IN THE COURT OF APPEALS OF VIRGINIA

Record No. 1639-22-2

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

Plaintiff–Appellants;

v.

COMMONWEALTH OF VIRGINIA *et al.*,

Defendant–Appellees.

UNOPPOSED MOTION OF PUBLIC TRUST LAW PROFESSORS MARY CHRISTINA WOOD, MICHAEL BLUMM, JOHN DERNBACH, *ET AL.*, FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS

Evan Dimond Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
Post Office Box 507
Lewisburg, West Virginia 24901
Telephone: (434) 738 – 1863
E-Mail: ejohns@appalmad.org

Counsel for Amicus Curiae

Public trust law Professors Mary Christina Wood, Michael C. Blumm, John C. Dernbach, Patrick A. Parenteau, Zygmunt J.B. Plater, Robert Abrams, Todd D. Ommen, Jacqueline P. Hand, Tim Duane, Jonathan Rosenbloom, Jeff Thaler, Joel Mintz, Richard Wallsgrove, Jessica Owley, Stephen Dycus, James M. Van Nostrand, Ann Powers, Richard M. Frank, and Maxine I. Lipeles (collectively, the Law Professors), file this Unopposed Motion Seeking Leave to File a Brief as *Amicus Curiae* in Support of the Plaintiff-Appellants. The proposed Brief of *Amicus Curiae* Public Trust Law Professors is included as Attachment A to this Motion.

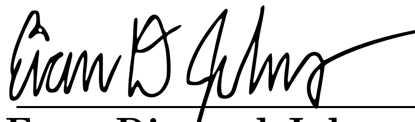
The public trust Law Professors are nationally recognized scholars at top environmental law schools who study and write about the public trust doctrine. Law Professors all work to emphasize the importance of utilizing the public trust doctrine for natural resource protection, and a legally, historically, and philosophically accurate understanding of it. Law Professors recognize the foundational role the public trust doctrine plays in our government—as an inherent limit on how the government can exercise its authority.

The Law Professors respectfully submit that their brief *amicus curiae* would be of assistance to the Court, as it provides a comprehensive explanation of the nature and effect of public trust doctrine, which is known as the *jus publicum* in Virginia.

No party would be prejudiced by the filing of this *amicus* brief, as the brief is being filed within the timeframe provided by Rule 5A:23(d) and the Defendants will have an opportunity to respond. Through counsel, the Law Professors reached out to all parties for their position on this Motion. All parties consent to the filing of this Motion and the attached *amicus* brief.

Dated: March 28, 2023

Respectfully submitted,



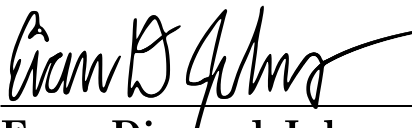
Evan Dimond Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
Post Office Box 507
Lewisburg, West Virginia 24901
Telephone: (434) 738 – 1863
E-Mail: ejohns@appalmad.org

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that the following counsel have been served with true and accurate copies of the Unopposed Motion of Public Trust Law Professors Mary Christina Wood, Michael Blumm, John Dernbach, *et al.*, Seeking Leave to File a Brief as *Amicus Curiae* in Support of the Plaintiff-Appellants, together with the proposed *Amicus Curiae* Brief, enclosed as Attachment A to the Motion:

Plaintiffs' Counsel Isak J. Howell: isak@howell-lawoffice.com
Plaintiffs' Counsel Nate Bellinger: nate@ourchildrenstrust.org
Plaintiffs' Counsel Kimberly Willis: kimberly@ourchildrenstrust.org
Defendants' Counsel Andrew N. Ferguson: AFerguson@oag.state.va.us
Defendants' Counsel Steven G. Popps: SPopps@oag.state.va.us
Defendants' Counsel Jacqueline C. Hedblom: JHedblom@oag.state.va.us
Defendants' Counsel Erika L. Maley: EMaley@oag.state.va.us
Defendants' Counsel Graham K. Bryant: GBryant@oag.state.va.us
Defendants' Counsel Thomas J. Sanford: TSanford@oag.state.va.us



Evan Dimond Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
Post Office Box 507
Lewisburg, West Virginia 24901
Telephone: (434) 738 – 1863
E-Mail: ejohns@appalmad.org

Counsel for Amicus Curiae

ATTACHMENT A:

Brief of *Amicus Curiae* Public Trust Law Professors
Mary Christina Wood, Michael Blumm, John Dernbach,
et al., in Support of the Plaintiff-Appellants

IN THE COURT OF APPEALS OF VIRGINIA

Record No. 1639-22-2

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

Plaintiff–Appellants;

v.

COMMONWEALTH OF VIRGINIA *et al.*

Defendant–Appellees.

BRIEF OF *AMICUS CURIAE* PUBLIC TRUST LAW PROFESSORS MARY CHRISTINA WOOD, MICHAEL BLUMM, JOHN DERNBACH, *ET AL.*, IN SUPPORT OF PLAINTIFF-APPELLANTS

Evan Dimond Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
Post Office Box 507
Lewisburg, West Virginia 24901
Telephone: (434) 738 – 1863
E-Mail: ejohns@appalmad.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY & INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE & FACTUAL BACKGROUND 6

ASSIGNMENT OF ERROR 7

STANDARD OF REVIEW 8

ARGUMENT 8

I. Origins of the Public Trust Doctrine 9

A. Social Contract Foundation 9

B. An Inherent Limitation on Government Authority 11

II. The public trust doctrine is self-executing 16

A. The public trust is self-executing based on its inherent status 16

B. *Robb* does not preclude Plaintiffs' *jus publicum* claims 21

III. The public trust doctrine is judicially enforceable 23

CONCLUSION & RELIEF SOUGHT 26

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

CASES

Arizona Center for Law in the Public Interest v. Hassell,
837 P.2d 158 (Az. Ct. App. 1991) 24

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 8

Brickell v. Trammel,
77 Fla. 544 (1919) 13, 15

Caminiti v. Boyle,
107 Wash. 2d 662 (1987) 13

Commonwealth v. City of Newport News,
158 Va. 521 (1932) .... *passim*

Center for Biological Diversity v. FPL Group,
166 Cal. App. 4th 1349 (Cal. Ct. App. 2008) 25

Geer v. Connecticut,
161 U.S. 519 (1896) 12

Gray v. Virginia Secretary of Transportation,
276 Va. 93 (2008) 8

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 13

Illinois Central Railroad v. Illinois,
146 U.S. 387 (1892). .... *passim*

In re Hawai'i Electric Light Co.,
No. SCOT-22-0000418, 2023 WL 2471890 (Haw. March 13, 2023) .. 14, 18, 19

In re Water Use Permit Applications,
94 Haw. 97 (2000) 12

Juliana v. United States,
217 F. Supp. 3d 1224 (D. Or. 2016) 11, 13, 14

Juliana v. United States,
947 F.3d 1159 (9th Cir. 2020) 11

Lake Michigan Federation v. U.S. Army Corp of Engineers,
742 F. Supp. 441 (N.D. Ill. 1990) 24, 26

Lamar Co. v. City of Richmond,
287 Va. 322 (2014) 8

Matthews v. Bay Head Improvement Association,
95 N.J. 306 (1984) 25

Mineral County v. Lyon County,
136 Nev. 503 (2020) 13

National Audubon Society v. Superior Court,
33 Cal. 3d 419 (Cal. 1983) 25

North Carolina v. Alcoa Power Generating,
No. 15-2225, 2016 WL 1399642 (4th Cir. April 7, 2016) 14

Pennsylvania Environmental Defense Foundation v. Commonwealth,
161 A.3d 911 (Pa. 2017) 17, 18, 19

Pennsylvania Environmental Defense Foundation v. Commonwealth,
255 A.3d 289 (Pa. 2021) 3, 13

Packer v. Bird,
137 U.S. 661 (1891) 12

Parks v. Cooper,
676 N.W.2d 823 (S.D. 2004) 12

Robb v. Shockoe Slip Foundation,
228 Va. 678 (1985) 21, 22, 23, 27

Robinson Township v. Commonwealth,
83 A.3d 901 (Pa. 2013) .... *passim*

United States v. 1.58 Acres of Land,
523 F. Supp. 120 (D. Mass 1981) 15

Virginia Marine Resources Commission v. Chincoteague Inn,
287 Va. 371 (2014) 9, 11, 12

CONSTITUTIONAL PROVISIONS

Hawai'i Constitution Article XI, § 1 19

Pennsylvania Constitution Article I, § 27 17

Virginia Constitution Article XI, § 2 22

Virginia Constitution Article XI, § 1 .... 20, 21, 22

OTHER AUTHORITIES

A.E. Dick Howard,
COMMENTARIES ON THE CONSTITUTION OF VIRGINIA (2d. ed. 1974) 20

A.E. Dick Howard, *State Constitutions and the Environment*,
58 VIRGINIA LAW REVIEW 193 (1972) 20, 22

Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*,
33 ARIZONA STATE LAW JOURNAL 849 (2001) 26

Gerald Torres & Nathan Bellinger, *The Public Trust, the Law's DNA*,
4 WAKE FOREST JOURNAL OF LAW & POLICY 281 (2014) 14

Jean-Jacques Rousseau, SOCIAL CONTRACT (1762) 10

Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*,
68 MICHIGAN LAW REVIEW 471 (1970) 24

MERRIAM-WEBSTER DICTIONARY (last visited March 23, 2023) 9, 16

Lord Lloyd of Hampstead & M.D.A. Freeman,
LLOYD'S INTRODUCTION TO JURISPRUDENCE (5th ed. 1985) 10

Mary C. Wood & Charles W. Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last,*
6 WASHINGTON JOURNAL OF ENVIRONMENTAL LAW & POLICY 633 (2016).... 23

Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*,
45 ENVIRONMENTAL LAW 399 (2015) 14

INSTITUTES OF JUSTINIAN
(Thomas Collette Sandars trans., 5th ed. 1867) 8

IDENTITY & INTERESTS OF AMICUS CURIAE

Law Professors, by and through the undersigned counsel, hereby file this brief as amicus curiae in support of Plaintiffs-Appellants.

Mary Christina Wood is Philip H. Knight Professor of Law at the University of Oregon and the Faculty Director of the law school's nationally acclaimed Environmental and Natural Resources Law Center. She is an award-winning professor and the co-author of leading textbooks on public trust law and natural resources law. Her book, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press), sets forth a new paradigm of global ecological responsibility. She originated the legal approach called Atmospheric Trust Litigation, now being used in cases brought on behalf of youth throughout the world, seeking to hold governments accountable to reduce carbon pollution within their jurisdictions. She has developed a corresponding approach called Atmospheric Recovery Litigation, which would hold fossil fuel companies responsible for funding an Atmospheric Recovery Plan to draw down excess carbon dioxide in the atmosphere using natural climate solutions. Professor Wood is a frequent speaker on climate issues and has received national

and international attention for her sovereign trust approach to global climate policy.

Michael C. Blumm is Jeffrey Bain Faculty Scholar and Professor of Law at Lewis & Clark Law School in Portland, Oregon. He has been teaching, writing, and practicing in the environmental and natural resources law field for over forty years. Professor Blumm is a prolific scholar, with well over one hundred published articles, book chapters, and monographs on salmon, water, public lands, wetlands, environmental impact assessment, public trust law, and constitutional takings law, to name just a few topics. He has co-authored casebooks on Natural Resources Law, Public Trust Law, and Native American Natural Resources Law.

John C. Dernbach is Commonwealth Professor of Environmental Law and Sustainability at Widener University Commonwealth Law School in Harrisburg, Pennsylvania. He is a nationally and internationally recognized authority on sustainable development, climate change, and environmental law. Professor Dernbach brings his expertise into the classroom in courses on property, environmental law, international law, and sustainability. He writes and

lectures widely on climate change, sustainable development, and environmental law. Professor Dernbach's scholarship and advocacy played a significant role in two landmark public trust decisions by the Pennsylvania Supreme Court, *Robinson Township v. Commonwealth*,[1] and *Pennsylvania Environmental Defense Foundation v. Commonwealth*.[2]

Patrick A. Parenteau, Emeritus Professor of Law and Senior Fellow for Climate Policy in the Environmental Law Center at Vermont Law School.

Zygmunt J.B. Plater, Professor at Boston College Law School.

Robert Abrams, Professor of Law, Florida A&M University College of Law.

Todd D. Ommen, Managing Attorney, Pace Environmental Litigation Clinic and Professor of Law, Elisabeth Haub School of Law.

Jacqueline P. Hand, Professor of Law, University of Detroit Mercy School of Law.

---

1 83 A.3d 901 (Pa. 2013).

2 255 A.3d 289 (Pa. 2021).

Tim Duane, Senior Fellow and Visiting Professor of Law, Wallace Stegner Center for Land, Resources & the Environment, S.J. Quinney College of Law, University of Utah and Professor Emeritus of Environmental Studies, University of California, Santa Cruz.

Jonathan Rosenbloom, Professor of Law, Albany Law School, Executive Director, Sustainable Development Code.

Jeff Thaler, Adjunct Professor (ex-Professor of Practice) at the University of Maine School of Law.

Joel Mintz, Professor of Law Emeritus and C. William Trout Senior Fellow, Nova Southeastern University College of Law.

Richard Wallsgrove, Assistant Professor, Co-Director, Environmental Law Program William S. Richardson School of Law, University of Hawai‘i at Mānoa.

Jessica Owley, Professor and Environmental Law Program Director University of Miami School of Law and Editor in Chief, Journal Law, Property, & Society.

Stephen Dycus, Professor Emeritus Vermont Law School.

James M. Van Nostrand, Charles M. Love, Jr. Endowed Professor of Law and Director, Center for Energy & Sustainable Development West Virginia University College of Law.

Ann Powers, Professor Emerita of Law, Global Center for Environmental Legal Studies, Elisabeth Haub School of Law at Pace University.

Richard M. Frank, Professor of Environmental Practice and Director, California Environmental Law & Policy Center School of Law, University of California.

Maxine I. Lipeles, Senior Lecturer in Law Emerita, Washington University School of Law.

Professors Wood, Blumm, Dernbach, Parenteau, Plater, Abrams, Ommen, Hand, Duane, Rosenbloom, Thaler, Mintz, Wallsgrove, Owley, Dycus, Van Nostrand, Powers, Frank, and Lipeles (collectively, the Law Professors) are nationally recognized scholars at top environmental law schools that study and write about the public trust doctrine. The Law Professors work to emphasize the importance of the public trust doctrine for natural resource protection. They recognize the foundational role the public trust doctrine plays in our government, as

an inherent limit on how the government can exercise its authority. This understanding of the public trust doctrine is legally, historically, and philosophically grounded, and Virginia courts should act accordingly.

STATEMENT OF THE CASE & FACTUAL BACKGROUND

Plaintiff–Appellants allege they have suffered and are continuing to suffer physical and mental harms attributable to the adverse effects of climate change. *See* Record at 11–12, 15–16, 18–25, and 28–29.[3] For example, Plaintiff Layla H. alleges that she has experienced "heat exhaustion and heat rash," *id.* at 11; Plaintiff Amaya T. alleges difficulties in managing her asthma, *id.* at 12; Plaintiff Tyrique B. alleges that he suffers from a tick-related allergy (alpha gal syndrome) that has spread more easily because of climate change, *id.* at 22; and Plaintiff Katerina Leedy alleges to be suffering mental health impacts ("stress, anxiety and fear") linked to climate change, *id.* at 28–29. The

3 Complaint for Declaratory & Injunctive Relief, *Layla H. v. Commonwealth*, No. CL22000632-00 (Va. Cir. February 9, 2022).

court below denied that Plaintiffs-Appellants could pursue their *jus publicum* claims due to Virginia's sovereign immunity from suit.

Amicus curiae Law Professors file this brief to make clear that *jus publicum*, understood properly, cannot be barred by sovereign immunity. Our argument is straightforward. Longstanding Virginia law recognizes *jus publicum* as an inherent limitation on the Commonwealth's sovereign authority to impair or destroy the public domain, including natural resources. Virginia courts have recognized this limitation on the Commonwealth's authority for decades. The decision of the court below in effect nullifies this longstanding law. To hold that a limitation on sovereignty cannot be enforced because of sovereign immunity is to hold that the limitation is meaningless. Although grounded in Virginia law, this conclusion is consistent with the abundant and analogous public trust law applied by other courts.

ASSIGNMENT OF ERROR

The court below erred in holding that sovereign immunity bars Plaintiffs' public trust (also known as the *jus publicum*) claims. Record at 215.

STANDARD OF REVIEW

Pure questions of law, including the issue of sovereign immunity, are reviewed *de novo*. *See Lamar Co. v. City of Richmond*, 287 Va. 322, 325 (2014). All factual allegations must be accepted as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gray v. Virginia Secretary of Transportation*, 276 Va. 93, 97 (2008).

ARGUMENT & AUTHORITIES

The public trust doctrine is an ancient and accepted principle of government, with roots dating back to at least the Roman Empire.[4] The doctrine imposes affirmative and negative obligations on government, as trustee, to protect natural resources (the *res*) for present and future generations (the beneficiaries). The effect of the public trust is twofold: (1) the people have the right to use and enjoy the *res*, and (2) the government cannot "substantially impair" the people's use and enjoyment of the *res*. *Commonwealth v. City of Newport News*, 158 Va.

---

4 *See* INSTITUTES OF JUSTINIAN 2.1.1 (Thomas Collette Sandars trans., 5th ed. 1867) ("[T]he following things are by natural law common to all—the air, running water, the sea, and consequently the seashore.").

521, 547 (1932); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453 (1892).

In Virginia, the public trust doctrine is referred to as the *jus publicum* (literally "public law").[5] The *jus publicum* is functionally equivalent to the public trust: (1) giving the people the right to use and enjoy the "public domain" (which includes natural resources), and (2) limiting the government from taking any action that would "substantially impair" the people's use and enjoyment of the "public domain." *Newport News*, 158 Va. at 547. The *jus publicum* is thus equivalent to the public trust, and any reference to the public trust is applicable to the *jus publicum*.

I. Origins of the Public Trust Doctrine

A. Social Contract Foundation

A comprehensive understanding of the public trust doctrine requires situating it in the context of history and political philosophy. In

---

5 *Jus Publicum*, MERRIAM–WEBSTER DICTIONARY, https://www.merriam-webster.com/legal/jus%20publicum (last visited March 23, 2023); *Virginia Marine Resources Commission v. Chincoteague Inn*, 287 Va. 371, 382 n.2 (2014) (noting the terminology difference between '*jus publicum*' and 'public trust').

philosophy, the social contract theory of government underlies the public trust doctrine. The idea is that the people collectively consent to be governed, and this consent is what legitimizes their government's authority over them.[6] The people's consent, however, only extends so far—the people did not consent to obey a government that could destroy the *res* vital to its own survival and well-being.[7] The public trust thus originates from the people's social contract, not any subsequent constitutions, statutes, or common law. *See Robinson Township v.*

---

6 *See* Lord Lloyd of Hampstead & M.D.A. Freeman, LLOYD'S INTRODUCTION TO JURISPRUDENCE 116 (5th ed. 1985) ("At root of the [social contract theory] is that 'no [one] can be subjected to the political power of another [e.g., the government] without [one's] own consent.'") (citation omitted).

7 This proposition is both common sense and gleaned from 16th–18th century European thinkers who expressed views on why people would consent to obey a government authority. For example, John Locke thought the people seek security in their property through government. *See* John Locke, TWO TREATISES OF GOVERNMENT 141 (1689), available at https://bit.ly/3FZEAOq (declaring the "chief end" of government is the "preservation of property."). Jean-Jacques Rousseau posited the people seek to have their "general will" reflected through government. Jean-Jacques Rousseau, SOCIAL CONTRACT at Book I, Chapter 6 (1762), available at https://bit.ly/3LYRsIn. Under this view, the people consented to obey a government authority that would promote, not damage, their well-being and survival.

Commonwealth, 83 A.3d 901, 947–48 (Pa. 2013) (tracing "inherent and indefeasible" public trust rights to the "social contract between government and the people"); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260–61 (D. Or. 2016), *dismissed on standing grounds*, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (linking public trust rights to the "consent of the governed from which the United States' authority derives").

B. An Inherent Limitation on Government Authority

The public trust (or *jus publicum*) is an inherent limit on government's sovereign authority in Virginia and elsewhere. In *Commonwealth v. City of Newport News*, the Virginia Supreme Court announced the *jus publicum* as an "incident[ ] of the sovereignty of the State." 158 Va. at 546. The Virginia Supreme Court recently confirmed this interpretation in *Virginia Marine Resources Commission v. Chincoteague Inn*, declaring the *jus publicum* "an essential attribute of the Commonwealth's state sovereignty" that "contains within it, as 'inherent' and 'inseparable incidents thereof,' certain 'rights of the people.'" 287 Va. 371, 381, 382–83 (2014). The *jus publicum* is a limitation on government authority because it means that the

Commonwealth cannot administer *jus publicum* resources in any way that it chooses. Instead, "it is a constitutional imperative that the Commonwealth cannot 'relinquish, surrender, alienate, destroy, or substantially impair' the right of *jus publicum*, or the rights of the people inherent to the *jus publicum*, except as authorized by the Constitution of Virginia." *Id.* at 383 (citing *Newport News*, 158 Va. at 547).

Other state and federal courts across the country agree the public trust doctrine is an "inherent attribute" of government and an indelible limitation on its sovereign authority. Examples include *In re Water Use Permit Applications*, 94 Haw. 97, 131 (2000) (declaring history and precedent have established the public trust as "an inherent attribute of sovereign authority"); *Parks v. Cooper*, 676 N.W.2d 823, 837 (S.D. 2004) (same); *see also Packer v. Bird*, 137 U.S. 661, 672 (1891) (stating the public trust "properly belongs to the [government] by [its] inherent sovereignty"); *Illinois Central*, 146 U.S. at 455 (noting the public trust arose "by virtue of [government] sovereignty"); *Geer v. Connecticut*, 161 U.S. 519, 527–28 (1896) (declaring the public trust is "[u]ndoubtedly [an] attribute of government"); *Brickell v. Trammel*, 77 Fla. 544, 559

(1919) (explaining the public trust is "governmental in its nature"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (recounting the public trust is "considered an essential attribute of sovereignty") (internal quotation marks omitted); *Juliana*, 217 F. Supp. 3d at 1260 (describing the public trust as an "inherent aspect[ ] of sovereignty"); *Mineral County v. Lyon County*, 136 Nev. 503, 511 (2020) (recognizing the public trust "derives from inherent limitations" on government). These cases make clear that sovereign immunity cannot bar public trust claims because the public trust itself is an innate limitation on sovereign government.

The public trust arose with the government itself, not as a result of any constitution, legislation, or regulation; these measures simply recognize the doctrine, often expanding its scope. *See Robinson Township*, 83 A.3d at 948 (recognizing the Pennsylvania constitution "preserved rather than created" the public trust doctrine); *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 255 A.3d 289, 313 (Pa. 2021) (same); *see also Caminiti v. Boyle*, 107 Wash. 2d 662, 666–67 (1987) (noting Washington's constitution was "but a formal declaration" of the public trust); *Juliana*, 217 F. Supp. 3d at 1260

(concluding public trust rights "predated the Constitution and are secured by it.") (citing Gerald Torres & Nathan Bellinger, *The Public Trust, the Law's DNA*, 4 WAKE FOREST JOURNAL OF LAW & POLICY 281, 288–94 (2014)); *In re Hawai'i Electric Light Co.*, Case No. SCOT-22-0000418, 2023 WL 2471890, at *16 n.24 (Haw. March 13, 2023) (Wilson, J., concurring) ("The public trust doctrine . . . exists independently of the constitutional mandate in Article XI, section 1 of the Hawai'i Constitution").

As an inherent attribute of government, the public trust "cannot be shed."[8] *Newport News*, 158 Va. at 547 (recognizing the "inalienability of the *jus publicum*"); *Juliana*, 217 F. Supp. 3d at 1260 (explaining a "defining feature" of the public trust is that it "cannot be legislated

---

8 Brief of *Amici Curiae* Law Professors in Support of Plaintiff-Appellant's Appeal Seeking Vacation and Remand, *North Carolina v. Alcoa Power Generating*, Case No. 15-2225, 2016 WL 1399642 at *6 (4th Cir. April 7, 2016); *see also* Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy & Illinois Central Railroad*, 45 ENVIRONMENTAL LAW 399, 420 (2015) (noting many state courts have "expressly articulated the basic understanding that the public trust doctrine is an inherent attribute of sovereignty that cannot be legislatively abrogated," citing cases).

away”); *Brickell*, 77 Fla. at 559 (stating the public trust “cannot be wholly alienated by the States”). The United States Supreme Court made clear in 1892 that the government cannot abdicate the public trust any more “than it can abdicate its police powers in the administration of government and the preservation of peace.” *Illinois Central*, 146 U.S. at 453. As one federal court put it, the public trust “can only be destroyed by the destruction of the sovereign” itself. *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass 1981). For as long as the people’s government has existed, the public trust doctrine (or *jus publicum*) has necessarily been in force.

Applying the doctrine of sovereign immunity to *jus publicum* claims would eviscerate the *jus publicum*. It would mean that the *jus publicum’s* restraint on government management of the public domain cannot be enforced against government. Shielding the government in this fashion would represent a profound reversal of longstanding Virginia law, and be inconsistent with public trust law in other jurisdictions.

II. The public trust doctrine is self-executing.

The public trust doctrine, properly understood as an inherent attribute of, and limitation on, government, is self-executing—it takes "effect immediately without implementing legislation."[9] This limitation is appropriate because it would otherwise be necessary for the government to legislate to impose a limitation on itself—something that the legislature is unlikely to do. In addition, because the *jus publicum* in Virginia is an inherent limitation on legislative authority, *Newport News*, 158 Va. at 546–47, a judicial interpretation that the legislature must impose limits on its own authority is a recipe for no action to protect public rights. Support for this conclusion is set forth below.

A. The public trust is self-executing based on its inherent status.

Virginia's *jus publicum* is self-executing, meaning that Virginia statutes are not necessary to execute it. Since the *jus publicum* predates all Virginia law (it arises from Virginia's sovereignty), at the time of the creation of the Virginia government, the *jus publicum* existed without

---

9 *Self-Executing*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/self-executing (last visited March 23, 2023).

any endorsement by any Virginia law. There is nothing in the *jus publicum* suggesting its execution depends on Virginia implementing statutes.

The *jus publicum* must be self-executing to have any meaning as an *inherent* limit on government authority. The Pennsylvania Supreme Court, in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) *(PEDF)*, illustrates this point. Pennsylvania's Constitution recognizes a public trust in "public natural resources," and requires the Commonwealth to "conserve and maintain" those resources for the benefit of present and future generations. Pennsylvania Constitution, Article I, § 27.[10] Article I of the state's constitution is its Declaration of Rights, which the court recognized as imposing a limitation on government authority. 161 A.3d at 931. Article

---

10 *See* Pennsylvania Constitution, Article I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."). The second and third sentences are the public trust clauses of the provision.

I, § 1 affirms that all citizens have certain "inherent and indefeasible" rights. In *PEDF*, the court recognized that these rights include the rights set out in Article I, § 27. *Id.* The court also held that the "Commonwealth's obligations as trustee 'create a right in the people to seek to enforce the obligations," and that this right is self-executing. *Id.* at 937 (citing *Robinson Township*, 83 A.3d at 974 (plurality)). Essentially, rights against the government, including public trust rights, are meaningless if government action is necessary for those rights to be actionable. As the Pennsylvania Supreme Court recognized, they are an inherent limit on sovereignty.

Justice Wilson's concurring opinion in *In re Hawai'i Electric Light Company*, tied the people's "fundamental right to a life-sustaining climate system" to the public trust doctrine codified in Article XI, Section 1 of the Hawaii Constitution.[11] 2023 WL 2471890, at *14 (Haw.

---

11 *See* Hawai'i Constitution Article XI § 1 ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural

2023) (Wilson, J., concurring). In his concurrence, Justice Wilson described the right to a life-sustaining climate system as "the foundation upon which society and civilization exist," as well as "implicit in the concept of ordered liberty and . . . at the base of all our civil and political institutions." *Id.* at *15. Justice Wilson based this fundamental right, in part, on the public trust, which "exists independently" of Article XI, Section 1. *Id.* at *16 n.24. He recognized that the public trust grounds and protects fundamental rights of the people, similar to the *PEDF* court's recognition that the public trust includes inherent rights of the people.

The logic underlying the *PEDF* decision and Justice Wilson's concurrence is readily applicable to this case. The *jus publicum* doctrine has a long history in Virginia, and is an inherent limitation on sovereignty. Like the Pennsylvania Supreme Court in *PEDF*, this Court should rule that *jus publicum* is an inherent limitation on government authority. Article XI, Section 1 of the Virginia Constitution codifies the

---

resources are held in trust by the State for the benefit of the people.").

jus publicum and its scope,[12] recognizing (1) the people's *jus publicum* right to "have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources," and (2) the Virginia government's sovereign obligation to protect the *jus publicum*, which includes preventing its "pollution, impairment, or destruction." Virginia Constitution, Article XI § 1. As an inherent right, the *jus publicum* must be self-executing to have any meaning and this Court should find that sovereign immunity is not a barrier to public trust, or *jus publicum*, claims such as those brought by Plaintiffs in this case.

---

12 *See* A.E. Dick Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1151 (2d. ed. 1974) (noting explicit public trust language was proposed for Article XI, Section 1, but was rejected as unnecessary by the floor sponsor of the Article because Section 1's language already acknowledged the existence of a public trust); A.E. Dick Howard, *State Constitutions and the Environment*, 58 VIRGINIA LAW REVIEW 193, 221–22 (1972) (recounting Virginia Senator Brault's statement that "section 1's language is to be read as *effecting*," though not creating, "a public trust in Virginia's natural resources and public lands.") (emphasis added).

B. *Robb* does not preclude Plaintiffs' *jus publicum* claims.

The Plaintiffs base their claims in this case on longstanding *jus publicum* law. Thus, their claims are not precluded by the Virginia Supreme Court's statement in *Robb v. Shockoe Slip Foundation,* 228 Va. 678, 683 (1985), that "Va. Const. art. XI, § 1 is not self-executing." In that case, a nonprofit corporation sought to enjoin the demolition of several state-owned buildings, claiming that the buildings had historic significance. They argued that the Commonwealth violated Article XI, § 1 of the state constitution by failing "to consider the Commonwealth's policy to conserve, develop, and utilize its historical buildings." *Id.* at 678. The Chancellor enjoined the demolition until the Commonwealth prepared documentation showing that it had considered the Commonwealth's "constitutionally stated public policy of preserving, utilizing, and developing its historical buildings." *Id.* at 681. On appeal, the Supreme Court reversed, holding that the provision is not self-executing. *Id.* at 683. The court reached that conclusion for two reasons. First, it said, "Article XI, § 1, contains no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be

given the force of law." *Id.* at 682. Second, it said that Article XI, § 2, which provides that the General Assembly "may undertake the . . . protection of historical sites and buildings," placed the responsibility for historical protection in the hands of the General Assembly. *Id.* at 682–83. Significantly, however, *Robb* did not address the issue of *jus publicum* rights. So nothing in that opinion is relevant to the Plaintiffs' *jus publicum* claims. Plaintiffs here bring common law *jus publicum* claims to vindicate their inherent rights, and do not rely on Article XI, § 1 as a source of those rights.

Article XI, § 1 did not create the people's *jus publicum* rights; these rights arose first and foremost from longstanding Virginia *jus publicum* law and the Virginia government's sovereignty. *See supra* Part II.B. In addition, historic resources are outside the scope of environmental resources ordinarily protected by *jus publicum* or the public trust doctrine. Thus, the legislative history of Article XI, § 1 indicates that the provision was intended to effectuate "a public trust in Virginia's natural resources and public lands." Howard, 58 VIRGINIA LAW REVIEW at 221-22. *Robb* is thus distinguishable for this reason as well.

In sum, this Court should interpret *Robb* in light of Article XI, Section 1's historical building language because *Robb* never mentions *jus publicum* rights, nor sovereign immunity. Moreover, *Robb* does not call into question the source of *jus publicum* rights as the Virginia government's sovereignty, nor does it bear on whether Plaintiffs have a common law cause of action for their *jus publicum* claims.

III. The public trust doctrine is judicially enforceable.

"The cornerstone of any trust lies in judicial enforcement."[13] Without judicial enforcement, trust beneficiaries have no redress if their trustees violate trust obligations or trust rights. A judicially unenforceable public trust would leave the people without redress if the government substantially impairs their trust *res* inconsistent with the Supreme Court's directive in *Illinois Central,* 146 U.S. at 452–53, draining the public trust of substantive meaning. *See Lake Michigan Federation v. U.S. Army Corp of Engineers*, 742 F. Supp. 441, 446 (N.D.

---

13 Mary C. Wood & Charles W. Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last,* 6 WASHINGTON JOURNAL OF ENVIRONMENTAL LAW & POLICY, 633, 655 (2016).

Ill. 1990) (“The very purpose of the public trust doctrine is to police the legislature’s disposition of public lands.”).

The judiciary plays an “important and fruitful role in safeguarding the public trust.”[14] Judicial review holds the political branches accountable for their public trust obligations: “Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res[ources], so the legislative and executive branches are judicially accountable for their dispositions of the public trust.” *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 168–69 (Az. Ct. App. 1991).

The judiciary therefore serves separation of powers principles by enforcing the public trust by reviewing the political branches’ management of the *res*. *Id.* at 169 (“The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.”). If the judiciary cannot enforce public trust obligations, the political branches would possess unchecked authority

14 Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICHIGAN LAW REVIEW 471 (1970).

over trust *res* management—an outcome violative of separation of powers principles as well as undermining the people's social contract with their government.

Courts have consistently stated that the people have standing to bring public trust claims against their government officials. *See Center for Biological Diversity v. FPL Group*, 166 Cal. App. 4th 1349, 1364 (Cal. Ct. App. 2008) ("'Any member of the general public . . . has standing to raise a claim of harm to the public trust'") (quoting *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 431 n.11 (Cal. 1983)). Further, the people retain the right "to bring actions to enforce the [public] trust when the public agencies fail to discharge their duties." *Center for Biological Diversity*, 166 Cal. App. 4th at 1366.

Public trust case law provides considerable evidence that the judiciary can enforce the public trust. *See, e.g.*, *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984) (enforcing the people's public trust right to access dry-sand beaches). The judiciary has overturned statutes as inconsistent with the public trust. *See*, *e.g.*, *Illinois Central*, 146 U.S. 387 (using the public trust doctrine to invalidate an Illinois statute granting Lake Michigan's submerged

lands to a private railroad company). Although courts sometimes defer to legislatures in balancing trust concerns, judicial invalidation is required when damage to a trust resource is "irreparable or not reparable within a reasonable time."[15]

Where a court finds a statute inconsistent with the trust, a legislative remand may be appropriate. But the political question defense has no legitimate role in most public trust actions, because it would eviscerate review of the trustee's performance. *See Robinson Township*, 83 A.3d at 929–30 (rejecting political question defense); *Lake Michigan Federation*, 742 F. Supp. at 446 ("If courts were to rubber stamp legislative decisions . . . the [public trust] doctrine would have no teeth.").

CONCLUSION & RELIEF SOUGHT

The *jus publicum,* or public trust doctrine, occupies a unique place in Virginia law. The trust is an inherent limitation in government authority, a result of the people's social contract with their government.

---

15 Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZONA STATE LAW JOURNAL 849, 880 (2001).

Virginia courts have expressly recognized the *jus publicum* as a limit on sovereign authority that cannot be relinquished. Countless other courts have recognized the same. The *jus publicum's* status as an inherent limit on government authority makes it clear that sovereign immunity does not and cannot apply to *jus publicum* claims. In addition, the *jus publicum* is self-executing.

Robb should be limited to Article XI, Section 1's historical building language because it does not mention the *jus publicum* at all. Moreover, *Robb* does not assert Article XI, Section 1 is the source of *jus publicum* rights, nor foreclose Plaintiffs from pleading common law *jus publicum* claims. Judicial enforcement is of paramount importance to the public trust, serving separation of powers principles, and evidenced by the fact that numerous courts have enforced the public trust. Public trust claims cannot be barred by sovereign immunity because the public trust fundamentally limits what the government can do with its authority. The government cannot escape a public suit when it exercises authority it does not have.

We believe the circuit court erred in finding the Plaintiffs' *jus publicum* claims barred by sovereign immunity, and the Plaintiffs correctly seek a remand so their claims can be heard on the merits.

Dated: March 28, 2023

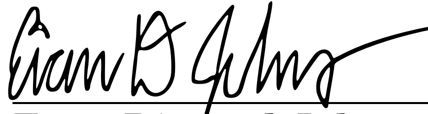
Respectfully submitted,

Evan Dimond Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
Post Office Box 507
Lewisburg, West Virginia 24901
Telephone: (434) 738 – 1863
E-Mail: ejohns@appalmad.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

In accordance with Rule 5A:4(d) of the Rules of the Supreme Court of Virginia, I certify that the brief—excluding the cover page, table of contents, table of authorities, and certificate contains 4963 words.



Evan Dimond Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
Post Office Box 507
Lewisburg, West Virginia 24901
Telephone: (434) 738 – 1863
E-Mail: ejohns@appalmad.org

Counsel for Amicus Curiae