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.

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

At issue in this appeal is whether sovereign immunity can shield the Commonwealth from lawsuits alleging: (1) violations of fundamental rights to life, liberty, and property under Article I, Section 11 of the Virginia Constitution, and (2) violations of common law *jus publicum* rights.

STATEMENT OF FACTS

The facts described herein provide context for the issues in this appeal and for Plaintiffs' claims. These facts apply equally to each assignment of error and must be taken as true at this stage in the litigation. *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 97 (2008).

I. The Fossil Fuel-Imposed Climate Crisis Is Harming Youth Plaintiffs

Defendants' fossil fuel-promoting laws and conduct challenged here exacerbate the climate crisis and are actively harming Plaintiffs. Record at 5-6, 10-30, 37-58. Climate change is causing temperatures to increase in Virginia, physically harming Plaintiffs—children that are uniquely vulnerable to heat-related illnesses compared to adults. Record at 56; *see also* Record at 157-58. The injuries Plaintiffs experience during childhood and adolescence accumulate over time and follow them into adulthood with harmful lifelong consequences. Record at 11-15, 19, 21-25, 28-29, 46-47, 55-58; *see also* Record at 157-58. For example, Plaintiff Layla H. suffered from heat exhaustion and heat rash after walking around her neighborhood on an

unseasonably hot day in June 2021. Record at 11; *see also* Record at 24-25. She developed deep, red lumps that itched intensely like she was on fire for three days. Record at 11. Plaintiff Katerina Leedy suffered from heat exhaustion while playing in a competitive soccer game, suddenly feeling nauseated and weak necessitating she leave the field. Record at 28. These heat-related injuries are becoming more frequent and severe because of Defendants' conduct. Record at 5-6, 37-47, 55-58.

Lyme disease is spread by ticks whose range is rapidly expanding in Virginia because of climate change. Record at 54-55. Plaintiffs Giovanna F. and Cedar B. contracted Lyme disease, a vector-borne illness that can cause long-term physical ailments. Record at 15-16, 23-24, 54-56; *see also* Record at 21, 26. When Plaintiff Cedar B. contracted Lyme disease he suffered from nausea, vomiting, fever, headaches, and rashes and felt extremely weak for weeks. Record at 15-16. Plaintiff Giovanna F. is permanently vision-impaired and still struggles with fatigue because of Lyme disease, which prevents her from playing the sports she loves, including soccer. Record at 23.

Plaintiff Tyrique B. was bitten by a tick and acquired alpha-gal syndrome, an acquired allergy to food products from mammals including beef, pork, and cow's milk. Record at 22, 54. Tyrique B. has had to dramatically alter his diet, and must carry an EpiPen at all times in case he has an allergic reaction—watery eyes, sneezing, and wheezing—if his food is contaminated with certain animal products.

Record at 22. Plaintiffs' health and safety remains at risk due to the increasing prevalence of ticks in Virginia because of climate change and Defendants' conduct. Record at 16, 21, 23, 26, 54-56; *see also* Record at 160-61.

For Plaintiffs Cedar B. and Giovanna F., their food sources are dwindling because of climate change. Record at 16, 24, 53; *see also* Record at 13. Climate change-induced drought reduces soil moisture and water needed for crop irrigation. Record at 53. As a result, Plaintiff Cedar B.'s orchard yields less fruit and Plaintiff Giovanna F.'s family garden is left to wither every August because she cannot afford the exorbitant and rising cost of water during periods of water restrictions. Record at 16, 24, 53.

Climate change also causes ocean acidification that degrades the shellfish in the ocean and Chesapeake Bay, reducing Plaintiff Amaya T.'s ability to access this important food source. Record at 13, 50. Amaya T. strives to eat local crab, shrimp, and crawfish as part of her diet and family culture, but as excessive carbon dioxide pollution from burning fossil fuels continues to acidify and heat the ocean, Amaya T.'s access to shellfish continues to degrade. *Id.*

Long periods of drought, which prevent Plaintiffs Cadence R.-H. and Cedar B. from recreating in their favorite creeks at Alum Springs Park and Poverty Creek, Record at 16, 20, 53, are punctuated by extreme precipitation events in Virginia because of anthropogenic climate change, causing flooding damage. Record at 54.

For example, an extreme precipitation event in 2018 flooded Plaintiff Layla H.'s home causing water damage and mold growth that cost $17,000 to remediate. Record at 10; *see also* Record at 13-15, 19, 160. Increasingly severe storm damage has also blocked safe access to recreation opportunities and travel for Plaintiffs Tyrique B., Layla H., Amaya T., and Cadence R.-H., and forced school cancelations for Plaintiffs Ava L. and Maryn O. Record at 11, 13, 19-23, 26-27, 53-54; *see also* Record at 58.

Climate change-induced sea level rise is already inundating many places where Plaintiff Giovanna F. seeks to visit regularly and recreate, including Chincoteague and Assateague Islands. Record at 24, 47-49. These low-lying barrier islands will be entirely lost to sea level rise within Giovanna's lifetime, unless Defendants alter their current fossil fuel promoting conduct. *Id.* Virginia is experiencing some of the highest rates of sea level rise in the United States which is inundating Plaintiffs' beloved coastal recreational areas and altering Virginia's coastline in unforeseen ways. Record at 47-49.

Finally, Plaintiffs are suffering a multitude of mental health injuries because of their government's conduct that knowingly worsens the climate crisis. Record at 58; *see also* Record at 161-62. This looming existential crisis, and the trauma of the physical injuries Plaintiffs have experienced, manifests in unprecedented levels of stress, depression, anxiety, and PTSD. Record at 58. Plaintiffs Katerina Leedy, Ava

L., Kyla H., Maryn O., Layla H., Claudia Sachs, and Elizabeth M. all experience ongoing harm to their mental health. Record at 12-15, 19-22, 25, 27-29, 58. Plaintiffs' psychological injuries are exacerbated because Defendants are aware of the harms their challenged laws and conduct cause, yet they persist in their present course of action to expand and "maximize" fossil fuel use. *Id.*; *see also* Record at 35 ("Defendant Virginia Energy is statutorily directed to maximize the exploration, development, and production of coal, oil, and gas resources.").

II. Defendants' Historic and Ongoing Policy and Practice of Permitting Fossil Fuel Infrastructure Causes and Contributes to Plaintiffs' Injuries From the Climate Crisis

Defendants control Virginia's energy system, which is explicitly designed to "maximize" fossil fuels as the primary energy source. Record at 9, 31-33, 35-37, 42, 68-70. Virginia's fossil fuel-based energy system results in high levels of greenhouse gas pollution that are injurious to the Youth Plaintiffs. Record at 42-44 (Virginia's greenhouse gas emissions have increased in the past three decades and are projected to remain dangerously high for the next three decades.). Even as the climate crisis worsens, Virginia's energy consumption profile has changed little over the past 30 years, with fossil fuels continuing to account for most energy consumption in Virginia. Record at 42-43. This did not happen due to market forces, but rather due to affirmative government laws and conduct that prioritize the use of fossil fuels, in spite of other less damaging alternatives. Record at 62-63. Defendants' historic and

ongoing policy and practice of permitting fossil fuel infrastructure, and the provisions of the Virginia Gas and Oil Act which direct Defendants to maximize the exploration, development, and production of coal, oil, and gas, exceed the constitutional and common law constraints long placed on the Commonwealth, which are designed to prevent infringements of Youth Plaintiffs' *jus publicum* and due process rights. Record at 37-44, 68-75.

If Defendants' conduct is left unchecked and immune from judicial review, as the Circuit Court found, Defendants will further cause and contribute to the climate crisis, exacerbate Plaintiffs' injuries, and perpetuate the infringement of Plaintiffs' constitutional and *jus publicum* rights. Record at 45; *see also* Record at 37-44, 68-75. As alleged in the Complaint, leading scientific bodies advise extreme climate impacts are increasing in frequency and severity with each passing year, and that a swift transition away from fossil fuels is economically and technically feasible, and needed to protect the lives and liberties of children in Virginia. Record at 59-63.

MATERIAL PROCEEDINGS BELOW

Youth Plaintiffs filed a declaratory judgment action in the Richmond City Circuit Court on February 9, 2022, detailing how, for decades, Defendants' policy and practice of approving permits for fossil fuel infrastructure in the Commonwealth of Virginia has and continues to cause dangerous levels of greenhouse gas pollution that results in grave harm to Plaintiffs in violation of their fundamental and

inalienable substantive due process rights, secured by Virginia's Constitution, Article I, Section 11, and common law *jus publicum* rights. Record at 37-59, 68-76. Plaintiffs also claim that the Virginia Gas and Oil Act sections 45.2-1602(1), (2), (5) and 45.2-1614(A)(1), (A)(2), (A)(4), and (B)(6), which direct Defendants to maximize the exploration, development, and production of coal, oil, and gas resources, violate Plaintiffs' *jus publicum* and due process rights and are unconstitutional. Record at 9, 68-76.

Plaintiffs seek a declaratory judgment that Defendants' policy and practice of permitting fossil fuel infrastructure projects violates their *jus publicum* and due process rights. Record at 75-76. Plaintiffs also seek a declaratory judgment that sections 45.2-1602(1), (2), (5) and 45.2-1614(A)(1), (A)(2), (A)(4), (B)(6) in the Virginia Gas and Oil Act violate their *jus publicum* and due process rights. *Id.* Plaintiffs further request injunctive relief if the Circuit Court deems that necessary or proper. Record at 76. Plaintiffs do not seek damages. Record at 75-76.

On April 11, 2022, Defendants filed a Demurrer and Plea of Sovereign Immunity. Record at 111-15. On July 29, 2022, Defendants filed a Brief in Support of Defendants' Demurrer and Plea of Sovereign Immunity. Record at 127-48. Among the arguments made in their brief, relevant to this appeal, Defendants claimed that "sovereign immunity bars the Complaint." Record at 131-34. On August 26, 2022, Plaintiffs filed their Brief in Opposition to Defendants' Demurrer

and Plea of Sovereign Immunity. Record at 163-91. On September 2, 2022, Defendants filed a Reply in Support of Defendants' Demurrer and Plea of Sovereign Immunity. Record at 192-213.

On September 16, 2022, the Circuit Court held a hearing on Defendants' Demurrer and Plea of Sovereign Immunity. After hearing from both parties, the Court stated from the bench:

> [T]he Court finds that the General Assembly has not waived its sovereign immunity in this case, and because sovereign immunity is not waived, sovereign immunity bars constitutional claims. And as to the provisions of Virginia's constitution being self-executing, based upon the authority presented, the Court does not find that to be the case. As such, the Court sustains the plea of sovereign immunity and dismisses the case with prejudice.

Record at 273-74.

On September 29, 2022, the Court entered its Order stating:

> Upon due consideration of the parties' written and oral arguments the Court **FINDS** that the Commonwealth of Virginia has sovereign immunity from Plaintiffs' allegations and **FINDS** that Virginia Constitution Article I, § 11, in this instance, is not self-executing. The Court **GRANTS** the Plea of Sovereign Immunity.

Record at 215.

On October 27, 2022, Plaintiffs timely filed their Notice of Appeal to this Court. Record at 216-22.

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. *Preserved*: Record at 63-76, 172-82, 186-88, 215, 216-22, 252-54, 256-66.

2. The Circuit Court erred in expanding the doctrine of sovereign immunity to apply to constitutional claims seeking equitable relief. *Preserved*: Record at 63-76, 172-82, 186-88, 215, 216-22, 252-54, 256-66.

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. *Preserved*: Record at 66-67, 69-71, 73-76, 172-78, 186-88, 215, 216-22, 252-54, 256-62, 252-54, 256-62.

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. *Preserved*: Record at 63-66, 68-69, 71-73, 75-76, 178-82, 186-88, 215, 216-22, 252-54, 262-66.

STANDARD OF REVIEW

The standard of review for Assignments of Error 1-4 is *de novo*. *Gray*, 276 Va. at 97 ("The existence of sovereign immunity is a question of law that is reviewed

de novo."). This Court must accept as true the facts in the pleadings for purposes of resolving the issue of sovereign immunity. *Id.*

ARGUMENT & AUTHORITIES

I. Sovereign Immunity Does Not Apply to Constitutional Cases Involving Rights Secured by Virginia's Bill of Rights That Seek Equitable Remedies[1]

In dismissing Plaintiffs' due process claims[2] under Article I, Section 11 on the basis that the Commonwealth of Virginia is immune from suit, the Circuit Court erroneously expanded the doctrine of sovereign immunity to apply to claims involving rights protected by the Bill of Rights that seek equitable remedies—not damages—including declaratory relief under the Declaratory Judgments Act. The Circuit Court decision here encroaches on the People of Virginia's sovereign rights to bring cases before the judiciary to hold their government accountable for constitutional violations. The Circuit Court's misapplication of law contradicts long-standing Virginia legal precedent and prevents these Youth Plaintiffs, and any other Virginians, from seeking judicial redress, in the form of declaratory relief, for government conduct that violates fundamental constitutional rights, an inviolable feature of Virginia's constitutional framework. Contrary to the Circuit Court's order (and Defendants' arguments below), Virginia's binding jurisprudence, constitutional

[1] This argument addresses Assignment of Error 1 and 2.
[2] Counts II and IV of Plaintiffs' Complaint. Record at 69-71, 73-76.

text, and history demonstrate that rights secured by Virginia's Bill of Rights are inalienable and the duty to interpret and enforce them rests with the judiciary. Applying the doctrine of sovereign immunity is antithetical to this Bill of Rights case brought by injured children seeking equitable remedies against their government.

A. Under Virginia's Supreme Court Precedent, Sovereign Immunity Does Not Apply to Cases Implicating the Bill of Rights That Seek Equitable Remedies

Virginia's binding Supreme Court precedent is clear: sovereign immunity does not bar equitable relief in cases seeking to protect rights secured by the Bill of Rights. Two leading cases are dispositive here, and no Supreme Court jurisprudence undermines or contradicts this precedent. In *DiGiacinto v. Rector & Visitors of George Mason University*, the Supreme Court held that claims under Article I, Section 14 of the Virginia Constitution, seeking declaratory and injunctive relief, were not subject to the defense of sovereign immunity. 281 Va. 127, 137-39 (2011). The Court reasoned that because plaintiff's claims were *constitutional*, and not statutory, in nature the Commonwealth was not immune from suit.[3] *Id.* at 137. Additionally, the Court emphasized that constitutional provisions that are of a negative character, in that they prohibit government from overstepping its

[3] The plaintiff also argued the Commonwealth violated his right to bear arms, secured by Article I, Section 13. The Court addressed that claim on the merits without addressing sovereign immunity. *DiGiacinto*, 281 Va. at 136-37.

constitutional authority, such as in the Bill of Rights, are self-executing, and claims thereunder cannot sustain a plea of sovereign immunity. *Id.* at 137-38 (citing *Gray*, 276 Va. at 103-04).

In *Gray*, the Supreme Court held that sovereign immunity was not a barrier to plaintiffs' constitutional claims because one claim originated from the Bill of Rights, another was a constitutional right of a negative character that prohibited certain conduct, and the third constitutional claim provided a clear constitutional rule that the court could apply in resolving the claim. 276 Va. 93, 105-06 (2008) (analyzing plaintiffs' claims under Article I, § 5, Article III, § I, and Article IV, § I of Virginia's Constitution). The *Gray* Court's ruling applies equally to, and is dispositive of, whether sovereign immunity applies to Youth Plaintiffs' due process claims under Article I, Section 11. As *Gray* stated:

> The constitutional provisions at issue in this case place duties and restrictions upon the Commonwealth itself and its departments. To give full force and effect to the provisions as self-executing, a person with standing must be able to enforce them through actions against the Commonwealth. Thus, we further hold that the self-executing constitutional provisions before us waive the Commonwealth's sovereign immunity.

Id. at 106. Thus, *DiGiacinto* and *Gray* make it irrefutable that sovereign immunity cannot bar equitable relief in cases seeking to protect rights secured by Virginia's Bill of Rights.

The dicta in *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007), and its citation by *DiGiacinto, Gray*, and some circuit courts, has created jurisprudential confusion, which this Court should rectify. *DiGiacinto*, 281 Va. at 137; *Gray*, 276 Va. at 102. For instance, circuit courts (and Defendants in their Circuit Court briefing in this matter, Record at 131-32, 194) have cited *Afzall* for its untailored proposition in dicta that: "the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action. . . . Sovereign immunity may also bar a declaratory judgment proceeding against the Commonwealth." *Afzall,* 273 Va. at 231 (applying sovereign immunity in a statutory interpretation case that would impact the public purse). However, that general principle of sovereign immunity is true only in cases involving statutory or tort claims, or where plaintiffs seek damages as a remedy. *See, e.g., Va. Bd. of Med. v. Va. Physical Therapy Ass'n*, 13 Va. App. 458 (1991), *aff'd,* 245 Va. 125 (1993) (statutory case)*; Hinchey v. Ogden,* 226 Va. 234 (1983) (tort claims); *Wiecking v. Allied Med. Supply Corp.,* 239 Va. 548, 551 (1990) (tort claims); *Messina v. Burden*, 228 Va. 301, 308 (1984) (tort claims); *Commonwealth v. Luzik*, 259 Va. 198, 208 (2000) (statutory claims seeking damages); *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 245-46 (2004) (tort claims); *Ligon v. Cnty. of Goochland*, 279

Va. 312, 317 (2010) (statutory claims).[4] That rule does not apply when inalienable fundamental rights preserved in the Bill of Rights are at stake in equitable relief cases, as is the case here. *Gray,* 276 Va. at 105-06; *DiGiacinto,* 281 Va. at 137-39. Indeed, no appellate cases in Virginia have held that sovereign immunity bars equitable relief in cases implicating rights secured by Virginia's Bill of Rights.

The Circuit Court's order improperly expanded the doctrine of sovereign immunity to constitutional claims seeking equitable relief in a way that no Virginia appellate court has done before, and in direct contravention of Supreme Court precedent. Plaintiffs have not brought statutory or tort claims and do not seek damages. Therefore, sovereign immunity does not apply to their due process claims (Counts II and IV of Plaintiffs' Complaint) under Article I, Section 11 of Virginia's Bill of Rights, and the Circuit Court's order should be reversed.

B. Virginia's Constitutional History Demonstrates an Independent Judiciary Protects Rights Secured by the Bill of Rights

The Circuit Court's unlawful expansion of sovereign immunity as an accepted

[4] Moreover, none of the circuit court cases cited by Defendants in their Circuit Court briefs held that sovereign immunity bars cases seeking equitable remedies for the deprivation of rights secured by the Bill of Rights—they are *all* damages cases. *See, e.g., Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712 (E.D. Va. 2015) (action for damages for the expulsion of a student from the university); *Quigley v. McCabe*, No. 2:17cv70, 2017 WL 3821806 (E.D. Va. Aug. 30, 2017) (seeking damages for negligent medical treatment while incarcerated); *Gray v. Rhoads*, 55 Va. Cir. 362 (2001) (discussing whether Article I, Section 11 is self-executing for damages cases).

defense to equitable constitutional claims is inconsistent with the Commonwealth's original history of establishing three separate branches of government, including an independent judiciary, and long-standing Supreme Court precedent. Constitutional history confirms that the purpose of Virginia's Bill of Rights (originally the Declaration of Rights in 1776) is to protect the inalienable and fundamental rights of Virginians from majoritarian abuses of power. *Smoot v. People's Perpetual Loan & Bldg. Ass'n,* 95 Va. 686, 690 (1898). According to Professor A.E. Dick Howard:

> The concept of a bill of rights is the cornerstone of our government. Its function . . . as the conscience of the state and the guardian of those principles of freedom which the American people hold most sacred has contributed in no small part to the longevity and vibrancy of one of the oldest democracies in the world.

Commentaries on the Constitution of Virginia 56 (1974). Virginia's Bill of Rights, the first in the nation, was a "revolution of law," in that the rights were intended to be enforceable as written, and unchangeable by the political branches. *Id.* at 43. According to Thomas Jefferson, the Bill of Rights is a vehicle "for each individual to be secure in his fundamental rights irrespective of majority sentiment." *Id.* at 42.

While Virginia's Bill of Rights enumerates a non-exhaustive list of Virginians' fundamental rights,[5] the drafters recognized that such rights would mean little without judicial enforcement. *Id.* at 35-36, 42-43 (James Madison, Thomas Jefferson, and George Mason considered an independent judiciary critical to

[5] *See* Va. Const. art. I, § 17.

protecting individual rights). Virginia's 1776 Declaration of Rights was unique in that for the first time, the people creating their sovereign state sought to secure individual rights from infringement from both executive and legislative powers. *Id.* at 36-37.[6] In advocating for a similar Bill of Rights to be included in the federal Constitution, Virginian James Madison stated:

> If [these rights] are incorporated into the Constitution, *independent tribunals of justice* will consider themselves in a peculiar manner the guardians of those rights; they *will be an impenetrable bulwark against every assumption of power in the Legislative or Executive*; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Davis v. Passman, 442 U.S. 228, 241-42 (1979) (quoting 1 Annals of Cong. 439 (1789) (emphasis added)). Virginia's constitutional framers understood that "[w]ithout an independent judiciary, judicial review of legislative action is rendered nugatory, leaving individuals rights to the transient demands of popular majorities." A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 36 (1974). Judicial protection of individual rights was, and remains, a central and critical purpose of Virginia's Bill of Rights. *Canales v. Torres Orellana*, 67 Va. App. 759,

[6] While Virginia's 1776 Declaration of Rights was heavily influenced by English charters, such as the Magna Carta, an independent judiciary acting as a check on the executive and legislative branches for government "was a significant departure from the British system." Albert L. Sturm, *The Constitution of Virginia: 1776 and 1976,* Univ. Va. Newsl. (Inst. of Gov't., Univ. of Va., Charlottesville, Va.), Dec. 1976, at 13-14.

776 n.10 (2017) (separation of powers is "a bedrock pillar of our government" that "first appears as § 5 of the Virginia Declaration of Rights of 1776").

Consistent with the Commonwealth's role as a pioneer in enshrining individual rights in a Bill of Rights, Virginia's judiciary was a national leader in affirming the duty of the courts to interpret the Constitution and protect individual rights from infringement by the political branches. In "the first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal," the Supreme Court of Virginia ruled courts have the power to declare legislative acts unconstitutional. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 20-21 (1782). This landmark ruling, which pre-dates *Marbury v. Madison* by twenty-one years, "fixed a precedent, whereon, a general practice, which the people of this country think essential to their rights and liberty, has been established." *Id.* at 21. According to Judge Pendleton, Virginia's Constitution, "declaring the rights of the citizens, and forming their government, divided it into three great branches, the legislative, executive, and judiciary, assigning to each its proper powers, and directing that each shall be kept separate and distinct, must be considered as a rule obligatory upon every department, not to be departed from on any occasion." *Id.* at 17. To grant the legislature, or here the executive as well, the power to declare itself immune from judicial review for abrogating rights set forth

in the Bill of Rights would upend what has been foundational to the constitutional interpretation of separation of powers since 1782.

In the 1793 case, *Kamper v. Hawkins*, the Court reaffirmed that the judiciary should not be complicit in the violation of constitutional rights by the political branches:

> What is the Constitution but the great contract of the people, every individual whereof having sworn allegiance to it? A system of fundamental principles, the violation of which must be considered as a crime of the highest magnitude. That this great and paramount law should be faithfully and rightfully executed, it is divided into three departments, to wit: the legislative, the executive, and judiciary, with an express restraint upon all, so that neither shall encroach on the rights of the other. *In the Bill of Rights many things are laid down, which are reserved to the people—trial by jury, on life and death, liberty of conscience, &c. Can the legislature rightfully pass a law taking away these rights from the people? . . . Can the executive do any thing forbidden by this bill of rights, or the constitution? In short, can one branch of the government call upon another to aid in the violation of this sacred letter? The answer to these questions must be in the negative*.

3 Va. (1 Va. Cas.) 20, 59 (1793) (emphasis added).[7] The justices made clear that Virginia's Constitution is the "fundamental law," and the purpose of the Bill of Rights is to ensure the judiciary is not "the mere creature of the legislative department." *Id.* at 82-83, 92-93. This premise remains unchanged to this day.

[7] *Kamper* pre-dated the landmark U.S. Supreme Court case, *Marbury v. Madison* by ten years and is one of the most influential cases in our nation's history affirming the duty of the judiciary to review legislative acts for their constitutionality. Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 72 (1990).

Howell v. McAuliffe, 292 Va. 320, 345 (2016) ("Virginia has steadfastly held to the separation-of-powers principle first recognized in its 1776 Virginia Declaration of Rights.").

There is nearly 250 years of precedent that Virginia's judiciary, consistent with constitutionally enshrined separation of powers, has a vital duty to protect individual rights enumerated in the Bill of Rights from encroachment by the political branches. Immunizing the Commonwealth from suits seeking equitable remedies to protect fundamental rights is an anathema to Virginia's constitutional history and jurisprudence. The Circuit Court's order abdicates the judiciary's constitutional duty to act as a check on the political branches and is contrary to Virginia's original constitutional history and legal precedent. If not corrected on appeal, the Circuit Court's order would deprive the courts of their constitutional mandate to act as a guardian of Virginians' fundamental rights.

II. Article I, Section 11 of Virginia's Constitution is Self-Executing, and Therefore, Sovereign Immunity Does Not Apply[8]

The substantive due process rights protected by Article I, Section 11 are self-executing constitutional rights needing no legislative sovereign immunity waiver. This section establishes the multiple bases requiring that conclusive ruling, including the Supreme Court's clear precedent on self-executing constitutional provisions,

[8] This argument addresses Assignment of Error 1 and 3.

accordant federal precedent, and unwavering historical support for Virginians' sovereign ability to sue their government for infringing their rights to life, liberty, and property and seek equitable relief, without needing their government's permission. For all of these reasons, the error of the Circuit Court must be reversed and the Circuit Court should consider Counts II and IV of Plaintiffs' Complaint on the merits. Record at 69-71, 73-75.

A. Article I, Section 11 Is Self-Executing Because It Is Within the Bill of Rights and Negative in Character

Plaintiffs' substantive due process rights under Article I, Section 11 fall within the Bill of Rights, are negative in character, and are therefore, self-executing. The Supreme Court's decision in *Robb v. Shockoe Slip Foundation* explicitly held, "constitutional provisions in bills of rights . . . are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct." 228 Va. 678, 681 (1985).[9] The Supreme Court's decision in *Gray* reiterated *Robb's* holding that constitutional provisions within the Bill of Rights are self-executing, particularly under the circumstances here, where Article I, Section 11 imposes a

[9] It is important to note that while *Robb* analyzed independent bases for finding a constitutional right "self-executing," *Robb* did *not* involve a sovereign immunity defense and is explicitly *not* precedential on the legal issue of sovereign immunity. 228 Va. 678. *Gray* and *DiGiacinto* are the Supreme Court's most recent sovereign immunity precedent this Court is bound by.

negative constraint on government from depriving citizens of their rights to "life, liberty, or property without due process of law." *See Gray*, 276 Va. at 103.

The Supreme Court has conclusively established that provisions in the Bill of Rights are self-executing. *See Gray,* 276 Va. at 105; *Robb*, 228 Va. at 681; *DiGiacinto,* 281 Va. at 138; *supra* § I.A. No precedent excepts substantive due process rights from the general rule that Bill of Rights provisions are self-executing. This Court should confirm Virginia's centuries-old precedent that the judiciary has the authority to review the constitutionality of statutes and government conduct that infringe on rights to life, liberty, or property and make clear, that sovereign immunity does not apply to Plaintiffs' due process claims seeking equitable relief.[10] Record at 66-67, 69-71, 73-75.

Virginia's due process clause is also a prohibition on conduct, specifically the deprivation of life, liberty, or property by the Commonwealth. Va. Const. art. I, § 11

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[10] Finding Plaintiffs' due process rights to be self-executing comports with the 1969 Report of the Commission on Constitutional Revision ("Report"). In explaining why the proposed (and subsequently adopted) amendments to Article I, Section 8 included explicit language making it self-executing (the only provision in the Constitution with such language), the Report states:

> It should not be inferred that making section 8 self-executing in any way affects the self-executing nature of the other sections of the Constitution. Section 8 needs the explicit statement only because of decisions holding some of section 8's provisions not to be self-executing. *Other sections do not pose this problem, and no additional language is needed to make them self-executing*.

Report of the Commission on Constitutional Revision, *The Constitution of Virginia* 92 (1969) (emphasis added).

("[*N*]*o person shall be deprived* of his life, liberty, or property without due process of law" (emphasis added)). According to *Robb,* even for rights outside of the Bill of Rights, "'[p]rovisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing.'" 228 Va. at 681-82 (quoting *Robertson v. Staunton,* 104 Va. 73, 77 (1905)); *cf. McCleary v. State*, 269 P.3d 227, 248 (Wash. 2012) ("The vast majority of constitutional provisions, particularly those set forth in the federal constitution's bill of rights and our constitution's declaration of rights, are framed as negative restrictions on government action."). Virginia's jurisprudence evaluating other constitutional provisions that are negative in character makes clear that the due process clause is self-executing. *DiGiacinto,* 281 Va. at 138 (Article I, § 14 self-executing because it is "stated in the negative"); *Gray,* 276 Va. at 105 (although Article III, § 1 is not in the Bill of Rights, it is self-executing because "it is of a negative character and specifically prohibits certain conduct"). Accordingly, because Article I, Section 11 is contained in the Bill of Rights and is negative in character, the due process clause is self-executing.

B. Federal Precedent Confirms That Virginia's Due Process Rights Are Self-Executing

The due process protections secured by the Constitution of Virginia are "co-extensive with those of the federal constitution." *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005); *see* Report of the Commission on Constitutional Revision, *The Constitution of Virginia* 96 (1969) (the proposed amendments to Article I, Section

11 "brings the due process clause of section 11 into line with the typical, and well understood, due process clauses of other state constitutions . . . as well as the language of the Fifth and Fourteenth Amendments to the Federal Constitution."). Accordingly, federal precedent establishing that due process protections secured by the Fifth and Fourteenth Amendments to the U.S. Constitution are self-executing is authoritative. The United States Supreme Court has held the substantive due process rights in the Fourteenth Amendment are self-executing because the power to enforce the safeguards within the Bill of Rights is a judicial, not legislative, power. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) ("[T]he Fourteenth [Amendment] is undoubtedly self-executing without any ancillary legislation"); *see also City of Boerne v. Flores*, 521 U.S. 507, 523 (1997); *Hills v. Gautreaux*, 425 U.S. 284, 289 (1976) (case brought directly under the Fifth Amendment). The U.S. Supreme Court has also held that the Due Process Clause serves "as a limitation on the State's power to act," and is thus negative in character. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). While the legislature is empowered to enact laws to further protect or remediate substantive due process protections pursuant to its police power, no affirmative legislation is needed to effectuate these rights. *See City of Boerne*, 521 U.S. at 524. It is an imperative feature of the separation of powers doctrine that the courts remain able to enforce provisions in the Bill of Rights

and interpret the Constitution, not the legislature. *Id*. at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

Virginia's courts also follow federal courts in applying the three tiers of scrutiny—rational basis, intermediate scrutiny, and strict scrutiny—in reviewing due process claims. *See Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 97 (1989). In identifying previously unrecognized liberty rights in substantive due process cases, Virginia courts also follow the federal analysis. *Paris v. Commonwealth*, 35 Va. App. 377, 383 (2001) (applying U.S. Supreme Court's *Glucksberg* test in an Article 1, Section 1 challenge to a Virginia statute).

This Court should not deviate from long-standing jurisprudence that Virginia's due process clause is self-executing.

C. The Constitutional History of Virginia's Substantive Due Process Rights Is Incompatible With the Sovereign Immunity Defense

As with other rights secured by the Declaration of Rights, judicial protections have always been considered essential for the full enjoyment of Virginians' rights to life, liberty, and property. Virginia's constitutional drafters viewed the rights to life, liberty, and property as immutable human rights (or natural rights) that predate written constitutions. A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 58, 60 (1974). According to George Mason, the drafter of Virginia's Declaration of Rights, the due process clause was designed "to provide the most effectual Securities for the essential Rights of human nature" and it was so vital to

Virginian's security that he "trust[ed] that neither the Power of Great Britain, nor the Power of Hell [would] be able to prevail against it." *The Papers of George Mason, 1725-1792,* at 434-35 (Robert A. Rutland ed. 1970) (letter to Mr. Brent, Oct. 2, 1778). The Virginia Supreme Court stated over 100 years ago, "[t]he prime object of the Bill of Rights is to place the life, liberty, and property of the citizen beyond the control of legislation . . . ." *Swift & Co. v. City of Newport News*, 105 Va. 108, 115 (1906) (citation omitted).

Virginia's Courts, like countless other federal and state courts, have regularly been called on to protect due process rights and grant equitable remedies without sovereign immunity ever being raised. *See, e.g., Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 577 (2017) (in a declaratory judgment case, court considered whether a statute violated property rights secured by Article I, § 11); *Wilkins v. West,* 264 Va. 447, 466-67 (2002) (reviewing on the merits plaintiffs' case seeking a declaration that redistricting criteria violated equal protection rights secured by Article I, §§ 1 and 11). Virginia's jurisprudence evaluating due process claims confirms that no legislative action is required for courts to determine whether an individual's due process rights have been violated. *Walton v. Commonwealth*, 255 Va. 422, 427-28 (1998) (evaluating whether a statute requiring suspension of driver's license upon conviction for possession of marijuana violates substantive due process under Article I, § 11 of the Virginia Constitution); *Sch. Bd. of City of Norfolk*

v. U.S. Gypsum Co., 234 Va. 32, 40 (1987) ("[T]he application of Code § 8.01-250.1 to the facts presented in the orders of certification is unconstitutional under the due process clause of Va. Const. art. I, § 11"); *Knox v. Lynchburg Div. of Soc. Servs.*, 223 Va. 213, 223 (1982) (concluding statute was constitutional and did not violate substantive due process rights in Article I, §§ 1 and 11 even though fundamental right was involved because there was a valid compelling state interest); *Dorsey v. Commonwealth*, 32 Va. App. 154, 166 (2000) (revocation of appellant's bail did not violate his substantive or procedural due process rights).

The Circuit Court's order that sovereign immunity prevents Plaintiffs from bringing their due process claims under Virginia's Constitution, absurdly leaves individual Virginians without *any* judicial recourse when the Commonwealth violates their due process rights. If allowed to stand, the order would have the dangerous consequence of giving the political branches the ability to violate Virginians' due process rights without any judicial review, thereby undermining the judiciary's role as a check on the political branches, an essential function of the courts dating back to 1782. *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782); *see also Kamper,* 1 Va. Cas. at 42-43 (the independence of the legislative and judicial branches is "essential to liberty" and necessary to avoid "complete despotism").[11]

[11] The separation of powers between the legislature and judiciary contained in Virginia's Declaration of Rights was influential when the federal Constitution was

III. Plaintiffs' Common Law Jus Publicum Claims Are Not Barred by Sovereign Immunity[12]

Plaintiffs' Complaint pleads their *jus publicum* claims against the Commonwealth under the common law—not under Article XI, Section 1 of the Virginia Constitution. Record at 6-7, 63-66, 68-69, 71-73. The Circuit Court erred to the extent it ruled that sovereign immunity bars Plaintiffs' common law *jus publicum* claims seeking equitable relief.[13] First, as described herein, the *jus publicum* is a common law cause of action that the Virginia Supreme Court said is uniquely and inextricably connected to the protection of the constitutional right to individual liberty. Because Plaintiffs' *jus publicum* rights are inseparable sovereign rights of the people, to have any meaning, they must be judicially enforceable against the government trustee of those rights. Sovereign immunity cannot shield the Commonwealth from suit for *jus publicum* claims, and no court has ever held otherwise. Second, while Article XI, Section 1 defined and expanded the scope of Virginians' *jus publicum* rights, it is not the basis for Plaintiffs' cause of action, and

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subsequently drafted. The Federalist No. 81 (Alexander Hamilton) (noting that Virginia and several other states had distinct legislative and judicial branches which "is highly to be commended").

[12] This argument addresses Assignments of Error 1 and 4.

[13] Although the Circuit Court's short order does not address Plaintiffs' *jus publicum* claims specifically, the order finds that "the Commonwealth of Virginia has sovereign immunity from Plaintiffs' allegations" and thus dismissed the entirety of Plaintiffs' case as barred by the sovereign immunity defense, including their *jus publicum* claims. Record at 215; *see* Va. Sup. Ct. R. 1.1(c).

therefore *Robb's* holding is inapposite. Third, even if *Robb's* analysis as to when a constitutional provision is self-executing can be applied to Plaintiffs' common law *jus publicum* claims, which is a question of first impression, it confirms that *jus publicum* claims are self-executing and not barred by sovereign immunity.

A. The *Jus Publicum* Is Inherent in the Sovereignty of the People and Acts as a Restraint on the Commonwealth's Powers

Sovereign immunity cannot bar Plaintiffs' *jus publicum* claims[14] 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. *Commonwealth v. City of Newport News*, 158 Va. 521, 546 (1932) ("The *jus publicum* and all rights of the people, which are by their nature inherent or inseparable incidents thereof, *are incidents of the sovereignty of the State*.") (emphasis added); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455 (1892) (declaring the rule that public trust resources are "held by the state, *by virtue of its sovereignty*, in trust for the public") (emphasis added).[15] Pursuant to the *jus publicum*, the Commonwealth holds "the public domain

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[14] Counts I and III of Plaintiffs' Complaint. Record at 68-69, 71-73.

[15] Other courts similarly recognize the *jus publicum,* also called the "public trust doctrine," as a fundamental and inalienable attribute of sovereignty. *See, e.g., Corvallis Sand & Gravel Co. v. State Land Bd*., 439 P.2d 575, 582-83 (Or. 1968) (Oregon acquired title to submerged lands "by virtue of its sovereignty"); *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 712 (Cal. 1983) (the "core" of the public trust is the state's authority, "as sovereign," to supervise and control navigable waters); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987) (state ownership of lands underlying navigable waters is an "essential attribute of

'for the interest or benefit . . . of the public.'" *Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 382 (2014) (quoting *G.L. Webster Co. v. Steelman*, 172 Va. 342, 357 (1939)). While the Commonwealth has discretion in how it administers the public domain, that discretion is limited by the *jus publicum* standards for protecting current and future generations' uses of the *jus publicum* resources and Virginia's Constitution. As the Supreme Court held in *City of Newport News*, the legislature has discretion to administer the Commonwealth's resources "except as is otherwise expressly or impliedly provided by the Constitution." 158 Va. at 549. Therefore, while Plaintiffs' *jus publicum* claim here is pled as a common law cause of action, it is inextricably connected to the preservation of constitutional rights.

The *jus publicum* is, in part, a negative right that denies the Commonwealth the power to take away, destroy, or substantially impair *jus publicum* rights and constrains the Commonwealth's authority in managing *jus publicum* resources. *City of Newport News,* 158 Va. at 546. As the Supreme Court has held:

> The *jus publicum* and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the State. Therefore, *by reason of the object and*

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sovereignty"); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 947-48 (Pa. 2013) (Castille, C.J., concurring) (describing public trust rights as "inherent and indefeasible" public property rights that are "inviolate"); *In the Matter of Hawai'i Elec. Light Co., Inc.*, 2023 WL 2471890, at *8, 16 (Haw. Mar. 13, 2023) (Wilson, J., concurring); Mary Christina Wood, *Nature's Trust: Protecting an Ecological Endowment for Posterity*, 52 Env't L. 749, 755-58 (2022).

> *purposes for which it was ordained, the Constitution impliedly denies to the legislature the power to relinquish, surrender or destroy, or substantially impair the jus publicum, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof*, except to the extent that the State or Federal Constitution may plainly authorize it to do so.

Id. at 546-47 (emphasis added); *see also Va. Marine Res. Comm'n*, 287 Va. at 383 (Virginia has a "most solemn duty" to exercise its *jus publicum* for the benefit of the people and cannot "relinquish, surrender, alienate, destroy, or substantially impair" the *jus publicum* or the rights of the people thereto.).

In the *jus publicum* case *City of Newport News*, the *jus publicum* right at issue was a constitutionally protected liberty interest in navigation. *City of Newport News*, 158 Va. at 548, 550. As the Court noted, the public's interests over navigable waters "bears a relationship to the right of liberty . . . and the right of liberty is declared by the bill of rights of the Constitution of Virginia to be an inalienable right." *Id.* at 550. The Court also cited Section 175 of the Constitution (now Article XI, § 3), and stated that pursuant to Section 175, the legislature holds the Commonwealth's "natural oyster beds, rocks and shoals" in trust, and the legislature is prohibited from allowing private parties to "take away, destroy, or substantially impair" the public's use of such resources. *Id.* at 553-54. Accordingly, *City of Newport News* makes clear that the *jus publicum* constrains the Commonwealth's authority to manage the public domain in a manner that would infringe on the constitutional rights and interests of Virginians. Judicial review provides an essential check on the Commonwealth to

ensure that it does not exceed its constitutional authority by infringing on the public's *jus publicum* rights. *See, e.g., Coastal Conservation Ass'n v. State*, 878 S.E.2d 288, 297 (N.C. Ct. App. 2022) ("Application of sovereign immunity in this case, however, would effectively reduce the public trust doctrine to nothing more than a 'fanciful gesture' and prevent judicial review . . . as a plaintiff would never have the 'opportunity to enter the courthouse doors and present his claims.'" (citation omitted)); *Chelan Basin Conservancy v. GBI Holding Co.*, 413 P.3d 549, 558 (Wash. 2018) ("[W]e have always embraced our constitutional responsibility to review challenged legislation . . . to determine whether that legislation comports with the State's public trust obligations."); *Nat'l Audubon Soc'y*, 658 P.2d at 728 n.27 (the public trust doctrine "remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts").

In claiming Plaintiffs' *jus publicum* claims are barred by sovereign immunity, Defendants seek unrestrained authority to impair Plaintiffs' *jus publicum* rights, thereby making the *jus publicum* meaningless. There must be an equitable judicial remedy available when the legislative and executive branches exceed the limits of their authority and infringe upon important and fundamental rights inherent to the *jus publicum*. *Wyatt v. McDermott*, 283 Va. 685, 693 (2012) (a right "implies a cause of action for interference with that right," otherwise there is "a right without a

remedy—a thing unknown to the law." (citations omitted)); *Carrington v. Goddin*, 54 Va. (13 Gratt.) 587, 600 (1857) (stating "[t]here can be no right without a remedy"). Otherwise, the Supreme Court in *City of Newport News*, by declaring that the Commonwealth has no power to deprive or substantially impair *jus publicum* rights, is empty rhetoric. *City of Newport News*, 158 Va. at 546; *see also Va. Marine Res. Comm'n,* 287 Va. at 383.

For the *jus publicum* to have any meaning, citizens must be able to bring suit against the Commonwealth when its conduct substantially impairs Virginians' *jus publicum* rights. Because the *jus publicum* is a restraint on the political branches and is an inalienable attribute of sovereignty since the founding of the Commonwealth, it does not require a legislative wavier of immunity to be operative and enforceable. As with Plaintiffs' due process rights, it is the duty of the judiciary to determine when Plaintiffs' *jus publicum* rights are infringed, and to provide equitable relief. Accordingly, sovereign immunity does not bar Plaintiffs' common law *jus publicum* claims, and the Circuit Court's ruling, impliedly suggesting otherwise without any analysis, must be reversed. Counts I and III of Plaintiffs' Complaint should therefore be remanded for further proceedings. Record at 68-69, 71-73.

B. *Robb*'s Holding Does Not Apply to Plaintiffs' *Jus Publicum* Claims

The Supreme Court's holding in *Robb* that Article XI, Section 1 of the Virginia Constitution is not self-executing under the facts of that case, does not apply

to Plaintiffs' common law *jus publicum* claims and does not provide a basis to bar Plaintiffs' claims based on sovereign immunity. Importantly, *Robb* was not a common law *jus publicum* case and it did not address sovereign immunity. 228 Va. at 680 (Plaintiff sought to enjoin the construction of certain buildings under claim brought pursuant to Article XI, § 1). In contrast to Plaintiffs' *jus publicum* claims here, *Robb* addressed a claim under Article XI, Section 1 "standing alone." *Id*. at 683. Article XI, Section 1 is only relevant to Plaintiffs' *jus publicum* claims because it defines the *scope* of their *jus publicum* rights—it does not provide the cause of action. *See City of Newport News,* 158 Va. at 553-54 (looking to Section 175 of the Constitution (now Article XI, § 3) to determine what resources the Commonwealth holds in trust).[16] Thus, while this Court is bound by *Robb's* holding that Article XI, Section 1 is not a self-executing constitutional provision, *Robb* is not otherwise precedential as to the common law *jus publicum* claim plead here. However, *Robb's* holding does imply that Article XI, Section 1 did not displace the common law *jus*

[16] A.E. Dick Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 222 (1972) (Article XI, § 1 "is to be read as *effecting* [not creating] a public trust in Virginia's natural resources and public lands.") (emphasis added); *Robinson Twp.*, 83 A.3 at 948 (public trust rights were "preserved rather than created" by the Pennsylvania Constitution's Environmental Rights Amendment).

publicum claim. If *jus publicum* claims cannot be brought directly under Article XI, Section 1, they must still find their cause of action in the common law.[17]

When Article XI, Section 1 was added to Virginia's Constitution in 1971, its purpose was to further define and expand the scope of Virginians' *jus publicum* rights, not to establish a new right.[18] In 1969, the Commission on Constitutional Revisions proposed that a conservation article be added to the Constitution, "in recognition of the growing awareness that among the fundamental problems which will confront the Commonwealth in coming years will be those of the environment." Report of the Commission on Constitutional Revision, *The Constitution of Virginia* 321 (1969). The conservation article became Article XI of the Constitution and was approved by the people of Virginia in November 1970. Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 207 (1972). As explained by Professor A.E. Dick Howard, "Section 1 of article XI, by proclaiming Virginia's public policy on the environment, makes the protection of the Commonwealth's natural resources, public lands, and historical sites part of the *jus publicum* in Virginia." *Id.* at 221-22.

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[17] Should the Court disagree with the manner in which Plaintiffs pled their *jus publicum* or due process claims, Plaintiffs reserve the right to move for leave to amend to comport their pleading with the manner in which the Court decides their *jus publicum* and due process claims should be plead. Record at 184 (preserving right to amend Complaint); Va. Sup. Ct. R. 1:8 ("Leave to amend should be liberally granted in furtherance of . . . justice.").

[18] It is well-recognized that the "breadth of the *jus publicum* changes with time and with the evolving values which society places on certain activities." Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 221 (1972).

Article XI, Section 1, therefore, codifies and expands the scope of Virginians' *jus publicum* rights, providing an additional constitutional restraint on the discretion of the Commonwealth to manage the public domain.

Article XI, Section 1 provides:

> To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, 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.

Thus, the scope of the *jus publicum* encompasses the Commonwealth's "atmosphere, lands, and waters" for the benefit of the people to have "clean air, pure water, and the use and enjoyment for recreation of adequate public lands, water and other natural resources." Va. Const. art. XI, § 1. This codification clarified that the *jus publicum* applied to rights beyond navigation and navigable waters described in the common law. *See*, *e.g., City of Newport News,* 158 Va. at 548, 550. The Office of the Governor has admitted that, consistent with Article XI, Section 1, "[t]he Commonwealth has a duty to protect our air, water, and land, and to ensure that no community in Virginia is disproportionately impacted by the negative effects of climate change," confirming that *jus publicum* duties imposed on the Commonwealth exist independent from Article XI, Section 1. Va. Office of the Governor, Exec. Order No. 29 (2019).

The codification of the scope of the *jus publicum* in the Constitution did not act to deprive the people of any enforceable right that preexisted at common law.[19] *Jus publicum* rights remain enforceable via a common law cause of action and nothing in *Robb* altered that right. Unlike in *Robb*, here Plaintiffs' *jus publicum* claims are not brought under Article XI, Section 1. Plaintiffs bring common law *jus publicum* claims to protect rights long held by the people and further defined by the Virginia Constitution. Because the source of Plaintiffs' *jus publicum* claims and Plaintiffs' requested relief are distinguishable from *Robb*, and because *Robb* did not address sovereign immunity at all, the Court's holding there is inapplicable to the case before this Court and does not support the Circuit Court's implicit conclusion that Plaintiffs' *jus publicum* claims are barred by sovereign immunity.

C. Even if This Court Applies *Robb's* Self-Executing Analysis to Plaintiffs' *Jus Publicum* Rights, They Must Be Self-Executing

While the bases set forth in *Robb* evaluate whether constitutional provisions are self-executing, even expanding *Robb*'s analysis to common law rights, which has never been done, the *jus publicum* easily meets the bar for being self-executing.

[19] Read in conjunction with Article I, Section 1, the Commonwealth must also protect the rights provided in Article XI, Section 1 for posterity. Va. Const. art. I, § 1 ("That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

For constitutional provisions that are not in the Bill of Rights, *Robb* looks to whether a provision is negative in character, expressly declares it is self-executing, or is declaratory of common law. *Robb*, 228 Va. at 681-82. If none of those bases exist, *Robb* looks to whether the provision "supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced." *Id.* at 682. These considerations confirm the *jus publicum* doctrine is self-executing.

First, as discussed above, the *jus publicum* is a restraint on government conduct and is, in part, negative in character. *Va. Marine Res. Comm'n*, 287 Va. at 383 (prohibiting government from allowing substantial impairment or destruction of the resource); *Ill. Cent. R.R. Co.*, 146 U.S. at 453 ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.")

Second, the *jus publicum* doctrine is "declaratory of common law" because it is of common law. *Va. Marine Res. Comm'n*, 287 Va. at 383 ("[W]hether an activity is a right of the people inherent to the *jus publicum* is a matter of Virginia common law . . ."); *id.* at 381 ("Under the common law of England, the sovereign Crown held title to and exercised dominion over all tidal waters and tidal bottomland below the high water line . . . ."). Other courts have similarly held that the *jus publicum* is a

matter of common law. *See, e.g., PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012) ("The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law . . . ."); *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 193 (N.C. Ct. App. 2015) ("The public trust doctrine is a creation of common law."); *Glass v. Goeckel*, 703 N.W.2d 58, 75 (Mich. 2005) ("[T]he public trust doctrine, descended at common law, applies to our Great Lakes.").

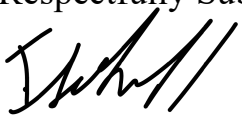
Third, while not necessary to the analysis, there is a "sufficient rule by means of which the right given may be employed and protected." *Robb*, 228 Va. at 682. There is a clear standard by which courts can judge whether the Commonwealth has infringed upon Plaintiffs' *jus publicum* rights. As the Supreme Court has already articulated, if the Commonwealth has "relinquish[ed], surrender[ed], alienate[d], destroy[ed], or substantially impair[ed]" the right, it has infringed upon that right. *City of Newport News*, 158 Va. at 547-48; *see also Va. Marine Res. Comm'n*, 287 Va. at 383. Thus, even applying *Robb*, the *jus publicum* proves to be self-executing. Because the sovereign doctrine of *jus publicum* must be self-executing, a defense of sovereign immunity by the Commonwealth cannot be sustained. Thus, the Circuit Court's order finding the Commonwealth immune from Youth Plaintiffs' claims seeking to protect their *jus publicum* rights should be reversed.

CONCLUSION

For the reasons detailed above, Youth Plaintiffs respectfully request that this Court reverse the Circuit Court's ruling and find Plaintiffs' due process and *jus publicum* claims are not barred by sovereign immunity, are self-executing, and remand to the Circuit Court to hear Plaintiffs' claims on the merits.

DATED: March 21, 2023

Respectfully Submitted,



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RULE 5A:20(h) CERTIFICATE

In accordance with Rule 5A:20(h) of the Rules of the Supreme Court of Virginia, I certify:

1. On March 21, 2023, an electronic version of this brief was filed electronically with this Court in compliance with Rule 5A:1(c). A copy was emailed to counsel for the appellee at the following addresses below.

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2. 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 9,627 words.

Counsel for Plaintiffs-Appellants request oral argument in this case.

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