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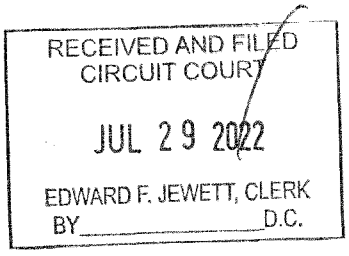

VIA HAND DELIVERY
Hon. Edward F. Jewett, Clerk
Richmond City Circuit Court
400 North Ninth Street
John Marshall Courts Building
Richmond, VA 23219

RE: **Layla H., et al. v. Commonwealth, et al.**
Case No. CL22000632-00

Dear Mr. Jewett,

On behalf of the Defendants in the above-styled matter, I have enclosed for filing a Brief in Support of Defendants' Demurrer and Plea of Sovereign Immunity. If you have any questions, please contact me at TSanford@oag.state.va.us or (804) 692-0551.

Sincerely,

T. Sanford

Thomas J. Sanford
Assistant Attorney General

Enclosure
CC: Isak J. Howell (via email)
Nate Bellinger (via email)
Kimberly Willis (via email)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

LAYLA H., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: CL22000632-00**
	)	
COMMONWEALTH OF VIRGINIA, et al.,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF DEFENDANTS' DEMURRER AND PLEA OF SOVEREIGN IMMUNITY

Defendants the Commonwealth of Virginia, Governor Glenn Youngkin, in his official capacity, the Virginia Department of Energy ("DOE"), Director John Warren, in his official capacity, the Virginia Department of Environmental Quality ("DEQ"), and Director Michael Rolband, in his official capacity (collectively, the "Defendants"), by counsel, submit this Brief in Support of their Demurrer and Plea of Sovereign Immunity.

At bottom, the Complaint in this action is a policy brief advocating for Plaintiffs' preferred energy and environmental policies. It belongs before the General Assembly, not this Court. Rather than lobby their elected representatives, however, Plaintiffs ask this Court to impose their preferred policies on the Commonwealth by distorting *jus publicum* rights and misconstruing the Constitution of Virginia. The *jus publicum* is a limited concept governing the Commonwealth's ownership of lands submerged beneath navigable tidal waterways. It has nothing to do with air emissions, nor is it a source of judicially enforceable private rights. From Alaska to Florida, state and federal courts across the country have repeatedly seen through these efforts to nullify the political process and have rejected similar suits. Virginia law mandates the same outcome here. The Complaint is barred by the doctrine of sovereign immunity. Additionally, Plaintiffs lack

standing and adjudicating their claims would usurp the legislative power vested exclusively in the General Assembly by the Virginia Constitution. Moreover, even if this Court had jurisdiction, Plaintiffs lack a right of action and the Complaint's theories are legally and factually foreclosed by well-established and binding precedent.

I. STATEMENT

The General Assembly has enacted an extensive statutory regime spanning six titles of the Code of Virginia to address the complex and interlocking issues of energy, the environment, natural resources, and conservation. *See, e.g.*, Va. Code titles 10.1, 28.2, 29.1, 45.2, 62.1, 67. Those statutes, in turn, entrust DEQ, DOE, and numerous other expert regulatory bodies with implementing the General Assembly's statutory framework. The agencies' implementation occupies two entire titles of the Administrative Code. *See, e.g.*, Va. Code §§ 10.1-1183 (establishing DEQ), 45.2-102 (establishing DOE); Va. Admin. Code titles 4, 9. Most relevant to Plaintiffs' claims, the Gas and Oil Act provides that it shall be "construed" and "administer[ed]" to "provide a method of gas and oil conservation for maximizing exploration, development, production, and utilization of gas and oil resources," Va. Code §§ 45.2-1602(1), (2), -1614(A)(1), (A)(2), as well as coal resources, *id.* §§ 45.2-1602(5), -1614(A)(4). The Act also provides that it shall be construed "[t]o protect the citizens and the environment of the Commonwealth from the public safety and environmental risks associated with the development and production of gas or oil." *Id.* § 45.2-1602(6).

Plaintiffs are thirteen Virginia youths represented by an organization—Our Children's Trust ("OCT")—that has filed unsuccessful suits raising the same legal theories in numerous jurisdictions. Plaintiffs contend there is a privately enforceable "right to use an atmosphere, lands, and waters protected from pollution, impairment, or destruction." Compl. ¶¶ 180, 193, 209. The

crux of Plaintiffs' claims is that the Gas and Oil Act and the Commonwealth's alleged "policy and practice of exercising their statutory discretion in favor of permitting fossil fuel infrastructure," *id.* ¶12, (1) substantially impair their *jus publicum* rights, *see id.* ¶¶ 166-177, 182-89 (Count I), 198-205 (Count III), and (2) violate their "substantive due process rights in the Virginia Constitution," *see id.* ¶¶ 178-181, 190-197 (Count II), 206-213 (Count IV).

Plaintiffs' purported injuries are derivative consequences of various categories of alleged secondary effects of global climate change: (a) "rising temperatures caused by climate change," *see, e.g.*, Compl. ¶¶ 23, 28, 49 (interference with outdoor and recreational activities), 38, 135, 142 ("alter[ed] insect populations," including "ticks" that carry disease and "emerald ash borer[s]" that damage certain trees), 23, 136 (gardening made more "difficult" and crops impacted), 52, 148 (additional pollen affecting allergies), (b) altered precipitation patterns and events, *see, e.g.*, *id.* ¶¶ 24, 47 (interference with recreational activities), 16-17, 68 (storms and related issues such as flooding or trees falling), 36, 57 (effect on farming, gardening, and foraging yields), (c) "ocean acidification," *see id.* ¶133 ("higher costs in purchasing local shellfish"), (d) changed "air quality due to climate change," *see, e.g.*, *id.* ¶¶ 22 (asthma aggravated), and (e) knowledge of climate change, *see, e.g.*, *id.* ¶¶ 21, 46 ("anxiety about climate change"), 20, 31 (vague claims of harm to a "religious and spiritual connection to Virginia's environment"). Plaintiffs do not tie any of these purported injuries directly to Virginia's existing regulatory framework, but they nevertheless ask this Court to effectively overthrow that regulatory framework as unconstitutional and a violation of the *jus publicum*. *See id.* at p. 71-72. Plaintiffs additionally seek "injunctive relief," without specifying what that relief would entail. *See id.* ¶¶ 12, 14, 189, 197, 205, 213.[1]

[1] The requested—and uniformly denied—injunctive relief in parallel OCT cases is instructive of the scope of the relief Plaintiffs seek in this case. *See, e.g.*, *Aji P. v. State*, 480 P.3d 438, 445 (Wash. Ct. App. 2021) ("[R]equest[ing] that the court order the State to develop and submit to the

II. LEGAL STANDARD

Plea in Bar Standard. "A plea in bar asserts a single issue," such as sovereign immunity, "which, if proved, creates a bar to a plaintiff's recovery." *Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019). "The party asserting the plea in bar bears the burden of proof" and may meet that burden by "relying on the pleadings." *Id.* "The existence of sovereign immunity is a question of law." *City of Chesapeake v. Cunningham*, 268 Va. 624, 633 (2004).

Demurrer Standard. "A demurrer tests the legal sufficiency of a complaint, ensuring that the factual allegations set forth in the pleading are sufficient to state a cause of action." *La Bella Dona Skin Care, Inc. v. Belle Femme Enters.*, 294 Va. 243, 255 (2017). It "admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred." *C. Porter Vaughan, Inc. v. DiLorenzo*, 279 Va. 449, 455 (2010).

Presumption of Constitutionality. "In assessing the constitutionality of a statute, [courts] must presume that the legislative action is valid. The burden is on the challenger to prove the alleged constitutional defect." *Castillo v. Commonwealth*, 70 Va. App. 394, 449 (2019).

III. ARGUMENT

This Court should dismiss the Complaint on any of multiple independently sufficient grounds and join its sister courts across the country in rejecting Plaintiffs' attempt "to distort limited doctrines into a means of litigating [] policy." *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 253 (E.D. Pa. 2019) (rejecting substantive due process and public trust doctrine

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Court . . . an enforceable state climate recovery plan, and that it retain jurisdiction . . . to approve, monitor and enforce compliance therewith."); *Chernaik v. Brown*, 475 P.3d 68, 72 (Or. 2020) (seeking "an injunction ordering the state to . . . implement a carbon reduction plan . . ., which the court would supervise to ensure enforcement."); *Aronow v. State*, No. A12-0585, 2012 Minn. App. Unpub. LEXIS 961, at *3 (Minn Ct. App. Oct. 1, 2012) (requesting the court to "compel respondents to take the necessary steps to reduce the State's carbon dioxide output by at least 6% per year, from 2013 to 2050.").

claims in similar climate change case). *First*, sovereign immunity bars the Complaint. *Second*, Plaintiffs lack standing to pursue their claims and adjudicating such claims would violate the separation of powers. *Third*, Plaintiffs lack a right of action. *Fourth*, the Complaint fails to state a claim, as a matter of law, that either Plaintiffs' *jus publicum* or due process rights have been violated. *Fifth*, Plaintiffs cannot establish causation. *Sixth*, Plaintiffs neither exhausted administrative remedies nor complied with statutory requirements for challenging permits.

A. Defendants' sovereign immunity bars all of Plaintiffs' claims.

"The doctrine of sovereign immunity is alive and well in Virginia." *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 101 (2008). Under this doctrine, "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." *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007). "Sovereign immunity . . . also bar[s] a declaratory judgment proceeding against the Commonwealth." *Id.* "Sovereign immunity is a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions," *Gray*, 276 Va. at 101, "provid[es] for smooth operation of government," and "prevent[s] citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation," *Afzall*, 273 Va. at 231. Sovereign immunity bars Plaintiffs' claims here because they expressly seek to "restrain [or compel] governmental action," *Afzall*, 273 Va. at 231, and interfere with "governmental functions," *Gray*, 276 Va. at 101. Namely, Plaintiffs ask this court to (a) restrain Defendants from issuing permits for fossil fuel infrastructure and (b) align government action with Plaintiffs' preferred policies. *See, e.g.*, Compl. ¶¶ 2-5, 12-13, 182-213.[2]

[2] Each Defendant is protected by sovereign immunity because the doctrine covers agencies of the Commonwealth, the governor, and high level governmental officials. *Gray*, 276 Va. at 102.

"[O]nly the legislature acting in its policy-making capacity can abrogate the Commonwealth's sovereign immunity. In the absence of such action by the legislature, the courts of this Commonwealth do not have the necessary jurisdictional authority" to decide the merits of an action. *Commonwealth v. Luzik*, 259 Va. 198, 206 (2000). Plaintiffs do not bring any statutory claims and, thus, cannot rely on any express statutory waiver of sovereign immunity. *See Afzall*, 273 Va. at 230. Nor can a purported common law *jus publicum* doctrine resurrect their claims, as "waiving sovereign immunity" requires "an express statutory or constitutional provision." *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244 (2004).

Unless the General Assembly has waived it, sovereign immunity bars constitutional claims unless those claims are "based on *self-executing provisions* of the Constitution of Virginia." *Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137 (2011) (emphasis added).[3] "Thus, the dispositive issue" for determining sovereign immunity in the absence of an express waiver "is whether the[] constitutional provisions [relied upon] are self-executing." *Gray*, 276 Va. at 102 ("[I]f the constitutional provisions . . . are not self-executing, then their claims . . . are barred."). Plaintiffs exclusively rely on four constitutional provisions—Article I, §§ 1, 11, 17 and Article XI, § 1. None of these provisions are self-executing.

Article XI, § 1. There can be no dispute that "Va. Const. art. XI, § 1, is not self-executing." *Robb v. Shockoe Slip Foundation,* 228 Va. 678, 682-83 (1985); *see also Chesapeake Bay Found. v. Commonwealth ex rel. Va. State Water Control Bd.*, 90 Va. Cir. 392, 397 (Richmond City Cir. Ct. 2015) (Jenkins, J.) (same). The Supreme Court reached this conclusion because "Article XI, § 1, contains no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of

[3] Virginia law recognizes no generalized equitable exception to sovereign immunity akin to the federal exception recognized in *Ex parte Young*, 209 U.S. 123 (1908). *See Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 455-56 (2005).

common law, and it lays down no rules by means of which the principles it posits may be given the force of law." *Robb*, 228 Va. at 682-83.

Article I, § 1. The courts of this Commonwealth have consistently held "that Article I, § 1, is not self-executing." *Chandler v. Routin*, 63 Va. Cir. 139, 141 (Norfolk Cnty. Cir. Ct. 2003) (citing cases). "Although [Article I, § 1] is contained in the Virginia Constitution's Bill of Rights, it neither expressly declares that it is self-executing . . . nor does it contain language that supplies a sufficient rule and remedy . . . . Rather, Article I, § 1, merely recites principles, but provides no 'rules by means of which those principles may be given the force of law.'" *Gray v. Rhoads*, 55 Va. Cir. 362, 368-69 (Charlottesville Cnty. Cir. Ct. 2001) (quoting *Robb*, 228 Va. at 681) *rev'd on other grounds*, 268 Va. 81 (2004). Therefore, the provision is not self-executing. *Id.*

Article I, § 11. Section 11 both generally declares that "no person shall be deprived of his life, liberty, or property without due process of law" and also sets forth specific provisions requiring just compensation for the taking of private property. Va. Const. art. I, § 11. Critically, "only the provisions of Section 11 'governing the taking or damaging of private property for public use have been held to be self-executing.'" *Chandler*, 63 Va. Cir. at 141 (citing *Young v. City of Norfolk*, 62 Va. Cir. 307, 312 (Norfolk Cnty. Cir. Ct. 2003)); *see also Ellis v. Kennedy*, Case No. CL19-03, 2020 Va. Cir. LEXIS 244, at *33 (Loudoun Cnty. Cir. Ct. May 22, 2020) ("Article I, § 11 . . . is only self-executing regarding the takings clause."); *Quigley v. McCabe*, Case No. 2:17-cv-70, 2017 U.S. Dist. LEXIS 141408, at *15 (E.D. Va. Aug. 30, 2017) (same). "The reason" for this distinction "is obvious; [Article I, § 11] expressly provides a remedy for takings of property . . . If the drafters had intended to provide similar rights and remedies for deprivation of life and liberty, they could have done so by including such language in that provision. They did not." *Rhoads*, 55 Va. Cir. at 368. Plaintiffs do not bring a takings claim under Article I, § 11. Rather

they assert a violation of their liberty under Article I, § 11. *See, e.g.*, Compl. ¶¶ 178-80 ("[T]here are certain liberty interests protected by the Due Process Clause"). They only allege violations of a provision that courts have unfailingly treated as non-self-executing.

Article I, § 17. Section 17 provides a rule of construction that the enumeration of certain rights "shall not be construed to limit other rights." Va. Const. art. I, § 17. Unsurprisingly, no reported case appears to have needed to address whether this provision is self-executing because it obviously is not. Section 17 "lays down no rules by means of which the principles it posits may be given the force of law" and, thus, it cannot be self-executing. *Robb*, 228 Va. at 682; *cf. Olson v. California*, Case. No. CV 19-10956, 2020 U.S. Dist. LEXIS 207347, at *30 (C.D. Cal. Sep. 18, 2020) (holding that the parallel provision in California's constitution "is not self-executing because it does not provide a specific method for its enforcement.").

None of the constitutional provisions relied upon by Plaintiffs are self-executing. As a result, they do not operate as a waiver of sovereign immunity. *See Digiacinto*, 281 Va. at 137; *Gray*, 276 Va. at 102. Sovereign immunity therefore shields Defendants from Plaintiffs' attempt to "influenc[e] the conduct of governmental affairs through the threat or use of vexatious litigation." *Afzall*, 273 Va. at 231. The Complaint should be dismissed on this basis alone.[4]

B. The separation of powers and Plaintiffs' lack of standing bars the Complaint.

The Constitution of Virginia mandates that the "legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to

[4] To the extent Plaintiffs attempt to escape Defendants' sovereign immunity by claiming the relief sought will not compel or restrain Defendants, their claims still fail because "[courts] do not have the power to render a judgment that is only advisory." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 100 (2013). Simply put, either granting the requested relief will alter Defendants' actions—*i.e.* restrain their permitting conduct—in which case the relief is barred by sovereign immunity, or it will do nothing, violating the prohibition on "advisory opinions." *Id.* at 98-100. Either way, the Complaint should be dismissed.

the others." Va. Const. art. III, § 1; *see also* Va. Const. art. I, § 5 (same); art. IV, § 1 ("The legislative power . . . shall be vested in a General Assembly."); art. V (vesting "executive power" in the executive branch). In such "a regime of separated powers that assigns to the legislature the responsibility for charting public policy, [the judiciary's] function is limited to adjudicating a question of law." *Daily Press, LLC v. Office of the Exec. Sec'y*, 293 Va. 551, 557 (2017). As a result, courts "may not" "second-guess the lawmakers on matters of economics, sociology and public policy." *Infants v. Va. Hous. Dev. Auth.*, 221 Va. 659, 671 (1980). "Those considerations belong exclusively in the legislative domain." *Id.*; *see also Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 309 (2013) ("[P]olicy decisions are subject to, and properly evaluated by, the political will of the people, and [the courts] have no authority to override such political decisions."). In this Commonwealth, "it is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests, and to devise standards for implementation." *Wood v. Bd. of Supervisors*, 236 Va. 104, 115 (1988).

As a natural corollary, the doctrine of "standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). It is well recognized that courts "have developed the requirement that a party have standing in order to confine the courts to a role consistent with the separation of powers." *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 965-66 (Utah 2006); *see also, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (Standing "keep[s] the Judiciary's power within its proper constitutional sphere."); *Baird v. City of Burlington*, 201 Vt. 112, 119 (2016) ("[S]tanding. . . respects the fundamental separation of powers.").

Despite these clear constitutional provisions and binding precedents, Plaintiffs—as

numerous courts confronting parallel climate suits have recognized—invite this court to "usurp the authority and responsibility of the other branches" by "wading into the waters of what policy approach to take, what economic and technological constraints exist, and how to balance all implicated interests to achieve the most beneficial outcome" with respect to energy and environmental concerns. *Aji P.*, 480 P.3d at 448-49 (holding that "the Youths' [climate] claims present a political question to be determined by the people and their elected representatives, not the judiciary"). Namely, Plaintiffs ask this Court to strike down provisions guiding the Commonwealth's permitting process, overrule an alleged long-standing practice of expert agencies on when permits should be issued, and invent a new constitutional right that would necessarily entangle the judiciary in oversight over any and all legislative or regulatory decisions affecting emissions. *See, e.g.*, Compl. at p. 71-72. In other words, "Plaintiffs essentially seek to impose ad hoc judicial natural resources management based on case-by-case adjudications of individual fundamental rights." *Sagoonick v. State*, 503 P.3d 777, 796 (Alaska 2022).

Granting such relief would require "infringing on an area constitutionally committed to the legislature . . . and disrespecting [] coordinate branches of government by supplanting their policy judgments with [the Court's] own normative musings about the proper balance of development, management, conservation, and environmental protection." *Id.* (affirming dismissal of parallel suit brought by youth plaintiffs against Alaska); *see also Iowa Citizens for Cmty. Improvement & Food & Water Watch v. State*, 962 N.W.2d 780, 785, 798 (Iowa 2021) ("[P]laintiffs' effort to repurpose the historically narrow public trust doctrine to solve a complex environmental problem presents a nonjusticiable political question.") (collecting cases); *Svitak v. State*, 2013 Wash. App. LEXIS 2836, at *4-5 (Wash. Ct. App. Dec. 16, 2013) (affirming dismissal of a "Complaint for declaratory and injunctive relief" regarding "the public trust doctrine," "global warming," and "the

pace and extent of greenhouse gas reduction" because it presented "a political question [that] under the separation of powers doctrine is within the purview of the legislature"); *Reynolds v. State of Florida*, Case No. 2018-CA-819 (Fla. Cir. Ct. June 10, 2020) (dismissing parallel climate case brought by OCT against Florida because plaintiffs' claims were "nonjusticiable" and "inherently political questions that must be resolved by the political branches of government"), *aff'd*, 316 So. 3d 813 (Fla. Dist. Ct. App. 2021). As each of these courts recognized, the Complaint presents precisely the type of issue that the Supreme Court of Virginia has repeatedly directed must be left to the judgment and expertise of the Commonwealth's political branches. *See, e.g.*, *Wood*, 236 Va. at 115; *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (observing an "expert agency" is "surely better equipped" to regulate "emissions . . . than individual [] judges issuing ad hoc, case-by-case injunctions"); *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012) (regulation of carbon emissions requires "determinations that are best left to the [executive] agencies that are better equipped, and that have a [legislative] mandate, to serve as the 'primary regulator of greenhouse gas emissions.'").[5]

In sum, "Plaintiffs' disagreement with Defendants is a policy debate best left to the political process," *Clean Air Council*, 362 F. Supp. 3d at 251, and the Complaint is "a policy statement that, in Virginia, may be more appropriately addressed to the legislature" because that branch "has the sole responsibility to enact the laws of the state." *Corp. Exec. Bd. v. Va. Dep't of Taxation*, 96 Va.

[5] Moreover, the Complaint runs headlong into the foundational principle that "it is not the role of the judiciary to second-guess the wisdom of the legislature," particularly "where the legislature has already acted." *Svitak*, 2013 Wash. App. LEXIS 2836, at *9; *see also Infants*, 221 Va. at 671; *Meeks*, 286 Va. at 309. Here, in addition to the extensive regulatory regime in place, Plaintiffs acknowledge that the Commonwealth has already reduced emissions and enacted legislation with respect to further reducing emissions. *See* Compl. ¶¶ 96, 114, 161 (citing Va. Code § 45.2-1706.1). Plaintiffs "in essence" want this court "to rewrite a statute" in order "to accelerate the pace and extend greenhouse gas reduction" to match their preferred policy approach. *Svitak*, 2013 Wash. App. LEXIS 2836, at *9. That is not a judicial function. *Id.*

Cir. 287, 300 (Arlington Cnty. Cir. Ct. 2017). As a result, adjudicating Plaintiffs' claims would force this Court to "usurp the authority and responsibility of the other branches," *Aji P.*, 480 P.3d at 449, in violation of Article III, § 1's prohibition on any one branch "exercis[ing] the powers properly belonging to the others." The Complaint should be dismissed on this basis alone.

Given the foundational connection between standing and the separation of powers, it is unsurprising that Plaintiffs' claims are also precluded by their lack of standing to bring this action. Under Virginia's standing doctrine, "advancing a public right or redressing a public injury cannot confer standing." *Wilkins v. West*, 264 Va. 447, 458 (2002); *see also Va. Beach Beautification Com. v. Bd. of Zoning Appeals*, 231 Va. 415, 419 (1986). Rather, "to have standing . . . a plaintiff must establish . . . that the alleged injury suffered is particularized to him." *Marshall v. Warner*, 64 Va. Cir. 389, 391-92 (Richmond City Cir. Ct. 2004). These rules protect the separation of powers by preventing a plaintiff from attempting to force a court to leave "its proper constitutional sphere," *Raines*, 521 U.S. at 82, in order to decide questions, which are properly reserved for the political branches, regarding injuries "suffered by all" and how to balance various considerations of public policy. *Marshall*, 64 Va. Cir. at 392. Yet, Plaintiffs, by definition, seek to advance a public right because their entire theory of the case is an effort to vindicate *jus publicum* rights of *public* ownership. Moreover, every claimed injury stems from alleged general changes to the environment caused by global climate change. *See* p. 3, *supra*. If these allegations could support standing for these Plaintiffs, they could support standing for literally anyone on the planet, as everyone is in some way affected by the climate.

Plaintiffs separately lack standing because they fail to show that their "rights will be affected by the disposition of the case." *Goldman v. Landsidle*, 262 Va. 364, 371 (2001). Specifically, they have not—and cannot—establish that their alleged injuries are caused by

Defendants' action, rather than the actions of governments and private parties across the globe, *see* p. 18-20, *infra*, or that the relief they request would redress those injuries by halting global climate change. *See, e.g.*, *Iowa Citizens*, 962 N.W.2d at 793 (dismissing similar suit against Iowa "for lack of standing" because "[t]here is not enough here to demonstrate that a favorable outcome in this case is likely to redress the plaintiffs' alleged [injuries].").

In the same vein, Plaintiffs lack statutory standing under Va. Code § 8.01-184 to pursue declaratory relief. A "declaratory judgment" is only appropriate if it will provide "specific relief through a decree of a conclusive character." *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 98. Yet, Plaintiffs' requested relief is an airy abstraction. *See* Compl. at p. 71. As multiple courts rejecting similar requests for declaratory relief in parallel climate change cases have recognized, "[P]laintiffs are simply seeking broad, abstract declarations in this litigation" which "do not provide any assurance of concrete results, although they do herald long-term judicial involvement." *Iowa Citizens*, 962 N.W.2d at 792; *Aji P.*, 480 P.3d at 451 (holding request for similar declaratory relief was nonjusticiable because it "would not be final or conclusive").

In addition, the "authority to enter a declaratory judgment is discretionary and must be exercised with great care and caution." *Callison v. Glick*, 297 Va. 275, 288 (2019). This Court should decline to entertain declaratory relief in light of the serious separation of powers concerns it presents. *See, e.g.*, *Sagoonick*, 503 P.3d at 802 (affirming "dismissal of [youth] plaintiffs' declaratory relief claims [regarding climate change and the public trust doctrine] on prudential grounds" because such relief "would do little more than restate the constitutional provisions" and "would provide no guidance to the legislature about undertaking its [] duties.").

C. Plaintiffs lack a right of action.

Plaintiffs do not have a right of action under Virginia's constitution, statutes, or common

law. "Provisions of the Virginia Constitution only provide for a private right of action if they are self-executing." *Chandler*, 63 Va. Cir. at 140; *see also Rhoads*, 55 Va. Cir. at 366 ("[T]o enforce a private right of action under the Virginia Constitution, the constitutional provision in question must be self-executing."). Thus, none of Plaintiffs' alleged constitutional claims provide a private right of action. *See* p. 6-8, *supra*; *see, e.g.*, *In re Almanza*, 2018 Va. Cir. LEXIS 3294, at *36 (Loudoun Cnty. Cir. Ct. Dec. 18, 2018) ("[C]ourts . . . have universally rejected the notion that a private right of action exists under Article I § 11 for the deprivation of life or liberty.").

Nor do Plaintiffs have any statutory cause of action. Indeed, Plaintiffs disclaim bringing any statutory claims. *See* Compl. ¶ 188 (rejecting the pursuit of "litigation under the Administrative Process Act of Virginia" ("VAPA")). And their request for declaratory judgment "does not *create* a right of action" where one did not previously exist "or, for that matter, any substantive rights at all." *Cherrie v. Va. Health Servs.*, 292 Va. 309, 318 (2016) (Plaintiffs "cannot use the Declaratory Judgment Act as a platform for asserting non-existent private rights of action."). Rather, "the Declaratory Judgment Act provides a procedural remedy." *Id.*

Similarly, no authority in this Commonwealth supports the existence of an independent private right of action stemming from *jus publicum* rights. Rather, the limited set of Virginia cases addressing privately raised *jus publicum* rights or mentioning the "public trust doctrine"—most of which concern appeals of actions of the Virginia Marine Resources Commission ("VMRC")—were brought under separate causes of action. *See, e.g.*, *Palmer v. Commonwealth Marine Res. Comm'n*, 48 Va. App. 78, 85 (2006) (considering an appeal pursuant to VAPA of VMRC's denial of a permit). The public trust doctrine itself, however, does not create a standalone right of action.

D. Plaintiffs have not alleged a violation of Article XI or any *jus publicum* rights.

The Complaint, as a matter of law, fails to allege any violation of either Article XI of the

Constitution of Virginia or *jus publicum* rights. As an initial matter, "Va. Const. art. XI, § 1, is not self-executing," *Robb*, 228 Va. at 682-83, and Article XI, § 2 recognizes the General Assembly's authority with regard to conservation of natural resources but does not require the General Assembly to exercise that authority in any particular way. Thus, there is no legally cognizable claim for a violation of Article XI in this case.[6]

With any claims under Article XI foreclosed, Plaintiffs fall back on the common law *jus publicum* doctrine. This maneuver is unavailing. *First*, the *jus publicum* doctrine simply does not apply to greenhouse gas emissions. Rather, this doctrine concerns only a "right to navigate the Commonwealth's waters." *Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 387 (2014); *see PPL Montana, LLC v. Montana*, 565 U.S. 603-04 (2012) ("[T]he States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title"). The Complaint, however, concerns emissions into the atmosphere, not subaqueous lands, much less navigation, making this doctrine irrelevant to Plaintiffs' claims.

Second, the *jus publicum* doctrine does not constrain the authority of the General Assembly or create judicially enforceable private rights. To the contrary, the Virginia Supreme Court has repeatedly held that "whether an activity is a right of the people inherent to the *jus publicum* is a

[6] When the General Assembly desires a permitting process to consider Article XI or *jus publicum* rights, it says so specifically. Namely, when issuing permits "for the use of state-owned bottomlands," the General Assembly has instructed the VMRC to account for "the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people." Va. Code § 28.2-1205. Plaintiffs' claims, however, involve atmospheric emissions and DEQ and DOE, not subaqueous lands or VMRC permits, making this provision inapplicable. Even with respect to VMRC permits, it is still inappropriate for courts to *independently* apply the public trust doctrine, as Plaintiffs here desire, because the statute "directs the [agency]—not the courts—to decide whether, in its expert discretion, granting the permit would be consistent with the public trust doctrine." *Boone v. Harrison*, 52 Va. App. 53, 57, 61 69 (2008) (Kelsey, J.) (holding "that the court exceeded its authority" in vacating a permit after "conduct[ing] its own review of the 'public trust doctrine'").

matter of Virginia common law subject to the Constitution of Virginia and the General Assembly's modification by statute." *Va. Marine Res. Comm'n*, 287 Va. at 383; *Commonwealth ex rel Attorney Gen. v. Newport News*, 158 Va. 521, 556 (1932) (*jus publicum* doctrine does not alter "the discretion of the legislature free from the control or interference of either the executive or judicial department of the government" to balance the different uses of the Commonwealth's resources.). Indeed, the Supreme Court of Virginia rejected the broad "public trust" conception of *jus publicum* rights advanced by Plaintiffs, *see* Compl. ¶¶ 3, 6, 167, 181, holding that "discuss[ing] the rights of the people to the tidal waters and their bottoms from the standpoint of a trust" fails to "serve[] any useful purpose," "establishes nothing," and "merely confuses the issue." *Newport News*, 158 Va. at 539-44 (rejecting *jus publicum* claim and holding "that the General Assembly has the power to authorize, permit or suffer sewage to be discharged into Hampton Roads . . . subject . . . to no restrictions . . . or to such restrictions as it may deem proper.").

Plaintiffs urge the Court to expand drastically the *jus publicum* doctrine to create judicially enforceable rights to "an atmosphere, lands, and waters free from pollution, impairment, or destruction." Compl. ¶¶ 7, 176, 180-81, 203. This Court should decline the invitation. Such an expansion (a) is inconsistent with Virginia Supreme Court precedent and has no basis in this Commonwealth's narrow approach to *jus publicum* rights, (b) is contrary to the non-self-executing and legislatively permissive nature of Article XI, and (c) has been overwhelmingly rejected by other jurisdictions, including in cases brought by OCT, because the "public trust doctrine has never been applied to the atmosphere." *Aji P.*, 480 P.3d at 457.[7] Simply put, Plaintiffs have

[7] *See, e.g.*, *Chernaik*, 475 P.3d at 76 (rejecting contention that "the public trust doctrine extends to all the waters of the state, wild fish and other wildlife, and the atmosphere in Oregon."); *Filippone v. Iowa Dep't of Nat. Res.*, 829 N.W.2d 589 (Iowa Ct. App. 2013) ("[T]here is no precedent for extending the public trust doctrine to include the atmosphere" and, therefore, "[state regulator] does not have a duty . . . to restrict greenhouse gases to protect the atmosphere."); *Aronow*, 2012

manufactured a doctrine foreign to this Commonwealth in an attempt to smuggle their substantive policy preferences into the laws of Virginia. As there is no legal basis for such a claim, Counts I and III should be dismissed.

E. Plaintiffs have not alleged a violation of their substantive due process rights.

The Complaint fails to allege any violation of Plaintiffs' substantive due process rights or unenumerated liberties. As one Justice of the Supreme Court of Virginia has observed, the Virginia Constitution's Due Process Clause "cannot fairly be read to include a substantive component" and thus does not establish any substantive rights. *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 585 (2017) (McCullough, J., concurring). And even if it did, the doctrine would not incorporate the expansive right that Plaintiffs' theory hinges upon. *See, e.g., Aji P.*, 480 P.3d at 453. The putatively substantive component of the Due Process Clause protects an unenumerated right only if that right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Courts must "exercise the utmost care whenever [] asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into [judicial] policy preferences." *Id.* at 720. Here, Plaintiffs not only seek to "break new ground," but to expand radically the scope of substantive due process to incorporate an unprecedented right "to use an atmosphere, lands, and waters protected from pollution, impairment, or destruction." Compl. ¶ 180.[8]

"An examination of 'our Nation's history, legal traditions, and practices' presents no

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Minn. App. Unpub. LEXIS 961, at *1, *6 (affirming dismissal of climate change "public-trust doctrine" claims because there is "no caselaw from Minnesota, or any other jurisdiction, in which a court has expanded the scope of the public-trust doctrine to include the atmosphere.").

[8] Further precluding Plaintiffs' claims, this purported right tracks the language of Article XI, but "the scope of substantive due process . . . does not extend to circumstances already addressed by other constitutional provisions." *Armendariz v. Penman*, 75 F.3d 1311, 1325 (9th Cir. 1996); *see also Skurstenis v. Jones*, 236 F.3d 678, 681 n.3 (11th Cir. 2000).

evidence of a liberty interest in a healthful and peaceful environment" and "creat[ing] such an interest [] would transform substantive due process rights into the policy preferences of the court." *Aji P.*, 480 P.3d at 453-54 (collecting cases); *see also, e.g.*, *Nat'l Sea Clammers Ass'n v. New York*, 616 F.2d 1222, 1238 (3d Cir. 1980) ("[T]here is no constitutional right to a pollution-free environment."); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (finding no constitutional right to a healthy environment); *Animal Legal Def. Fund v. United States*, 404 F. Supp. 3d 1294, 1302 (D. Or. 2019) ("[C]ourts have consistently held that there is no fundamental right to a particular type of environment or environmental conditions.") (collecting cases); *Pinkney v. Ohio EPA*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (holding there is no "fundamental right to a healthful environment implicitly or explicitly in the Constitution."). Indeed, only "a single court," which was subsequently reversed, "has recognized a substantive due process right analogous to what Plaintiffs urge here." *Clean Air Council*, 362 F. Supp. 3d at 250 (rejecting plaintiff's claimed constitutional right to a "life-sustaining climate system" and collecting cases holding the same).[9] Simply put, the constitutional right that Plaintiffs depend upon does not exist and, in fact, has been consistently rejected by both state and federal courts. Counts II and IV should be dismissed.[10]

F. The Complaint fails to allege facts sufficient to state a claim.

Plaintiffs further fail to state a claim because they do not—and cannot—allege an injury *caused* by either Defendants' conduct or the challenged statutory provisions. *First*, Plaintiffs "rely on too tenuous a causal link between their allegations of climate change and [the government's]

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[9] It is "settled law" that "the corresponding provisions of the Virginia Constitution *go no further* than their federal counterparts." *Greco v. Commonwealth*, 2014 Va. App. LEXIS 125, at *4 n.2 (Va. Ct. App. Apr. 1, 2014) (emphasis added). Thus, federal courts rejecting Plaintiffs' asserted substantive due process right is equally fatal to their claim under Virginia law.

[10] In the face of this avalanche of authority, all Plaintiffs can muster to support their claim of a deeply rooted tradition are a few out-of-context and marginally relevant lines from one speech by James Madison followed by a 153-year leap to the adoption of Article XI. *See* Compl. ¶¶ 8-9.

action," especially given the global nature of emissions and the role of independent actors in the causal chain. *Ctr. for Biological Diversity v. United States DOI*, 563 F.3d 466, 478 (2009) (rejecting causal theory based on government oil and gas development leasing program). To provide one illustrative—and typical—example of the overly attenuated causal reasoning Plaintiffs depend upon: (1) the challenged statutes inform Defendants' discretion in issuing permits for fossil fuel infrastructure, (2) third parties engage in projects under those permits, (3) those projects result in emissions, (4) those emissions incrementally contribute to global climate change, (5) global climate change results in higher temperatures locally, (6) those higher temperatures provide a more favorable environment for the emerald ash borer to infest ash trees, (7) additional ash trees are "gradually" rendered susceptible to falling, (8) Plaintiffs are allegedly injured by needing to avoid "the woods when it's windy" and remove fallen trees. *See* Compl. ¶¶ 35, 42, 44, 80-122, 135.

Second, the premise of their causation theory fails because "Plaintiffs simply ignore that Defendant agencies and officers *do not produce* greenhouse gases, but act to regulate those third parties that do." *Clean Air Council*, 362 F. Supp. 3d at 249 (holding plaintiffs' alleged injuries from climate change were not traceable to the challenged conduct of regulators); *French v. Va. Marine Res. Comm'n*, 64 Va. App. 226, 234 (2015) (Kelsey, J.) (rejecting claim that "issuance of [a bridge building] permit, by itself has the legal effect of" violating plaintiff's "property rights" because "the VMRC issued the permit but did not build the bridge" and "[a]s a matter of law . . . the *bridge* may or may not affect such rights, but the *permit* does not.").

Indeed, Defendants' conduct and Virginia's regulatory scheme actually reduce net emissions. As the *Aji P.* court recognized in rejecting similar claims, "the State's regulation of GHG emissions, although it fails to provide for the reductions that the Youths claim are necessary . . . still places the Youths in a position of lesser danger than that which they would be in if the

State chose not to regulate GHG emissions at all." 480 P.3d at 457. Moreover, Plaintiffs admit that there has been a "decline in the past 10 years" in Virginia's gas production, that "Virginia's emissions have declined from their peak in 2005," and that current Virginia law provides for "net-zero emission by 2045." Compl. ¶¶ 96, 114, 161; Va. Code § 45.2-1706.1. Virginia's falling emissions under its existing regulatory scheme are not the legal cause of Plaintiffs' injuries.

G. Plaintiffs' claims are procedurally and statutorily prohibited.

Ignoring Virginia's substantive and procedural requirements for challenging regulatory permits, the Complaint attacks them *en masse*. This Court should not tolerate a suit sidestepping those requirements because "[i]t is a long settled rule of judicial administration that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted." *Fauquier Cnty. Dep't of Soc. Servs. v. Robinson*, 20 Va. App. 142, 152 (1995). Plaintiffs concede that they have not sought any administrative remedy, averring that such a remedy "is not equal to the relief sought." Compl. ¶ 188. But the stated basis for Plaintiffs' relief is that it will "inform" and "guide the future actions of Defendant[s]"—*i.e.*, it will influence their future permitting decisions. *Id.* ¶¶ 187-88. Thus, raising the Complaint's arguments in administrative challenges to those individual permits provides what Plaintiffs purportedly seek. Moreover, there are specific statutory requirements for challenging a permit under the Gas and Oil Act. *See* Va. Code §§ 45.2-1632, -1637. This Court should not allow Plaintiffs to dodge those requirements via collateral suit.

IV. CONCLUSION

The Court should sustain Defendants' Plea of Sovereign Immunity and Demurrer, dismiss the Complaint with prejudice, and grant any other relief that the Court deems just and proper. [11]

[11] Plaintiffs' request for "costs" and "attorneys' fees," Compl. at p. 72, is barred by their failure to plead a basis for such costs and the rule that "in the absence of a statute or contract to the contrary, a court may not award attorney's fees." *Russell Cnty. Dep't of Soc. Servs. v. O'Quinn*, 259 Va. 139, 142 (2000) (denying "attorney's fees in a declaratory judgment action.").

July 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, pursuant to an agreement of counsel, a true and correct copy of the foregoing Brief in Support of Defendants' Demurrer and Plea of Sovereign Immunity was sent by electronic mail to the following addresses:

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