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

DELANEY REYNOLDS; et al.,

Plaintiffs,

v. CASE NO.: 2018-CA-000819

THE STATE OF FLORIDA; et al.,

Defendants.
_____/

DEFENDANTS STATE OF FLORIDA, THE FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, COMMISSIONER NIKKI FRIED, AND THE FLORIDA PUBLIC SERVICE COMMISSION'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Pursuant to Rules 1.140(b)(1) and (6) of the Florida Rules of Civil Procedure, Defendants State of Florida; the Florida Department of Agriculture and Consumer Services; Commissioner Nikki Fried, in her official capacity as the Commissioner of Agriculture[1]; and the Florida Public Service Commission (collectively "the Movants") herein move to be dismissed with prejudice as parties and to dismiss with prejudice the First Amended Complaint ("Amended Complaint"). This motion is based on the below:

[1] On January 8, 2019, Nikki Fried became Florida's current Commissioner of Agriculture. She automatically replaces former Commissioner Adam Putnam as the official capacity defendant Commissioner of Agriculture pursuant to Rule 1.260(d), Fla. R. Civ. P.

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INTRODUCTION

Plaintiffs are young adults and minor children who seek declaratory and injunctive relief against various state agencies and state officials based on generalized allegations that Defendants have not done enough to protect Florida's natural resources and atmosphere from the impacts of greenhouse gas pollution caused by fossil fuel emissions. Plaintiffs base their legal claims on provisions in the Florida Constitution and their attempt to expand the protection of the Public Trust Doctrine to the atmosphere. They ask this Court to issue a wide range of declaratory judgments and injunctions over the Executive and Legislative Branches.[2] *See* Am Compl., p. 81. The gravamen of their requested relief is a requirement that Defendants adopt new practices and policies that include "an enforceable comprehensive statewide remedial plan" that would phase out fossil fuel use in Florida and "draw down excess atmospheric [carbon dioxide] through carbon sequestration in Florida's terrestrial ecosystems." Am Compl., p.81.

The Amended Complaint essentially raises the same issues that were raised in the original Complaint. The main differences are that the Amended Complaint adds certain evidentiary allegations based on a recent climate change report issued by the U.S. Global Change Program and the prior two counts are now split into

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[2] The Florida Public Service Commission is an arm of the Legislative Branch. § 350.001, Fla. Stat.

four counts. Original Count I sought both declaratory and injunctive relief for the alleged breach of Florida's Public Trust Doctrine, and original Count II sought declaratory and injunctive relief for the alleged violation of substantive due process. Count I of the Amended Complaint now seeks only declaratory relief for the alleged breach of Florida's Public Trust Doctrine, whereas Count II seeks injunctive relief based on that alleged breach. Am. Compl. pp. 69-77. Similarly, Count III of the Amended Complaint seeks only declaratory relief for alleged violations of substantive due process and Count IV seeks injunctive relief based on those alleged violations. Am. Compl., pp. 77-81.

The essence of Plaintiffs' grievances is that they disagree with some unidentified decisions made by Defendants which, in Plaintiffs' view, aggravated climate change. But such claims do not rise to the level of actionable, justiciable controversies under chapter 86, Florida Statutes. Plaintiffs' counts also lack any justiciable standards for this court to apply and raise issues that should be dispensed with under the Political Question Doctrine or the Separation of Powers Doctrine. Plaintiffs ask this Court to create an entirely new regulatory framework that would usurp the statutory and constitutional responsibilities of Defendants. The reach of Plaintiffs' requested "enforceable comprehensive statewide remedial plan" would also extend without advance notice to non-parties, including persons and businesses regulated by agencies that otherwise would apply statutes and rules

but for the injunction that Plaintiffs request. In other words, Plaintiffs seek unprecedented judicial interference into the Executive and Legislative Branches.

Each Movant requests to be dismissed with prejudice because they are not a proper party, and no justiciable controversy exists between them and the Plaintiffs. They also request that the Amended Complaint be dismissed with prejudice because its counts are based on constitutional provisions that are not self-executing and lack enforceable standards, and would require this Court to resolve nonjusticiable political questions that would intrude into discretionary acts of the Executive and Legislative Branches and also violate Florida's Separation of Powers Doctrine.

Counts I and II also fail because they do not state actionable claims. Those claims allege that Defendants violated Florida's Public Trust Doctrine, which does not extend to the atmosphere. Counts III and IV also fail to state actionable claims. They allege violations of substantive due process because of a claimed right to a stable and habitable climate, which is not a fundamental right protected by either the Florida Declaration of Rights or the Nation's historical traditions.

The Amended Complaint should also be dismissed because it fails to allege separate claims against each defendant with clearly distinguishable, ultimate facts in support of each claim, and is infused with nonspecific allegations and surplusage. But because the Amended Complaint cannot be amended to state a

justiciable cause of action, for the reasons discussed below, it should be dismissed with prejudice.

LEGAL STANDARDS

Standards Governing Motions to Dismiss

A legally sufficient complaint must include "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends" and (2) "a short and plain statement of the ultimate facts showing the pleader is entitled to relief." Fla R. Civ. P. 1.110(b).

A motion to dismiss is essentially a request that the trial court determine whether the complaint properly states a cause of action upon which relief can be granted. If it fails to do so, then the Court must enter an order of dismissal. *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001). Dismissal also is proper if the court lacks jurisdiction over the subject matter. *See* Fla. R. Civ. P. 1.140(b)(1). The trial court's review, which is generally limited to the four corners of the complaint, must draw all inferences in favor of the non-moving party and must accept as true all well-pleaded allegations. *Id.* Mere conclusory allegations, however, will not suffice. *See Stander v. Dispoz-O-Products, Inc.*, 973 So. 2d 603, 605 (Fla. 4th DCA 2008).

"[T]he issue of whether a complaint is sufficient to state a cause of action is a question of law" appropriate for resolution on a motion to dismiss. *James v.*

Crews, 132 So. 3d 896, 898 (Fla. 1st DCA 2014). "A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party." *The Fla. Bar v. Greene*, 926 So. 2d 1195, 1999 (Fla. 2006); *see also Felder v. State, Dep't of Mgmt. Servs., Div. of Retirement*, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008). Similarly, a motion to dismiss for lack of subject-matter jurisdiction tests the legal sufficiency of a complaint. *Acquadro v. Bergeron*, 851 So. 2d 665, 671–72 (Fla. 2003). The Court may, however, consider documents attached to and incorporated in the complaint. *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 600 (Fla. 1st DCA 2013).

The Florida Rules of Civil Procedure provide that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . . ." Fla. R. Civ. P. 1.110(b). To be sufficient, a complaint must allege ultimate facts and not merely legal conclusions. *Maiden v. Carter*, 234 So. 2d 168, 170 (Fla. 1st DCA 1970). Stated otherwise, "[m]ere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact; and every fact essential to the cause of action must be pleaded distinctly,

definitely, and clearly." *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 716 (Fla. 1st DCA 1963).

If a complaint cannot be amended to state a justiciable claim, the complaint should be dismissed with prejudice. *See Doe v. American Online, Inc.*, 718 So. 2d 385, 389 (Fla. 4th DCA 1998) (holding that the trial court did not err by not allowing the plaintiff to amend his complaint because it could not be amended to overcome the defendant's immunity from the lawsuit). A complaint consisting mostly of allegations stating in general terms a plaintiff's dissatisfaction and frustration with how a defendant performs his legal duties fails to state a cause of action. *K.R. Exchange Services, Inc. v. FHI, PL*, 48 So. 3d 889, 894 (Fla. 3d DCA 2010).

Where a claim is alleged against multiple defendants, each claim should be alleged in a separate count against each defendant "instead of lumping all defendants together." *Pratus v. City of Naples*, 807 So. 2d 795, 797 (Fla. 2d DCA 2002); *see also K.R. Exchange Services*, 48 So. 3d at 893 ("A party should plead each distinct claim in a separate count, rather than plead various claims against all defendants together"). A pleader may adopt by reference any statements in other portions of a complaint, but he must concisely identify the common factual allegations that are common to the multiple counts and legal theories. *See Pratus*, 807 So.2d at 797. However, a complaint cannot take a "shotgun approach." *See*

Graham v. Pruitt, 2008 WL 827840, 2007 CA-1818, (Fla. 2d Judic. Cir. Jan 3, 2008) (finding a complaint improperly used a "shotgun approach" in alleging ultimate facts such that the court would be prevented "from making a finding that there is any specific allegation that a particular enactment prevents the Board of Governors from performing any specific constitutional duty or exercising any specific constitutional power."); *see also Frugoli v. Winn-Dixie Stores, Inc.*, 464 So. 2d 1292, 1293 (Fla. 1st DCA 1985) (rejecting a complaint's approach that incorporated by reference into each succeeding count all prior allegations, including those in prior counts.). "Shotgun pleadings" prevent an adversary from being able to discern what is claimed and to frame a responsive pleading, and they thwart a court's ability to determine which facts support which claims, whether the plaintiff has stated any claims upon which relief can be granted, and which evidence is relevant. *See Weiland v. Palm Beach Cty. Sheriffs' Office*, 792 F.3d 1313, 1320 (11th Cir. 2015) (citing *T.D.S. Inc. v. Shelby Mut Ins. Co.*, 760 F.2d 1520, 1544 n. 14 (Tjotflat, J. dissenting)).

A complaint includes an objectionable shotgun pleading when it: (1) incorporates by reference the allegations of preceding counts, which results in the successive counts containing irrelevant factual allegation and legal conclusions; (2) is "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action"; (3) fails to separate "into a different

count each cause of action or claim for relief"; and (4) asserts "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Weiland,* 792 F.3d at 1321-24 (internal citations omitted).

Chapter 86 Pleading Requirements For Declaratory Relief

Section 86.091, Florida Statutes, states that, when declaratory relief is sought, parties must have an "interest [that] would be affected by the declaration." To establish jurisdiction, a plaintiff must show that a case or controversy, namely, an "actual, present, adverse, and antagonistic interest," exists. *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952).

Absent a "present controversy based on articulated facts which demonstrate a real threat of immediate injury," this Court lacks jurisdiction. *Apthorp v. Detzner*, 162 So. 3d 236, 240–41 (Fla. 1st DCA 2015). When a complaint for declaratory relief "fail[s] to make a prima facie showing that any present, justiciable question exists regarding [plaintiffs'] rights and a good-faith, actual, present, and practical need for a declaration exists," the action must be dismissed. *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 859 (Fla. 1st DCA 2013).

Those entities with adverse and antagonistic interests must be "before the court" in order to maintain the action. *Santa Rosa Cty. v. Administration Comm'n,*

Div. of Admin. Hearings, 661 So. 2d 1190, 1193 (Fla. 1994) (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991)). Without the proper defendant, a court has no jurisdiction to consider a declaratory judgment suit. *Coal. for Adequacy & Fairness in Sch. Funding*, 680 So. 2d 400, 402-04 (citing *Santa Rosa Cty.,* 661 So. 2d at 1192-93). This requirement is "necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts." *Martinez v. Scanlan,* 582 So. 2d at 1170 (quoting *May*, 59 So. 2d at 639).

The declaratory relief sought must have the ability to affect the entity being sued if a case or controversy truly exists. Consequently, the proper defendant is the official responsible for the law's enforcement, for it is that official's duties that will be affected and whose "interests are at stake." *Coal. for Adequacy & Fairness*, 680 So. 2d at 403. Therefore, "when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule." *Walker v. President of the Senate*, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995) (internal citations omitted); *see also Atwater v. City of Weston*, 64 So. 3d 701, 703 (Fla. 1st DCA 2011) (internal citations omitted) (holding that the proper defendant in an action challenging a statute's constitutionality is the state official designated to enforce that statute).

ARGUMENT

I. NONE OF THE MOVANTS IS A PROPER PARTY.

Each of the Movants must be dismissed because no justiciable controversy has been alleged between Plaintiffs and any of them. And each of them must be dismissed with prejudice because none of the constitutional provisions or statutes cited in the Amended Complaint can provide a basis for an actionable controversy.

A. The State of Florida is not a proper party.

The State of Florida is not a proper defendant and it should be dismissed with prejudice. Pursuant to section 86.091, Florida Statutes, which sets forth that when declaratory relief is sought, parties must have an "interest [that] would be affected by the declaration." Those entities with adverse and antagonistic interests must be "before the court" in order to maintain the action. *Santa Rosa Cnty*, 661 So. 2d at 1193. Under this standard, the State of Florida is not a party with interests at issue.

The State of Florida does not possess any specific duties that can be alleged to be unconstitutional. A suit challenging the constitutionality of actions or omissions must be brought against the state agency or department charged with enforcing the statutes or constitutional provisions at issue. *See Walker,* 658 So. 2d at 1200 (holding that the Senate President and Speaker of the House were not proper parties to a declaratory action challenging certain operations of the

Department of Corrections); *see also Atwater,* 64 So. 3d at 701 (holding that the Senate President, Speaker of the House, Governor, and Secretary of State were not proper parties to a lawsuit challenging the constitutionality of the growth management statute). The State of Florida is not a distinct legal entity charged with specific statutory or constitutional duties at issue in this case.

The Amended Complaint fails to provide a citation to any law or constitutional provision that charges the State of Florida with any duties. Although Plaintiffs allege duties owed to them by the State of Florida, they fail to provide citations to any specific laws or constitutional provisions that charge the State of Florida, as opposed to any particular arm of state government or state agency, with any affirmative duties. For example, Paragraph 42 of the Amended Complaint alleges "Defendant, the State of Florida, is the sovereign trustee over public natural resources within its domain, ... The State of Florida must refrain from its trustee duties in a manner that results in the substantial impairment of Public Trust Resources, ..." Am. Compl., p. 16. That paragraph does not identify any particular statute or constitutional provision that Plaintiffs allege to have been violated by the State of Florida.

The Amended Complaint also unsuccessfully attempts to allege justiciable interests of the State of Florida with which Plaintiffs have an actual controversy. In Paragraph 149 a., for instance, the Amended Complaint alleges that: "[t]he State

of Florida has declared energy policy a state function via state law. § 377.601, Fla. Stat." Am. Compl., pp. 61-62. That citation adds nothing to Plaintiffs' contention that the State of Florida can be a named party. Section 377.601, Florida Statutes, is a legislative intent statute that declares state energy policies that are articulated in other statutes in chapter 377, Part II, Florida Statutes. That intent statute is not self-executing and no specific duties are charged therein to the State of Florida. That statute provides no basis to assert actionable claims against the State of Florida.

Based on the above, the State of Florida must be dismissed as a party. And because the State of Florida cannot be made a proper party, it must be dismissed with prejudice.

B. The Department of Agriculture and Consumer Services ("FDACS") is not a proper party.

Plaintiffs have not alleged a justiciable controversy against the FDACS. Paragraphs 46 and 47 of the Amended Complaint refer to various statutory duties charged to the FDACS, but they fail to allege specifically what FDACS has done, or not done, that rises to the level of a justiciable controversy between FDACS and Plaintiffs under the Public Trust Doctrine (Counts I and II) or that violates substantive due process (Counts II and IV). *See* Am. Compl., pp. 18-19.

Additionally, the vast bulk of the allegations against the FDACS improperly lump that agency with other Defendants and do not segregate any individual count

against the FDACS. Each Defendant can only be sued in particular claims alleged against it individually, and each of those individual claims must allege ultimate facts that support each claim. The Amended Complaint entirely fails to do that.

Moreover, the statutes that Plaintiffs cite in support of their claims against the FDACS cannot provide a justiciable claim. Section 377.703(1), Florida Statutes, which is cited in Paragraph 46 of the Complaint, is merely a legislative intent statute. *See* Am. Compl., p. 19. It is not self-executing and, more importantly, it does not provide any objective criteria for this Court to apply. Other statutes cited in Paragraphs 46 and 47 similarly fail to provide any objective criteria that this Court can apply. *See* Am.Compl., pp. 18-19. Subsection 377.703(2), Florida Statutes, requires FDACS to analyze energy data and prepare long-range forecasts of energy supply and demand. Section 377.603, Florida Statutes, authorizes, but does not require, the FDACS to collect various types of data, prepare periodic reports, and adopt rules. §§ 377.603(1)-(3), Fla. Stat. That law only requires the agency to verify the accuracy of information that it receives. § 377.603(4), Fla. Stat. Section 582.02, Florida Statutes, is a non-actionable legislative intent statute. It merely states legislative policies and purposes regarding soil and water resources. Section 589.04, Florida Statutes, simply lists general duties of the Florida Forest Service, (a division of the FDACS), but it does not provide any objective criteria by which to measure performance.

And as explained below as to Counts I through IV, FDACS is not charged with any Public Trust Doctrine or constitutional duties which are alleged in those counts to have been violated.

Plaintiffs ask this Court to take charge of the FDACS and tell it how to exercise it discretionary duties. But such matters are for the Executive Branch to determine, not the judiciary, and Plaintiffs' requested relief would violate the Separation of Powers Doctrine. *See* Art. II, § 3 of the Florida Constitution. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.")

"Florida has a vigorous separation of powers doctrine." *Fla. Fish and Wildlife Conservation Comm'n v. Daws*, Case No. 256 So.3d 907 (Fla. 1st DCA Apr. 10, 2018) (citing *Citizens for Strong Schools v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017), *aff'd,* 2019 WL 98253, __ So.3d ___ (Fla. Jan 4., 2019) (per curiam)). "The judiciary cannot dictate the manner of executing legislative policies or appropriations in any particular way." 232 So. 3d at 1171 (citing, in part, Art. II, § 3, Fla. Const.). "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). Thus, the FDACS must be dismissed as a party. And because no claim under any of the Amended Complaint's cited statutes or constitutional

provisions can be amended to raise a justiciable controversy against the FDACS, the FDACS must be dismissed with prejudice.

C. Commissioner Nikki Fried is not a proper party.

Whether a state official is a proper defendant in a declaratory action challenging the constitutionality of a statute is governed by three factors. First, the Court must ascertain whether the named state official is charged with enforcing the statute. *Haridopolos v. Alachua Cty.*, 65 So. 3d 577, 578 (Fla. 1st DCA 2011); *see also Marcus v. State Senate for the Senate*, 115 So. 3d 448, 448 (Fla. 1st DCA 2013) (holding that state legislators were not proper parties to an action challenging a statute that preempted county and municipal regulation of firearms and ammunition because the legislators were not designated as the enforcement authority); *Walker,* 658 So. 2d at 1200 (holding that the Senate President and Speaker of the House were not proper parties to a declaratory action challenging certain operations of the Department of Corrections).

If the named official is not charged with enforcing the statute, then courts must consider two additional factors: (1) whether the action involves a broad constitutional duty of the state implicating specific responsibilities of the state official; and (2) whether the state official has an actual, cognizable interest in the challenged action. *Atwater,* 64 So. 3d at 703 (Fla. 1st DCA 2011); *see also Coal. for Adequacy & Fairness in Sch. Funding, Inc.*, 680 So. 2d at 403 (holding that the

governor was a proper party to an action challenging the failure to adequately fund the public education system due to his position as chief executive officer and chairperson of the Board of Education); *Brown v. Butterworth*, 831 So. 2d 683, 689–90 (Fla. 4th DCA 2002) (holding that the Attorney General and the President of the Florida Senate were proper parties to an action challenging the constitutionality of a redistricting plan); *Scott v. Francati,* 214 So. 3d 742, 745-46 (Fla. 1st DCA 2017) (finding that Governor Scott was not a proper party in an action challenging the constitutionality of a statute for which he had no specific duties).

Paragraph 48 of the Amended Complaint alleges that the Commissioner of Agriculture "is responsible for ensuring that FDACS meets its statutory and constitutional obligations." Am. Compl., p. 20. But Plaintiffs make no specific allegations against her in her official capacity. And, as discussed in the preceding section, the Amended Complaint does not allege any justiciable controversy against the agency that she oversees. To the extent that Plaintiffs sue Commissioner Fried for the same reasons cited in Amended Complaint Paragraphs 46 and 47 against the FDACS, she herein adopts the agency's arguments in the preceding section and she should be dismissed as a party.

Moreover, if Plaintiffs intend to include Commissioner Fried in their allegations against the collective defendants, their pleading is fatally insufficient.

Each Defendant must be sued in separate counts, and each of those individual counts must allege ultimate facts that support each claim. The Amended Complaint fails to comply with this requirement.

Commissioner Fried is also being sued in her official capacity as a member of the Florida Cabinet. Am. Compl. p. 20. That is improper as a matter of law. Commissioner Fried's status as a member of the Florida Cabinet does not subject her to be a party and suing her cannot bring the Cabinet within this Court's jurisdiction. The Cabinet consists of the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. Fla. Const. Art. IV, § 4(a). The Florida Cabinet is a collegial body that is constitutionally and statutorily charged to perform specific duties alongside the Governor under different names. *See* Fla. Const. Art. IV, § 4(e)-(f) (the Governor and Cabinet are the State Board of Administration, the Board of Trustees of the Internal Improvement Trust Fund ("BOT"), and the head of the Department of Law Enforcement); § 403.503(8), Fla. Stat. (the Governor and Cabinet sits as the Electrical Power Plant Siting Board). It is not proper to sue individual members of the Florida Cabinet based on their Cabinet functions.

And, in any event, naming as a defendant only one member of the Cabinet, such as Commissioner Fried, would not confer this Court jurisdiction over the entire Cabinet and subject it to any relief imposed by this Court.[3]

Moreover, the Cabinet's duties are set forth in Article IV, section 4 and "as may be prescribed by law." Fla. Const. Art. IV, § 4(a). None of the constitutional provisions cited in Counts I through IV impose any duties on the Cabinet.

Because the Amended Complaint cannot be amended to state a justiciable claim against Commissioner Fried, she must be dismissed with prejudice.

D. The Florida Public Service Commission is not a proper party.

The Amended Complaint fails to allege sufficient facts to show a present, justiciable controversy between Plaintiffs and the Florida Public Service Commission ("the FPSC"). Plaintiffs allege what they perceive to be FPSC's statutory duties (Am. Compl., p. 21, ¶ 50), but they fail to allege any supporting, ultimate facts that would suggest that the PSC failed to comply with a statutory duty. That deficiency fails to place FPSC on notice as to which actions or omissions Plaintiffs seek to place at issue. It is not proper pleading form for

[3] It is noted that the BOT already is named as a defendant and would be subject to relief that may properly be granted by this Court against it.

Plaintiffs to lump together the FPSC and the other Defendants in broad, sweeping allegations.

The only specific FPSC action, policy, practice or custom that the Amended Complaint refers to is FPSC's reviews of the Ten-Year Site Plans of Florida's electric utilities. Ten-Year Site Plans are required to be submitted to the FPSC by each generating electric utility at least every two years and must include estimates of the utility's power-generating needs and general locations of any proposed power plants. §186.801(1), Fla. Stat. Upon review of each plan, the FPSC classifies it as "suitable" or "unsuitable," and may suggest alternatives. §186.801(2), Fla. Stat. Although the statute lists various items that must be included in the plans and reviewed by the FPSC, it does not provide any measurable standards or even any aspirational goals. *See* §186.801(3), Fla. Stat.

The Amended Complaint's lone contention against the FPSC is that, although the FPSC projected the renewable outlook as likely to increase, the FPSC approved, through its Ten-Year Site Plan reviews, an overall increase in the use of natural gas. Am. Compl., pp. 68-69, ¶149 t. No citation is provided to show how or why those allegations present a justiciable controversy with the FPSC. As mentioned above, section 186.801 does not provide the FPSC with a measuring stick to apply when reviewing the site plans for the various facilities. But more significantly for purpose of this motion, the list of items that the FPSC must

consider when it reviews Ten-Year Site Plans does not include addressing climate change or a need to shift to renewable energy sources. *See* §186.801(2), Fla. Stat.

Also notably, the Amended Complaint does not contend that the FPSC has failed to review any site plans. Plaintiffs simply disagree with how the FPSC exercised its discretion. And asking this Court to dictate the manner in which the FPSC should execute its discretion would result in a separation-of-powers violation. *See* Art. II, § 3 of the Florida Constitution. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.")

The sole specific allegation against the FPSC—its review of the Ten-Year Site Plans—fails to establish a justiciable controversy, and the Amended Complaint cannot be amended to allege one. And as explained below as to the nonjusticiability of Counts I through IV, the FPSC is not charged with any public trust or constitutional duties which are alleged in those counts to have been violated. The FPSC must be dismissed as a party with prejudice.

II. COUNTS I THROUGH IV FAIL TO STATE A CAUSE OF ACTION.

A. Counts I through IV fail to plead a claim for relief.

As a matter of pleading, all four counts fail to state a cause of action because they do not meet the requirements that a claim for relief contain "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends" and

(2) "a short and plain statement of the ultimate facts showing the pleaded is entitled to relief." Fla R. Civ. P. 1.110(b). Rather than attempt to succinctly show this Court why there is a justiciable controversy that confers upon it jurisdiction under chapter 86 or to assert specific claims against each defendant, the Amended Complaint buries Defendants with evidentiary allegations, verbosity, and naked conclusions, and then lumps together all the claims against the Defendants collectively in four counts.

More specifically, the counts fail to show, in a short and plain manner, how this Court has jurisdiction over the claims. Count I consists of Paragraphs 1 through 179, Count II consists of Paragraphs 1 through 187, Count III consists of Paragraphs 1 through 198, and Count IV consist of Paragraphs 1 through 206. But the rule requires short and plain allegations of the grounds upon which this Court's jurisdiction, which in this case is the need to show a justiciable controversy under chapter 86. *See* Fla. R. Civ. P. 1.110(b)(1); *see also May*, 59 So. 2d at 639. Plaintiffs leave it to Defendants and this Court to sift through the allegations and sort them into justiciable controversies against each Defendant. That task, however, is properly the duty of Plaintiffs and their failure to comply with the rule warrants dismissal.

As for the second rule requirement, short and plain statements of ultimate facts showing Plaintiffs' entitlement to relief, the Amended Complaint is a jumbled

entanglement of allegations, claims, and aggregated Defendants. It exemplifies all four types of objectional shotgun pleadings discussed in *Weiland*, 792 F.3d at 1321-24: Counts II, II and IV adopt all prior allegations, including those in each prior count; the Amended Complaint is loaded with conclusory facts not obviously connected to any particular count(s); the Amended Complaint raises multiple constitutional claims in each count; and the Amended Complaint alleges multiple claims against all Defendants without specifying which Defendants are responsible for which acts, omissions, or claims. Each Defendant is left guessing which constitutional claims are lodged against him, and which legal and factual allegations support each of those claims.

B. Counts I and II do not state a justiciable cause of action.

Counts I and II allege that Defendants breached purported mandatory fiduciary duties to protect Florida's natural resources that are held in the public trust under the state constitution. The difference between the two counts is the relief sought. Count I seeks declaratory relief and Count II seeks injunctive relief. Because the two counts are mainly based on common allegations, they are discussed together herein.

In support of these counts, Plaintiffs claim violations of the following provisions in the Florida Constitution: Article I, § 1; Article II, § 7(a); Article X, § 11, and Article X, § 16. Counts I and II should be dismissed because: (1) the cited

constitutional provisions are not self-executing; (2) they raise political questions outside the jurisdiction of this court and with no justiciable standard for evaluating the claims; and (3) they violate Florida's Separation of Powers Doctrine.

Count I also should be dismissed because the Public Trust Doctrine does not extend to the atmosphere and the count's cited constitutional provisions do not impose any climate related duties. Count II also should be dismissed because there is no fundamental right to a stable climate atmosphere and the count's cited constitutional provisions do not impose any climate related duties.

1. The cited constitutional provisions are not self-executing and do not provide the basis for a valid claim.

The constitutional provisions upon which Plaintiffs rely in Counts I and II do not present an "actual controversy" actionable under chapter 86, nor can a cause of action be based on any of them. Article I, § 1; Article II, § 7(a); Article X, § 11, and the single sentence cited in Article X, § 16 are not self-executing. In fact, it is the express intent of the framers of the Florida Constitution that air quality, water quality, and natural resources be regulated and protected "by law." *See* Art. II, §7(a), Fla. Const.; Art. X, §11, Fla. Const. None of the Defendants are charged by the state constitution with any environmental duties. Such duties are to be assigned by the Legislature.

The Florida Supreme Court has held that a constitutional provision is self-executing only when it "lays down a sufficient rule by means of which the right or

purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). A bare adequacy requirement, unaccompanied by some objective and ascertainable standard to measure it, fails this test. *See Simon v. Celebration Co.*, 883 So. 2d 826, 831 (Fla. 5th DCA 2004); *see also Haridopolos,* 81 So. 3d 465, 474 (Fla. 1st DCA 2011) (en banc) (Wolf, J., specially concurring) (controlling opinion).

Article I, § 1, Article II, § 7(a), Article X, § 11 and the first sentence in Article X, §16 do not articulate any ascertainable, measurable standards that this Court may apply to Plaintiffs' claims. Article I, § I states:

> **Political power.-** All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Article II, § 7(a) states:

> **Natural resources and scenic beauty**.-
>
> (a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Article X, § 11 states:

> **Sovereignty lands. -** 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.

The first sentence of Article X, § 16(a) is the only portion of that lengthy constitutional provision which is cited in Count I. *See* Am. Compl., p. 71, ¶157. Subsection (a) states in its entirety:

> **Limiting marine net fishing**. -
> (a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste.
>
> * * * *

Article I, § 1, for its part, contains a general policy statement. It contains no standards. It plainly cannot support a legally cognizable cause of action.

The first sentence in Article II, § 7(a) contains a general policy statement about natural resources and scenic beauty. That policy statement is not self-executing. The next sentence makes that clear by explicitly

deferring to implementing laws by stating that "[a]dequate provision shall be made by law . . . ." Fla. Const. Art. II, § 7(a).

The sovereignty-lands provision of Article X, § 11 also defers to implementation "by law." Although it contains "public interest" standards for the sale or use of sovereignty lands, the language of the constitutional provision intends the provision to not be self-executing by requiring the sale or use of sovereignty lands to be "by law." Fla. Const. Art. X, § 11

The first sentence in Article X, § 16(a) provides no self-executing standards, not even for the use of marine nets, which is the purpose of that provision. Certain marine net standards are found elsewhere in Article X, § 16, specifically subsection (c), but they are not referenced in the Amended Complaint. More fatally to Counts I and II's use of that provision,[4] the first sentence in subsection (a) cannot be read alone as creating any general rights to marine resources. As the title and full text make clear, Article X, § 16 has a very specific purpose—protecting marine resources through net fishing restrictions. The second sentence

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[4] The Amended Complaint incorrectly suggests that there is only one sentence in Article X, § 16 and that its purpose is to create a self-executing right of all Florida residents to the state's marine resources by alleging: "Article X, Section 16 of the Florida Constitution states: The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations." Am. Compl., 71, ¶ 157.

of subsection (b), which Plaintiffs severed from its preceding sentence, drives home that point:

> (a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. **To this end the people hereby enact limitations on marine net fishing in Florida to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste.**

Fla. Const. Art. X, § 16(a). (emphasis added).

Counts I and II cannot be amended to allege any claim under Article X, § 16 against any of the Defendants. The Amended Complaint does not contend that any of the Defendants failed to enforce the constitutional net restrictions, nor are any of them charged with any duties by that constitutional provision.

2. <u>Political Question Doctrine</u>

The questions raised in this court are political and are not appropriate for judicial intervention. To gauge whether a case raises a political question that is outside the scope of the judiciary's jurisdiction, the United States Supreme Court, in *Baker v. Carr,* 369 U.S. 186 (1962), set forth six criteria:

(1) a textually demonstrable 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; and lastly

(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Coal. for Adequacy and Fairness in School Funding, 680 So.2d at 408 (citing *Baker,* 369 U.S. at 217). Any one of the criteria may indicate the presence of a political question. *Baker*, 369 U.S. at 217.

The claims in Counts I and II present nonjusticiable political questions for multiple, independent reasons under *Baker*. The second criterion in that case indisputably applies. None of the constitutional provisions at issue in those counts, specifically Article I, § 1; Article II, § 7(a); Article X, § 11, and Article X, § 16, contain any standards or sound grounds for providing relief. And, as discussed above, none of the statutes cited in the Amended Complaint provide performance standards. "Without 'satisfactory criteria' to channel discretion in judicial rulings, litigation involving a subjective advisory guideline invites arbitrary and capricious judicial actions which improperly invade the spheres of action of the political branches." *Citizens for Strong Schools v. Fla. State Bd. of Educ.*, 232 So. 3d at 1169 (citing *Baker,* 369 U.S. at 210). .Because both the constitutional and

statutory provisions upon which Plaintiffs rely lack judicially ascertainable standards, Counts I and II pose non-justiciable political questions.

And because each of the statutes and constitutional provisions cited in the Amended Complaint lack objective, measurable criteria, the third and fourth criteria also require the Court to grant Defendants' motion. Counts I and II call upon this Court to set its own policies over those exercised within the discretion of the Defendant state agencies and officials. Those agencies and officials are part of the Executive and Legislative Branches. Such intrusion would also implicate the third and fourth *Baker* criteria.

The third *Baker* criterion also is implicated because the Court must make a policy judgment of a legislative nature. The Amended Complaint repeatedly refers to a "Fossil Fuel Energy System" (Am. Compl., *passim*) that Plaintiffs challenge as unconstitutional. Am. Compl., p. 2, n. 1. That term was coined by Plaintiffs for purposes of this lawsuit as a shorthand reference to unidentified agency actions they challenge in the aggregate against all Defendants:

> By and through Defendant's affirmative aggregate and systematic actions with respect to "all components related to the production, conversion, delivery and use of energy," Defendants have demonstrated their policy, practice, and custom with respect to fossil fuels and GHG emissions in Florida (hereinafter Defendants' "Fossil Fuel Energy System").

Am. Compl., p. 2, n. 1

The Amended Complaint does not catalog what all is entailed in the "Fossil Fuel Energy System" or otherwise inform this Court of the specific agency policies, practices, and customs it is asked to evaluate. Plaintiffs leave it to the Court to circumscribe and determine the boundaries of the disputed initial policy, the so-called "Florida Fossil Fuel System." Such a policy judgment would violate the Separation of Powers Doctrine.

Moreover, even with compelling evidence that there is anthropogenic climate change, the Legislature may decide that other matters, such as employment opportunities, resource development, or power generation, should be weighed against that evidence. It would not be appropriate for a court to decide which policy choices are "wrong."

And, as noted above, the Florida Constitution intends air and water quality control, and the protection of natural resources to be provided "by law." *See* Art. II, §(7)(b), Fla. Const. When the language of the constitution uses the phrase "adequate provision shall be made by law," the issue is assigned to the legislative branch, not the judiciary. *See Citizens for Strong Schools*, 232 So. 3d at 1169 (applying Article IX, section 1(a) of the Florida Constitution which states "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools"

and affirming the trial court's dismissal of a public education system challenge on the basis that it raised political questions not subject to judicial review).

Additionally, the fourth *Baker* factor is implicated because this Court lacks the resources to grapple with the broad and global scale of climate change. Whatever decision this Court could make would need to be confined to the record created by the parties. It has no independent authority to convene a panel of experts or commission studies to determine what Defendants' proportionate duties are with respect to the atmosphere or to compare any such duties with those of the Federal Government and other jurisdictions. This Court also is not postured to independently determine how best to grant Plaintiffs' multiple injunctive relief requests.

Moreover, this lawsuit is a transparent attempt to overrule current legislation regarding greenhouse gases and replace it with judicially imposed injunctions that will bypass the legislative procedures contemplated by the Florida Constitution. As explained above, the Florida Constitution charges the Legislature with "the abatement of air and water pollution" and "the conservation and protection of natural resources. Art. 2, §7(a), Fla. Const. The Amended Complaint acknowledges some of the implementing legislation, including sections 403.061, 377.703(2), 366.82(5), 377.603, 582.02, 366.05(1), 366.06, 366.92(5), 366.81, 403. 537, Fla. Stat. *See* Am Comp., ¶¶ 44, 46, 47, 49, 50.

But the Amended Complaint fails to mention that the Legislature has passed statutes to address climate change and Plaintiffs' requested relief would surreptitiously override those laws. The Amended Complaint does not mention the "Florida Energy and Climate Protection Act," sections 377.801-377-804, Florida Statutes. It also ignores provisions of the State Comprehensive Plan, chapter 187, Florida Statutes, which address human emissions of greenhouse gas, albeit without using the terms "climate change" or "global warming." The Air Quality section of that plan includes policies to "[r]educe sulfur dioxide and nitrogen oxide emissions and mitigate their effects on the natural and human environment"; "[e]ncourage the use of alternative energy resources that do not degrade air quality."; and "[e]ncourage the development of low-carbon-emitting electric power plants." §§187.201(10)3.,4., and 5., Fla. Stat. The Energy section includes a policy to "[p]romote the use and development of renewable energy resources and low-carbon-emitting electric power plants." §187.201(11)9., Fla. Stat.

Other state courts recently found that similar climate change claims present nonjusticiable political questions that are best left to their respective legislatures. *Aji. P. v. State of Washington*, Case No. 18-2-1-SEA, 2018 WL 3978310 at *3 (Wash. Super. Ct. King Cty. Aug. 14, 2018) (finding the trial court is not equipped to legislate what constitutes a successful regulatory scheme by balancing public policy concerns or determining which risks are acceptable), appeal docketed Case

No. 963169-9 (Wash. Sept. 11, 2018); *see also Sinnok v. State of Alaska*, Case No. 3AN-17-9910 CI, Third Judicial Dist. at Anchorage (Alaska Oct. 30, 2018) (finding the plaintiffs injunctive relief claims would violate the separation of powers and conflict with the third *Baker* factor in granting the defendants' motion to dismiss), appeal docketed No. S517297 (Alaska S. Ct. Nov. 29, 2018). The instant lawsuit presents similar concerns about intruding into the legislative branch and should be dismissed with prejudice.

3. Separation of Powers Doctrine

In Counts I and II, Plaintiffs ask this Court to dictate to each Defendant state agency and state official how to perform their discretionary, statutory duties. This Court must not accept that invitation. To do so would usurp the constitutionally imposed balance of power between the branches and blur their distinctions.

The Separation of Powers Doctrine is set forth expressly in Article II, § 3 of the Florida Constitution, which provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Coal. for Adequacy and Fairness in School Funding, Inc., 680 So.2d 400, 407 (Fla. 1996).

As explained in the above discussions about the third *Baker* factor and why FDACS, Commissioner Fried and the PSC are not proper parties, and adopted herein, the Amended Complaint violates the Separation of Powers Doctrine.

Even though the Amended Complaint joins these particular Defendants and asks this Court to declare that they have violated the Public Trust Doctrine and various constitutional provisions, and to compel them to take certain remedial actions, the result, if not the plain objective of Plaintiffs, is to get this Court to substitute its judgment for the Legislature and preempt the Legislature in the field of greenhouse gas emissions.

Other state courts have found that similar public trust and substantive due process claims violate of their Separation of Powers Doctrines. In Oregon, the trial court granted the defendants' motion for summary judgment because there is no public trust duty to protect submerged and submersible lands from climate change and on the basis of the state's separation of powers prohibition. *Chernaik v. Brown*, 2015 WL 12591299 (Or. Cir. May 11, 2015), vacated and reversed *Chernaik v. Brown*, Case No. 159826 (Or. Jan 9, 2019) (affirming that there is no duty to protect public trust resources from the effects of climate change, but vacating and remanding to the trial court for a judgment that declares the respective rights of the parties consistent with that opinion); *see also Sinnok v. State of Alaska*, Case No. 3AN-17-9910 CI, Third Judicial Dist. at Anchorage

(Alaska Oct. 30, 2018)(granting a motion to dismiss based on the state's separation of powers prohibition), appeal docketed No. S517297 (Alaska S. Ct. Nov. 29, 2018). Florida's Separation of Powers Doctrine should similarly dispose of the instant lawsuit.

3. The Public Trust Doctrine does not extend to the atmosphere.

Counts I and II erroneously assume that Florida's Public Trust Doctrine encompasses several constitutional provisions and that each Defendant is charged with fiduciary duties under it. But the Public Trust Doctrine is far more limited than Plaintiffs allege. Article X, § 11 of the Florida Constitution is the only state constitutional provision that addresses that doctrine, and it mentions lands, navigable waters, and beaches, but not the atmosphere, air, or climate. Fla. Const. Art. X, § 11. It also requires the sale and private use of sovereignty land to be "authorized by law." *Id.* And only the BOT is charged by law with fiduciary duties over sovereignty lands. *See* § 253.12, Fla. Stat.

The Public Trust Doctrine can trace its roots to an ancient Roman civil law and more recently in the English common law doctrine on public navigation and fishing rights over tidal lands. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012) (internal citations omitted). In this country, the Public Trust Doctrine is "a matter of state law." *Id.* (internal citations omitted).

In Florida, the Public Trust Doctrine does not apply to the atmosphere. It

expressly applies to submerged lands. Florida's Public Trust Doctrine is codified in Article X, § 11 of the Florida Constitution. *Krieter v. Chiles*, 595 So. 2d 111, 111 (Fla. 3d DCA 1992). That provision vests to the sovereignty of the state the title to land beneath navigable waters: "Under both the state constitution and the common law, the state holds the lands seaward of the mean high water line (MHWL), including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation." *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008).

Under Article X, § 11 of the Florida Constitution, sovereignty lands are held by the BOT "as a public trust and the Board's authority is rigidly circumscribed by this common law doctrine." *Mariner Properties Development, Inc. v. Bd. of Trustees of Internal Improvement Trust Fund,* 743 So. 2d 1121, 1122 (Fla. 1st DCA 1999); *see also* § 253.12, Fla. Stat. Actions taken by BOT in that regard are taken in a proprietary, not a regulatory, capacity. *Id.* at 1122-23.

The Florida Supreme Court has not extended the Public Trust Doctrine to the atmosphere. Florida courts have discussed public trust assets of submerged lands, but not the air, climate or atmosphere. *See, e.g., Coastal Petroleum v. American Cyanamid*, 492 So. 2d 339, 343 (Fla. 1986) (dealing with navigable rivers); *Mariner Properties Development, Inc.* 743 So. 2d 1121 at 1122 (discussing submerged sovereignty lands). Thus, Plaintiffs ask this Court to impose new

fiduciary duties on the BOT, and also on the other Defendants who never were charged with any public trust duties, and to expand public trust duties to resources not described in Article X, §11 or by the courts in construing that provision.

Thus, Plaintiffs cannot base any cause of action under the Public Trust Doctrine for failure to regulate greenhouse gases. To hold otherwise would impose unintended constitutional duties on the BOT, as opposed to managing only its constitutional sphere of sovereignty submerged lands. As explained above, the Florida Constitution reserves the regulation of air and water quality to the Legislature.

C. Counts III and IV do not state a justiciable cause of action.

In Counts III and IV, Plaintiffs raise substantive due process claims based on alleged liberty interests. Plaintiffs allege violations of the following provisions in the Florida Constitution which they incorrectly contend afford them fundamental rights: Article I, § 1; Article I, § 2; and Article 1, § 9. The claims under this count should be dismissed because: (1) those constitutional provisions are not self-executing; (2) they raise political questions outside the jurisdiction of this court and with no justiciable standard for evaluating the claims; and (3) the substantive component of the due process clause in Article I, § 2 does not apply to liberty interests in the atmosphere.

The difference between the two counts is the relief sought. Count III seeks declaratory relief and Count IV seeks injunctive relief. Because the two counts are mainly based on common allegations, they are discussed together herein.

1. Article I, § 1 and Article I, § 9 are not self-executing, and do not provide the basis for a valid claim.

The constitutional provisions upon which Plaintiffs rely in Counts III and IV do not present an "actual controversy" actionable under chapter 86, nor can a cause of action be based on any of them. Article I, § 1, Article I, § 2 and Article 1, § 9 are not self-executing.

Article I, § I states:

> **Political power.-** All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Article 1, § 2 states:

> **Basic Rights.-** All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect private property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Article 1, § 9 states:

> **Due process.-** No person shall be deprived of life, liberty, or property without due process of law, or be twice put in jeopardy for the same offences, or be compelled in any criminal matter to be a witness against oneself.

As the plain text of those provisions show, none of them supplies a sufficient rule of law in and of themselves, nor do any of them contain an objective and ascertainable standard of measurement, as required by *Gray v. Bryant*, 125 So.2d at 851 and *Simon*, 883 So.2d at 826. They therefore fail to supply an adequate basis for a justiciable controversy under chapter 86.

2. Count III and IV present non-justiciable political questions and also violate the Separation of Powers Doctrine.

Count III and IV raise political questions that are not suitable for judicial intervention. As with Counts I and II, these counts raise a nonjusticiable political question because they run afoul of the second, third and fourth criteria in *Baker v. Carr,* 369 U.S. at 217: (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; and (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.

The same reasons discussed above as to why Counts I and II present political question also apply to Counts II and IV. The same arguments for the third and fourth factors also apply here, and are adopted herein. As for the second *Baker*

factor, Article I, § 1, Article I, § 2 and Article 1, § 9 also have no standards or objective grounds that this Court can apply for providing relief.

Counts III and IV also violate the Separation of Powers Doctrine. The same reasons discussed above as to why Counts I and II violate the Separation of Powers Doctrine also apply to Counts II and IV, and are adopted herein.

3. There is no Substantive Due Process right in the atmosphere or to a stable climate system.

Plaintiffs assert a "fundamental right to a stable climate system capable of sustaining human life." A stable climate means an atmosphere and oceans that are free from dangerous levels of anthropogenic CO2 and CHGs." Am. Compl., p. 77, ¶ 189. They base this right on the general protections in Article 1, §§ 1, 2, and 9 of the Florida Constitution. *Id.*, ¶194, ¶198, However, Florida courts have not recognized a right to a stable climate system historically or through Article I of the Florida Constitution.

Substantive due process prevents the government from engaging in conduct that "shocks the conscience" or interferes with rights implicit in the concept of ordered liberty. *Hudson v. State*, 825 So. 2d 460, 465 (Fla. 1st DCA 2002) (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987)). It does not apply to all asserted rights and courts must employ caution and restraint when employing substantive due process protections to government action. *See Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977). The threshold for determining

whether a plaintiff has a non-legislative substantive due process claim is whether he has demonstrated an interest that is deeply rooted in the Nation's history and traditions, or is protected as a fundamental right. *City of Lauderhill v. Rhames*, 864 So. 2d 432, 438-39 (Fla. 4th DCA 2003) (internal citations omitted).

Here, Plaintiffs have not shown that their asserted right to a stable, habitable climate, is deeply entrenched in our Nation's history. Quite to the contrary, Plaintiffs' many evidentiary allegations suggest that climate change is a recent phenomenon that has unfurled during the young lives of Plaintiffs.

Nor have Plaintiffs shown that any purported right is fundamental. "A fundamental right is one which has its source in and is explicitly guaranteed by the federal or Florida Constitution." *State v. J.P.,* 907 So. 2d 1101, 1109 (Fla. 2004) (internal citations omitted). The personal liberties secured though the Declaration of Rights of the Florida Constitution are fundamental rights. *Id.* (internal citation omitted).

The Declaration of Rights is found in Article I, which includes the three constitutional provisions upon which Plaintiffs base their substantive due process claims. It "embraces a broad spectrum of enumerated and implied liberties" that form an overarching freedom of protecting each individual within Florida's borders from the unjust encroachment of state authority into his life. *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992). Those rights "embody the fundamental

principle of robust individualism . . . ." *Id.* Under the Declaration of Rights, each basic liberty and each citizen is on equal footing with every other and is protected with equal vigor from government overreaching. *Id.* (citing *Boynton v. State*, 64 So. 2d 536, 552-53 (Fla. 1953).

Plaintiffs claim that there is a fundamental right to a stable, habitable climate that, in their view, is a liberty protected by the Declaration of Rights. But none of the provisions in Article I refers to the air, climate, atmosphere, or any other natural resources. Nor can any of those provisions reasonably be inferred as providing a protected interest in the climate. Article I addresses governmental intrusion into the rights of individuals, such as rights of a criminal defendant (*See* Article I, §§ 9, 12-17, 22) and various freedoms (*See* Article X, §§2-6, 8-12, 23-24). Natural resources are specifically addressed in other articles of the Florida Constitution. *See* Article II, § 7 (natural resources and scenic beauty); Article X, § 11 (sovereignty lands); Article X, § 16 (limiting marine net fishing). Plaintiffs cannot incorporate other constitutional provisions into the special protections of the Declaration of Rights, and nothing in the plain text of Article I, §§1, 2 and 9 suggests that they create any climate rights. "If the constitutional language is clear, unambiguous, and addresses the matter at issue, it must be enforced as written, and courts do not turn to rules of constitutional construction." *Ford v. Browning,* 992

So. 2d 132, 136 (Fla. 2008) (citing *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n,* 489 So. 2d 1118, 1119 (Fla. 1986)).

This Court also should decline to recognize a new fundamental right to a "stable climate system," which would not involve a fundamental individual right that is rooted in protecting a deeply rooted personal freedom, such as the right to marry another person. *See Aji P*, 2018 WL 3978310 at *3. "There is no individual, personal right to a 'stable climate system,' just as there is no personal, individual right to world peace, or economic prosperity, or any of a number of other objectives." *Id.* A stable and healthy climate is a shared aspiration of a people, not a right of a person, and it should be pursued through political processes. *See id.*

As Plaintiffs have not shown a right that is protected by substantive due process,[5] Count III and IV must be dismissed. And because any right to a stable, habitable climate that Plaintiffs may allege in an amended pleading has not been a traditional right in this country's history and is not ensured by Florida's Declaration of Right, Counts III and IV must be dismissed with prejudice.

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[5] Because Plaintiffs have not shown a fundamental right that is protected by substantive due process and this count therefore should be dismissed as a matter of law, there is no need to address whether the government created the alleged climate danger and therefore has an affirmative obligation to take actions to protect Plaintiffs' asserted liberty interest, or to debate whether heightened or rational basis review applies.

CONCLUSION

Based on the above, the State of Florida; the Florida Department of Agriculture and Consumer Services; Commissioner Nikki Fried, in her official capacity as the Commissioner of Agriculture, and the Florida Public Service Commission respectfully request an order that:

(1) Dismisses with prejudice the State of Florida; the Florida Department of Agriculture and Consumer Services; Commissioner Nikki Fried, in her official capacity as the Commissioner of Agriculture; and the Florida Public Service Commission; and

(2) Dismisses the Amended Complaint with prejudice.

In the alternative, the Movants ask that an order be entered that:

(1) Dismisses the Amended Complaint with leave to amend; and

(2) Instructs Plaintiffs that any amended complaint must:

(a) fully comply with Rule 1.110(b), including the requirements for short and plain statements of jurisdiction and claims for relief; and

(b) each claim against each Defendant must be alleged in a separate count with clearly identifiable supporting ultimate facts; and

(c) each claim must be stated succinctly without surplusage, such as unnecessary evidentiary allegations.

(3) Any other relief this Court deems proper and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing was e-filed via the Florida Portal which serves all counsel of record and was served by Email to the following on this 6th day of February, 2019:

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