues, and his co-authored text, *Regulation of Toxic Substances and Hazardous Waste*, is the leading casebook on toxic substances regulation. Professor Sachs was awarded the University of Richmond's Distinguished Educator award in 2013, the highest recognition for teaching and scholarship on the faculty. He was also chosen as the University of Richmond's Outstanding Faculty nominee in the rising star category to the Virginia State Council of Higher Education in 2009.

James R. May, Esq. is Distinguished Professor of Law, Founder of the Global Environmental Rights Institute, and co-Founder of the Dignity Law Institute at Widener University Delaware Law School, where he has served as the H. Albert Young Fellow in Constitutional Law and Chief Sustainability Officer for Widener University. May is a former national defense engineer and litigator who has

prosecuted hundreds of public interest claims in federal court, and author of Principles of First Amendment Law (2022), co-author of Global Environmental Constitutionalism (2015), editor of Principles of Constitutional Environmental Law (2013), and co-editor of Environmental Human Rights and the Anthropocene (2023), Environmental Rights: The Development of Standards (2019), and Implementing Environmental Constitutionalism (2018) and Shale Gas and the Future of Energy (2016).

Erin Daly is Professor of Law at Delaware Law School and the Director of the Dignity Rights Clinic, dedicated to advancing the dignity rights of people around the world. She is the co-Director of the Dignity Rights Institute. She served as Interim Dean and Vice Dean of the Law School in 2013-2015. Professor Daly has written extensively on the law of human dignity, comparative constitutional law, and transitional justice issues throughout the world. She is the author of *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (U. Penn 2d ed. 2020) and the co-author and co-editor with James R. May, of *Global Environmental Constitutionalism* (Cambridge 2015) and *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar 2019).

Delegate Sam Rasoul has been a member of the Virginia House of Delegates since 2014, currently representing the 11th House District (City of Roanoke). He serves on the Public Safety, Education, and House Appropriations committees.

Among other things, Delegate Rasoul cares deeply about the intersection of environmental, economic, and social justice issues and about supporting Virginia's children.

II. BACKGROUND

The Youth Plaintiffs in this case assert that the Commonwealth of Virginia is actively contributing to the climate crisis by permitting fossil fuel infrastructure including the production, transport, and burning of fossil fuels, thus violating the youths' public trust and state constitutional rights of life, liberty, and property. On September 29, 2022, Judge Jenkins Jr. ruled in favor of the Commonwealth and against Youth Plaintiffs, citing sovereign immunity. The judge used the doctrine of sovereign immunity to allow the Commonwealth to avoid suit when Plaintiffs seek to protect their fundamental rights to life and liberty, guaranteed by the Virginia Constitution's Bill of Rights, and thereby closed the courthouse doors on these Youth Plaintiffs.

Amicus curiae law professors and scholars[2] file this brief to provide textual and historical information that demonstrate why the Doctrine of Sovereign of

[2] Some Supreme Court Justices and legal scholars, including *amici* here, have exhaustively documented that the Sovereign Immunity Doctrine cannot be found explicitly or implicitly in the Constitution under textualist, originalist, or any other formulae of constitutional interpretation. *See, e.g., Alden v. Maine,* 527 U.S. 706, 764 (1999) (Souter, D., dissenting); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201 (2001); Akhil Reed Amar*, Of Sovereignty and*

Immunity does not bar claims against the Commonwealth when it violates rights protected by the Virginia Constitution's Bill of Rights.

Amicus curiae accept and adopt Appellants' Statements of Facts, Assignments of Error, and Standard of Review and will not repeat them here.

III. ARGUMENT

Thomas Jefferson, alongside fellow Virginian constitutional framers of his time, recognized that laws that violated individual rights were the worst form of governmental abuse—so abusive that he labeled them "the tyrant's will."[3] Virginia's framers, therefore, took great pains in the Constitution and 1776 Declaration of Rights (now the Bill of Rights) to enshrine individual rights, recognize the people as sovereign, and create institutions—including an independent judiciary—to allow the people to hold their government accountable when it violated their fundamental constitutional rights. This brief reviews: (1) the Bill of Rights articulation of individual rights and the framer's understanding of these rights, (2) its recognition

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Federalism, 96 Yale L.J. 1425 (1987); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. Univ. L. Rev. 899 (1997). These same concerned voices have explained how sovereign immunity offends core principles that the framers enshrined in state and federal constitutions. *Amicus curiae* commend these analyses to this Court and at the same time emphasize that the case before it focuses narrowly on the argument that the Virginia Constitution's Bill of Rights explicitly recognizes the people rather than its governmental institutions as sovereign and makes the latter accountable to the former "at all times."

[3] Jefferson, *supra* note 1.

of Virginia's people as sovereign and the source of all authority, and (3) the accountability that the Bill of Rights imposes on the government through judicial review.

This review is supported by the Virginia Supreme Court's ruling in *Terry v. Mazur*[4] that it is a fundamental duty of the courts to evaluate the constitutionality of a particular law or government conduct and rule on whether that law infringes on constitutional rights. This review supports the courts' essential role in evaluating cases that seek declaratory relief as to the constitutionality of government statutes and conduct under the Bill of Rights.[5] *Amicus curiae*, therefore urge this Court to follow *Terry* and open the courthouse doors to allow the Plaintiffs' case to be heard on the merits.

A. Individual Rights "Are the Basis and Foundation of Government"

Article I of the Virginia Bill of Rights declares that the rights it contains "are the basis and foundation of government."[6] The rest of the Virginia Constitution, therefore, must be read as literally resting on these rights. As George Mason, the

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[4] 234 Va. 442, 449-50 (1987) ("An Act passed by the General Assembly inconsistent with or repugnant to the Constitution is invalid, and it is our duty to declare such an act unconstitutional." (citation omitted)).

[5] Such declaratory relief serves, rather than hinders orderly government administration, by ensuring that government administration and affairs are being pursued in compliance with the Commonwealth's constitutional obligations and duties. Such relief distinguishes this case from those seeking damages, where sovereign immunity has been found to apply.

[6] Va. Const. art. I.

Declaration of Rights' drafter, explained, the rights were meant "to provide the most effectual Securities for the essential Rights of human nature."[7] The Bill of Rights power was so potent, that George Mason "trust[ed] that neither the Power of Great Britain, nor the Power of Hell [would] be able to prevail against it."[8] Applying the Sovereign Immunity Doctrine to the Bill of Rights elevates mere laws above the Constitution's foundation and allows such laws to prevail against protected rights. By doing so the doctrine eviscerates the Bill of Rights' supreme power derived from the people in a way that would shock its drafter.

B. The Bill of Rights Recognizes the Virginia People as Sovereign

The Sovereign Immunity Doctrine, by insulating the government from accountability to the people, protects a false sovereign because under Virginia's Constitution, the people—not the institutions to which they delegate authority—are sovereign. Specifically the same Article I proclamation that acknowledges the foundational role of individual rights, provides that the declaration of these rights is "made by **the good people of Virginia in the exercise of their sovereign powers**."[9] Article I, Section 2—entitled—"People the source of power"—enforces this point,

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[7] *The Papers of George Mason, 1725-1792*, at 434–35 (Robert A. Rutland ed. 1970) (letter to Mr. Brent, Oct. 2, 1778).
[8] *Id.*
[9] Va. Const. art. I. (emphasis added). The 1928 amendments to the Constitution make this point explicitly. However, as explained by A.E. Dick Howard at the time of its adoption it was not viewed as a major amendment. A.E Dick Howard, *Commentaries on the Constitution of Virginia* 57 (1974).

stating that, "all power is vested in, and consequently derived from, the people."[10] The Commonwealth's Bill of Rights, unsurprisingly echoes James Madison's view that "the people are the only legitimate fountain of power."[11]

If the Commonwealth's plain language was not sufficiently clear on who is Virginia's sovereign—which it is—the history of the state's and nation's[12] founding drives home the point—these bodies are "governments of laws," not men or women.[13] Seen in this light, the revolution was not just a revolution of arms against a ruler, but a revolution in the understanding of the basic concept of government.[14] The American Revolution replaced a king who could "do no wrong" with a framework of shared power in which the people divided their power among three branches designed to check each other and to ultimately hold the government

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[10] Va. Const. art. I., § 2.

[11] The Federalist No. 49, at 313 (James Madison). Blackstone, a contemporary and keen observer of Great Britain and the new United States noted, "In the United States the people have retained the sovereignty in their own hands." William Blackstone & St. George Tucker, 1 *Blackstone's Commentaries,* Note B.

[12] Federal precedent is useful in interpreting Virginia's constitution "[b]ecause the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution," *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005) (recognizing federal precedent as helpful where coextensive federal and state rights are at issue).

[13] Chemerinsky, *supra* note 2, at 1202.

[14] As one scholar notes, "In the war of ideas between Britain and America that preceded and inspired the military struggle over independence-an intellectual war whose battle lines were drawn over concepts of 'imperium' and 'empire'—a distinctly American vision of sovereignty . . . began to crystallize." Amar, *supra* note 2 at 1430.

accountable to the people. Put simply, "[a] doctrine derived from the premise that 'the King can do no wrong' deserves no place in American law."[15]

C. The Virginia Bill of Rights Holds the Government Accountable to the People "At All Times"

Article I, Section 2 of the Commonwealth Bill of Rights further provides "that magistrates are [the people's] trustees and servants, and at all times amenable to them."[16] The text's plain meaning as well as its historical context establish the people's right to judicial review to vindicate claims that their government has abridged their individual rights.

Synonyms for "amenable" include "obedient" and "compliant."[17] Antonyms include "unaccountable," "irresponsible" and "exempt."[18] A doctrine that places government officials and institutions—the people's trustees and magistrates—beyond individual claims of constitutional abuse means that the government is not "amenable to the people."

"At all times" means what it says—whenever necessary. If being "amenable" to the people was restricted to using the political process, as the government argues,

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[15] Chemerinsky, *supra* note 2, at 1202.
[16] Va. Const. art. I, § 2.
[17] *Amenable*, Merriam-Webster Thesaurus, https://www.merriam-webster.com/thesaurus/amenable (last visited Mar. 2023).
[18] *Id.*

the Bill of Rights would say so and not indicate that the people always have recourse to redress governmental abuse.

The plain language of accountability again makes sense in light of the historical context following the Revolutionary War. As Justice Souter explained regarding the lack of sovereign immunity in the pre-war colonies:

> The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; 'antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states.'[19]

Evidence from early American States after independence support a longstanding tradition of judicial petition.[20] Speaking from his experience of Virginia, Thomas Jefferson specifically addressed both the problem of concentrating the power in the legislative branch and the solution to such concentration.

Regarding the problem, Jefferson's *Notes on the State of Virginia* observed that concentrating the powers of the legislative, executive, and judiciary in the legislature's hands "is precisely the definition of despotic government."[21]

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[19] *Alden v. Maine*, 527 U.S. at 764 (Souter, D., dissenting) (citing 1 J. Story, *Commentaries on the Constitution* § 207, 149 (5th ed. 1891)). For a detailed discussion of Justice Souter's analysis, *see* Chemerinsky, *supra* note 2, at 1209.

[20] Pfander, *supra* note 2, at 982-83.

[21] Thomas Jefferson, *Notes on the State of Virginia* (William Peden ed., Omohundro Inst. of Early Am. Hist. and Culture and the Univ. of N.C. Press 1954), http://press-pubs.uchicago.edu/founders/documents/v1ch10s9.html.
The University of Chicago Press. Jefferson's views on Virginia are later used by James Madison, to explain the U.S. Constitution's similar approach. *See* The Federalist No. 48 (James Madison).

Specifically addressing the legislative branch's potential for abuse, Jefferson continued, "[i]t will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one."[22] Jefferson concluded emphatically, "[a]n elective despotism was not the government we fought for."[23] "Despotism" had special meaning to the founders tied to Blackstone's characterization of England's government as "despotic."[24]

Regarding the solution to such concentrated power, Jefferson was equally clear:

> [T]he powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[25]

Judicial review of claims of violations enshrined in Section 5 of the Bill of Rights is precisely the restraint on abuse of individual rights which Jefferson envisioned.

Jefferson was not alone. Fellow Virginian Edmund Randolph believed based on his experience in the Commonwealth that the proposed federal constitution both did and should allow states to be sued. Addressing the Virginia Convention considering ratification of the U.S. Constitution, Randolph rhetorically queried:

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[22] *Id.*
[23] *Id.*
[24] *See e.g.,* William Blackstone & St. George Tucker, 1 *Blackstone's Commentaries* *123.
[25] Jefferson, *supra* note 21.

> I ask the Convention of the free people of Virginia if there can be honesty In rejecting the government because justice is to be done by it? . . . Are we to discard the government because it will make us all honest.[26]

In other words, Randolph believed that the people needed judicial review for "justice to be done" and was the essential means to keep government institutions "honest," that is faithful to the Bill of Rights.[27]

James Madison similarly explained this role of checks,

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[28]

Blackstone, commenting after the nation's founding, summarized the dangers of consolidating the peoples' power in one branch:

> [T]he union of the sovereignty with the government constitutes a state of absolute power, or tyranny, over the people, every attempt to effect such an union is treason against the sovereignty . . . and every extension of the administrative authority beyond its just constitutional limits, is absolutely an act of usurpation in the government, of that sovereignty, which the people have reserved to themselves.[29]

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[26] *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 575, (Jonathan Elliott ed. 1937).
[27] Randolph's comments occurred specifically in the context of the debate over the right under the U.S. Constitution to sue states in federal courts. For a fuller understanding of that debate *see* Chemerinsky, *supra* note 2, at 1206-1209.
[28] The Federalist No. 51, at 321-23 (James Madison).
[29] William Blackstone & St. George Tucker, 1 *Blackstone's Commentaries*, Note B.

Finally, federal courts have emphasized that where the government deprives its people of life, liberty or property—the rights that Virginia similarly protects—that the courts provide the forum for redress. Virginia courts should be no less vigilant in protecting its people, whose rights are the government's foundation.

IV. CONCLUSION

The Sovereign Immunity Doctrine, when applied to the Commonwealth's Bill of Rights, renders worthless inalienable and fundamental rights constitutionally enshrined by Virginia two and half centuries ago. Of the lower court's application of the doctrine Justice Wilson, another founding framer would ask "What, then, or where, are the People? Nothing! No where! . . . From legal contemplation they totally disappear!"[30] The Bill of Rights' explicit language and historical context argue against the people's power disappearing. A legislature unaccountable to its citizens in Jefferson, Madison, and other framers' eyes is "despotic" and in Jefferson's words "not the government we fought for." "Simply put, governments have neither 'sovereignty' nor 'immunity' to violate the Constitution."[31]

By applying the Bill of Rights' plain language regarding Virginians as sovereign people whose government is "amenable at all times" to the people and affirming the Youth Plaintiffs' right to judicial review of its claims, this Court will

[30] *Chisholm v. Georgia*, 2 U.S. 419, 461-62 (1793) (opinion of Wilson, J.)
[31] Amar, *supra* note 2, at 1425-27.

give the people their proper place under the Virginia Constitution. Such a decision will also reaffirm Virginia's unique place in this nation's history. The 1776 Virginia Declaration of Rights helped inspire the Declaration of Independence, U.S. Bill of Rights, and other state constitutions. And while fundamental rights to life, liberty, and property were recognized before the revolution, what was different about the Virginia Declaration of Rights and subsequent U.S. constitutions were the independent judiciaries. In order for the fundamental rights secured by the Bill of Rights to mean anything, an independent judiciary that can review constitutional claims that rights have been abused, without needing the legislature's permission, is necessary to give the Bill of Rights meaning.

DATED: March 27, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 5A:4(d), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 3278 words.

DATED: March 27, 2023

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