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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DELANEY REYNOLDS, *et al*.

Plaintiffs/Appellants,

v.

Case No. 1D20-2036

L.T. Case No. 18-CA-00819

THE STATE OF FLORIDA; RON DESANTIS, in his official capacity as Governor of the State of Florida, *et al*.

Defendants/Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. APPELLANTS HAVE STANDING 1

A. Appellants Have Been Injured by Appellees' Conduct. 2

B. Appellants' Injuries Are Redressable by the Court. 4

II. APPELLANTS HAVE SUCCESSFULLY ESTABLISHED A VIABLE CAUSE OF ACTION 8

A. Appellants' Substantive Due Process Claims Are Viable. 8

B. Appellants' Claims Under the Public Trust Doctrine Are Viable. 12

III. APPELLANTS' CLAIMS DO NOT RAISE A POLITICAL QUESTION 14

IV. SEPARATION OF POWERS DOES NOT BAR APPELLANTS' CLAIMS 19

V. THE PRIMARY JURISDICTION DOCTRINE IS INAPPLICABLE TO APPELLANTS' CONSTITUTIONAL AND PUBLIC TRUST CLAIMS 20

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

5F, LLC v. Dresing,
142 So. 3d 936 (Fla. 2d DCA 2014) 11, 13

Adams Packing Ass'n, Inc. v. Fla. Dep't of Citrus,
352 So. 2d 569 (Fla. 2d DCA 1977) 20

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,
300 U.S. 227 (1937) 6

Alachua Cty. v. Scharps,
855 So. 2d 195 (Fla. 1st DCA 2003) 3

Albright v. Oliver,
510 U.S. 266 (1994) 11

Allen v. Wright,
468 U.S. 737 (1984) 4

Apthorp v. Detzner,
162 So. 3d 236 (Fla. 1st DCA 2015) 6

Askew v. Game & Fresh Water Fish Comm'n,
336 So. 2d 556 (Fla. 1976) 15

Baker v. Carr,
369 U.S. 186 (1962) 14, 16, 17, 18

Bennett v. Spear,
520 U.S. 154 (1997) 5

Brandon-Thomas v. Brandon-Thomas,
163 So. 3d 644 (Fla. 2d DCA 2015) 9, 11

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 9

Brown v. Firestone,
382 So. 2d 654 (Fla. 1980)..1

Brown v. Plata,
563 U.S. 493 (2011)..9

Bush v. Schiavo,
885 So. 2d 321 (Fla. 2004)..19

Chicago Title Ins. Co. v. Butler,
770 So. 2d 1210 (Fla. 2000)..16

Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.,
262 So. 3d 127 (Fla. 2019)..11, 16, 19

Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles,
680 So. 2d 400 (Fla. 1996)..1, 2

Cowart v. City of W. Palm Beach,
255 So. 2d 673 (Fla. 1971)..1

Ctr. for Biological Diversity v. U.S. Dep't of Interior,
563 F.3d 466 (D.C. Cir. 2009)..4

Dayton Bd. of Educ. v. Brinkman,
433 U.S. 406 (1977)..19

Dep't of Cmt'y Affairs v. Moorman,
664 So. 2d 930 (Fla. 1995)..15

Dep't of Revenue of Fla. v. Young Am. Builders,
330 So. 2d 864 (Fla. 1st DCA 1976)..9

Dep't of Transp. v. Morehouse,
350 So. 2d 529 (Fla. 3d DCA 1977)..19

DeSantis v. Fla. Educ. Ass'n,
No. 1D20-2470, 2020 WL 5988207 (Fla. 1st DCA Oct. 9, 2020)..5

Fla. Wildlife Fed'n v. State Dep't of Envtl. Regulation,
390 So. 2d 64 (Fla. 1980)..3

Florida v. Georgia,
138 S. Ct. 2502 (2018) 19

Foster v. Washington Dep't of Ecology,
No. 14–2–25295–1 SEA, 2015 WL 7721362
(Wash. Super. Ct. Nov. 19, 2015) 13

Gainesville Woman Care, LLC v. State,
210 So. 3d 1243 (Fla. 2017)..17

Gray v. Bryant,
125 So. 2d 846 (Fla. 1960)..14

Haire v. Fla. Dep't of Agric. & Consumer Servs.,
870 So. 2d 774 (Fla. 2004)..15

Hayes v. Guardianship of Thompson,
952 So. 2d 498 (Fla. 2006)..2

Ivory v. State,
299 So. 3d 1178 (Fla. 1st DCA 2020)..10

Juliana v. United States,
947 F.3d 1159 (9th Cir. 2020)..4, 5, 10

Juliana v. United States,
217 F. Supp.3d 1224 (D. Or. 2016)..10

Junco v. State Bd. of Accountancy,
390 So. 2d 329 (Fla. 1980)..20

Kanuk v. State Dep't of Nat. Res.,
335 P.3d 1088 (Alaska 2014)..17

Key v. State,
430 So. 2d 909 (Fla. 1st DCA 1983)..17

Krischer v. McIver,
697 So. 2d 97 (Fla. 1997) 9

Lambert v. People of the State of California,
355 U.S. 225 (1957) 11

Larson v. Valente,
456 U.S. 228 (1982) 5, 6

League of Women Voters of Florida v. Detzner,
172 So. 3d 363 (Fla. 2015) 6, 19

Lochner v. New York,
198 U.S. 45 (1905) 11

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 3, 4

Made in the USA Found. v. United States,
242 F.3d 1300 (11th Cir. 2001) 5

Martinez v. Scanlan,
582 So. 2d 1167 (Fla. 1991) 6

Massachusetts v. E.P.A.,
549 U.S. 497 (2007) 4, 5

Metro. Dade Cty. v. Dep't of Commerce,
365 So. 2d 432 (Fla. 3d DCA 1978) 7

Milliken v. Bradley,
433 U.S. 267 (1977) 7

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 5

Montgomery v. State,
45 So. 879 (Fla. 1908) 15

Nevitt v. Bonomo,
53 So. 3d 1078 (Fla. 1st DCA 2010) 3

Obergefell v. Hodges,
576 U.S. 644 (2015) 9

Peregood v. Cosmides,
663 So. 2d 665 (Fla. 5th DCA 1995) 2

Rep. Nat'l Bank of Miami v. U.S.,
506 U.S. 80 (1992) 7

Rolling Oaks Homeowner's Ass'n, Inc. v. Dade Cty,
492 So. 2d 686 (Fla. 3d DCA 1986) 1

Rucho v. Common Cause,
___ U.S. ___ 139 S. Ct. 2484 (2019) 6

Sanders-Reed v. Martinez,
350 P.3d 1221 (N.M. Ct. App. 2015) 13

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974). 4

State ex rel. Dep't of Gen. Servs. v. Willis,
344 So. 2d 580 (Fla. 1st DCA 1977) 20

State ex rel. Ellis v. Gerbing,
47 So. 353 (Fla. 1908) 12, 17

State v. Egan,
287 So. 2d 1 (Fla. 1973) 13

State v. J.P.,
907 So. 2d 1101 (Fla. 2004) 2

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971) 18

Walton Cty. v. Stop Beach Renourishment, Inc.,
998 So. 2d 1102 (Fla. 2008) 14

Washington v. Glucksberg,
521 U.S. 702 (1997) 9

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 10

STATUTES

§ 120.73, Fla. Stat. 20

§ 86.061, Fla. Stat. 7, 18

CONSTITUTIONAL PROVISIONS

Art. I, §§ 1, 2, and 9, Fla. Const. 15

Art. I, §§ 2 and 9, Fla. Const. 14, 19

Art. II, § 7(a), Fla. Const. 14, 15, 16

Art. V, § 20(c)(3), Fla. Const. 7, 18

Art. V, § 5(b), Fla. Const. 7, 18, 19

OTHER AUTHORITIES

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*
(Amy Gutman, ed. Princeton Univ. Press (1997)) 14

INTRODUCTION

This Court should reject Appellees' efforts to drain all meaning out of the Florida Constitution and divest the Court of its utmost duty to declare and uphold Appellants' constitutional rights. This case is about government conduct which has knowingly exposed and continues to expose children to a dangerous situation from which they cannot escape. To deny these children their privilege to assert their substantive due process and public trust rights subverts the Florida Constitution. The Court should hold that Appellants' claims are justiciable and that the circuit court erred in its decision dismissing Appellants' claims.

ARGUMENT

I. APPELLANTS HAVE STANDING

For the first time on appeal,[1] Appellees argue that Appellants lack standing. In Florida, "unlike the federal system, the doctrine of standing has not been rigidly followed." *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 (Fla. 1996). Generally, Florida courts hold "a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy." *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980);

[1] Standing can be waived when not raised in the circuit court as the record below lacks any discussion or ruling on standing. *Cowart v. City of W. Palm Beach*, 255 So. 2d 673, 674-75 (Fla. 1971); *Rolling Oaks Homeowner's Ass'n*, *Inc. v. Dade Cty*, 492 So. 2d 686, 690 (Fla. 3d DCA 1986).

Hayes v. Guardianship of Thompson, 952 So. 2d 498, 505 (Fla. 2006) (standing requires a plaintiff "to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly."). A plaintiff must demonstrate an "injury in fact," that is "concrete," "distinct and palpable," and "actual or imminent," "a causal connection between the injury and the conduct complained of," and "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (internal citations and quotation marks omitted). Appellants have alleged sufficient facts to meet Florida's more flexible test for standing.

A. Appellants Have Been Injured by Appellees' Conduct.

Injuries for purposes of standing "may be aesthetic, conservational, recreational, [or] economic . . . ." *Peregood v. Cosmides*, 663 So. 2d 665, 668 (Fla. 5th DCA 1995); *id.* at n.4 (collecting injury cases, including "individual environmental injury" and constitutional rights cases); *Coal. for Adequacy & Fairness in Sch. Funding, Inc.*, 680 So. 2d at 403 n.4 (finding injury to students alleging denial of an adequate education because "[t]here is no question that this case involves a controversy that would have a direct impact on Florida children.").

Appellees incorrectly state that Appellants are required to allege a "special injury," a requirement that does not apply in substantive due process or public trust

cases.[2] Without addressing ***any*** of Appellants' allegations of individual harms in the Complaint, all of which are assumed to be true at this stage in the case,[3] Appellees label Appellants' injuries a "generalized grievance." Gov. Answer Br. at 22 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992)). To the contrary, Appellants have alleged that they have each suffered individual harm, which is distinct from harm suffered by the "public at large." *Lujan*, 504 U.S. at 573; R. 706-716, 738, 761, 772-783. Appellants injuries are not generalized, but rather concrete and particularized injuries that affect them in personal and individual ways. R. 706-716; 601-605. For example, Appellants Delaney, Levi and Oscar have suffered property damage from climate change-exacerbated hurricanes and flooding, which infringes on their personal security; Appellant Isaac has experienced crop failure and animal loss on his family farm due to climate change; Appellant Valholly, whose father is a member of the Panther Clan of the Seminole Tribe of Florida, is experiencing trauma as she witnesses her government contribute to the disappearance of the

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[2] A "special injury" is only required in taxpayer standing, public nuisance and zoning cases. *Fla. Wildlife Fed'n v. State Dep't of Envtl. Regulation*, 390 So. 2d 64, 67 (Fla. 1980). The case of *Alachua Cty. v. Scharps* cited by Appellees is easily distinguishable from this case as the *Alachua County* plaintiff alleged no individual injuries except that he was a taxpayer and that there was a potential for violating someone's (not his own) First Amendment and equal protection rights. 855 So. 2d 195, 199-201 (Fla. 1st DCA 2003).

[3] *Nevitt v. Bonomo*, 53 So. 3d 1078, 1081 (Fla. 1st DCA 2010) (when reviewing an order granting a motion to dismiss for standing, the court "may look no further than the four corners of the complaint, and all allegations in the complaint must be accepted as true.").

Everglades, which is a violation of her human dignity and family and cultural autonomy. R. 706-712, 714-716, 758-759; *see also Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020), *petition for rehearing en banc pending*, No. 18-36082, Dkt. Entry 156 (March 2, 2020) (finding Levi's climate change injuries to be sufficiently concrete and particularized for the stricter federal Article III injury requirement). Appellants have suffered specific harms and, indeed, their ongoing injuries are only worsening as the climate crisis persists in their communities.[4]

B. Appellants' Injuries Are Redressable by the Court.

Redressability is established when a plaintiff shows it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). Even under the more rigid

[4] Appellees' generalized grievance theory has never been adopted by any Florida court. In *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, the plaintiff failed to introduce evidence of actual, individual harms, instead basing their claims on "the general harm caused by climate change." 563 F.3d 466, 477-78 (D.C. Cir. 2009). The plaintiffs' claims in *Schlesinger v. Reservists Comm. to Stop the War*, failed because they merely involved abstract injuries. 418 U.S. 208, 220 (1974). Appellees' reliance on the dissenting opinion of *Massachusetts v. E.P.A.*, is in error since the majority in that case recognized the well-established rule that "'it does not matter how many persons have been injured by the challenged action,'" so long as "'the party bringing suit . . . show[s] that the action injures him in a concrete and personal way.'" 549 U.S. 497, 517 (2007) (quoting *Lujan*, 504 U.S. at 581) (Kennedy, J., concurring); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting that standing doctrine requires a plaintiff's injuries to be "distinct and palpable"). The scientific evidence of climate change is contextual for Appellants' individual and concrete harms, which are sufficiently alleged in the Complaint to establish an injury for the purposes of standing.

federal standard, the remedy need not guarantee complete redress for all of plaintiffs' injuries. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 (11th Cir. 2001) (a "partial remedy would be sufficient for redressability."). To "slow or reduce" the harms, *Massachusetts*, 549 U.S. at 525 (citing *Larson*, 456 U.S. at 244 n.15), or to "minimiz[e] the risk" of harm is sufficient. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010) (Alito, J.). Moreover, a plaintiff's burden to demonstrate redressability is "relatively modest" at this stage of the proceedings. *Bennett v. Spear*, 520 U.S. 154, 171 (1997).

Appellees rely on the *Juliana* decision to argue that a single aspect of Appellants' remedy—a remedial plan—intrudes on the political branches and is thus not within the Court's power to order due to the political question doctrine.[5] Gov. Answer Br. at 23, 24. However, the *Juliana* decision explicitly states that "we do not find this to be a political question[.]" *Juliana*, 947 F.3d at 1174 n.9. Moreover, the Ninth Circuit's redressability analysis, subject to reversal *en banc*, is not persuasive because it ignores the viability of declaratory relief to remedy constitutional violations and contravenes well-settled precedent that redressability does not require

[5] Appellees reliance on *DeSantis v. Fla. Educ. Ass'n* is similarly misplaced because in that case, "whatever the outcome of [the] lawsuit, the choice of how to deliver education to students remains with Florida's school boards," who were not defendants in the case. No. 1D20-2470, 2020 WL 5988207, at *5 (Fla. 1st DCA Oct. 9, 2020), *petition for en banc pending*. Here, Appellees do not dispute their conduct is the cause of Appellants' injuries. Gov. Answer Br. (failing to challenge the causation prong of standing).

total elimination of all plaintiff injuries. *Larson*, 456 U.S. at 243 n.15. Additionally, the political question case relied upon, *Rucho v. Common Cause*, supports the justiciability of Appellants' claims in Florida's courts. ___ U.S. ___ 139 S. Ct. 2484, 2507 (2019) (citing *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015), as an example of how "state constitutions can provide standards and guidance for state courts to apply" that are lacking in federal jurisprudence).

Appellees' arguments disregard Appellants' requests for declaratory relief, a viable and important partial remedy and within the court's power to order. Initial Br. at 36-38. Appellees' characterization of declaratory relief as an advisory opinion has long been rejected by the U.S. Supreme Court. *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937) (request for declaratory judgment between two adverse parties "is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts."). The cases Appellees cite in support of their cursory statement that Appellants' claims present no justiciable controversy are inapposite. *See Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991) (deciding constitutionality of statute on the merits and declining to address justiciability issue since not raised by the parties); *Apthorp v. Detzner*, 162 So. 3d 236, 242 (Fla. 1st DCA 2015) (finding challenge to "qualified blind trust" statute not justiciable because the statute was never used to create or report a qualified blind trust).

Contrary to precedent, Appellees argue that Florida courts lack authority to order the executive branch to come into compliance with the Florida Constitution. Gov. Answer Br. at 23, 24. However, after issuance of declaratory relief in the first instance, injunctive relief is firmly within the competence of the judiciary to remedy a constitutional violation. *See* Initial Br. at 38-40; Fla. Const. Art. V, §§ 5(b), 20(c)(3); § 86.061, Fla. Stat. ("Further relief based on a declaratory judgment may be granted when necessary or proper."); *Metro. Dade Cty. v. Dep't of Commerce*, 365 So. 2d 432, 433 (Fla. 3d DCA 1978) ("where a party's constitutional rights are endangered[,]" "the circuit court has jurisdiction to entertain appropriate declaratory and injunctive relief."). Moreover, it is premature to assess the viability of injunctive relief without a fully developed factual record as to liability because (1) it may not ultimately be needed;[6] and (2) the nature of the remedy can only "be determined by the nature and scope of the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). Appellants have adequately alleged redressability at this stage and accepting Appellees' arguments would require the court to assume, in contravention to well-pleaded facts in the Complaint, that there is nothing the court could order to lessen the injuries that Appellants are currently experiencing.[7]

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[6] It is presumed government officials will comply with declaratory judgments. *See, e.g., Rep. Nat'l Bank of Miami v. U.S.*, 506 U.S. 80, 97-98 (1992) (White, J., concurring).

[7] Redressability does not require the Court to solve global climate change. Instead, to state a viable substantive due process claim, it is incumbent upon Appellants to

II. APPELLANTS HAVE SUCCESSFULLY ESTABLISHED A VIABLE CAUSE OF ACTION

A. Appellants' Substantive Due Process Claims Are Viable.

Appellees fail to identify any element of a substantive due process claim that Appellants' Complaint does not allege. Appellees completely disregard Appellants' allegations regarding the infringement of their enumerated due process rights to life, liberty, property, and pursuit of happiness. R. 772-784. The Complaint explicitly alleges harms to Appellants' rights to personal security, human dignity, family and cultural autonomy, and bodily integrity—liberty interests that the Supreme Court has recognized as giving rise to the protections of the due process clause. R. 772-784, 706-716. Therefore, Appellees' claim that Appellants have failed to identify a liberty interest subject to the due process claim is patently false. Gov. Answer Br. at 26. If Appellees wish to contest Appellants' allegations as to how their already-recognized liberty interests are being infringed by Appellees' conduct they can do

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allege that options are available for Appellees to implement Florida's energy system in a way that does not make climate change worse and injure Appellants. R. 737-38. For example, in 2008, the Appellee State of Florida "noted that if Florida acted to reduce GHG pollution, the effects of climate change could be 'avoided, minimized, or mitigated' and that actions to reduce GHG pollution already are available." R. 728; *see also* R. 737 (Trump Administration recognizing that "'[e]arly greenhouse gas emissions reductions reduce climate impacts in the near term and in the longer term by avoiding critical thresholds (such as marine ice sheet instability and the resulting consequences for sea level rise.)'"). This is not an invitation to the Court to manage the energy system, but rather to exercise its proper role in reviewing Appellees' systemic conduct for constitutionality.

so in an Answer. *Dep't of Revenue of Fla. v. Young Am. Builders*, 330 So. 2d 864, 865 (Fla. 1st DCA 1976) ("the relative merits of the parties' positions does not deprive the circuit court of jurisdiction to determine the merits.").

Appellees only contest Appellants' claim that their right to liberty encompasses a right to a stable climate system capable of sustaining human life. To determine whether a right to a stable climate system is an inalienable attribute of liberty, courts apply the "well-settled general framework" of whether the right is "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Brandon-Thomas v. Brandon-Thomas*, 163 So. 3d 644, 653 (Fla. 2d DCA 2015) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). A thorough fundamental rights analysis involves an empirical inquiry and is often decided on appeal of merits decisions, not on appeal of a motion to dismiss. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954) (four district court records); *Brown v. Plata*, 563 U.S. 493, 499-500 (2011) (two district courts); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (three final decisions for plaintiffs and one preliminary injunction); *see also Krischer v. McIver*, 697 So. 2d 97, 99 (Fla. 1997) (six-day bench trial). Without mentioning or engaging in the analysis to determine whether an unenumerated right is fundamental, Appellees summarily assert that no right exists based upon their baseless assumption that a stable climate system is simply

"legislative decisions on economic systems;" an assumption contradicted by facts in the Complaint, basic science, and Florida's long history and tradition of depending upon its unique natural environment to sustain life in Florida. FDEP Answer Br. at 4; R.724-726, 728, 731-761, 772-783.

Important fundamental rights include those that are "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Juliana v. United States*, 217 F. Supp.3d 1224, 1250 (D. Or. 2016), *overruled on other grounds by Juliana*, 947 F.3d 1159 (9th Cir. 2020). This is particularly true in Florida, much of which, including Appellants' property and cultural lands, is presently being degraded and will be inundated at current levels of warming, causing economic losses in the billions of dollars. R. 738-740, 744-756. Appellants should be entitled to present factual evidence and argument to support their allegations that a stable climate system is fundamental to Florida's ordered scheme of liberty and deeply rooted in history and tradition. At this stage, even if the court declines to recognize a fundamental right to a stable climate system, Appellants have provided sufficient facts and allegations to "show a liberty interest that gives rise to the protections of the due process clause." *Ivory v. State*, 299 So. 3d 1178, 1179 (Fla. 1st DCA 2020).

Contrary to Appellees' assertions, FDEP Answer Br. at 3-4, Appellants *do not* seek the Court's regulation of third-party conduct, but rather protection from unconstitutional government intrusion, which is the proper role of the Court. *Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Brandon-Thomas*, 163 So. 3d at 653 ("The substantive component of the Due Process Clause checks state authority to enact untenable measures . . . ."). In adopting the Florida Constitution, the people of this state did not give the political branches the authority to take actions that knowingly harm children in the guise of policymaking on "economic systems." For this reason, this case does not repeat the sins of *Lochner*. FDEP Answer Br. at 7 *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 144 (Fla. 2019) (Canady, J., concurring) (the legislature's duty to set fiscal priorities "does not mean that the judiciary in adjudicating individual constitutional claims can never make decisions that have an impact on state spending."). Appellants do not dispute that Appellees have the authority to make policy choices; yet, in doing so, Appellees cannot deprive children of their fundamental rights. *Lambert v. People of the State of California*, 355 U.S. 225, 243 (1957) (recognizing that due process limits the exercise of police power); *5F, LLC v. Dresing*, 142 So. 3d 936, 946 (Fla. 2d DCA 2014) ("it is apparent the [State's] authority to control and manage submerged lands is restricted by the public trust doctrine"). Appellants have adequately alleged a viable substantive due process claim.

B. Appellants' Claims Under the Public Trust Doctrine Are Viable.

Ignoring all of Appellants' allegations of impairment of traditional resources that Florida courts have historically found as subject to the public trust doctrine, including submerged state sovereignty lands, banks of rivers and creeks, beaches, and marine resources, R. 716, 762-772, 777, Appellees claim that Appellants have not alleged facts to state a cause of action under the public trust doctrine. However, Appellees do not identify any element of a public trust claim omitted in the Complaint. Rather, their argument is far narrower: the public trust doctrine should not be extended to the atmosphere.

Appellants have sufficiently pled that Appellees have caused substantial impairment to and abdicated general control over already-recognized public trust resources (including lands under navigable waters) in a way that injures Appellants. R. 762-772, 775-779. Appellants allege that they are being denied access to parks and beaches they regularly visit and enjoy because of sea level rise, increased flooding, seaweed invasion, bacterial outbreaks, and jellyfish swarms—conditions caused by Appellees' implementation of its energy system. R. 706, 708, 710-715. These allegations, which should be taken as true at the motion to dismiss stage, state valid *prima facie* public trust claims. *State ex rel. Ellis v. Gerbing*, 47 So. 353, 355 (Fla. 1908) (finding that abdication of general control over trust lands and waters

constitutes a breach of duty to preserve and control such lands and waters for the public good).

Appellants separately seek a declaration that the atmosphere is a public trust resource, which is a reasonable extension of the doctrine and appropriate based on the facts presented in this case. Initial Br. at 3-4, 13; R. 1401-402; *Foster v. Washington Dep't of Ecology*, No. 14–2–25295–1 SEA, 2015 WL 7721362, at *4 (Wash. Super. Ct. Nov. 19, 2015) ("The navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical."); *State v. Egan*, 287 So. 2d 1, 6-7 (Fla. 1973) ("courts may properly extend old principles to new conditions, determine new or novel questions by analogy, and even develop and announce new principles made necessary by changes wrought by time and circumstance."). Thus, even if the Court refuses to extend the public trust doctrine to the atmosphere, a legal question that should be informed by an evidentiary record,[8] Appellants have adequately alleged all necessary elements for their public trust claim to proceed to the merits.

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[8] *See 5F, LLC*, 142 So. 3d at 939 (deciding scope of common law rights based on summary judgment record). Appellees cite the case of *Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015), for the proposition that no courts have applied the public trust doctrine to the atmosphere, but that is exactly what the New Mexico Court of Appeals did in that case. *Id*. at 1225 ("We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state."). This case was resolved on summary judgment with a factual record. *Id*. at 1224.

III. APPELLANTS' CLAIMS DO NOT RAISE A POLITICAL QUESTION

Appellees erroneously argue that there is a "textually demonstrable constitutional commitment" of Appellants' claims to the Legislature through Article II, § 7(a) of Florida's Constitution. *Baker v. Carr*, 369 U.S. 186, 217 (1962). However, the Florida Supreme Court has ruled that Article II, § 7(a) does not displace the public trust doctrine. *Walton Cty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1110 (Fla. 2008) (emphasis added) ("*In addition to* its duties under the public trust doctrine, the State has an obligation to conserve and protect Florida's beaches as important natural resources."). Nor does Article II, § 7(a) constitute an exclusive commitment of Legislative authority over Appellants' due process rights.

Appellees' argument renders the text of Article I, §§ 2 and 9 meaningless, which is an impermissible constitutional interpretation that frustrates the will of the people who affirmatively sought to restrain government conduct that infringed upon individuals' lives, liberties and property. *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla. 1960); *see also* Antonin Scalia*, A Matter of Interpretation: Federal Courts and the Law* 22, 23 (Amy Gutman, ed. Princeton Univ. Press (1997)) ("[T]he text is the law, and it is the text that must be observed . . . ."). "In construing the Constitution every section should be considered so that the Constitution will be given effect as a harmonious whole. A construction which would leave without effect any part of the

Constitution should be rejected." *Askew v. Game & Fresh Water Fish Comm'n*, 336 So. 2d 556, 560 (Fla. 1976).

While Article II, § 7(a) confirms the legislature has authority to enact laws for environmental protection pursuant to its police powers, the exercise of that power is constrained by Article I, §§ 1, 2, and 9, even in cases that involve issues related to the protection of natural resources.[9] *See, e.g., Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774 (Fla. 2004) (deciding substantive due process challenge to Citrus Canker Law that involved damage to citrus trees from environmental threat); *Dep't of Cmt'y Affairs v. Moorman*, 664 So. 2d 930, 932-33 (Fla. 1995) (indicating that constitutional rights to equal protection, privacy, and due process continue to apply in case involving exercise of Article II, § 7(a) authority); *see also Montgomery v. State*, 45 So. 879, 881 (Fla. 1908) ("The duty rests upon all courts, state and national, to guard, protect, and enforce every right granted or secured by the Constitution . . . whenever such rights are involved in any proceeding before the court and the right is duly and properly claimed or asserted."). Any interpretation of Article II, § 7(a) that gives the political branches unreviewable discretion to infringe fundamental rights to life, liberty and property improperly adds language into the constitution that is not there. This court should reject Appellees'

[9] While the constitutional infringements relate to climate change, the legal claims concern Appellees' energy policy, which is clearly outside the scope of Article II, § 7(a).

attempts to recast Appellants' due process claim to protect their lives and liberties as an air pollution claim subject to unfettered legislative discretion under Article II, § 7(a).

Under the second *Baker* formulation, a claim implicates a political question if there are "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. Florida's public trust doctrine and due process clause provide clear, judicially manageable standards based upon the "well-established principles of law" by which Florida's courts have historically resolved claims. Initial Br. at 22-28; *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1215 (Fla. 2000). *Citizens* does not change this analysis because Appellants' substantive due process and public trust claims do not require the court to interpret the phrase "adequate provision." *Citizens*, 262 So. 3d at 141; Initial Br. at 27-28. The question for the Court is not "whether Florida adequately addresses greenhouse gases," Gov. Answer Br. at 1, but, because fundamental rights are at stake, whether Appellees' conduct in implementing its energy system is "justified by a 'compelling state interest'" that is served or protected through "the least restrictive means."[10] *Gainesville Woman Care,*

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[10] If the Court finds that no fundamental rights are involved, the test is whether the government conduct "bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive." *Chicago Title Ins. Co v. Butler*, 770 So. 2d 1210, 1214-15 (Fla. 2000). Either way, there are legal standards for the Court to apply to the facts in this case.

LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017); *see also State ex rel. Ellis*, 47 So. at 355 (setting forth standard to show public trust doctrine violation).

In answering this question, the Court would not be required to make "an initial policy determination of a kind clearly for nonjudicial discretion" because that policy decision to provide its citizens with energy has already been made.[11] *Baker*, 369 U.S. at 217; Initial Br. at 28-30. It is now the Court's job to determine whether Appellees' implementation of that policy is constitutional. That the resolution of this case may involve the introduction of scientific evidence does not render this case a political question because the trial court, as gatekeeper, "has wide discretion concerning admissibility of evidence." *See Key v. State*, 430 So. 2d 909, 910 (Fla. 1st DCA 1983) (explaining that trial courts have determined the admissibility of scientific evidence "in such diverse fields as voiceprint analysis, ion microprobic analysis of hair, neutron activation analysis of bomb package fragments, psychiatric diagnosis, polygraph examination, and infrared detection of aircraft.").

Appellees' argument that this case cannot be decided "without expressing lack of the respect due coordinate branches of government," *Baker*, 369 U.S. at 217, is

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[11] The fact that the energy policy decision has already been made is what distinguishes this case from *Kanuk v. State Dep't of Nat. Res*., 335 P.3d 1088, 1096-97 (Alaska 2014). In *Kanuk*, the plaintiffs challenged the state of Alaska's failure to address climate change and thus they were not challenging a specific policy or implementation of that policy. Here, Appellants are challenging the state's energy policy that has been statutorily declared and is being implemented by Appellees in an unconstitutional manner.

entirely premised on their fabricated characterization of a form of injunctive relief that has not been requested or ordered in the case and may never be ordered.[12] Gov. Answer Br. at 16-17. It is premature at this stage, without a developed factual record, to speculate if any relief ordered by the Court implicates separation of powers concerns underlying the political question doctrine. *Baker*, 369 U.S. at 198 ("[I]t is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."). First, Appellees make no showing as to how the declaratory relief requested would show a lack of respect to the political branches. Second, it is clear that circuit courts have original jurisdiction to hear constitutional issues and issue injunctions. Fla. Const. Art. V, §§ 5(b), 20(c)(3); § 86.061, Fla. Stat. Third, *if* injunctive relief is awarded in the form of a remedial plan (again, a possibility only after the Court issues declaratory relief in the first instance), it would be up to the Appellees to construct a plan as they see fit, so long as it complies with their existing statutory authority and the Florida Constitution. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *see also*

[12] Appellees' litany of hypothetical questions as to what they believe injunctive relief would encompass illustrates why these claims need to be decided on the evidence, not in the abstract. Gov. Answer Br. at 16-17.

Florida v. Georgia, 138 S. Ct. 2502, 2517 (2018); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977); *League of Women's Voters*, 172 So. 3d at 413.

IV. SEPARATION OF POWERS DOES NOT BAR APPELLANTS' CLAIMS

Under Appellees' broad separation of powers theory, it would be hard to conceive of a constitutional case that would be justiciable. But, the judiciary is a co-equal branch with the constitutional duty to measure executive and legislative action against the Florida Constitution. Fla Const. Art. V, § 5(b); *Bush v. Schiavo*, 885 So. 2d 321, 329-30 (Fla. 2004). The Florida Constitution does not specifically assign to the political branches the question of whether they have exceeded their own authority under Art. 1, sections 2, 9 or the public trust doctrine. Moreover, Appellees' reliance on Justice Canady's concurrence in *Citizens* is misplaced because that case involved the legislature's exclusive authority "to set fiscal priorities through appropriations," while here Appellants are not challenging funding decisions. 262 So. 3d at 144 (Canady, J., concurring) (explaining how the legislature holds the power of the purse). This case involves "a constitutional attack . . . on specific identified actions of the government [R. 762-772] that have violated the Constitution," *id.*, and is thus squarely within the realm of the judicial branch. *Cf. Dep't of Transp. v. Morehouse*, 350 So. 2d 529, 533 (Fla. 3d DCA 1977) (separation

of powers stands as a bar to administrative determination of constitutional questions).

V. THE PRIMARY JURISDICTION DOCTRINE IS INAPPLICABLE TO APPELLANTS' CONSTITUTIONAL AND PUBLIC TRUST CLAIMS

Constitutional challenges to systemic government conduct can rightfully proceed outside of the APA. *See* § 120.73, Fla. Stat.; *Junco v. State Bd. of Accountancy*, 390 So. 2d 329, 331 (Fla. 1980) (quoting *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 590 (Fla. 1st DCA 1977)) ("[T]he jurisdiction of the circuit court to resolve constitutional issues is unaffected by the [APA] and remains a 'necessary concomitant of the judicial power vested in the circuit courts by article V, sections 1 and 5 of the Constitution."); *Adams Packing Ass'n, Inc. v. Fla. Dep't of Citrus*, 352 So. 2d 569, 571 (Fla. 2d DCA 1977) (same). Review of Appellees' individual actions and decisions that cause climate change would be fragmented and limited to the agency record, which would foreclose consideration, review and a remedy for the systemic nature of the conduct that has led to the constitutional violations at issue. *See* Initial Br. at 44.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand this case, thereby upholding the traditional role of the courts in constitutional interpretation and declaring the rights of the parties.

Respectfully submitted this 9th day of December, 2020,

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CERTIFICATE OF COMPLIANCE

Mitchell Chester, attorney for Appellants, hereby states that the foregoing brief complies with Florida Rule of Appellate Procedure 9.210 and has been typed in Times New Roman, 14-point font.

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I HEREBY CERTIFY that on this 9th day of December, 2020, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court utilizing the Florida Courts e-Filing Portal system, and served electronically upon all counsel of record, including the following:

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