IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
COMMONWEALTH OF VIRGINIA

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; JULIAN SCHENKER; 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;

Plaintiffs,

v.

COMMONWEALTH OF VIRGINIA; GLENN YOUNGKIN, in his official capacity as Governor; VIRGINIA DEPARTMENT OF ENERGY; JOHN WARREN, 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;

Defendants.

CASE NO. CL22000632-00

BRIEF IN OPPOSITION TO DEFENDANTS' DEMURRER AND PLEA OF SOVEREIGN IMMUNITY

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I. INTRODUCTION

Plaintiffs Layla H., Amaya T., Claudia Sachs, Cedar B., Julian Schenker, Ava L., Cadence R.-H., Tyrique B., Giovanna F., Elizabeth M., Maryn O., Kyla H., and Katerina Leedy are 13 young Virginians, age 10–19, suffering disproportionately grave injuries to their health and well-being due to Defendants' ongoing policy and practice of permitting fossil fuel infrastructure[1] that exacerbates climate change. Plaintiffs ask this Court to exercise its judicial duty to ascertain whether the conduct of executive branch Defendants, and statutes mandating that conduct, violate Plaintiffs' constitutional and *jus publicum* rights.[2]

Defendants mischaracterize Plaintiffs' claims, straying far outside the four corners of the Complaint and Virginia's jurisprudence, to distort Plaintiffs' allegations and argue the Commonwealth has unfettered discretion to permit fossil fuel infrastructure without judicial review. Contrary to Defendants' arguments, Plaintiffs have not submitted a "policy brief" and do not ask this Court to replace Defendants' policies with ones curated by Plaintiffs. Rather, they ask this Court to evaluate the constitutionality of government conduct and statutes by issuing declaratory relief. This will not "overthrow [Virginia's] regulatory framework" nor its "extensive statutory regime spanning six titles of the Code of Virginia." Defs.' Br. 2–3. It will only address the discrete conduct of permitting fossil fuel infrastructure, and the limited sections of the Virginia Gas and Oil Act Plaintiffs challenge. Va. Code §§ 45.2-1602(1), (2), (5); 45.2-1614(A)(1), (A)(2), (A)(4), (B)(6); Compl. at pp. 71–72, ¶¶ (A)(4)–(6). Defendants turn to out-of-state cases seeking specific injunctive relief instead of simply reading Plaintiffs' Complaint, which focuses on

[1] Fossil fuel infrastructure includes permits for the production, transport, and burning of fossil fuels. Compl. ¶ 2.

[2] A Montana court found a similar lawsuit for declaratory relief justiciable. *Held v. State of Montana*, No. CDV-2020-307, *22 (Mont. First Jud. Dist. Ct. Lewis & Clark Cnty., Aug. 4, 2021).

declaratory relief, does not ask for a remedial plan, and does not ask this Court to retain jurisdiction to enforce any plan. Defs.' Br. 3 n.1, 10–12; Compl. ¶ 12. Defendants' arguments attempt to usurp judicial power by claiming their conduct immune from constitutional review. However, the Virginia Constitution imbues the judiciary with a duty to act as a check on the actions of the other branches of government; it does not allow Defendants to escape accountability.

This Court should deny Defendants' Demurrer and Plea of Sovereign Immunity because: (1) Plaintiffs' claims are self-executing, thereby waiving Virginia's sovereign immunity and providing a private right of action; (2) Plaintiffs sufficiently allege violations of their substantive due process and *jus publicum* rights grounded in Virginia's Constitution, history, and jurisprudence; (3) Plaintiffs have standing because they sufficiently allege a controversy over legal rights where they each suffer from unique, particularized injuries caused by Defendants; (4) resolving the controversy over the existence of Plaintiffs' rights, and whether those rights were violated, does not violate the separation of powers doctrine, but instead protects it; and (5) Plaintiffs are not required to exhaust administrative remedies.

II. LEGAL STANDARD

The Virginia Supreme Court "disapprove[s] the grant of motions which 'short circuit' the legal process thereby depriving a litigant of his day in court and depriving this Court of an opportunity to review a thoroughly developed record on appeal." *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 95 (1997) (collecting cases). A demurrer can only be granted if the "pleading does not state a cause of action" or "fails to state facts upon which the relief demanded can be granted." Va. Code § 8.01-273; *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 28 (1993) (rejecting demurrer). At this stage in the proceedings, the Court must "accept as true all factual allegations expressly pleaded in the complaint and interpret

those allegations in the light most favorable to the plaintiff." *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358 (2018). Reasonable inferences must also be accepted as true. *Id.*

Plaintiffs have standing in declaratory judgment actions when they can demonstrate a "justiciable interest," meaning an "actual controversy" where there is an "actual antagonistic assertion and denial of right." *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 360 (2017). Standing also requires Plaintiffs show "a personal stake in the outcome of the controversy." *Cupp v. Bd. of Sup'rs*, 227 Va. 580, 589 (1984). "Typically, to establish standing a plaintiff must allege a particularized injury that is separate from the public at large." *McClary v. Jenkins*, 299 Va. 216, 222 (2020). The Virginia Code establishing the remedy of declaratory judgments to determine "controversies over legal rights" instructs it be "liberally interpreted and administered with a view to making the courts more serviceable to the people." Va. Code § 8.01-191.

III. ARGUMENT

A. Plaintiffs' Self-Executing Substantive Due Process Claims Waive the Commonwealth's Sovereign Immunity and are Supported by Sufficient Factual Allegations

1) Plaintiffs' Substantive Due Process Rights to Life and Liberty are Self-Executing

It is well-established that self-executing constitutional provisions waive the Commonwealth's sovereign immunity. *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137 (2011); *Gray v. Virginia Sec'y of Trans.*, 276 Va. 93, 97 (2008). Such provisions do not require legislation to make them operative and provide a private right of action. *Gray*, 276 Va. at 103. A constitutional provision is self-executing when it: (1) "expressly so declares;" (2) is contained in the bill of rights; (3) is "merely declaratory of common law;" or (4) "specifically prohibit[s] particular conduct." *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681 (1985). "Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-

executing." *Id.* at 681–82 (quoting *Robertson v. Staunton,* 104 Va. 73, 77 (1905)). The *Robb* test does not require all elements be met to find a constitutional provision self-executing, rather it lists factors for the court to weigh.

The Virginia Constitution provides that "no person shall be deprived of his life, liberty, or property without due process of law." Art. I, § 11. This provision, contained in Virginia's Bill of Rights, was intended by the founders to establish *guarantees* to the most fundamental of rights. George Mason, the drafter of Virginia's Bill of Rights, explained it was meant "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* 434–35 (Robert A. Rutland ed. 1970) (letter to Mr. Brent, Oct. 2, 1778). In arguing that Plaintiffs' substantive due process claims are not self-executing, Defendants take the undemocratic position that the Commonwealth could violate fundamental constitutional rights and Virginians would be left without judicial recourse. However, for the fundamental rights to life and liberty to provide the meaningful protection for Virginians the founders intended, they *must* be enforceable in the Commonwealth's courts.

Importantly, Article I, § 11 prohibits particular conduct by the Commonwealth—the deprivation of life, liberty, and property. This weighs heavily in favor of finding the right self-executing because negative constitutional provisions are nearly *universally* construed to be self-executing. *Robb*, 228 Va. at 681–82. Here, the provision's placement in the Bill of Rights, prohibition on certain government conduct, and negative character all weigh in favor of finding substantive due process rights to be self-executing. *See DiGiacinto*, 281 Va. at 138 (finding Article I, § 14 of Virginia's Constitution self-executing because it is located in the Bill of Rights and is a prohibition on certain conduct).

Defendants cite no binding precedent that holds substantive due process rights are not self-executing. Defs.' Br. 7 (citing unpublished and circuit court cases). "Because 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), federal precedent supports this Court holding that substantive due process provisions are self-executing. Federal courts have exercised their jurisdiction to review due process cases for over 100 years. *See Ex parte Young*, 209 U.S. 123, 135 (1908) (involving Fourteenth Amendment claims). 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. *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997) (superseded by statute on other grounds); *see also C.R. Cases*, 109 U.S. 3, 20 (1883) ("the Fourteenth [Amendment] is undoubtedly self-executing without any ancillary legislation"); *see also Hills v. Gautreaux*, 425 U.S. 284, 289 (1976) (case brought directly under the Fifth Amendment). While the legislature is empowered to enact laws that further protect or remediate substantive due process protections, no 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."). This Court should follow this long-standing federal jurisprudence and find that Virginia's due process clause is self-executing, thereby waiving sovereignty immunity.

2) Plaintiffs' Sufficiently Allege a Violation of Virginia's Substantive Due Process Clause

Plaintiffs' Complaint includes two substantive due process claims: (1) Plaintiffs argue that that sections of the Virginia Gas and Oil Act promoting fossil fuels violate their substantive due

process rights (Count II); and (2) Plaintiffs argue that Defendants' long-standing policy and practice of permitting fossil fuel infrastructure violates their substantive due process rights (Count IV). In both claims, Plaintiffs argue Defendants' conduct violates their enumerated and previously recognized substantive due process rights to life and liberty, including the right to personal security, the right for Plaintiffs to provide for their basic human needs, safely raise families, learn and practice their religious and spiritual beliefs, and maintain their bodily integrity. Compl. ¶¶ 192, 208. Separately, Plaintiffs argue Defendants' conduct violates their unenumerated fundamental liberty right to use an atmosphere, lands, and waters protected from pollution, impairment, or destruction. Compl. ¶¶ 193, 209.

Defendants, relying exclusively on the non-binding concurring opinion of one Virginia Supreme Court justice, argue there is no substantive component to Virginia's due process clause. Defs.' Br. 17 (*citing Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 584–87 (2017) (McCullough, J., concurring)). However, Defendants' argument is at odds with *decades* of controlling Virginia Supreme Court precedent, as well as federal precedent, recognizing substantive due process rights under Article I, § 11 of the Virginia Constitution. *Shivaee*, 270 Va. at 119; *Willis v. Mullett*, 263 Va. 653, 657 (2002); *Walton v. Commonwealth*, 255 Va. 422, 427 (1998); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 97 (1989); *see also Obergefell v. Hodges*, 576 U.S. 644 (2015); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Moreover, the right to liberty has been viewed expansively by Virginia's courts since the early 1900s. *Young v. Commonwealth*, 101 Va. 853, 862–63 (1903) (liberty is an individual and inalienable right that is more expansive than freedom to travel and includes "the right of the citizen to be free in the enjoyment of all his faculties" and to "live and work where he will"). The Virginia

Constitution explicitly recognizes the existence of inherent rights, even when the right is not textually within the Virginia Constitution. Art. I, § 17.

Plaintiffs' asserted unenumerated liberty right to "an atmosphere, lands, and waters free from pollution, impairment, or destruction" is grounded in Virginia's Constitution and jurisprudence. Compl. ¶¶ 7, 174, 176, 180–81; Art. XI, § 1. To identify an unenumerated fundamental right under the substantive due process clause, Virginia courts follow the federal test laid out in *Glucksberg*: (1) the right must be "deeply rooted in this Nation's history and tradition," and (2) "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *see also, Shivaee*, 270 Va. at 119 (same analysis applies to federal and Virginia substantive due process claims); *Paris v. Commonwealth*, 35 Va. App. 377, 383 (2001) (applying *Glucksberg* test to challenge of Virginia statute as violation of state constitutional liberty rights).

The unenumerated fundamental liberty interest "to use an atmosphere, lands, and waters protected from pollution, impairment, or destruction" is "deeply rooted in this Nation's history and tradition" because the need to protect natural resources and the atmosphere was recognized as vitally important when the Virginia Constitution was drafted, and again affirmed during Virginia's Constitutional Convention in 1971. Compl. ¶¶ 8–10, 176, 181; *Address to the Agricultural Society of Albemarle, 12 May 1818*, Founders Online, National Archives, http://founders.archives.gov/documents/Madison/04-01-02-0244 (speech by James Madison, a drafter of Virginia's 1776 Constitution) ("[T]he atmosphere is the breath of life. Deprived of it, [animals and man] all equally perish."); A.E. Dick Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 205–06 (1972) (citing The Commission on Constitutional Revision) (adding protection of atmosphere, lands, and waters to the constitution in 1971 because

"among the fundamental problems which will confront the Commonwealth in coming years will be those of the environment").[3] Additionally, Plaintiffs allege the right is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed;" the health of the Commonwealth's atmosphere, lands, and waters are essential to sustain human life and liberties. Compl. ¶¶ 180, 181; *see also Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) *rev'd and remanded on other grounds*, 947 F.3d 1159 (9th Cir. 2020) (motion to amend complaint pending in District Court) (recognizing the liberty right "to a climate system capable of sustaining human life is fundamental to a free and ordered society").

Plaintiffs have, at minimum, presented viable claims for *enumerated and previously recognized liberty rights*, including the right to personal security,[4] the capacity of Plaintiffs to provide for their basic human needs,[5] safely raise families,[6] learn and practice their religious and spiritual beliefs,[7] and maintain their bodily integrity.[8] Compl. ¶¶ 65 (Maryn's personal security threatened by increasingly powerful storms); 57 (Giovanna's basic human need for food

[3] This Court's ultimate decision on the existence of Plaintiffs' asserted unenumerated liberty right should be based on a fully developed evidentiary record where Plaintiffs will present additional historical evidence on how the "use an atmosphere, lands, and waters protected from pollution, impairment, or destruction" is "deeply rooted in this Nation's history and tradition." *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (courts should decide cases "based on the historical record compiled by the parties.")

[4] *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security.").

[5] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.").

[6] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Fourteenth Amendment liberty guarantee "denotes . . . the right of the individual to . . . establish a home and bring up children").

[7] *Meyer*, 262 U.S. at 399 (Fourteenth Amendment protects "the right of the individual . . . to worship God according to the dictates of his own conscience").

[8] *Rochin v. California*, 342 U.S. 165, 174 (1952); *accord Glucksberg*, 521 U.S. at 720.

threatened); 46 (Ava's ability to safely raise children in the future); 20 & 27 (Layla and Amaya's ability to practice their religions); 51 (Tyrique's ability to maintain his bodily integrity). Other than wrongly claiming that there is no substantive due process, Defendants do not argue that Plaintiffs have failed to allege a violation of these previously recognized substantive due process rights. In short, Plaintiffs have presented claims and alleged facts to demonstrate that both their previously recognized and unenumerated substantive due process rights are being violated, sufficient to overcome Defendants' Demurrer.

B. Plaintiffs' Self-Executing *Jus Publicum* Claims Waive the Commonwealth's Sovereign Immunity and are Supported by Sufficient Factual Allegations

1) Plaintiffs' *Jus Publicum* Claims are Self-Executing

The *jus publicum* (also referred to as the public trust doctrine) is an ancient legal doctrine that acts as a restraint on political branches. *Commonwealth v. City of Newport News*, 158 Va. 521, 547 (1932). The Commonwealth cannot "relinquish, surrender, alienate, destroy, or substantially impair" the *jus publicum*, or the rights of the people inherent to the *jus publicum*, except as authorized by the Constitution of Virginia or the U.S. Constitution. *VMRC v. Chincoteague Inn*, 287 Va. 371, 383 (2014).

The source of Virginians' *jus publicum* rights, widely recognized by Virginia courts, is a fundamental feature of Virginia's government—sovereignty. *See, e.g.*, *Newport News*, 158 Va. at 546 ("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); *Chincoteague Inn*, 287 Va. at 381–82.[9] Sovereignty and government powers are intended to protect

[9] Other courts similarly recognize the public trust doctrine as a fundamental attribute of sovereignty. *See, e.g.*, *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 455 (1892) (stating public trust resources are "held by the state, *by virtue of its sovereignty*, in trust for the public") (emphasis added); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981) (declaring "[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed

constitutional rights and the "exercise thereof and not the abdication thereof." *Newport News*, 158 Va. at 545. Using sovereign immunity as a shield to allow the Commonwealth to abdicate its "most solemn duty" to protect the *jus publicum* and rights inherent to it undermines the very sovereignty the Commonwealth's immunity is based upon. If the *jus publicum* is not self-executing, it would render the doctrine largely meaningless, as the Commonwealth could destroy resources its citizens depend on to exercise essential fundamental rights, including the rights to life and liberty, without recourse. *See Carrington v. Goddin*, 54 Va. (13 Gratt.) 587, 600 (1857) ("there can be no right without a remedy"); *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).

Further, the *jus publicum* is a quasi-constitutional doctrine because it is wholly dependent upon the parameters of the Virginia Constitution to determine which resources it protects. *Newport News*, 158 Va. at 544–45 (the *jus publicum* only protects resources whose uses are constitutionally guaranteed); *Chincoteague Inn*, 287 Va. at 383. It is also unlike other common law doctrines because it *predates* the Virginia Constitution, *see Newport News*, 158 Va. at 545, and deserves special consideration akin to other constitutional protections in light of its long-standing guarantees in Virginia constitutional law. *Newport News*, 158 Va. at 545. Thus, it should be evaluated according to the *Robb* factors to determine whether it is self-executing.

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by the destruction of the sovereign"); *Corvallis Sand & Gravel Co. v. State Land Bd.*, 250 Or. 319, 334–36 (1968) (Oregon acquired title to submerged lands "by virtue of its sovereignty"); *Nat'l Audubon Soc'y v. Super. Ct.*, 33 Cal. 3d 419, 425 (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 sovereignty").

Applying the *Robb* factors, the *jus publicum* specifically prohibits particular conduct: substantially impairing the *jus publicum* or the rights of the people inseparable from the *jus publicum*. *Id.* at 546–47. Because it is a prohibition on government conduct, it is of negative character and thus nearly universally construed to be self-executing under *Robb*. 228 Va. at 681–82. The purpose of the *jus publicum* is to protect natural resources from substantial impairment or destruction when the Virginia Constitution guarantees use of those resources to citizens. *Newport News*, 158 Va. at 553–54; *Chincoteague Inn*, 287 Va. at 383; *see also, e.g.*, *id.* at 386–87 (*jus publicum* protects use of subaqueous bottomland to "fish, fowl, hunt, take and catch oysters and other shellfish" and "navigate the Commonwealth's waters") (cleaned up). Sovereign immunity cannot bar citizens from asserting their rights in court when the Commonwealth impairs their use of *jus publicum* resources, lest we forget, "[t]he people collectively in their sovereign capacity are the State" and the Constitution and *jus publicum* are intended to protect their rights, not enable the government to infringe on them. *Newport News,* 158 Va. at 541.

2) Plaintiffs' *Jus Publicum* Rights are Recognized in Virginia Law

Virginia's *jus publicum* is grounded in both the Commonwealth's jurisprudence and Constitution. In 1932, the Virginia Supreme Court defined the *jus publicum* as limiting the power of the Commonwealth to "take away, destroy or substantially impair the use by the people of the tidal waters or their bottoms" when the purpose of their use is either constitutionally guaranteed or when the Constitution denies the Commonwealth the power to "take away, destroy or substantially impair" the right to use the resource for a particular purpose. *Newport News*, 158 Va. at 544–45; Compl. ¶ 166. The *jus publicum* both predates and is secured by the Virginia Constitution because it is derived from the Commonwealth's sovereign powers and looks to the Constitution to determine which uses of resources are protected. *See Newport News*, 158 Va. at 545; 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. v. Commonwealth*, 623 Pa. 564, 640–41 (Pa. Sup. Ct. 2013) (public trust rights were "preserved rather than created" by the Pennsylvania Constitution's Environmental Rights Amendment); Compl. ¶ 167.

In 1971, Virginia amended its Constitution to add the Conservation Article, declaring 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; Compl. ¶ 170. Although the Supreme Court has held that this policy statement did not create a private right of action, *Robb*, 228 Va. at 683,[10] it does evince the scope of Virginia's *jus publicum* as extending beyond "tidal waters or their bottoms" to Virginia's "atmosphere, lands, and waters." A.E. Dick Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 221–22 (1972) (explaining amendment expanded scope of *jus publicum*); Compl. ¶ 177. While the *source* of Plaintiffs' *jus publicum* rights is not derived from the Conservation Article, the Conservation Article defines the *scope* of the *jus publicum* rights.

The General Assembly can modify the *jus publicum* by statute, even to impair or destroy uses of the *jus publicum*, so long as those uses are not protected by the Virginia Constitution. *Newport News*, 158 Va. at 552; *Chincoteague Inn*, 287 Va. at 383. The Virginia Constitution's protection of the rights to life and liberty is a limit on the Commonwealth's ability to impair or destroy elements of the *jus publicum*—the Commonwealth's atmosphere, lands, and waters—because the preservation of those resources is essential to sustain life and liberty. The sections of

[10] *But see* A.E. Dick Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 208 (1972) (Article XI, § 1 is "self-executing not with regard to the public at large but with regard to those entities which are constitutionally bound by public policy, namely the government, its courts, and its agencies." Finding otherwise "would be inconsistent with the aim of the drafters of the 1971 Constitution . . . .").

the Virginia Gas and Oil Act that Plaintiffs challenge substantially impair Virginia's atmosphere, lands, and waters, causing and contributing to climate change which infringes on Plaintiffs' constitutional rights to life and liberty. Compl. ¶¶ 184, 193, 200, 209. Further, Defendants' unconstitutional actions exacerbate climate change and infringe on Plaintiffs' constitutional rights by confining Plaintiffs indoors to avoid extreme heat, flooding, and storms, Compl. ¶¶ 18, 48–50, 56, 60, 65, 70; saddling them with tick-borne diseases, Compl. ¶¶ 33, 51, 55, 63; and exacerbating their asthma, Compl. ¶¶ 22, 46, 72. The Commonwealth cannot authorize excessive greenhouse gas ("GHG") emissions through permitting fossil fuel infrastructure, including at the direction of the Virginia Gas and Oil Act, because the *jus publicum* uses of the Commonwealth's atmosphere, lands, and waters to sustain life and liberty are protected by the Virginia Constitution.

In the alternative, if this Court only recognizes navigable waterways as a protected use of the *jus publicum*, Plaintiffs have sufficiently alleged that their ability to access and utilize the Commonwealth's waterways is being impaired by Defendants' conduct. *E.g.*, Compl. ¶¶ 29 (impairing Claudia's access to James River); 47 (impairing Cadence's access to Rappahannock and Potomac Rivers, and Lake Anna).

C. Plaintiffs have Standing to Bring their Substantive Due Process and *Jus Publicum* Claims

1) Plaintiffs have Standing to Obtain Declaratory Relief

Defendants confirm there is an actual controversy over whether Plaintiffs' substantive due process and *jus publicum* rights exist and whether Defendants are violating them, thereby underscoring the appropriateness of declaratory relief. Compl. at pp. 71–72, ¶¶ (A)(1)–(9); *compare* Defs.' Br. 17 (denying substantive due process rights exist); 15 (denying Plaintiffs' asserted *jus publicum* rights exist); 12–13 (denying Defendants caused Plaintiffs' injuries). The pleadings in this case affirm the existence of the controversy required for standing, and in

accordance with the "liberally interpreted" declaratory judgment statute, this Court should allow Plaintiffs' claims to proceed on the merits.

2) Plaintiffs Sufficiently Allege Particularized Injuries

Defendants argue that because *everyone* is affected in some way by the climate, *no one* has standing to advance climate injuries in court. Defs.' Br. 12. That argument is wrong as a matter of law. *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Plaintiffs here have specifically alleged unique, personal injuries directly resulting from Defendants' actions exacerbating climate change—allegations that must be accepted as true at this stage. Compl. ¶¶ 16–73. These personal injuries include financial costs, such as Layla's expenses to remediate flooding and remove trees, Kyla's expenses to repair her driveway and remove fallen trees after severe flooding and precipitation events, and Claudia and Julian's loss of income. Compl. ¶¶ 16–17, 28, 37, 68; *see Westlake Properties, Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc.*, 273 Va. 107, 120 (2007) ("A party has standing if it can 'show an immediate, pecuniary, and substantial interest in the litigation . . . .'"). Plaintiffs' injuries also include particularized harms to their physical health and well-being, such as Amaya and Katerina's asthma attacks, Cedar and Giovanna's illnesses due to Lyme disease, Tyrique's alpha-gal syndrome, and Layla, Elizabeth, Kyla, and Katerina's heat-related illnesses. Compl. ¶¶ 19, 22, 33, 51, 55, 59, 69, 71–72. Moreover, Plaintiffs' injuries are distinct and particularized because, as children, they are "uniquely vulnerable and disproportionately injured by the climate crisis." Compl. ¶¶ 4, 144–49.

These injuries detailed in Plaintiffs' Complaint are particularized *to these individual children* and distinct from the public at large. Moreover, the gravity of these injuries and their ongoing nature demonstrates Plaintiffs' profound personal stake in the outcome of the controversy. Compl. ¶¶ 144–49 (climate change harms to children accumulate over time). This Court should

reject Defendants' invitation to find that no climate injuries, even the unique injuries alleged here, can ever suffice to establish standing.[11]

D. Plaintiffs Sufficiently Allege Defendants Cause and Contribute to their Injuries

Plaintiffs allege Defendants control fossil fuel permitting in Virginia and are causing and contributing to their injuries through their historic and ongoing permitting of fossil fuel infrastructure, which results in dangerous GHG emissions, thereby contributing to and exacerbating the climate crisis. Compl. ¶¶ 79–83, 93, 95–122. Defendants' actions are *increasing* the Commonwealth's GHG emissions at a time when GHG *reductions* are critical. Compl. ¶ 118. Given the severity of the climate crisis, "[e]very tonne of CO_2 emissions adds to global warming" and increases the frequency and severity of climate impacts, including those particularized impacts experienced by Plaintiffs. Compl. ¶ 122.

Defendants do not dispute these allegations; rather they attempt to deflect their own responsibility for permitting infrastructure that has created an energy system dominated by fossil fuels by pointing the finger "across the globe" at other governments and "private parties" that also contribute to climate change. Defs.' Br. 13. However, there is no legal doctrine that permits ongoing constitutional violations so long as others are *also* contributing to the violation of those rights. Most importantly for this stage of the proceedings, Plaintiffs have alleged that because of Defendants continued permitting of fossil fuel infrastructure, Virginia's energy system is predominately fossil fuel based and is releasing dangerous amounts of GHG emissions that directly exacerbate the climate crisis and cause significant harm to Plaintiffs. Compl. ¶ 112 (80% of Virginia's energy comes from burning fossil fuels); *id.* ¶¶ 95–122.

[11] Plaintiffs preserve their right to request leave to amend their complaint to cure any pleading defects. Va. Sup. Ct. R. 1:1(c) (court may sustain demurrer and grant leave to amend pleading); Va. Sup. Ct. R. 1:8 ("Leave to amend should be liberally granted in furtherance of . . . justice.").

Other courts have found that plaintiffs can establish causation when challenging government conduct that causes and contributes to climate change, even when defendants' conduct is not the sole source of the injury. *Held v. State of Montana,* No. CDV-2020-307, *8–14 (Mont. First Jud. Dist. Ct. Lewis & Clark Cnty., Aug. 4, 2021); *Juliana*, 947 F.3d at 1169. Plaintiffs have alleged detailed facts regarding Defendants' role in causing and contributing to climate change and Plaintiffs' injuries—those facts must be accepted as true at this stage. The ultimate question of Defendants' role in causing and contributing to Plaintiffs' injuries is a fact intensive inquiry to be decided *on the merits* with a fully developed factual record. *See Connecticut v. Am. Elec. Power Co., Inc.,* 582 F.3d 309, 347 (2d Cir. 2009) (causation in climate change cases is "best left to the rigors of evidentiary proof . . . rather than dispensed with as a threshold question of constitutional standing"); *rev'd on other grounds, Am. Elec. Power Co. Inc. v. Connecticut,* 564 U.S. 410 (2011).

E. Plaintiffs' Requested Relief Preserves and Does Not Violate Separation of Powers

Separation of powers under the Virginia Constitution requires that the three co-equal branches of government "shall be separate and distinct, so that none exercise the powers properly belonging to the others." Va. Const. art. III, § 1; *id.* art. I, § 5. This "prevents . . . the judicial branch performing a legislative function, or the legislative branch taking on powers of a judicial nature." *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 221 (1991) (internal citations omitted). Plaintiffs ask this Court to evaluate the constitutionality of statutes and executive actions, a function squarely within the role of the judiciary that *no other branch can fulfill*. This Court will not violate the separation of powers doctrine by fulfilling its constitutional duty to act as a check on the political branches. Defendants' argument that their allegedly unconstitutional conduct is unreviewable by the courts would usurp the judiciary's duty to evaluate the legality of government conduct. *Ex parte Young*, 209 U.S. at 143 ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the

Constitution."). Rejecting Defendants' argument is the only way to *protect* separation of powers and the rule of law in our *constitutional* democracy.

1) Declaratory Relief

Plaintiffs ask this Court to declare provisions of the Virginia Gas and Oil Act unconstitutional, a power *only* the judicial branch can exercise. Compl. at pp. 71–72. "[T]he judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof." *Kamper v. Hawkins*, 3 Va. 20, 40 (Va. Gen. Ct. 1793). The Virginia Supreme Court has affirmed: "[o]ur role is simply to ascertain whether the political entities have acted within the constitutional boundaries that limit the exercise of their governmental power." *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 309–10 (2013). Neither executive nor legislative branches can determine the constitutionality of statutes. *Carl v. City of Richmond*, 11 Va. Cir. 100 (1987) ("The Legislature cannot determine the constitutionality of one of its own enactments."); *Finnerty v. Thornton Hall, Inc.*, 42 Va. App. 628, 635 (2004); *Moreau v. Fuller*, 276 Va. 127, 136 (2008). This Court will not invade the provinces of the legislative and executive departments by evaluating the constitutionality of sections of the Virginia Gas and Oil Act.

Plaintiffs also ask this Court to declare Defendants' policy and practice of permitting fossil fuel infrastructure violates their constitutional and *jus publicum* rights. Compl. at p. 72. Nowhere in the Complaint do Plaintiffs ask the Court to replace the General Assembly's current policies, practices, or statutes with a specific set of alternative ones preferred by Plaintiffs. *Contra* Defs.' Br. 1, 5, 11 n.5, 17. In fact, Plaintiffs agree the executive and legislative branches are responsible for shaping energy policy, but it is the judiciary's role to ensure those statutes and policies *are within constitutional boundaries*. The Plaintiffs' requested declaratory relief keeps the Court squarely in its lane and continues to leave policy choices to the political branches.

A declaratory judgment from this Court will conclusively resolve the controversy over the existence of Plaintiffs' constitutional and *jus publicum* rights, and whether provisions of the Virginia Gas and Oil Act and Defendants' actions violate those rights. *See Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Sup'rs*, 285 Va. 87, 98 (2013) (purpose of declaratory judgment action is to adjudicate rights). Plaintiffs do not seek to "halt[] global climate change" through this lawsuit, Defs.' Br. 13, rather they seek clarity on the contours of their constitutional and *jus publicum* rights so as to guide Defendants' future conduct. Compl. ¶¶ 187, 196, 204, 212; *see Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970). As a result of a ruling in Plaintiffs' favor, Defendants would no longer be allowed to implement an unconstitutional statutory directive to maximize gas and oil production. Defendants would also be on notice that future approval of fossil fuel infrastructure is violative of Plaintiffs' rights, and would be expected to adjust their conduct accordingly, which might not necessitate any additional judicial involvement. A declaratory judgment in Plaintiffs' favor will redress their injuries by reducing Virginia's contribution to climate change and decreasing the severity of impacts that would otherwise materialize if the Commonwealth continued to follow statutory directives to maximize gas and oil production and continued to issue unnecessary fossil fuel permits. Compl. ¶¶ 122, 164.

2) Injunctive Relief

Plaintiffs do not seek specific injunctive relief; the gravamen of this case is declaratory relief which circuit courts have the power to grant "whether or not consequential relief is, or at the time could be, claimed." Va. Code § 8.01-184. Nevertheless, Defendants prematurely forecast this Court will violate the separation of powers doctrine if it grants injunctive relief by misleadingly comparing this case to other, out-of-state cases, that requested specific and ongoing injunctive relief. Defs.' Br. 3 n.1, 10–12. Virginia jurisprudence is clear—whether a court should issue an injunction is deferred until the issue is heard on the merits, because it is a question of fact based

on the full evidence presented. *Ticonderoga Farms, Inc. v. Cnty. of Loudoun*, 242 Va. 170, 176 (1991) (plaintiffs must *prove* irreparable harm and lack of an adequate remedy at law to obtain injunctive relief). While it is unquestionably within the court's discretion to fashion an injunctive remedy if appropriate, in the first instance courts presume states will abide by their declaratory judgment rulings. *Anderson v. Delore*, 278 Va. 251, 257 (2009).

F. Plaintiffs are Not Required to Exhaust Administrative Remedies

This case involves constitutional and *jus publicum* claims—it does not include a Virginia Administrative Process Act ("VAPA") claim nor does it challenge, or seek to overturn, any final agency decisions under the VAPA.[12] Va. Code § 2.2-4000 et seq; *see Fauquier Cnty. Dep't of Soc. Servs. v. Robinson*, 20 Va. App. 142, 153 (1995) (cases that do not appeal administrative decisions under VAPA do not require exhaustion of administrative remedies). Exhaustion requirements are intended to protect the finality of agency decisions—which are not at issue here. *See Eubank v. Thomas*, 300 Va. 201, 207 (2021). Rather, Plaintiffs bring this declaratory judgment action to resolve a constitutional controversy and inform and guide the Commonwealth's future actions. Compl. ¶¶ 187, 196, 204, 212; *Bishop*, 211 Va. at 421. Contrary to Defendants' arguments, Plaintiffs are not required to wholly transform their constitutional declaratory judgment suit seeking systemic guidance on *future* decision-making into a facility-by-facility challenge under VAPA of *past* individual permitting decisions. *See Hunter v. Hunter as Tr. of Third Amended & Restated Theresa E. Hunter Revocable Living Tr.*, 298 Va. 414, 429 (2020) ("the complainant is 'the master of the complaint'") (citation omitted).

Importantly, exhaustion of administration remedies is not required when there is "no administrative remedy equal to the relief sought . . . ." *Bd. of Sup'rs of James City Cnty. v. Rowe*,

[12] Since Plaintiffs are not bringing a statutory claim, they are not required to establish statutory standing under the Virginia Gas and Oil Act. *Contra* Defs.' Br. 20.

216 Va. 128, 133 (1975). Plaintiffs' ask this Court to find provisions of the Virginia Gas and Oil Act unconstitutional and declare the Commonwealth's policy and practice of permitting fossil fuel infrastructure violates their constitutional and *jus publicum* rights. Compl. at pp. 71–72. Pursuant to the separation of powers doctrine, *only* the judiciary, not executive branch administrative agencies, can review the constitutionality of a statute or of challenged government conduct. Va. Const. art. I, § 5; *see Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Defendants cannot determine the constitutionality of their own conduct and Plaintiffs cannot obtain a remedy through VAPA that will guide all future actions of Defendants; VAPA can only remedy individual agency final decisions, which are not at issue here. Va. Code §§ 2.2-4027, 2.2-4029; *see Dail v. York Cnty.*, 259 Va. 577, 582 (2000) (exhaustion of administrative remedies not required when administrative processes cannot resolve issues presented).

IV. CONCLUSION

Plaintiffs' claims are well-recognized in Virginia's history, Constitution, and jurisprudence and must be self-executing to guarantee the promise of fundamental rights the founders bestowed upon Virginians in the Bill of Rights and ensure the Commonwealth's sovereignty cannot be perverted into a means to destroy itself. Plaintiffs' request for a declaratory judgment presents a legal controversy affirmed by Defendants' own brief, that only this Court can redress by fulfilling its constitutional role to determine whether the political branches are acting within the boundaries of Virginia's Constitution. Plaintiffs respectfully request this Court deny the Commonwealth's Demurrer and Plea of Sovereign Immunity.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2022, a true and correct copy of the foregoing Plaintiffs' Brief in Opposition to Defendants' Demurrer and Plea of Sovereign Immunity was sent via electronic mail to the following addresses:

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