SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA
CIRCUIT COURT

DELANEY REYNOLDS, et. al, Plaintiffs, v. THE STATE OF FLORIDA; RICK SCOTT, in his official capacity as Governor of the State of Florida; et al., Defendants.	)	CASE NO.: 18-CA-000819 ***JURY TRIAL REQUESTED***

PLAINTIFFS' CONSOLIDATED RESPONSE TO THE DEFENDANTS' MOTIONS TO DISMISS[1]

INTRODUCTION

The Plaintiffs, eight young Floridians who seek to assert their constitutionally-protected substantive due process and public trust rights, have filed a Complaint which can -- and should -- be resolved by this Court. In a nutshell, the Plaintiffs' Complaint alleges that the Defendants' actions (and inactions) are causing and contributing to dangerous climate change, which in turn is causing real harm to their fundamental constitutional rights to life, liberty and property.

At this motion to dismiss stage, the Plaintiffs' allegations must be taken as true. The Court should not be distracted by the Defendants' various suggestions that the Defendants are either immune from suit, that the Court's enforcement of the Plaintiffs' constitutional rights would constitute an improper interference into the Executive and Legislative Branches, or that determinations about whether climate change is occurring - or how it can best be curtailed - are necessary at this preliminary stage.

[1] The various Defendants have filed separate Motions to Dismiss, containing overlapping and repetitive arguments. For the Court's convenience and for greater efficiency, the Plaintiffs are filing one single Consolidated Response.

The Court, in our balance-of-powers system, acts as a check on the executive and legislative branches of governments, and the Defendants should be required to respond to well-framed allegations that they have ignored constitutional limitations or otherwise exceeded their authority. The Plaintiffs are *not*, despite the Defendants' suggestions to the contrary, asking the Court to either write legislation, undertake administrative rulemaking, or otherwise intrude on proper legislative or executive prerogatives. Rather, the Plaintiffs merely request that the Court require the Defendants to comply with their constitutional obligations.

STANDARD OF REVIEW

In Florida, a legally sufficient complaint consists of "a short and plain statement" of the Court's jurisdiction, setting forth "the ultimate facts showing the pleader is entitled to relief." Fla. R. Civ. P. 1.110(b). The Plaintiffs' Complaint satisfies this requirement. When a defendant challenges a complaint by a motion to dismiss, the Court's review is restricted: it "must accept the material allegations as true and is bound to a consideration of the allegations found within the four corners of the complaint." *Murphy v. Bay Colony Property Owners Ass'n*, 12 So. 3d 924, 926 (Fla. 2d DCA 2009).

SUMMARY OF RELEVANT FACTUAL ALLEGATIONS

The Plaintiffs' Complaint, which has alleged standing, jurisdiction, violations of their rights and resulting harm, is sufficient to withstand a motion to dismiss. Climate change, caused by the buildup of carbon dioxide and other greenhouse gasses (GHG) in the atmosphere, is causing increasing temperatures and rising seas to threaten the habitability and existence of parts of the state of Florida, as well as the safety and wellbeing of the Plaintiffs, as set forth in the Complaint. (*Id.* ¶ 3). The Plaintiffs in this case do not allege general environmental grievances,

but monumental harms to their ability to pursue life, liberty and property in the state of Florida due to climate change.

For example, because of the Defendants' conduct, some Plaintiffs are unable to fish for and otherwise enjoy the local marine species that are being negatively impacted by ocean warming and acidification. (*Id.* ¶ 15, 34.) When Hurricane Irma struck Florida in 2017, many Plaintiffs were denied the right to educational opportunities, because their schools were closed for several weeks (*Id.* ¶¶ 16, 18, 25, 28, 33, 37).[2] Plaintiff Levi D.'s school was shut down entirely due to hurricane damage, and he was forced to enroll in a new school, an extremely distressing experience. (*Id.* ¶ 18.) Plaintiff Delaney R.'s home in the Florida Keys suffered tremendous damage as it was located where the northern eyewall of Hurricane Irma hit Florida. (*Id.* ¶ 16). Defendants have previously acknowledged that "`tropical storms and hurricanes are likely to become more intense, produce stronger peak winds, and produce increased rainfall over some areas due to warming sea surface temperatures.'" (*Id.* ¶¶ 61; 68; 73; 103). The mental health of some Plaintiffs has been jeopardized because they understand the gravity and urgency of climate change -- yet see their government taking actions such as pursuing an energy system based on fossil fuels, known to cause them harm. (*Id.* ¶¶ 16, 20, 21.) Plaintiff Levi D., who lives on a southeastern Florida barrier island, has been forced from his family home because of the flooding and infrastructure failure attributable to sea level rise, a loss that will become permanent in the coming decades. (*Id.* ¶ 17.) Increased temperatures have made it difficult for Plaintiff Isaac A. to work on his family farm. (*Id.* ¶ 22.) Plaintiff Valholly F., whose father is a member of the Panther Clan of the Seminole Tribe of Florida, has witnessed the devastating effects of climate change on the Everglades, which holds extreme cultural significance to people

[2] The Florida Constitution, Art. 9, §1, guarantees access to a "high quality education."

like Valholly and her family. (*Id.* ¶ 35-36.) The Plaintiffs allege 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 invasion, all of which are largely caused by ever-worsening conditions due to climate change. (Compl. ¶¶ 14, 19, 23, 24, 26, 31, 34, 38.) These injuries are severe, real and immediate.

The Complaint alleges these injuries have occurred because of government conduct, in that the Defendants' unconstitutional actions include the creation, operation, and promotion of a fossil fuel-based energy system that is causing dangerous climate change. All Defendants play a role in creating and implementing Florida's energy system. (Compl. ¶¶41-52.) Florida government, in addition to being responsible for direct GHG emissions through operation of its own facilities, also sanctions and causes third parties to discharge GHG emissions, by and through its control of the energy system. (Compl. ¶124.) The cumulative effect of these GHG emissions is disruption of the Earth's energy balance, causing dangerous climate change that is injuring the Plaintiffs. (Compl. ¶ 53-57.) The Florida governmental actors responsible can and should be accountable for the share of GHG emissions the State affirmatively causes. (*See, e.g.*, Compl. ¶ 124(d) (Florida is third in the nation in both total energy consumption and electric energy consumption, and second in electric energy production; it generates more electricity from petroleum than any state in the nation, and it generates the second highest amount of CO_2 emissions of any state from electricity)). While the separate acts that make up Florida's energy system taken individually may not cause Plaintiffs' injuries, the collective and systemic implementation of Florida's energy policies, plans and decisions have foreseeably caused – and continue to cause - dangerous levels of GHG emissions that in turn have foreseeably harmed – and continue to harm - the Plaintiffs.

MEMORANDUM OF LAW

I. THE DEFENDANTS ARE PROPER PARTIES, AND THE COURT HAS AUTHORITY TO HEAR THESE IMPORTANT CONSTITUTIONAL ISSUES.

A. The Defendants Are Proper Parties.

The current Defendants are all proper parties because they have "either taken a present, adverse, and antagonistic position to that espoused by [Plaintiffs] or would be necessary parties to an action to determine the State's responsibility under the controlling constitutional provision," the standard set forth by the Florida Supreme Court in *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 (Fla. 1996). The Defendants have actual, cognizable interests in the outcome of this case, and the Plaintiffs' constitutional and public trust claims "implicat[e] specific responsibilities of the defendants." *Atwater v. City of Weston*, 64 So. 3d 701, 704 (Fla. 1st DCA 2011). The Plaintiffs have alleged that Florida's energy system is under the control and supervision of the Defendants, (Compl. ¶ 124(a)), and since each Defendant has played a role in causing the constitutional injuries alleged in the Complaint, the Court has the authority to consider the Plaintiffs' claims, and ultimately, order the Defendants to comply with their constitutional obligations.

1. The Governor.

Florida courts have the authority and obligation to review actions of members of Florida's executive branch to ensure their compliance with the Florida Constitution. This result is logically and procedurally necessary; if this judicial power did not exist, the executive branch would be unchecked. For instance, judicial review of the Governor's pardoning powers was found in *Sullivan v. Askew*, 348 So. 2d 312, 313-16 (Fla. 1977). Courts have also considered

whether the Governor has adequately funded the public education system, as required by the Florida Constitution. *Coalition for Adequacy & Fairness in Sch. Funding, Inc.*, 680 So.2d 400.

The Governor is Florida's chief executive officer and has great influence over the development and implementation of the State's energy system, which the Complaint alleges caused, and is contributing to, the Plaintiffs' injuries. The Governor makes policy recommendations through the State's Comprehensive Plan, which includes "protection and conservation of" Florida's natural resources. *See* § 186.002, Fla. Stat. The Governor also sits on the Power Plant Siting Board, the Transmission Line Siting Board, and the Natural Gas Transmission Pipeline Siting Board, that decides whether and under what conditions power plants, transmission lines, and natural gas pipelines may be built in Florida;[3] he appoints various agency heads as well as the Florida Public Services Commissioners; and is also one of the three members of Florida's Cabinet, who comprise the Board of Trustees for the Florida Internal Improvement Trust Fund.[4] The Governor, through agency appointments, policy recommendations, and veto power, has heavy involvement in and influence over the state's energy system. The Complaint, at para. §124(k) and (l), alleges that the Governor's actions have exacerbated the climate crisis, thus exposing Plaintiffs to a dangerous climate system that violates their constitutional rights.

[3] § 403.503(8), Fla Stat. (defining "Board" as "the Governor and Cabinet sitting as the siting board"); *see also* § 403.503(9) (defining "certification" as "the written order of the board . . . approving an application for the licensing of an electrical power plant, in whole or with such changes or conditions as the board may deem appropriate.").

[4] A key piece of Florida's energy system is the requirement that it coordinate with other states in the South for "the development of a balanced economy for the region," § 377.711 Fla. Stat., resulting in an interstate compact for the conservation of oil and gas resources, for which the Governor officially represents the state. Florida joined the Interstate Compact to Conserve Gas and Oil in 1945, to which 29 other states belong. While the Governor cannot alter its terms, he can withdraw the State from the Compact. § 377.03 Fla. Stat.

2. <u>The State of Florida</u>.

Florida establishes the state's energy system, and when a case challenges the constitutionality of a state-established system, the state is naturally a proper party. *State ex rel. Shevin v. Kerwin*, 279 So. 2d 836, 838 (Fla. 1973) ("Accordingly, pursuant to our rulemaking authority (Fla. Const., art. V, s 2(a), F.S.A.), we hold that the State of Florida, through the Attorney General, is a proper party to any action in which the constitutionality of any general statute is raised, solely as to those papers, pleadings, or orders dealing directly with the constitutional issue."). The Defendants do not (and cannot) dispute that the State is charged with managing and protecting the State's public trust resources, and the State was properly named.

3. <u>The Florida Department of Agricultural and Consumer Services ("FDACS") and Department of Environmental Protection ("FDEP") are proper parties</u>.

FDACS, as set forth in ¶¶45-47 of the Complaint, runs Florida's Office of Energy and oversees many energy-related aspects of Florida's agricultural and forestry lands. FDEP's mission - environmental protection - is set forth in the very name of the agency. To this end, FDEP is charged with developing and implementing a vast array of energy-related permitting and land management responsibilities. These agencies, of course, can only implement their delegated authority in a manner compliant with the Florida Constitution: "[I]f executive officers regard a statutory provision prescribing their duties as violative of the Constitution, it is their sworn duty to give effect to the Constitution." *State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 84 Fla. 592, 621 (1922).

Florida law requires that suits challenging the constitutionality of agency conduct must be brought against the state agency or department charged with enforcing the statute at issue. *Walker v. President of the Senate*, 658 So. 2d 1200 (Fla. 5th DCA 1995) (Senate President and Speaker of the House were not proper parties to a declaratory action challenging operations of

the Department of Corrections); *Haridopolos v. Alachua Cty.*, 65 So. 3d 577, 578 (Fla. 1st DCA 2011). Commissioner Adam Putnam and Secretary Noah Valenstein, as the state officials responsible for compliance with the constitutional provisions at issue, are properly named. *See ACLU v. The Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (citing *Diamond v. Charles*, 476 U.S. 54, 64 (1986)); *Harris v. Bush*, 106 F. Supp. 2d 1272, 1276 (N.D. Fla. 2000); *Walker*, 658 So. 2d 1200; *Atwater*, 64 So. 3d at 703.

4. The Florida Public Service Commission ("PSC").

The PSC's mission, according to the introductory section ("The PSC's Role") in its own public web site, www.psc.state.fl.us, is "making sure that Florida's consumers receive some of their most essential services" — including energy and water — "in a safe, reasonable, and reliable manner. In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service." (Compl. ¶ 49). The PSC has the responsibility to ensure the development of "adequate and reliable energy grids," which involves the determination of need for new electric power plants and transmission lines. §§ 403.501-518, 403.537, 366.05(7), Fla. Stat. The PSC has a mandatory duty to develop "plans and implement programs for increasing energy efficiency and conservation and demand-side renewable energy systems," § 366.81, Fla. Stat., and is the exclusive forum for the determination of need for an electrical power plant in Florida. § 403.519, Fla Stat. Even though the Florida legislature has recognized "that it is in the public interest to promote the development of renewable energy resources in this state," § 366.91(1), Fla. Stat., and has authorized the Commission to consider and encourage renewable energy, §§ 366.04(1), 366.81, 366.92, Fla. Stat., only 3.1% of Florida's overall electric generation capacity comes from renewable sources, well below the national average of 15%.

(Compl. ¶ 124(e)). The PSC is a proper Defendant to the extent that the PSC has an interest in, and authority over, the creation and use of Florida's energy system that is causing Plaintiffs' harm. (Compl. ¶ 124(t)).

5. <u>The Board of Trustees of Internal Improvement Trust Fund ("Board of Trustees")</u>.

The Board of Trustees, under § 253.04(1) Fla. Stat., is vested and charged with the conservation and protection of all lands owned by the State, and the Board of Trustees is required to take actions "necessary to the full protection and conservation of [state] lands," in compliance with its constitutional responsibilities. Fla. Const. Art. II, § 7; Art. X, § 11. The Board of Trustees is charged with conserving and protecting energy resources that exist on state lands. § 270.11, Fla. Stat. The Board of Trustees is required to prepare "an annual inventory of all publicly owned lands within the State." § 253.03(8)(a), Fla. Stat. The Board of Trustees, as the state agency that holds title to state trust lands in trust for the people, is a proper party. *State, Bd. of Trustees of Internal Imp. Tr. Fund v. Lost Tree Village Corp.*, 600 So. 2d 1240, 1243 (Fla. 1st DCA 1992) ("The Board is entrusted with the express constitutional duty to protect the public's interest in sovereign submerged lands."); *State Bd. of Trustees v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 698 (Fla. 1st DCA 2001) ("As the state agency holding title to and charged with managing the state's sovereignty lands, the Trustees have broad responsibilities under the public trust doctrine.").

B. <u>The Court has statutory jurisdiction over this cause under §86.011 *Fla. Stat*</u>.

The Plaintiffs, at p. 58 of their Complaint, seek a declaration of their rights under the Florida Constitution and public trust doctrine, and the Court has statutory jurisdiction over such questions under the Declaratory Judgment Act:

> The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:
>
> (1) Of any immunity, power, privilege, or right; or
>
> (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

§ 86.011 Fla. Stat. Florida's case law provides that the Declaratory Judgment Act should be liberally construed. *X Corp. v. Y Person*, 622 So. 2d 1098, 1100 (Fla. 2d DCA 1993). The fact that Plaintiffs also seek injunctive relief at pp. 58-59 of their Complaint in no way divests the Court of jurisdiction to hear a declaratory judgment action by operation of § 86.011(2) of that Act, in addition to Florida's practice of allowing alternative pleading under Fla. R. Civ. P. 1.110(g). The Defendants' motions ignore this express statutory jurisdictional provision, and fail to present a viable argument against its exercise.

Individual youth such as the Plaintiffs here are empowered to challenge unconstitutional government conduct by way of declaratory judgment since at least 1803, when Chief Justice Marshall explained that it is "emphatically the province and duty of the judicial department to say what the law is.'" *Mikolsky v. Unemployment Appeals Comm'n*, 721 So. 2d 738, 740, n.2 (Fla. 5th DCA 1998) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). The test of a complaint's sufficiency when seeking declaratory judgment is not ultimate success, but rather to the entitlement to the declaration:

> Thus, to activate jurisdiction the party seeking a declaration must show that he is in doubt as to the existence or nonexistence of some right, status, immunity,

> power or privilege and that he is entitled to have such doubt removed. In this regard, the plaintiff must show a bona fide, actual, present, and practical need for the declaration.

X Corp., 622 So. 2d at 1101 (internal citations omitted); *Hialeah Race Course v. Gulfstream Park Racing Ass'n*, 210 So. 2d 750, 752 (Fla. 4th DCA 1968) (whether a complaint in Florida gives rise to a Declaratory Judgments Act proceeding asks whether the party seeking the declaration "shows that he is in doubt or is uncertain as to existence or non-existence of some right, status, immunity, power or privilege and has an actual, practical and present need for a declaration.").

The Plaintiffs have alleged real and not speculative injuries, and they are entitled to a declaration of their rights under the Florida Constitution and the public trust doctrine. Their allegations, which must be taken as true at this point in the proceedings, are that the Defendants have allowed dangerous levels of GHG pollution, resulting in substantial impairment to vital natural resources upon which the Plaintiffs depend for the exercise of their constitutional rights. (Compl. ¶¶ 124, 136-147, 153-158.) The allegations are sufficient.

C. The Court Has Authority To Hear Plaintiffs' Substantive Due Process Claim.

The Plaintiffs seek to protect substantive due process rights guaranteed by Article I, §§ 1, 2, and 9 of the Florida Constitution. Contrary to the Defendants argument, under Florida law, the constitutional provisions that secure the Plaintiffs' substantive due process rights are self-executing. *Schreiner v. McKenzie Tank Lines, Inc.*, 432 So. 2d 567, 568 (Fla. 1983). Defendants' cite to no authority supporting their argument that the core constitutional provisions at issue here have no meaning absent legislative implementation. Indeed, Defendants' position would subject Florida's core constitutional protections to legislative nullification contrary to the primacy of constitutional over statutory law. *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960)

("[T]he modern doctrine favors the presumption that constitutional provisions are intended to be self-executing. This is so because in the absence of such presumption, the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.").

Florida courts have both the authority and obligation to hear substantive due process claims brought under the Florida Constitution:

> Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights." *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991).

Substantive due process claims can be brought as challenges to legislative acts or "non-legislative/executive acts," that "'typically arise from the ministerial or administrative activities of members of the executive branch.'" *City of Lauderhill v. Rhames*, 864 So. 2d 432, 438 (Fla. 4th DCA 2003) (quoting *McKinney v. Pate*, 20 F.3d 1150, 1557 n.9 (11th Cir. 1994) (en banc)).

Infringement of a fundamental right that is "implicit in the concept of ordered liberty" constitutes a violation of substantive due process. *Crocker v. Pleasant*, 778 So. 2d 978, 983 (Fla. 2001) (quoting *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994)). Violations of substantive due process can also arise where the governmental action shocks the conscience. *Id.* (citations omitted); *City of Lauderhill*, 864 So. 2d at 438 (quoting *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3rd Cir. 2000) ("A fundamental right that falls within the ambit of substantive due process may not be taken away by a state's executive or non-legislative acts 'for reasons that are arbitrary, irrational, or tainted by improper motive.'")). Here, Plaintiffs'

assert that Defendants' knowing, historic, and ongoing affirmative contribution to climate change violates both their enumerated substantive due process rights to life, liberty, and property, as well protected unenumerated liberty interests, including their right to a stable climate system that sustains human life and liberties. (Compl. ¶ 153). All of these rights are fundamental. Defendants neither address nor dispute Plaintiffs' allegations regarding the infringement of their enumerated due process rights to life, liberty, and property nor Plaintiffs' previously judicially recognized unenumerated rights to Plaintiffs' dignity, including their capacity to provide for their basic human needs, safely raise families, practice their religious and spiritual beliefs, maintain for their bodily integrity, and lead lives with access to clean air, water, shelter and food. *Id.* For that reason alone, Plaintiffs' substantive due process claims should proceed to trial.

Further, Plaintiffs' have properly asserted a fundamental right to a stable climate system that sustains human life and liberty. Judicial recognition of this right is appropriate under the standards governing identification of constitutionally protected unenumerated rights in Florida. Courts must examine whether the asserted 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.'" *Zurla v. City of Daytona Beach*, 876 So. 2d 34, 35 (Fla. 5th DCA 2004) (citation omitted); *City of Lauderhill*, 864 So. 2d at 438-39.[5] The identification of fundamental rights "has not been reduced to any formula" and "history and tradition guide

[5] The protection of the environment, including the right to a climate system capable of sustaining human life and liberty, is both "deeply rooted in" Florida's and "our Nation's history and tradition" and "implicit in the concept of ordered liberty." *See, e.g.*, James Madison, "Address to the Agricultural Society of Albemarle, 12 May 1818," *Founders Online*, National Archives, http://founders.archives.gov/documents/Madison/04-01-02-0244. (Animals, including man, and plants may be regarded as the most important part of the terrestrial creation . . . *To all of them, the atmosphere is the breath of life. Deprived of it, they all equally perish . . .*"). Further, the constitutional codification of the public trust doctrine in Florida evidences the deep roots of the principles of environmental protection in Florida. Development of a full factual record in this case on the merits will further demonstrate the history and tradition of this fundamental right.

and discipline this inquiry but do not set its outer boundaries." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). The catalog of fundamental rights is intended to grow as society develops beyond the imaginations of the framers of Florida's and our Nation's Constitutions: "When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Obergefell*, 135 S. Ct. at 2598. Important fundamental rights include those that are "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), or required "to enable the exercise of all rights, whether enumerated or unenumerated." *Juliana*, 217 F. Supp. 3d at 1249; *see also Obergefell*, 135 S. Ct. at 2599 (enumerated liberty right inherently encompasses right to marry).

The right to a stable climate system that sustains human life and liberty is likewise "preservative of all rights" and deserving of fundamental status. "[A] stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress." 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *aff'd under clear error standard*, *In re United States*, 884 F.3d 830 (9th Cir. 2018), *and*, *In re United States*, 895 F.3d 1101 (9th Cir. 2018), *application for stay, certiorari, and mandamus denied*, *United States v. U.S. Dist. Court for Dist. of Oregon*, ___ S.Ct. ___, No. 18A65, 2018 WL 3615551 (July 30, 2018). Plaintiffs are not asserting a fundamental right to be free from pollution. Rather, Plaintiffs allege the Defendants' conduct has caused climate change on a catastrophic level such that the lives and liberties of Plaintiffs and the habitability of much of Florida is in peril. (Compl. ¶¶ 89-90). "[W]here a complaint alleges government action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human life spans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation." *Id.* Defendants' causation and

contribution to climate change and the impacts injuring Plaintiffs is precisely the type of "new insight" that "reveals discord between the Constitution's central protections and a perceived legal stricture," requiring that Appellants' "claim to liberty be addressed."

D. The Court Can Hear The Plaintiffs' Public Trust Doctrine Claims.

Florida's "Public Trust Doctrine," which has been interpreted and applied in a number of judicial decisions, is a long-standing and essential part of Florida's common and constitutional law. *Lee v. Williams*, 711 So. 2d 57, 60 (Fla. 5th DCA 1998) ("the public trust doctrine . . . is subject to judicial determination, at least where there is no contrary constitutional or legislative directive."). In 1974, the Supreme Court of Florida recognized the propriety of protecting the public interest in, and utilization of, Florida's beaches and oceans:

> No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this Court. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974).

While Florida can regulate authorization and usage of the beaches or shores, such authorization "must be subject to reasonable use of the beach or shore for its primary and long established public purposes, *for which the State holds it in trust*, and subject to lawful governmental regulations." *City of Daytona Beach*, 294 So. 2d at 75 (emphasis added). The interest and rights of the public to Florida's beaches is something to be protected. *Id.* at 77. Logically, the Defendants' implementation of an energy system that foreseeably and substantially impairs Florida's public trust resources is tantamount to physically barricading the public's access to these resources when it comes to assessing the impact on Plaintiffs' rights. It does not matter for purposes of the public trust analysis whether Defendants build a fence blocking access to a

public beach or create an energy system which causes beaches to suffer significant degradation, erode and disappear entirely due to rising seas.

The public trust doctrine also has constitutional dimensions, and is partially enshrined in Article X, section 11 of the Florida Constitution:[6]

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

See also Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 344 (Fla. 1986) (Art. X, §11 "is largely a constitutional codification of the public trust doctrine contained in our case law.").

Florida courts have applied the public trust doctrine to protect public interests beyond navigation. By way of example:

> [T] the State holds title to lands under tidal navigable waters and the foreshore thereof (land between high and low water marks). As at common law, this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically, it is trust property and should be devoted to the fulfillment of the purposes of the trust, to wit [sic]: the service of the people.

Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957); *see also Brickell v. Trammell*, 82 So. 221, 226 (Fla. 1919) ("the doctrine traces to English common law, recognizing the rights of the people to the navigable waters and the lands thereunder, including the shore and space between high and low waters marks.").

[6] All Defendants, of course, have an obligation to comply with the constitutional and common law requirements of the public trust doctrine.

Courts necessarily have jurisdiction to hear and decide public trust cases, as a constitutionally-based and judicially-enforced doctrine. In fact, Florida courts have resolved many public trust cases, and routinely require compliance with the public interest-protection mandates of the doctrine. *See, e.g.*, *Coastal Petroleum Co.*, 492 So. 2d 339; *Mariner Properties Dev. v. Bd. of Trustees of Internal Imp. Tr. Fund*, 743 So. 2d 1121, 1122 (Fla. 1st DCA 1999) ("Consistent with article X, section 11, of the Florida Constitution, such [sovereign] lands are held by the Board as a public trust and the Board's authority is rigidly circumscribed by this common law doctrine."); *Lee*, 711 So. 2d at 60 ("the public trust doctrine is a creature of the common law, the extent of which and alterations to which are subject to judicial determination, at least where there is no contrary constitutional or legislative directive."). Plaintiffs, as beneficiaries of the public trust, retain the right to bring this action against the public trustees for failing to discharge their duties and causing destruction of public trust resources. *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1114-15 (Fla. 2008) ("the State has a constitutional duty to protect Florida's beaches, part of which it holds in trust for public use."). This Court has jurisdiction to hear Plaintiffs' public trust claims.

II. THE DEFENDANTS ARE NOT IMMUNE FROM THIS SUIT.

The case Defendants cited to this Court as supplemental authority confirms that Defendants are not immune from this suit: "sovereign immunity will not bar a claim against the State from a challenge based on violation of the federal or state constitutions." *Fla. Fish and Wildlife Conservation Comm'n v. Daws*. No. 1D16-4839, 2018 WL 3911472, at *3, 7 __ So.3d __ (Fla. 1st DCA Aug, 16, 2018). Moreover, article X, §13 of the Florida Constitution is entitled "Suits against the state." That section provides: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The

Florida Legislature, as anticipated in the Florida Constitution, statutorily waived sovereign immunity for the State of Florida, as well Florida's various agencies and subdivisions, for tort actions occurring after October 1, 1981, and this waiver is statutorily codified at § 768.28 Fla. Stat. Subsection (1) provides in relevant part that:

> Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Subsection (2) of § 768.28 then provides:

> As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

Given this backdrop, it is surprising that any Defendant has challenged suit based on immunity, though they do correctly concede in their motion that Florida allows claims for equitable or declaratory relief against governments when governmental action has directly infringed the rights of plaintiffs. *See* FDEP Motion to Dismiss, p. 16. Since this is what the Plaintiffs allege, the Court's inquiry ends here. In a last-ditch effort, the FDEP's Motion to Dismiss wrongly suggests that "Plaintiffs seek an order compelling executive agencies to enact new laws and policies, and to undertake regulatory action against third parties . . ." *Id.* This is simply not true; no such relief is sought in the Complaint.

III. THE COMPLAINT SETS FORTH JUSTICIABLE CAUSES OF ACTION.

A. The Plaintiffs allege harm both to traditional public trust resources and to the atmosphere.

The Plaintiffs' Complaint, at ¶¶ 4, 39, 50, 117, 124, 132, and 136-148, comprehensively describes how the Defendants breached their public trust responsibilities to protect and preserve access to Florida's public trust resources, including "the atmosphere (air), submerged state sovereignty lands, lakes, rivers, beaches, water (both surface and subsurface), forests, and wild flora and fauna." The Plaintiffs allege impairment of resources that the Defendants concede are subject to the public trust doctrine. The Plaintiffs also seek a declaration that the atmosphere is a public trust resource that cannot be impaired by Defendants' unconstitutional conduct. The Court need not resolve that latter issue today. For the purposes of the motion, Plaintiffs allegations must be taken as true, and Defendants can point to no authority stating that the atmosphere is *not* subject to the public trust doctrine.

While the Defendants concede that some of these resources (specifically, submerged lands) are the property of the State under the public trust doctrine, the Defendants challenge the premise that "the public trust doctrine can somehow be extended to cover the atmosphere" (*see*, DEP Motion at 18). This argument is logically and scientifically unsound. Air, water and land are inter-related systems, which depend upon each other. The atmosphere - which cannot in any way be subject to private ownership - is the responsibility of the sovereign state and, through it, the Defendants. The Defendants cannot fail to protect and substantially impair the atmosphere while simultaneously protecting other public trust resources; failure to protect the former inevitably impairs the latter and detrimentally impacts the Plaintiffs' rights to these resources.

Even if the Court were to jump ahead and begin to consider the inclusion of the atmosphere as a public trust resource now prior to hearing evidence, the Plaintiffs' position rests

on solid legal ground. First, as a scientific as well as logical reality, the air and the water are part of a symbiotic ecosystem; both are critical to the health of traditional public trust resources such as beaches and marine resources. As the Plaintiffs allege in ¶133, "without an atmosphere free from substantial impairment, all other Public Trust Resources will inevitably also be substantially impaired."[7] *See also,* § 259.032, Fla. Stat. (connecting the protection of air with the "policy of the state that the citizens of the state shall be assured public ownership of natural areas for purposes of maintaining this state's unique natural resources.").

Second, the atmosphere should be considered a public trust resource because Art. II, §7(a) of the Florida Constitution, (Compl. ¶ 134), specifically identifies the air as necessary for the preservation and protection of Florida's natural resources, and directs the legislature to enact laws "for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources."[8]

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[7] A state court in Washington has extended the public trust doctrine to the atmosphere using this rationale. *Foster v. Wash. Dep't of Ecology*, 2015 WL 7721362 (Wash. Super. 2015) explains: "Ecology argues that since the Public Trust Doctrine has not been expanded by the courts beyond protection of navigable waters it cannot be applied to protection of the 'atmosphere.' But this misses the point since current science makes clear that global warming is impacting the acidification of the oceans to alarming and dangerous levels, thus endangering the bounty of our navigable waters."). *Id*. at *8 ("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."); *see also Juliana*, 217 F. Supp. 3d at 1255 n.10 ("To be clear, today's opinion should not be taken to suggest that the atmosphere is not a public trust asset . . . ."

[8] Contrary to the Defendants assertion (Gov. Mot. at 3, State Mot. at 23), Plaintiffs are not citing this constitutional provision as "self-executing." Rather, it is evidence that air be treated an essential natural resource. *Walton County*, 998 So. 2d at 1110, 1111 (citing Art. II, § 7(a) for the principle that "the State has an obligation to conserve and protect Florida's beaches as important natural resources" that supplements the State's "constitutional duty to protect Florida's beaches, part of which it holds 'in trust for all the people'"). To reach even further back in history, the Florida Supreme Court cited to the *Institutes* of Justinian in its early public trust jurisprudence, which recognized that, "'under the jurisprudence of Justinian, these were held natural rights and common to all; the air, running water and the sea, and hence the shores of the sea.'" *Geiger v. Filor*, 8 Fla. 325, 335-36 (1859) (citation omitted, but reinforcing the common law notion that the King holds dominion "not as his own private property, but for the public and as trustee to preserve and maintain it…. The King has the property, but the people have the use necessary.") This in turn derived from Roman law where such things "common to all," were "expressly denominated by the Roman jurists as "res communes", or thing of the community. *Sullivan v. Richardson*, 33 Fla. 1, 117 (1894). *See also,* Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. Envtl. Aff. L. Rev. 421, 424 (2005) ("The public trust doctrine was first formally declared in the fifth century A.D. by the Justinian Institute: "By the law of nature these three things are common to mankind—the air, running water, [and] the sea." (quoting J. Inst. 2.1.1).

Third, and although this issue a matter for resolution on the merits, the status of the atmosphere (air) under the common law is not analogous to that of ground water, though the DEP argues to the contrary. Under Roman law, air, like running water, the sea and the shoreline, was in some respects the property of all and in others the property of nobody. *Sullivan*, 33 Fla. at 117. Common law "was to assign to everything capable of occupancy and susceptible of ownership a legal and certain proprietor, and accordingly it makes those things which, from their nature, cannot be exclusively occupied and enjoyed, the property of the sovereign.'" *Geiger v. Filor*, 8 Fla. at 336 (citations omitted). This rationale applies to the atmosphere: since it cannot be exclusively occupied, it belongs to the sovereign - in this case, Florida. For this reason, courts in other states that have explicitly considered the issue have long recognized that air and atmosphere are a public trust resource. *See, e.g., Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J. 1821). Florida has a consequent duty to maintain and preserve this public trust for all.[9]

[9] S*ee also Sullivan*, 33 Fla. at 117; Jan S. Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U. C. Davis L. Rev. 195, 197-198 (1980). The English common law position regarding running or flowing water was settled in *Embrey v. Owen*, 155 Eng.Rep. 579 (1851), where the House of Lords described the public's rights to running water and "the analogous cases of rights to air and light" as a "usufruct… subject to the similar rights of all… to the reasonable enjoyment of the same gift of Providence." *Id.* at 585-586 (1851). *See also* Blackstone, *Commentaries on the Laws of England* (1766), bk. 2, c. 1, p. 14 ("But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water…"). The common law has thus treated the atmosphere as property vested in the sovereign in which all have rights. *Chasemore v. Richards*, 11 Eng.Rep. 140, 152 (1859) (Cranworth, L.J.) states: "The right to running water has always been properly described as a natural right, just like the right to the air we breathe; they are the gifts of nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because running water is something visible, and no one can interrupt it without knowing whether he does or does not do injury to those who are above or below him. But if the doctrine could be applied to water merely percolating, as it is said, through the soil, and eventually reaching some stream, it would be always a matter that would require the evidence of scientific men, to state whether or not there had been interruption, and whether or not there had been injury. It is a process of nature not apparent, and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received." Since the common law treated ground water distinctly from other public trust resources, courts in different jurisdictions have been free to adopt and apply different rules regarding its use. *See, e.g., Cason v. Florida Power Co.*, 76 So. 535 (Fla. 1917) (establishing a doctrine of "reasonable use" in respect of ground water in Florida); *Hous. & T.C. Ry. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904) (establishing a "rule of capture" in respect of ground water in Texas); *In Re Water Use Permit Applications, Petitions For Interim Instream Flow Standard Amendments, And Petitions For Water Reservations For The Waiahole Ditch*, 9 P.3d 409 (Haw. 2000) (extending

Fourth, Florida has already recognized the importance of maintaining air quality through the implementation of various statutes. For instance, the Florida legislature, in § 403.021(1) Fla. Stat., notes the inter-connected nature of air, water and land: "The pollution of the air and waters of this state constitute a menace to public health and welfare; creates public nuisances; is harmful to wildlife and fish and other aquatic life; and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water." Subsections (2) and (3) of that same statute declare it Florida's public policy to protect and maintain a high level of air (and water) quality. By way of further example, under § 403.0874 Fla. Stat., another part of Chap. 403 governing "Environmental Control," an "Air Pollution Control Trust Fund" has already been established in, and is administered by, the DEP.

The public trust doctrine, in any event, has already been judicially extended beyond submerged lands. For instance, Florida courts have applied the public trust doctrine to beaches in *Walton County*, 998 So. 2d at 1110-11 (Fla. 2008), *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (1974), and *Martin v. Busch*, 112 So. 274, 283 (Fla. 1927); to the banks of rivers and creeks (*Teat v. City of Apalachicola*, 738 So.2d 413, 414 (Fla. 1999)); to state lands (*Coastal Petroleum*, 701 So. 2d at 625); and state lands and the ocean (*City of Daytona Beach*, 294 So. 2d at 75). Art. X, §16(a) of the Florida Constitution similarly extends the doctrine to marine resources

The atmosphere and Florida's waters, of course, interact, and both are essential to life. It is therefore a logical and natural extension for the public trust doctrine to include Florida's atmosphere, as substituting air for water is the only material distinction between the case law examples cited above. Even if the Court, for whatever reason, were to refuse to apply the public

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the public trust doctrine to ground water in Hawai'i). In contrast, the common law has always cited air alongside and akin to other public trust resources.

trust doctrine to the atmosphere, the Plaintiffs' other claims regarding the Defendants' impairment of the other traditional public trust resources (submerged lands, beaches, and marine resources) should proceed.

B. The Defendants Have a Mandatory, Enforceable Duty To Protect And Prevent Substantial Impairment To Florida's Public Trust Resources.

Florida, under the public trust doctrine, "has an affirmative obligation to restrict or eliminate private activity on sovereign lands when such activity becomes contrary to the public interest. Article X, Section 11, Florida Constitution confirms this obligation." *Coastal Petroleum*, 701 So. 2d at 624 (affirming the trial court); *Walton Cty.*, 998 So. 2d at 1115 (considering Florida's constitutional duty to protect its beaches).[10]

The Defendants breached their duty to protect Florida's public trust resources (1) through the systemic creation and operation of an energy system that causes dangerous levels of GHG emissions; and (2) through the approval, and failure to restrict, private activities, both of which have caused substantial impairment to the state's public trust resources. (Complaint at ¶¶ 85-123); ¶ 93 ("With sea level rise, Florida's coastal ecosystems are changing due to the increase in dry-land loss due to submergence, erosion, wetland loss/change, flood damage, saltwater intrusion from surface to ground water, and higher water tables that impede drainage."); ¶ 95 (the reef system "already is showing signs of climate change vulnerability in the form of mass bleaching events caused by stress due to increased ocean temperatures."); ¶ 99 ("within the next 12 years, property values in Florida will decline by $15 billion."); ¶ 118 ("A recent study by the University of Miami showed that in the last decade, flooding in Miami Beach has increased by 400%."); ¶ 70 ("Scientific evidence demonstrates that non-linear sea level rise would submerge much of Florida . . .").

[10] This constitutional provision states that Florida holds title to all lands under navigable waters, including beaches below mean high water lines, "in trust for all the people."

The Defendants' primary role in administering trust resources is to ensure that they are "devoted to the fulfillment of the purposes of the trust, to wit [sic]: the service of the people." *Hayes*, 91 So. 2d at 799. One analytical compliance standard for the courts is whether the state has "materially impaired" or "abdicated control" of the trust resource:

> A state may make limited disposition of portions of such [trust] lands, or of the use thereof, in the interest of the public welfare, where the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired. The states cannot abdicate general control over such lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good.

State ex rel. Ellis v. Gerbing, 47 So. 353, 355 (Fla. 1908); *see also American Cyanamid Co.*, 492 So. 2d at 346 (Boyd, C.J, dissenting) ("Florida law has long recognized that it is not necessary for the state to retain absolute ownership of the bed of a river in order to retain the control of the use of the surface waters for the benefit of the public."). Otherwise put: "if the grant of sovereignty land to private parties is of such nature and extent as not to substantially impair the interest of the public in the remaining lands and waters it will not violate the inalienable trust doctrine." *Holland v. Fort Pierce Fin. & Constr. Co.*, 27 So. 2d 76, 81 (Fla. 1946).

By deliberately creating, operating and maintaining an energy system based on fossil fuels and by authorizing and failing to restrict private activity that causes dangerous levels of GHG emissions, the Defendants have caused substantial impairment to and "abdicated general control" over public trust lands and resources in a way that harms the Plaintiffs. (Compl. ¶ 136-147). These actions, causing dangerous climate change, have damaged the Plaintiffs' constitutional rights of access to places that they enjoy and visit, as set forth in Compl. ¶ 14, 19, 23, 24, 27, 31, 38. The Defendants have breached their duty to administer and manage public trust lands and resources by, among other things, failing to complete any accounting of Florida

GHG emissions since 2008, only considering historical anthropogenic GHG emissions from 1990-2005.[11] (Compl. ¶ 138.) They routinely issue permits and authorizations for fossil fuel projects and infrastructure that cause dangerous levels of GHG emissions. (Compl. ¶ 124.) They have failed to meaningfully restrict emissions of GHGs. *Id.* These allegations, which must be taken as true at the motion to dismiss stage, state valid *prima facie* public trust claims.

IV. THE PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE PRIMARY JURISDICTION DOCTRINE.

The Defendants have argued that the primary jurisdiction doctrine bars the Plaintiffs' claims, but this argument misses the mark. That doctrine "dictates that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction until such time as the issue has been ruled upon by the agency." *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1036-37 (Fla. 2001).

A. The Primary Jurisdiction Doctrine is Inapplicable.

The doctrine of primary jurisdiction applies "whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special

[11] A current GHG emissions accounting is a widely accepted means of calculating the amount of GHGs produced in a given region over a given time. Such an accounting is within the Court's authority to order and is essential to understanding the full extent of the harms at issue. "The public trust doctrine is based upon common law equitable principles. That is, the administration of land subject to the public trust is governed by the same principles applicable to the administration of trusts in general." *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733, 738 (Idaho 1987), citing Bogert & Bogert, Law of Trusts, § 6 (1973). A long-recognized duty of trustees is the duty to account. *Sewell v. Sewell Properties*, 159 Fla. 570, 573 (1947); *Slocum v. Borough of Belmar*, 569 A.2d 312, 316–17 (N.J. 1989) ("The Borough of Belmar, as a municipality chartered by the state, is trustee over the public trust resources within its jurisdiction. As trustee, it has a duty of 'loyalty,' 'disclosure,' and 'to keep clear and adequate records of accounts. . . When the trustee fails to keep proper accounts, all doubts are resolved against him.'"). In addition to the outdated and incomplete GHG emissions inventory completed in 2008, the DEP also engages in a form of trust accounting for submerged state sovereignty lands by determining the mean high water elevation to meet the requirements of the Coastal Mapping Act, §§ 177.25-177.40 Fla. Stat.; *see also* § 253.03(8)(a) Fla Stat (requiring Board of Trustees to prepare an annual inventory of state trust lands). Thus, an updated GHG emissions inventory is a reasonable remedy to Plaintiffs' public trust claim that would not raise any political question concerns.

competence of an administrative body . . .” *Flo-Sun, Inc. v. Kirk*, 783 So. 2d at 1037 n.5. Defendants cite no statute or rule giving them specific authority to define the scope of Plaintiffs’ substantive due process and public trust rights. Furthermore, a recognized exception exists to the doctrine of primary jurisdiction:

> Florida courts have consistently held that parties need not resort to administrative remedies where agency errors are so ‘egregious or devastating that the promised administrative remedy is too little or too late.’

Id. at 1037 (quoting *Communities Fin. Corp. v. Florida Dep’t of Envtl. Regulation*, 416 So. 2d 813, 816 (Fla 1st DCA 1982)). To invoke this exception:

> [T]he complaint must demonstrate some compelling reason why the APA [Administrative Procedures Act, codified at Chap. 120, Florida Statutes] does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack of general authority in the agency and, if it is shown, that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if that is the case, that the APA cannot remedy that illegality; or (4) agency ignorance of the law, the facts, or public good must be shown and, if any of that is the case, that the Act provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interests and refuses to afford a hearing or otherwise refuses to recognize that the complainants' grievance is cognizable administratively.

Id. at 1038 (quoting *Communities Fin. Corp.*, 416 So. 2d at 816).

In this case, the APA provides no remedy for Plaintiffs’ non-administrative public trust and substantive due process claims, which are based in constitutional and common law rights. The Plaintiffs’ grievances concern the Defendants’ combined creation, operation and maintenance over time of an unconstitutional energy system – matters that neither the Division of Administrative Hearings (which implements the APA), the DEP, nor any other single Defendants has legislative authority to address them. As in *Lombardozzi v. Taminco US Inc.*, “most of the issues in this case - for example, whether Defendant breached a duty to Plaintiffs, whether Defendant's activities unreasonably interfered with Plaintiffs’ use and enjoyment of their

properties, and the extent of Plaintiffs' damages - are all of a type commonly adjudicated by the courts."[12] Resolving these questions will not require extensive interpretation of FDEP regulations or a detailed technical analysis beyond that in which this Court ordinarily engages. This is particularly so in light of the fact that the Legislature has failed to implement and repealed statutory laws that were passed in 2008 to address climate change. (Compl. ¶ 124(i)). Defendants are therefore incorrect that Florida law "requires" that the Plaintiffs' claims be deferred until the DEP "has rendered a decision on the matter."[13] (DEP Mot. at 15.) There are multiple reasons that this argument is incorrect.

First, failure to exhaust administrative remedies is an affirmative defense that is not apparent on the face of the complaint. Thus, it cannot be a valid basis for dismissal. *Wilson v. County of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004). Second, Plaintiffs are not challenging individual agency actions under the APA. Rather, they challenge the constitutionality of the Defendants' systemic conduct in creating, operating and managing Florida's energy system. No statute delegates to the DEP (or any other Defendant) the expertise to interpret and define the scope of Plaintiffs' constitutional substantive due process and public trust rights. In fact, any attempt to do so would overtly violate the separation of powers doctrine.[14] Third, "the application of the doctrine of primary jurisdiction is a matter of deference,

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[12] *Lombardozzi v. Taminco US Inc.*, No. 3:15CV533/MCR/EMT, 2016 WL 4483856, at *2 (N.D. Fla. Aug. 24, 2016). *See also Pierson v. Orlando Reg'l Healthcare Sys.*, No. 6:08CV466-ORL-28GJK, 2010 WL 1408391, at *14 (M.D. Fla. April 6, 2010). ("Tort claims for damages are not something with which courts are unfamiliar or for which courts need agency expertise to resolve."); *Swartout v. Raytheon*, No. 808-CV-890-T-26EAJ, 2008 WL 2756577, at *3 (M.D. Fla. July 14, 2008) (noting that "[c]ourts and juries routinely decide issues of property value"); *Luckey v. Baxter Healthcare Corp.*, No. 95-CV-509, 1996 WL 242977, at *5 (N.D. Ill. May 9, 1996) (primary jurisdiction not applicable, despite EPA expertise, because "[t]housands of tort cases involving technical issues of product design and safety are decided by courts every year, and the plaintiff's case [is] indistinguishable ... [i]f the district court believe[s] that it need[s] information from the EPA, it [can] ask the agency to file an amicus brief.").

[13] The DEP has previously denied a petition for rulemaking requested the reduction of GHG emissions as called for by best available science. (Compl. ¶ 124(q)).

[14] The DEP, although it has played a role in causing and contributing to the dangerous climate change at issue in this suit, does not even have legislative authority, alone, to remedy the harms alleged. In fact, DEP is no longer the

policy and comity, not subject matter jurisdiction." *Flo-Sun, Inc.*, 783 So. 2d at 1037-38. Fourth, the Florida legislature has not "devised a detailed and exhaustive regulatory system" to address the problems caused by GHG emissions. *Id.* at 1034; (Compl. ¶ 124(i)).

The Plaintiffs do not seek review of individual agency actions under the APA. Rather, they challenge the Defendants' fossil fuel-based energy and transportation system which does not—and, with the policies and resources now in place—cannot meet constitutional requirements. Constitutional challenges to systemic government conduct have rightfully proceeded outside of the APA and limiting Plaintiffs' claims to the strictures of the APA would violate Plaintiffs' procedural due process right to meaningful review.

The private interests at stake for Plaintiffs are unquestionably of the highest constitutional importance, and limiting the Plaintiffs' constitutional challenges to the strictures of the APA system risks seriously depriving them of fundamental rights. Indeed, some of Defendants' unconstitutional acts as challenged in the Complaint are not "agency actions" subject to the APA at all, and furthermore, parties are required to exhaust administrative remedies only when the remedies "are available and adequate,"[15] which is not the case here. Agency treatment could not begin to address the systemic nature of the challenged conduct and the harm it causes, nor could even hundreds of different piecemeal agency challenges afford the complete relief to which the Plaintiffs are entitled. Further, any further review would be limited to the agency record, which would foreclose consideration, review, and redress of the systemic nature that has led to the constitutional violations at issue.

"agency with special competence" with respect to energy policy because that authority has largely been transferred to the Florida Department of Agriculture and Consumer Services. (Compl. ¶ 124(p)). The Complaint alleges that the current administration has taken repeated actions to ignore and deny the issue of climate change and undo agency policy and response, and lacks the will to address the climate change issues presented in this case. (*Id.* ¶ 124(i), (p)-(t)).

[15] *State ex rel. Dep't of Gen. Serv. v. Willis*, 344 So. 2d 580, 589 (Fla. 1st DCA 1977).

As an unfair procedural barrier, the Court should also consider that many of the discriminatory agency actions comprising the Defendants' systemic constitutional violations were committed decades ago, long before these young Plaintiffs were born, and therefore could not even attempt to comply with Florida's 90-day APA appeal deadline. Litigational efficiency militates in favor of treating the Plaintiffs' claims as a single systemic challenge as well, rather than as a myriad of multitude challenges to individual agency actions. Even if that process were feasible at all (it is not), it would prove costly, inefficient, and unduly burdensome for all parties, compared to this single judicial process.

B. The Defendants' Primary Jurisdiction Doctrine Authorities Are Either Distinguishable or Inapplicable; This Case Should Not Be Deferred.

Defendants incorrectly rely on three cases to support their claim that this case must be deferred due to the application of primary jurisdiction. First, Defendants cite *Flo-Sun, Inc.*, 783 So. 2d 1029 and *Florida Fish & Wildlife Conservation Comm'n v. Pringle,* 838 So. 2d 648 (Fla. 1st DCA 1983) to argue that primary jurisdiction requires that an action based on "complex environmental regulations" must be deferred. The Court should reject that notion.

Flo-Sun, Inc. involved a public nuisance case between two private parties regarding a specific activity that was subject to DEP regulation. 783 So. 2d 1029. Unlike this case, in *Flo-Sun, Inc*., there were clearly established statutes delegating authority to DEP that the Court needed to interpret and address to resolve the claims in the case. The Court in Flo-Sun noted, "it is abundantly apparent that the comprehensive legislative scheme established to deal with environmental concerns is aptly suited to address the complex technical issues which may arise in this case." *Id*. at 1040. Here, in contrast, there is no "comprehensive legislative scheme" at all to address dangerous climate change. Worse, the scheme that was enacted has been largely

repealed or unenforced by the Defendants, as set forth in ¶¶ 124(c), (h), (i), (k), (m)-(t) of the Complaint.

Furthermore, in the *Flo-Sun, Inc.* case, the Florida Supreme court emphasized that primary jurisdiction is a matter of deference, not subject matter jurisdiction: "the simple fact that the doctrine of primary agency jurisdiction may apply does not necessarily mean that it must be applied. As noted earlier, this is a doctrine grounded on the notion of judicial deference and restraint." 783 So.2d at 1039. This Court should not defer to state actors who have proven incapable of any meaningful remediation or other resolution of the conditions that led to the harms alleged in the Complaint.

Second, in *Florida Fish & Wildlife Conservation Commission*, the issue raised involved technical expertise regarding fishing gear specifications and prohibitions. 838 So. 2d at 650. In contrast, when the allegations in the Complaint here must be taken are deemed true, the Court needs no particular technical expertise to determine jurisdiction over the Plaintiffs' substantive due process and public trust claims.

Defendants reliance on *Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of Internal Imp. Tr. Fund*, 427 So. 2d 153 (Fla. 1983) is also misplaced. *Key Haven* dealt with specific agency actions that were reviewable and appealable under the APA. Here, Plaintiffs do not challenge specific, individual agency actions. Instead, the Plaintiffs challenge Defendants' aggregate and systemic actions, that collectively served to violate Plaintiffs' constitutional rights, something not at issue in *Key Haven*, and something that cannot be adequately addressed through piecemeal agency review.

The case before this Court is more in line with *Wilson v. County of Orange*, 881 So. 2d 625 (Fla. 5th DCA 2004), where plaintiffs alleged a civil rights cause of action under 42 U.S.C.

§1983. In *Wilson,* the court held that the Wilsons sufficiently alleged a cause of action that should properly be decided after a jury had the benefit of hearing evidence and argument from both parties on the issues, and denied the defendants claim that the Wilson's failed to exhaust administrative remedies, holding: "[i]t is well established that the facial constitutionality of a statute may not be raised in an administrative proceeding." *Id*. at 630-31. A constitutional challenge to Defendants' systemic conduct here is not something that can first be heard by an administrative agency lacking in expertise or authority to interpret and apply constitutional substantive due process and public trust rights. The doctrine of primary jurisdiction does not apply to prohibit judicial review of the Plaintiffs' claims.

V. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR PLAINTIFFS' DUE PROCESS OR PUBLIC TRUST CLAIMS.

The Defendants erroneously argue that Plaintiffs' claims implicate a nonjusticiable political question beyond this Court's competency. Defendants are wrong for at least three reasons. First, Plaintiffs' claims implicate none of the formulations indicating the presence of a nonjusticiable political question. Defendants' conclusory arguments to the contrary mischaracterize Plaintiffs' claims, the relief they seek, and the law governing their justiciability. Second, the separation of powers principles underlying the political question doctrine establish that it is the judiciary's core function to assess legislative and executive action and policy for constitutional compliance. Third, federal precedent establishes that claims premised on climate change do not implicate nonjusticiable political questions.

A. Plaintiffs' Claims Implicate None of the *Baker* Formulations Indicating the Presence of a Nonjusticiable Political Question.

The judiciary has the responsibility to decide cases properly before it, even those a court would rather avoid. *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (citations omitted). The

"political question doctrine" constitutes a "narrow exception to that rule." *Id.* at 195. Courts cannot avoid their responsibility, however, merely "because the issues have political implications." *INS v. Chadha*, 462 U.S. 919, 943 (1983),[16] and in Florida, "circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be." *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977).

As announced by the U.S. Supreme Court in *Baker v. Carr*, unless one of the following considerations is "*inextricable* from the case at bar," there can be no dismissal for non-justiciability on the ground of a political question's presence:

> [(1)A] textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Coalition for Adequacy of Fairness in School Funding, 680 So. 2d at 408 (*quoting Baker v. Carr*, 369 U.S. 186, 217 (1962)) (emphasis added).

First, although the Defendants' mischaracterize the Plaintiffs' claims as statutory claims, (*see* DACS Mot. at 26-27; DEP Mot. at 8), the Complaint clearly and consistently challenges, as violative of *constitutional* rights, the *affirmative actions and conduct of Defendants*, in causing

[16] It is difficult to imagine a dispute that does not have at least some "political" overtones, but cases from around the country recognize that judicial review is particularly appropriate when individual rights are at stake. *See e.g., Eain v. Wilkes*, 641 F. 2d 504, 516 (7th Cir. 1981) (courts are cautious to invoke political question doctrine where individual rights are involved), cert. denied 454 U.S. 894 (1981); *Allende v. Shultz*, 605 F. Supp. 1220, 1223 (D. Mass. 1984) (judicial review is particularly appropriate in cases involving fundamental rights of citizens); *Sharon v. Time*, 599 F. Supp. 538, 552-53 (S.D. N.Y. 1984) (political question doctrine was improperly invoked when individual rights were involved).

and contributing to dangerous climate change through their permitting, authorization, promotion and facilitation of activities that make up Florida's energy system. (Compl. ¶¶ 2, 5, 124).

Second, Defendants fundamentally misconstrue the nature of the relief Plaintiffs seek. The Plaintiffs do not ask the Court to seize control over, or execute the power of, another branch of government. Defendants mistakenly argue that the Plaintiffs "ask this Court to dictate to each Defendant state agency and state official how to perform their discretionary, statutory duties." *See e.g.*, DACS Mot. at 25. Plaintiffs neither ask the Court to micromanage agency or official duties, nor to order Defendants to adopt any specific policy or take any specific actions. Simply put, Defendants do not have the discretion to violate Plaintiffs' fundamental, constitutional rights. Plaintiffs properly ask this Court to assess the constitutionality of Defendants' systemic conduct, declare that conduct violates Plaintiffs' fundamental rights, and order the Defendants to come into constitutional compliance while deferring to Defendants' judgment and discretion as to the best way to develop and implement the technical details of a remedial plan of their own devising.[17] This is appropriate, as explained in *Florida Dep't of Children and Families v. J.B.*, 154 So. 3d 479, 481 (Fla. 3d DCA 2015) ("[T]he judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government *absent a violation of constitutional or statutory rights*.") (emphasis added).

The Plaintiffs' requested relief is thus consistent with the judiciary's broad authority to "fashion practical remedies when confronted with complex and intractable constitutional violation." *Brown v. Plata*, 563 U.S. 493, 526 (2011) (Approving court order requiring California to reduce state-wide prison population to no more than 137.5% of design capacity and leaving it to State to formulate and implement policy to reach compliance); *see also Brevard*

[17] Thus Plaintiffs' relief neither asks nor requires the Court to "direct[] an agency to perform its duties in a particular manner" as might implicate the separation of powers concerns identified in *Fla. Fish and Wildlife Conservation Comm'n*, No. 1D16-4839, 2018 WL 3911472 , at *7, 7 __ So.3d at __ .

Land Materials, Inc. v. Boruch-David, LLC, 135 So. 3d 578 (Fla. 5th DCA 2014) (trial courts possess "broad equitable powers").

In any event, it is premature now to speculate as to whether *any* relief that might ultimately be ordered, after a determination on the merits, would in any way implicate the separation of powers concerns underlying the political question doctrine. *Baker v. Carr*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial."); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.").

1. The First *Baker* Formulation.

The *Baker* formulations are "listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). Under the first *Baker* formulation, a court should dismiss a claim as presenting a nonjusticiable political question if there has been "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. For this first *Baker* formulation, Defendants rely primarily on Art. II, Sec. 7(a), Florida Constitution, which declares the policy of the State of Florida to "conserve and protect its natural resources and scenic beauty" and provides that "[a]dequate provision shall be made by law for the abatement of air and water pollution . . . for the conservation and protection of natural resources."[18] This is not an *exclusive* commitment of

[18] Defendants' also argue that article V, section 13(d), which states that "The judiciary shall have no power to fix appropriations," is a textually demonstrable commitment here. However, neither Plaintiffs' claims nor their resolution requires the Court to determine any issues regarding appropriations. Nor do they require the Court to "reweigh the competing policy concerns underlying a legislative enactment." (Gov. Scott Mot. at 6) (citing *Bush v. Holmes*, 940 So. 2d 392 (Fla. 2006)). This case seeks only for the Court to engage in the familiar judicial exercise of

unchecked authority over environmental issues to the legislative branch. *See, e.g., Comer v. Murphy Oil USA*, 585 F.3d 855, 874 (5th Cir. 2009) (vacated for rehearing en banc which never occurred) ("Although . . . courts may not decide an issue whose resolution is committed by the Constitution to the exclusive authority of a political branch of government, a federal court may decide a case that merely implicates a matter within the authority of a political branch.") (citing *Baker*, 369 U.S. at 217).

While the legislature has authority to enact laws for environmental protection, the judiciary retains the authority and duty to see that government actions and policies comply with the constitution, including those involving environmental concerns. *See, e.g., 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."); *Jones v. Chiles*, 654 So. 2d 1281, 1286 (Fla. 1st DCA 1995) ("State action, whether taken by a county commission or by any other organ of state government is subject to the strictures imposed by the Florida and federal constitutions."). Although it is the duty of the legislature to "provide the ways and means of enforcing [constitutional rights]," where the political branches transgress or fail to fulfill a constitutionally assigned duty, the judiciary will "have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution and comply with [its] responsibility." *Dade Cty. Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684, 686, 688 (Fla. 1972). Defendants' reading of article II, section 7(a) would put all environmental issues beyond the purview of the judiciary, a position fundamentally repugnant to Florida's system of

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determining whether governmental actions comply with Florida's constitutional guarantee of fundamental individual rights.

checks and balances and jurisprudential history. *See, e.g., Barley v. S. Florida Water Management Dist.*, 823 So. 2d 73 (Fla. 2002) (upholding tax to fund Everglades pollution abatement as compliant with Article II, section 7(a)).

2. The Second *Baker* Formulation.

Under the second *Baker* formulation, a case presents a political question if there exists a "lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. Defendants erroneously argue that neither the public trust doctrine, as incorporated in Florida's constitution, nor the constitutional guarantee of due process provide this Court with standards by which to adjudicate Plaintiffs' claims. If accepted, Defendants' arguments would place all constitutional claims beyond judicial competency, a position fundamentally repugnant to Florida's founding principles and the role of the courts. *See Burnsed v. Seaboard Coastline R. Co.*, 290 So. 2d 13, 16 (Fla. 1974) ("It is a fundamental rule of construction of our constitution that a construction of the constitution which renders superfluous, meaningless or inoperative any of its provisions should not be adopted by the courts."). Contrary to Defendants' arguments, both the public trust doctrine and the due process clause provide clear and well-established standards under which Florida's courts have resolved countless claims and cases.

One standard that Florida courts apply in determining compliance with public trust duties is whether the state has "materially impaired" or "abdicated control" of the trust resource. *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 609 (1908). Defendants' argument that article II, section 7's "adequate provision" language does not provide a clear standard is irrelevant, as Florida's courts have found the public trust doctrine inherent in the constitution and provided standards for its enforcement. *Id.; Coastal Petroleum Co.*, 492 So. 2d at 344. Likewise, as explained more fully in Section I(C), when assessing whether state actions and policies comply with the constitutional

guarantee of due process, Florida's "courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights." *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991). As the *Baker* Court stated with respect to the Fifth Amendment claims at issue in that case, the standards governing Plaintiffs claims are "well developed and familiar." 369 U.S. at 226. As in *Baker,* this Court need only apply well-established standards governing individual constitutional rights to the facts alleged. *See* Erwin Chemerinsky, *Federal Jurisdiction*, § 2.6 n.7 (5th ed. 2007) ("If a litigant claims an individual right has been invaded, the lawsuit by definition does not involve a political question.") (quoting Howard Fink & Mark Tushnet, *Federal Jurisdiction: Policy and Practice* 231 (2d ed. 1987).)

3. The Third *Baker* Formulation.

This Court would not be required to make "an initial policy determination of a kind clearly for nonjudicial discretion" under the third *Baker* formulation. 369 U.S. at 217; *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 607 (Fla. 2012). Defendants' arguments to the contrary are premised on the mistaken contention that the Court must employ the adequacy standard from article II, section 7 to Plaintiffs' public trust claim. As explained, above, that is not the standard governing Plaintiffs' public trust or substantive due process claims. *See* Sections I(B), (C), *supra*.

Defendants' further erroneously argue that Plaintiffs' requested relief would require the Court to "make discretionary decisions on how best to overhaul and manage" Florida's energy

system. (DEP Mot. at 11.) As demonstrated above, that is not the relief Plaintiffs request—the relief Plaintiffs seek would leave discretionary decisions as to how best to attain constitutional compliance with Defendants. Like any traditional constitutional case, Plaintiffs' claims require only that the Court assess Defendants' actions for constitutionality. *See Juliana*, 217 F. Supp. 3d at 1239 (Second and third *Baker* formulations not applicable where "plaintiffs do not ask this Court to pinpoint the 'best' emissions level; they ask this Court to determine what emissions level would be sufficient to redress their injuries."). Further, as demonstrated above, it is entirely premature to speculate as to the propriety of any relief that may be issued following a determination of liability on the merits.

4. The Fourth, Fifth, and Sixth *Baker* Formulations.

There is neither an impossibility of resolving this case "without expressing lack of the respect due coordinate branches of government[,]" an "unusual need for unquestioning adherence to a political decision already made[,]" nor the likelihood of "embarrassment from multifarious pronouncements by various departments on one question," such as would implicate the fourth, fifth, and sixth *Baker* factors, respectively. 369 U.S. at 217. Defendants argue that these formulations are implicated simply because Florida's legislative and executive branches have enacted policies allowing the challenged activities to continue. Such a test would foreclose all court challenges, constitutional or otherwise, to government action. Defendants have it backward. One of the core judicial functions is to check encroachment upon individual liberties by the other branches of government—that is the very essence of judicial review. Accordingly, the U.S. Supreme Court has repeatedly ruled that these formulations, the least determinative of the *Baker* set, are not implicated when a court is called upon, as here, to resolve the constitutionality of another branch's acts. *See, e.g., United States v. Munoz-Flores*, 495 U.S.

385, 390-91 (1990) (ruling justiciable a claim that a statute violated the Origination Clause); *Powell v. McCormack,* 395 U.S. 486, 548-49 (1969) (ruling justiciable a challenge to House of Representatives' refusal to seat petitioner). Indeed, the Florida Constitution purposely established the judiciary as a co-equal branch with the duty to measure executive and legislative action against the Constitution. *Bush v. Schiavo*, 885 So. 2d 321, 329-30 (Fla. 2004). "Since the separation of powers exists for the protection of individual liberty, its vitality 'does not depend' on 'whether 'the encroached-upon branch approves the encroachment.'" *Nat'l Labor Relations Bd. v. Canning*, 134 S. Ct. 2550, 2593-94 (2014) (Scalia, J. concurring). The legislative and executive branches possess the authority to meet state energy needs without violating Plaintiffs' inalienable constitutional rights. This Court has the authority to order such constitutional compliance.

VI. IT IS THE JUDICIARY'S ROLE, UNDER THE SEPARATION OF POWERS DOCTRINE, TO DECIDE CASES OF FUNDAMENTAL INDIVIDUAL RIGHTS.

Florida recognizes that constitutional rights are fundamental rights. *DeAyala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989) (heightened judicial scrutiny applies to statute which impinges on fundamental constitutional rights); *Public Health Trust of Dade Cty. v. Wons*, 541 So. 2d 96, 97 (Fla. 1989) (patient's refusal of life-saving blood transmission treated as a fundamental constitutional right); *Holiday Isle Resort & Marina Assoc. v. Monroe Cty*., 582 So. 2d 741 (Fla. 3d DCA 1991) (trial court's refusal to consider appeal of Board action regarding petitioners' fundamental constitutional rights denied them procedural due process).

The Plaintiffs' constitutionally-grounded claims here are consistent with, and adjudication is compelled by, the separation of powers principles underlying the political question doctrine. *Citizens for Strong Schools, Inc. v. Florida State Board of Educ.*, 232 So. 3d 1163, 1169 (Fla. 1st DCA 2017) (deeming the political question inquiry "essentially a function

of separation of powers.") (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). As the United States Supreme Court stated in *Bowsher v. Synar*, "the declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty." 478 U.S. 714, 721 (1986). Under Florida's tripartite system of government, it is the judiciary's ultimate responsibility and core duty to decide whether affirmative state actions and policies, such as those challenged here, infringe fundamental individual rights safeguarded by the constitution. *Dade County Classroom Teachers Ass'n, Inc. v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972) ("We are under a constitution, but the constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the constitution.") (quotations omitted).

Under Florida's system of checks and balances, "the [judiciary] is responsible for measuring" the acts and policies of the coordinate branches "with the yardstick of the Constitution." *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d at 607. As the Florida Supreme Court has observed:

> It matters not whether the usurpation of power and the violation of rights guaranteed to the people by the organic law results from the activities of the executive or legislative branches of the government or from officers selected to enforce the law, the rights of the people guaranteed by the Constitutions must not be violated.

Boynton v. State, 64 So. 2d 536, 552 (Fla. 1953).

The Court's core power and obligation is to assess whether the actions of the legislative and executive branches infringed upon the Plaintiffs' constitutionally protected fundamental individual rights, and the legislative and executive branches cannot be expected to police their own compliance with the constitution; that is the purview of the judiciary.

VII. CLAIMS PREDICATED ON CLIMATE CHANGE DO NOT INHERENTLY INVOLVE NONJUSTICIABLE POLITICAL QUESTIONS.

No federal appellate court has found that claims predicated on climate change implicate a nonjusticiable political question. On the contrary, those courts confronting the issue have found that such claims fall squarely within the judiciary's purview. This result only makes sense: if despite all evidence the political branch refuses to recognize that climate change even exists (and therefore refuses to seek a remedy), an independent judiciary has an obligation to step in to protect the children being harmed by the government's conduct.

In *Connecticut v. American Elec. Power Co.*, (*"AEP"*), the Second Circuit ruled that public nuisance claims against power companies premised on climate change implicated none of the *Baker* formulations. 582 F.3d 309, 324-332 (2d Cir. 2009), rev'd on other grounds *Amer. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420 (2011). Similarly, in *Comer v. Murphy Oil USA*, the Fifth Circuit ruled that the plaintiffs' nuisance, trespass, and negligence claims against oil and energy companies did not implicate a political question. 585 F.3d 855, 880 (5th Cir. 2009) (vacated for a rehearing *en banc* which never occurred).

The climate change-related claims at issue in *AEP* and *Comer* were rooted in common law, but the Plaintiffs' claims here are premised upon infringement of fundamental constitutional rights. As such, it is even more clear in this case than in *AEP* and *Comer* that the Plaintiffs' claims are justiciable. *See, e.g., Imparato v. Spicola*, 238 So.2d 503, 509 (Fla. 2nd DCA 1970) (quoting *Boyd v. United States*, 116 U.S. 616 1886) ("`It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'").

The Defendants mistakenly rely on *City of Oakland v. B.P. P.L.C.*, a single district court opinion in a non-constitutional public nuisance case against private corporations seeking monetary damages. Federal appellate courts that have reviewed climate-premised claims have

consistently found them not to implicate nonjusticiable political questions. Further, Plaintiffs' claims and requested relief are bolstered by *City of Oakland*, where the court clarified that "federal courts have authority to fashion . . . remedies for claims based on global warming" but "must also defer to the other co-equal branches of government when the problem . . . deserves a solution best addressed by those branches." Order Granting Motion to Dismiss, No. C 17-06011 WHA, 2018 WL 3109726, at * 9 (N.D. Cal. June 25, 2018). This is precisely the relief Plaintiffs request here. Plaintiffs ask the Court to assess the constitutionality of Defendants' systemic conduct, declare that conduct violates Plaintiffs' fundamental rights, and order Defendants to come into constitutional compliance while appropriately deferring to Defendants' judgment as to the best way to develop and implement a plan to remedy the constitutional violations.

The clear justiciability of Plaintiffs' claims is further underscored by *Juliana*, which involves claims and underlying factual circumstances substantially similar to those presented here. 217 F. Supp. 3d 1224. Like Plaintiffs here, the *Juliana* plaintiffs alleged infringement of their fundamental constitutional rights based upon the federal government's aggregate and systemic actions related to GHG emissions. 217 F. Supp. 3d at 1240. After a thorough and reasoned analysis of all six *Baker* formulations' application to the claims at hand,[19] *id.* at 1235-1242, the *Juliana* court concluded that the case did not present a nonjusticiable political question, emphatically concluding:

> There is no need to step outside the core role of the judiciary to decide this case. At its heart, this lawsuit asks this Court to determine whether defendants have

[19] The case of *Aji P. v. State of Washington*, Case No. 18-2-04448-1 SEA (Wash. Super. Ct. Aug. 14, 2018), that Defendants' cite as supplemental authority, in contrast to the *Juliana* decision, contained no legal analysis of the *Baker* factors and applied the incorrect standard of review by not accepting the facts alleged in the Complaint as true. Furthermore, unlike Washington, Florida has no mandatory GHG reduction targets, no renewable energy portfolio standard, and no administrative rule capping and regulating the discharge of carbon dioxide emissions. A notice of appeal has been filed in that case and thus the superior court decision is of no precedential value in this case.

> violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary.

Id. at 1241.

Juliana stands for the proposition that the constitutionally-rooted principle of separation of powers requires the judiciary to confront the merits of climate cases premised on violations of fundamental rights, and Florida's Constitution affords *at least* as much protection of individual liberties as its federal counterpart. *See State v. Lavazzoli*, 434 So. 2d 321, 324 (Fla. 1983) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.")

VIII. THE DEFENDANTS' REMAINING TECHNICAL OR PROCEDURAL CHALLENGES ARE WITHOUT MERIT.

Any remaining challenges the Defendants assert should be rejected. The Complaint involves complicated issues, and the Plaintiffs have made a good faith effort to set forth their claims clearly and specifically. Furthermore, it would be improper to dismiss a complaint for failure to state a cause of action solely because it failed to state the claim in short and plain statements. *Barrett v. City of Margate*, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999). Otherwise put, a pleading may be lengthy, and yet be a succinct statement of the ultimate facts relied on for relief. *Hannum v. Hannum Co.*, 135 Fla. 1, 2-3 (1938).

CONCLUSION

The Court's review is limited to the four corners of the Plaintiffs' Complaint. The Plaintiffs have adequately pleaded the Court's jurisdiction over the cause and over the parties, and they have asserted important justiciable issues of great constitutional importance. The Court should order all pending motions to dismiss denied, and require all Defendants to promptly respond to the Complaint on the merits, without further delay.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September 2018, 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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