COMMONWEALTH *of* VIRGINIA

Office of the Attorney General

Jason S. Miyares
Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

September 2, 2022

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 Reply 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.	)	

REPLY 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 Reply Brief in Support of their Demurrer and Plea of Sovereign Immunity.

Plaintiffs' Brief in Opposition to Defendants' Demurrer and Plea of Sovereign Immunity (the "Opposition") only confirms that the Complaint should be dismissed. As a threshold matter, the Opposition simply ignores the wealth of directly on-point authority from courts across the country, including many state courts of last resort, evaluating and rejecting the precise substantive theories Plaintiffs advance in the present action.[1] Instead of addressing these cases substantively,

---

[1] *See, e.g.*, *Sagoonick v. State*, 503 P.3d 777, 782 (Alaska 2022) (affirming dismissal of youth plaintiffs' climate change case seeking declaratory and injunctive relief based on substantive due process and public trust doctrine claims); *Aji P. v. State*, 480 P.3d 438, 444-45 (Wash. Ct. App. 2021) (affirming dismissal of youth plaintiffs' climate change case seeking declaratory and injunctive relief based on substantive due process and public trust doctrine claims); *Iowa Citizens for Cmty. Improvement & Food & Water Watch v. State*, 962 N.W.2d 780, 785, 799 (Iowa 2021) (ordering dismissal of a complaint based on the public trust doctrine); *Reynolds v. State of Florida*, 316 So. 3d 813 (Fla. Dist. Ct. App. 2021) (dismissing youth plaintiffs' climate change case seeking

Plaintiffs dismiss them without elaboration as "out-of-state cases," while themselves relying on a single decision from a Montana trial court in ongoing proceedings subject to appeal. *See* Opp. at 1, n.2, 16.[2] It would be hard to imagine a more lopsided split in authority, except that the Opposition repeatedly advances positions for which Plaintiffs cannot cite even a *single* supporting case. The Opposition offers no reason for this Court to depart from the great weight of authority and the consistent approach of courts across the country in rejecting Plaintiffs' claims.

I. ARGUMENT

The Opposition confirms that this Court should dismiss the Complaint with prejudice on any of multiple independently sufficient grounds. *First*, the Opposition acknowledges that Defendants are shielded by sovereign immunity and that Plaintiffs' claims can proceed only if that immunity has been waived. Plaintiffs, however, cannot cite a single case supporting a waiver of sovereign immunity with respect to their constitutional and common law claims. *Second*, the Opposition does not identify a single case recognizing any of Plaintiffs' purported rights of action, thereby confirming that Virginia law does not recognize those rights of action. *Third*, "Plaintiffs agree the executive and legislative branches are responsible for shaping energy policy," yet they simultaneously pursue legal arguments and a theory of causation that would force this Court to oversee and make policy decisions violating the separation of powers. Opp. at 17. *Fourth*, the

---

declaratory and injunctive relief); *Juliana v. United States*, 947 F.3d 1159, 1170-75 (9th Cir. 2020) (instructing district court to dismiss youth plaintiffs' climate change case seeking declaratory and injunctive relief); *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 253 (E.D. Pa. 2019) (rejecting substantive due process and public trust doctrine claims in dismissing climate change case); *Svitak v. State*, 2013 Wash. App. LEXIS 2836, at *4-5, 12 (Wash. Ct. App. Dec. 16, 2013) (dismissing complaint based on the public trust doctrine seeking declaratory and injunctive relief).

[2] *See Held v. State of Montana*, Case No. CDV-2020-307, *16-17, 19-22 (Mont. First Jud. Dist. Ct. Lewis & Clark Cnty., Aug. 4, 2021) (declining to dismiss claims for declaratory relief but holding the court "lacks the authority to grant Youth Plaintiffs' injunctive relief" because "[s]uch expansive relief presents a political question and exceeds the court's powers").

Opposition reveals that Plaintiffs not only lack statutory standing to seek a declaratory judgment, but also standing to pursue this entire action. *Fifth*, the Opposition demonstrates that Plaintiffs have not—and cannot—state a claim for a violation of either their purported substantive due process rights under the Constitution of Virginia or their alleged common law *jus publicum* rights.

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

The Opposition does not dispute that Defendants' sovereign immunity bars Plaintiffs' claims for both declaratory and injunctive relief unless those claims are based on "self-executing" constitutional provisions. Opp. at 2-3; *see also* Br. at 5-6; *Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137 (2011) (only "self-executing provisions of the Constitution of Virginia" waive sovereign immunity); *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 101 (2008); *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007). But the Opposition fails to identify a self-executing provision to rely upon. Given the Supreme Court of Virginia's express holding that "Va. Const. art. XI, § 1, is not self-executing," *Robb v. Shockoe Slip Foundation*, 228 Va. 678, 683 (1985), Plaintiffs abandon their claim based on that constitutional provision. Plaintiffs now exclusively argue that (a) Article I, § 11 of the Constitution of Virginia[3] and (b) the common law *jus publicum* doctrine are self-executing and abrogate Defendants' sovereign immunity.[4] Opp. at 4-5, 9-11. Thus, with respect to Defendants' Plea of Sovereign Immunity, the dispositive issues are (a) whether Article I, § 11 is self-executing and (b) whether a common law doctrine is capable of waiving sovereign immunity and, if so, whether the *jus publicum* does in fact waive immunity.

---

[3] Article I, § 11 provides in relevant part that "no person shall be deprived of his life, liberty, or property without due process of law." Va. Const. art. I, § 11. The Opposition confirms that Plaintiffs only allege violations of their "substantive due process rights to life and liberty." Opp. at 3. Plaintiffs have not brought a takings claim. *See, e.g.*, Compl. ¶¶ 178-80.

[4] Plaintiffs offer no argument that Article I, Sections 1 and 17 are self-executing. *See* Br. 7-8 (explaining why neither Article I, § 1 nor § 17 is self-executing).

Article I, § 11 is not Self-Executing. Plaintiffs' claim that Article I, § 11's provisions regarding life and liberty are self-executing stands in direct conflict with *every single court* to consider that question. Simply put, the many courts to rule on this issue have repeatedly and universally held that Article I, § 11's Due Process Clause "is not self-executing and does not support a private cause of action" with respect to life and liberty. *Chandler v. Routin*, 63 Va. Cir. 139, 141 (Norfolk Cnty. Cir. Ct. 2003); *see also Jones v. City of Danville*, Case No. 4:20-cv-20, 2021 U.S. Dist. LEXIS 157888, at *33 (W.D. Va. Aug. 20, 2021) (dismissing "plaintiff's state constitutional claim [] for failure to reference a relevant self-executing provision of the Virginia Constitution" because "Article 1, Section 11 is Virginia's Due Process Clause and is self-executing only in the context of claims of damages to or takings of property."); *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 not universally self-executing, but is only self-executing regarding the takings clause."); *Delk v. Moran*, Case No. 7:16-cv-554, 2019 U.S. Dist. LEXIS 49950, at *11 (W.D. Va. Mar. 26, 2019) (holding plaintiff "fail[ed] to state a cognizable claim based on" Article 1, § 11 because "Virginia's Due Process Clause [] is self-executing only in the context of [takings] claims."); *Calloway v. Virginia*, Case No. 5:16-cv-81, 2017 U.S. Dist. LEXIS 153018, at *9-10 (W.D. Va. Sep. 20, 2017) (dismissing "claims brought pursuant to Article 1, Sections 10 and 11" because the "case d[id] not involve the taking of property under Section 11"); *Quigley v. McCabe*, Case No. 2:17-cv-70, 2017 U.S. Dist. LEXIS 141408, at *15 (E.D. Va. Aug. 30, 2017) (same); *K.I.D. v. Jones*, Case No. CL14-51, 2016 Va. Cir. LEXIS 103, at *31 (Richmond Cnty. Cir. Ct. June 8, 2016) ("[C]ase law holds that other than for a claim against the government for depriving an individual of property without just compensation, the rights referred to [in Article I, § 11] are not self-executing."); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 728

(E.D. Va. 2015) (dismissing plaintiff's "allegation of a Virginia Constitution due process violation" with "regard to liberty interests" because "the due process provision of the Virginia Constitution is 'self-executing' . . . only . . . with regard to property deprivation."); *Boren v. Nw. Reg'l Jail Auth.*, Case No. 5:13-cv-013, 2013 U.S. Dist. LEXIS 140169, at *35 (W.D. Va. Sep. 30, 2013) (holding that "Article I, § 11" is not self-executing "for the deprivation of life or liberty"); *Botkin v. Fisher*, Case No. 5:08-CV-58, 2009 U.S. Dist. LEXIS 24554, at *16 (W.D. Va. Mar. 25, 2009) (same); *Young v. City of Norfolk*, 62 Va. Cir. 307, 312 (Norfolk Cnty. Cir. Ct. 2003) ("Article I, § 11, of the Constitution of Virginia embraces many objects, but only its provisions governing the taking or damaging of private property for public use have been held to be 'self-executing.'"); *Gray v. Rhoads*, 55 Va. Cir. 362, 368 (Charlottesville Cnty. Cir. Ct. 2001) (holding Article I, § 11 is not self-executing with respect to the "deprivation of life and liberty").

Plaintiffs did not identify—and Defendants have not found—*a single case* adopting Plaintiffs' position that Article I, § 11 is self-executing with respect to life and liberty. As a result, Plaintiffs have nothing but the bare assertion that Article I, § 11 is self-executing because it "prohibits particular conduct" and appears in "the Bill of Rights." Opp. at 4. The extraordinarily broad scope Plaintiffs assign to the liberty protected by Article I, § 11, however, belies their claim that it constitutes a prohibition on *particular* conduct. Rather, as the courts to address the provision have recognized, "there is no language rendering Article I, § 11, self-executing, and the provision states a principle without a remedy." *Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d at 735. In other words, "it lays down no rules by means of which the principles it posits may be given the force of law" and therefore cannot be self-executing. *Robb*, 228 Va. at 682. Moreover, whether a provision appears in the Bill of Rights is but one consideration in determining whether it is self-executing; it is by no means determinative. *See, e.g.*, *Chandler*, 63 Va. Cir. at 141

("Although Article I, § 1, is part of the Bill of Rights . . . [it] is not self-executing and does not support a private cause of action."); *Delk*, 2019 U.S. Dist. LEXIS 49950, at *10 ("Va. Const. art. I § 9 states only the principle that cruel and unusual punishment ought not to be inflicted, without any attendant rules; therefore, § 9 is not self-executing.").

Unable to rely on any basis in Virginia law, the Opposition opts for vague citations to federal case law interpreting separate provisions of the federal Constitution to support Plaintiffs' state law claims. *See* Opp. at 5 ("federal precedent supports this Court holding that substantive due process provisions are self-executing"). These citations are wholly misplaced. *First*, Plaintiffs elected to bring a Complaint devoid of any federal claims, rendering these cases regarding *federal* law inapposite. *See generally infra* Part F. *Second*, Plaintiffs' attempt to tie whether provisions of state law are self-executing to federal law is contradicted by the cases that dismiss state law claims brought under Virginia's Due Process Clause because that provision is not self-executing, while addressing federal claims brought under the Fourteenth Amendment's Due Process Clause on the merits. *See, e.g.*, *Delk*, 2019 U.S. Dist. LEXIS 49950, at *11, *35 (dismissing due process claim under the Constitution of Virginia because the relevant provision of § 11 is not self-executing, while separately addressing the substance of plaintiff's "Fourteenth Amendment due process claims"); *Boren*, 2013 U.S. Dist. LEXIS 140169, at *24-30, 32-35 (denying motion to dismiss with respect to Fourteenth Amendment claims, but granting it with respect to claims under Article I, § 11 because that provision is not self-executing). *Third*, the Supreme Court of Virginia has already rejected Plaintiffs' argument. Plaintiffs analogize to the exception to sovereign immunity for violations of federal law recognized in *Ex parte Young*, 209 U.S. 123 (1908), apparently asking this Court to create a similar doctrine under Virginia law. *See* Opp. at 5. The Supreme Court of Virginia, however, has already refused to recognize such a generalized equitable

exception to sovereign immunity. *See Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 455-56 (2005).

The Common Law Jus Publicum is not Self-Executing. The unambiguous weight of authority foreclosing Plaintiffs' reliance on any express provision of the Virginia Constitution leads Plaintiffs to propose the novel theory that "*jus publicum* claims are self-executing" and "waive the Commonwealth's sovereign immunity." Opp. at 9. This position is fundamentally flawed and contrary to binding Supreme Court precedent.

First, Plaintiffs concede that the *jus publicum* is a "common law doctrine[]." Opp. at 10. Yet, the Supreme Court has repeatedly held that an "express statutory or constitutional provision" is required to waive sovereign immunity. *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244 (2004); *Ligon v. Cnty. of Goochland*, 279 Va. 312, 316 (2010) ("[T]he Commonwealth is immune . . . unless an express statutory or constitutional provision waives that immunity."); *Gray*, 276 Va. at 102 ("Only the General Assembly, acting in its capacity of making social policy, can abrogate the Commonwealth's sovereign immunity . . . [and a] waiver of sovereign immunity will not be implied."). There is no basis for Plaintiffs' contention that a "common law doctrine" can waive sovereign immunity, much less do so by implication.[5] Unsurprisingly, Plaintiffs have not cited *a single case* where a common law doctrine was found to abrogate sovereign immunity.

Second, finding alleged common law *jus publicum* rights to be self-executing would make a mockery of the Supreme Court's holding that "Va. Const. art. XI, § 1, is not self-executing." *Robb*, 228 Va. at 683. Moreover, even if *Robb*'s holding regarding Article XI did not control this case, its reasoning would mandate the same result with respect to a common law *jus publicum*

[5] Plaintiffs assert the *jus publicum* doctrine is "unlike other common law doctrines because it *predates* the Virginia Constitution." Opp. at 10. This fact is meaningless. The doctrine of sovereign immunity also predates the 1971 Constitution as do numerous common law doctrines.

theory. Namely, the Court held Article XI is not self-executing because it "lays down no rules by means of which the principles it posits may be given the force of law" and "its language invites crucial questions of both substance and procedure." *Id.* at 682. Plaintiffs' own theory is that Article XI "defines the *scope* of the *jus publicum* rights" at common law. Opp. at 12. As a result, those purported rights would, by definition, also provide "no rules" and beg "crucial questions" making them not self-executing. *Robb*, 228 Va. at 682.

The lack of any self-executing provision to overcome Defendants' sovereign immunity leaves Plaintiffs to assert that their alleged rights waive sovereign immunity because "they *must* be enforceable in the Commonwealth's courts." Opp. at 4 (emphasis in original), 20 (same). This is *ipse dixit* logic, not legal argument. Moreover, this position ignores that the entire purpose of sovereign immunity is to render the sovereign immune from certain suits, regardless of their underlying merit or lack thereof. *See Ligon*, 279 Va. at 316 ("[T]he Commonwealth is immune . . . *from suits*.") (emphasis added); *cf. Kidd v. Tex. PUC*, 481 S.W.3d 388, 394-95 (Tex. Ct. App. 2015) ("That sovereign immunity might arbitrarily deprive a litigant of judicial remedies for its grievances against government or be perceived to operate inequitably is, like it or not, a characteristic feature of this centuries-old doctrine.").

In sum, this Court should sustain Defendants' Plea of Sovereign Immunity because Plaintiffs have not identified any waiver or abrogation of Defendants' sovereign immunity.

B. The Opposition confirms Plaintiffs lack a right of action.

The lack of a right of action is fatal to Plaintiffs' claims. Yet, in their Opposition, Plaintiffs gloss over the question of whether any constitutional provision or common law doctrine provides them a private right of action. "Provisions of the Virginia Constitution only provide for a private right of action if they are self-executing." *Chandler*, 63 Va. Cir. at 140. Thus, for the same reasons that Article I, § 11 is not self-executing, it also does not provide a right of action. *See supra* Part

A; *see also 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."); *Quigley v. McCabe*, 91 Va. Cir. 397, 399 (Norfolk Cnty. Cir. Ct. 2015) (holding that "no private right of action exists under § 11" of the Virginia Constitution "except for [takings] claims"); *Boren*, 2013 U.S. Dist. LEXIS 140169, at *35 ("Virginia courts have repeatedly rejected the assertion that a private right of action exists under Article I, § 11 for the deprivation of life or liberty.").

Nor does the concept of *jus publicum* rights invest individual plaintiffs with a private right of action. *See* Br. at 14. Plaintiffs again do not cite *a single case* in this Commonwealth where a private plaintiff brought a claim under a *jus publicum* common law doctrine. Rather Plaintiffs exclusively rely upon *Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371 (2014), which concerned an appeal pursuant to the Virginia Administrative Process Act, and *Commonwealth ex rel Attorney Gen. v. Newport News*, 158 Va. 521, 526 (1932), which involved "a bill brought by the Commonwealth of Virginia," not a private party.[6] Opp. at 9-13. As neither Article I, § 11 nor the concept of *jus publicum* rights provide a right of action—and Plaintiffs do not advance any other possible source of a right of action—the Complaint can be dismissed on this basis alone.

C. The Opposition confirms that adjudicating Plaintiffs' claims would violate the separation of powers.

The parties agree that 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 the others." Va. Const. art. III, § 1; *see* Opp. at 16. And Plaintiffs do not dispute that

[6] *Cf. Town of Nags Head v. Toloczko*, 728 F.3d 391, 397 (4th Cir. 2013) (under North Carolina law "only the State . . . has standing to bring an action to enforce the State's public trust rights."); *Pappas v. Cnty. of Milwaukee*, 819 N.W.2d 562, ¶ 12 (Wis. Ct. App. 2012) ("The public trust doctrine itself does not provide a plaintiff with an affirmative cause of action.").

pursuant to the separation of powers, "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); *see* Opp. at 16; Br. at 9. Indeed, "Plaintiffs agree the executive and legislative branches are responsible for shaping energy policy." Opp. at 17.

Having accepted these foundational principles, Plaintiffs' entire argument with respect to the separation of powers hinges on their claim that their requested "relief keeps the Court squarely in its lane and *continues to leave policy choices to the political branches*." Opp. at 17 (emphasis added). Not so. Although Plaintiffs attempt to disguise the vast scope of the Complaint, including by refusing to name the injunctive relief sought,[7] it is undeniable that adopting their theory of the case would require this Court—and the judiciary overall—to take on a policy making role and, as numerous courts confronting the same claims have recognized, "usurp the authority and responsibility of the other branches" of government. *Aji P.*, 480 P.3d at 448-49; *see also Iowa Citizens*, 962 N.W.2d at 785; *Svitak*, 2013 Wash. App. LEXIS 2836, at *4-5; Br. at 10-11.

The Opposition demonstrates on its own terms the vast scope and policy-centric nature of the relief sought by Plaintiffs. Plaintiffs try to narrow the Complaint by claiming it "only address[es] the discrete conduct of permitting fossil fuel infrastructure, and [] limited sections of

[7] Plaintiffs attempt to justify refusing to disclose the injunctive relief they seek by noting "whether a court should issue an injunction is deferred until the issue is heard on the merits, because it is a question of fact" and "plaintiffs must prove" their case to obtain an injunction. Opp. at 18-19. Although it is true that a court can only *grant* a permanent injunction after fully hearing a matter, a court is also entitled to *dismiss* a claim for injunctive relief on demurrer. In evaluating the Complaint's request for injunctive relief, the Court is under no obligation to pull the wool over its own eyes and ignore the logical consequence of Plaintiffs' own legal theories. That is especially true when Plaintiffs' counsel has identified that logical consequence repeatedly in other cases bringing the same claims based on the same theory of causation. *See* Br. at 3, n.1.

the Virginia Gas and Oil Act." Opp. at 1. That, however, is a remarkably broad field because such infrastructure includes the "production, transport, and burning of fossil fuels," which Plaintiffs maintain constitutes "80% of Virginia's energy." *Id.* at 1 n.1, 15. Moreover, Plaintiffs seek to establish "that future approval of fossil fuel infrastructure is violative of Plaintiffs' rights," *id.* at 18, and to "guide *all future actions* of Defendants," *id.* at 20 (emphasis added). In other words, Plaintiffs ask this Court for relief that would not only govern every aspect of fossil fuels and the vast majority of the Commonwealth's energy policy, but that would also preclude the political branches of government from electing to authorize or approve future energy infrastructure of a certain kind—namely, fossil fuels—regardless of their other actions with respect to energy and the environment. This is not a challenge to "discrete conduct." *Id.* at 1.[8]

Of course, the foregoing discusses only the relief Plaintiffs readily admit they seek. Their legal arguments and theory of causation, however, have an indisputably broader reach. At bottom, Plaintiffs allege their purported legal rights are violated by the derivative consequences of certain secondary effects of global climate change. *See* Br. at 3. Plaintiffs, however, do not tie any of their injuries directly to Virginia's existing policy regarding fossil fuel infrastructure. Rather, the Complaint manufactures a connection via a highly attenuated causal theory. *See* Br. at 19 (explaining Plaintiffs' eight step theory of causation); *see also* Compl. ¶¶ 80-122. Central to their theory of causation is Plaintiffs' allegation that "every tonne of CO2 emissions adds to global warming and increases the frequency and severity of climate impacts." Opp. at 15. Thus, every action contributing to emissions, no matter how indirect, injures Plaintiffs under their theory of

[8] Demonstrating the near-boundless scope of Plaintiffs' claims, they brought this action despite conceding 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.

causation. There is no logical limiting principle.

Plaintiffs' position, if accepted, would thus necessarily "herald long-term judicial involvement," *Iowa Citizens*, 962 N.W.2d at 792, by forcing the courts to oversee any and all governmental action or inaction that allegedly results in emissions—or even that fails to reduce emissions at a rate a plaintiff deems adequate. In short, Plaintiffs seek to have the judiciary "impose ad hoc" energy and environmental policy "based on case-by-case adjudications of individual fundamental rights." *Sagoonick*, 503 P.3d at 796 (dismissing similar claims for declaratory and injunctive relief). That undeniably removes "policy choices [from] the political branches," Opp. at 17, violating the separation of powers, *see, e.g.*, *Clean Air Council*, 362 F. Supp. 3d at 251; Br. at 8-12.

D. The Opposition reveals Plaintiffs lack standing to pursue their claims.

The gravamen of the Complaint is Plaintiffs' generalized allegation that the challenged statutory provisions and Defendants' conduct permit fossil fuel infrastructure that creates emissions that in turn contribute to climate change. *See* Opp. at 1. The requirement of particularized injury for standing, however, precludes Plaintiffs from litigating climate change generally. *See Wilkins v. West*, 264 Va. 447, 458 (2002); Br. at 18-20. Recognizing this problem, Plaintiffs go to great lengths to connect alleged "unique, personal injuries," such as catching Lyme disease from a tick, to the secondary effects of climate change. Opp. at 14. In doing so, however, Plaintiffs are forced to add numerous steps to their alleged causal chain running back to Defendants' permitting conduct, which renders that chain far too attenuated to establish causation. *See Ctr. for Biological Diversity v. United States DOI*, 563 F.3d 466, 478 (2009); Br. at 18-20. As a result, Plaintiffs' injuries are either (a) non-particularized, depriving them of standing, or

(b) particularized but too attenuated to be traceable to Defendants' conduct. Either way, the Complaint should be dismissed.

Moreover, in focusing on "particularized" injury, the Opposition ignores the other requirements for standing. Most notably, a plaintiff must demonstrate that their "rights will be affected by the disposition of the case." *Goldman v. Landsidle*, 262 Va. 364, 371 (2001). Plaintiffs cannot make that showing—especially if they are now disclaiming injunctive relief—because "a declaration that the government is violating the Constitution [with respect to fossil fuels and climate change] . . . alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries. A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action." *Juliana*, 947 F.3d at 1170 (remanding and ordering dismissal due to lack of redressability); *see also* Br. at 12-13. For the same reason, Plaintiffs also lack statutory standing to pursue a declaratory judgment, as they cannot show that it will provide "specific relief through a decree of a conclusive character." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 98 (2013); *see also* Br. at 13.[9]

E. Plaintiffs have not alleged a violation of any *jus publicum* rights.

The Opposition confirms that Plaintiffs have failed to state a claim for any violation of their alleged *jus publicum* rights. In an attempt to salvage Counts I and III of the Complaint, Plaintiffs in their Opposition ask this Court to take the unprecedented steps of enforcing a non-

[9] "[T]he purpose of a declaratory judgment action is not to resolve disputed facts." *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 55, (2018). Yet, the Opposition avers that the "ultimate question of Defendants' role in causing and contributing to Plaintiffs' injuries is *a fact intensive inquiry*." Opp. at 16 (emphasis added). As a result, Plaintiffs' requests for declarations that Defendants have violated or impaired their purported rights are additionally inappropriate. *See* Compl. at p. 71(A)(4)-(9).

self-executing constitutional provision as a matter of common law and extending the *jus publicum* to the "atmosphere." Opp. at 12-13. Unsurprisingly, Plaintiffs once again do not—and cannot—cite a single case to support this radical maneuver. *See id.* at 11-13. Nor do they dispute that the "public trust doctrine has *never* been applied to the atmosphere." *Aji P.*, 480 P.3d at 457 (emphasis added); *see also* Br. at 16, n.7 (collecting cases). And even if the Court were to accept that radical extension, Plaintiffs *still* would not have stated a claim because Article XI, § 2 recognizes the General Assembly's discretionary authority with regard to the conservation of natural resources, *see* Va. Const. art. XI, § 2, and the *jus publicum* 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, *Newport News*, 158 Va. at 556; *Chincoteague Inn*, 287 Va. at 383 ("the *jus publicum* is . . . subject to . . . the General Assembly's modification by statute."). As a result, Plaintiffs' claims fail under any theory because they are in effect challenging an exercise of that discretion.

Properly understood, the common law *jus publicum* doctrine in this Commonwealth concerns only a "public right *to navigate* the Commonwealth's waters." *Chincoteague Inn*, 287 Va. at 387 (emphasis added). Perhaps recognizing the absence of any authority for their expansive conception of *jus publicum* rights, Plaintiffs attempt to save the Complaint by alleging "their ability to access and utilize the Commonwealth's waterways" for swimming and other recreational activities "is being impaired." Opp. at 13; Compl. ¶¶ 29, 47. "The right of navigation, for purposes of the public right inherent to the *jus publicum*," however, "is the right to move and transport goods from place to place over the great natural highways provided by the navigable waters of the State without let or hindrance from or charge by any private person or corporation." *Chincoteague Inn*, 287 Va. at 387. Thus, Plaintiffs' activities are far outside the scope of the *jus publicum*. Indeed,

in *Newport News*, the Supreme Court rejected a *jus publicum* claim even where the challenged conduct of discharging "raw sewage" resulted in "pollution" that "rendered [certain] waters unfit for bathing purposes" because the "right of the public to bathe in and use the waters of the" Commonwealth "for other pleasure purposes is . . . clearly an incident of the State's *jus privatum*," not the *jus publicum*. *Newport News*, 158 Va. at 528, 531. Thus, binding Supreme Court precedent forecloses Plaintiffs' *jus publicum* claims. In short, Counts I and III should be dismissed because there is no legal basis for Plaintiffs' *jus publicum* claims.

F. Plaintiffs have not alleged a violation of any substantive due process rights.

The Opposition confirms that Plaintiffs have not—and cannot—plead a violation of any substantive due process rights. *First*, the Opposition only bolsters the conclusion that the Due Process Clause of the Constitution of Virginia does not include a substantive component. *Second*, even if the Due Process Clause did have substantive component, it would not recognize the right Plaintiffs' claim. *Third*, Plaintiffs cannot rely upon purported violations of federal constitutional rights because (a) they did not bring any federal claims in this case and (b) their allegations would not establish a violation of those rights regardless.

In addressing Justice McCullough's explanation that 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), Plaintiffs prove his point. As Justice McCullough explained, the Virginia case law regarding substantive due process has "*assumed* the existence of a substantive component to our Due Process Clause," but has "never undertaken the textual or historical inquiry necessary to" make that determination. *Id.* Rather, the discussion of substantive due process "has always been in connection with case law from the United States Supreme Court and the Constitution of the United States." *Id.* In attempting to refute this position, Plaintiffs cite four

Virginia cases that all involved claims brought under both the Federal Constitution and the Constitution of Virginia. Opp. at 6.[10] As a result, each of these cases is merely an example of an instance in which the Supreme Court of Virginia had no need to address whether the Due Process Clause of the Constitution of Virginia independently contained a substantive component because the federal provision would apply. These cases do nothing to refute Justice McCullough's analysis. Indeed, half of the Virginia cases cited by Plaintiffs are the very examples Justice McCullough provided. *See Palmer*, 293 Va. at 585 (citing *Walton*, 255 Va. 422 and *Etheridge*, 237 Va. 87).

Even assuming that the Virginia Constitution includes a substantive component of the Due Process Clause, Plaintiffs acknowledge that component would only protect a right that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Opp. at 7 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The Opposition confirms that Plaintiffs cannot make this showing.

As an initial matter, the Opposition makes no attempt to dispute the substantial authority rejecting their claimed substantive due process right to "an atmosphere, lands, and waters free from pollution, impairment, or destruction." Opp. at 7; Br. at 17-18 (collecting cases rejecting Plaintiffs' alleged substantive due process right); *see also, e.g.*, *Aji P.*, 480 P.3d at 453-54 (holding "[a]n examination of 'our Nation's history, legal traditions, and practices' presents no evidence of a

---

[10] *See Shivaee v. Commonwealth*, 270 Va. 112, 118 (2005) (plaintiff alleged a statute "violate[d] both the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 8, 9, and 11 of the Constitution of Virginia"); *Willis v. Mullett*, 263 Va. 653, 657 (2002) (plaintiff claimed a statute violated the "due process rights guaranteed to him by both the United States Constitution and the Constitution of Virginia."); *Walton v. Commonwealth*, 255 Va. 422, 427 (1998) (plaintiff claimed a statute "violate[d] his substantive due process rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 11 of the Virginia Constitution."); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 91 (1989) (evaluating whether the challenged statute "violates either the Federal or Virginia Constitution").

liberty interest in a healthful and peaceful environment").[11] Rather, Plaintiffs are only able to cite a single federal district court decision in support of their position. *See* Opp. at 8 (citing *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016)). That decision, however, was not only reversed by the Ninth Circuit as addressing nonjusticiable issues, *see Juliana*, 947 F.3d at 1175 ("revers[ing] the certified orders of the district court" and instructing dismissal "for lack of Article III standing"), but has also been repeatedly criticized, *see Clean Air Council*, 362 F. Supp. 3d at 250, 254 (observing "the *Juliana* Court certainly contravened or ignored longstanding authority" and its "reasoning is less than persuasive"); *Aji P.*, 480 P.3d at 454-55 ("[W]e are not persuaded by *Juliana I*'s conclusion," including because it "was reversed based on the nonjusticiability of the question presented and therefore is not a final order with persuasive authority.").

Nor would Plaintiffs' efforts to create a novel substantive due process right fare any better even if this were an issue of first impression. In their attempt to satisfy *Glucksberg*'s stringent requirements, all Plaintiffs can point to are a few lines from one speech by James Madison in 1818 and the adoption of Article XI in the 1971 Constitution of Virginia. *See* Opp. at 7-8; Compl. ¶¶ 8-9. These isolated allegations do not represent a right "deeply rooted in this Nation's history and tradition" and certainly do not satisfy the "utmost care" a court must exercise when asked to recognize a right under the Due Process Clause. *Glucksberg*, 521 U.S. at 720-21. Indeed, Plaintiffs' only allegations of a consistent "history and tradition" concern Virginia's "history and tradition" of permitting fossil fuel infrastructure. *See, e.g.*, Compl. ¶¶ 2 (discussing "Defendants' historic and ongoing permitting of fossil fuel infrastructure"), 95 (recognizing "Defendants'

[11] Similarly, Plaintiffs do not dispute that "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* Br. at 17, n.8. Thus, their attempt to read a right that tracks the language of Article XI into the Due Process Clause fails from the outset.

longstanding policy and practice of permitting fossil fuel infrastructure").[12]

Lastly, Plaintiffs try to salvage their substantive due process claims by pivoting to an argument that they have alleged violations of "previously recognized liberty rights." Opp. at 8. Plaintiffs, however, cite no authority recognizing any of these purported rights under the Constitution of Virginia. Rather Plaintiffs exclusively rely on federal case law regarding rights under the United States Constitution. *See* Opp. at 8, n. 4-8. This reliance is misplaced. Plaintiffs elected not to bring any federal claims, including any federal constitutional claims. As a result, Plaintiffs cannot piggyback on federal constitutional protections. Rather, they must establish a constitutional right under Virginia's Due Process Clause.

Moreover, even if Plaintiffs could invoke these federal rights in this action, the allegations in the Complaint and the passing argument in the Opposition do not come close to stating a claim for a violation of those rights. *First*, Plaintiffs, citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), allege a violation of the "right to personal security" based on exposure to storms. Opp. at 8 & n.4, Compl. ¶ 65. *Ingraham*, however, concerned "freedom from bodily restraint and punishment" and the principle "that the state cannot hold and physically punish an individual

[12] Tacitly conceding that their allegations regarding a "deeply rooted" right are woefully lacking, Plaintiffs seek to delay this Court's disposition of their claims until they can muster unspecified "additional historical evidence." Opp. at 8, n.3. There is no legal basis for denying a demurrer and permitting a facially deficient complaint to proceed based solely on a plaintiff's representation that they may offer additional arguments to support their claims in the future. Tellingly, the sole support Plaintiffs offer for this request is the Supreme Court's observation that courts should rule "based on the historical record compiled by the parties." *Id.* (quoting *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022).) Yet, in *Bruen*, the Court fully resolved a constitutional dispute on the record developed with respect to a motion to dismiss and rejected arguments that "a trial and factual findings" were necessary to decide the case. *Bruen*, 142 S. Ct. at 2125, 2159. Thus, *Bruen* stands for the exact opposite proposition that Plaintiffs claim and reaffirms that this Court can resolve Plaintiffs' constitutional claims on demurrer. In short, Defendants agree that this Court should rule on the "historical record" before it. Here, that means considering one speech by James Madison and Article XI of the Constitution of Virginia.

except in accordance with due process of law." 430 U.S. at 674 (holding that where authorities "*deliberately* decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain . . . Fourteenth Amendment liberty interests are implicated.") (emphasis added). Here no Plaintiff is being held, much less deliberately punished by the state.

Second, Plaintiffs allege a violation of their rights "to provide for their basic human needs" based on one Plaintiff's choice to let a family "garden wither every August" instead of paying "for the extra water required to maintain it." Opp. at 8-9 & n.5; Compl. ¶ 57. Plaintiffs cite *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989), in support of this proposition but misconstrue the right in question. In that case, the Supreme Court acknowledged the unremarkable "proposition that when the State takes a person into its custody and holds him there against his will," it cannot then "fail[] to provide for his basic human needs." *Deshaney*, 489 U.S. at 199-200. No Plaintiff is being held in custody here, rendering this principle inapposite.

Third, Plaintiffs cite *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), to allege a violation of their right to "establish a home and bring up children" because one Plaintiff "is now questioning whether she should bring more children into a world where they will bear the burden of a worsening climate crisis." Opp. at 8-9 & n.6; Compl. ¶ 46. Once again, Plaintiffs misconstrue the right in question, which in *Meyer* concerned the authority of parents to make decisions regarding their children's education and upbringing. *Meyer*, 262 U.S. at 400. Nothing in *Meyer*, or any other case, suggests that the United States Constitution requires the States to maintain a prospective parent's preferred natural environment, or that the citizen has a right to be free of subjective doubts and concerns about whether to bring children into the world.

Fourth, again citing *Meyer* and the right to "worship God according to the dictates of [one's] own conscience," Plaintiffs conclusorily allege interference with two Plaintiffs' "ability to

practice their religions." Opp. at 8-9 & n.7; Compl. ¶¶ 20, 27. Yet, Plaintiffs identify nothing about the challenged statutory provisions or Defendants' conduct that in any way restrains Plaintiffs from practicing their religions as they see fit. For example, one Plaintiff "often attends church service outdoors," and she is perfectly free to do so. Compl. ¶ 27. Moreover, the Supreme Court already rejected Plaintiffs' theory when considering analogous claims brought under the Free Exercise Clause because "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). As a result, "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not trigger heightened scrutiny. *Id.* at 441, 450-52 (holding the Free Exercise Clause did not prohibit "the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest," even assuming that conduct would "have devastating effects on traditional Indian religious practices.").

Fifth, Plaintiffs cite *Rochin v. California*, 342 U.S. 165, 174 (1952), to allege a violation of "bodily integrity" because one Plaintiff was bitten by a tick. Opp. at 8-9 & n.8; Compl. ¶ 51. Plaintiffs' allegations are simply not comparable to those in *Rochin*, in which the efforts of "agents of government to obtain evidence" included "[i]llegally breaking into the privacy of the petitioner," "struggl[ing] to open his mouth and remove what was there," and "forcibl[y] extracti[ng] his stomach's contents." *Rochin*, 342 U.S. at 172.

In sum, Plaintiffs have failed to state a claim for any violation of the Due Process Clause of the Constitution of Virginia. As a result, Counts II and IV should be dismissed.

II. 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.

September 2, 2022

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA, GOVERNOR GLENN YOUNGKIN, VIRGINIA DEPARTMENT OF ENERGY, DIRECTOR JOHN WARREN, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, AND DIRECTOR MICHAEL ROLBAND

By: T. Stw
Counsel for Defendants

Jason S. Miyares
Attorney General of Virginia

Andrew N. Ferguson (VSB No. 86583)*
Solicitor General

Steven G. Popps (VSB No. 80817)*
Deputy Attorney General

Jacqueline C. Hedblom (VSB No. 68234)*
Senior Assistant Attorney General

Erika L. Maley (VSB No. 97533)*
Principal Deputy Solicitor General

Graham K. Bryant (VSB No. 90592)*
Deputy Solicitor General

Thomas J. Sanford (VSB No. 95965)*
Assistant Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 692-0551
Facsimile: (804) 371-2087
Email: AFerguson@oag.state.va.us
SPopps@oag.state.va.us
JHedblom@oag.state.va.us
EMaley@oag.state.va.us
GBryant@oag.state.va.us
TSanford@oag.state.va.us
**Counsel of Record for Defendants*

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2022, pursuant to an agreement of counsel, a true and correct copy of the foregoing Reply Brief in Support of Defendants' Demurrer and Plea of Sovereign Immunity was sent by electronic mail to the following addresses:

Isak J. Howell
isak@howell-lawoffice.com
Counsel for Plaintiffs

Nate Bellinger
nate@ourchildrenstrust.org
Counsel for Plaintiffs

Kimberly Willis
kimberly@ourchildrenstrust.org
Counsel for Plaintiffs

T. Sanford

Thomas J. Sanford
Assistant Attorney General