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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DELANEY REYNOLDS, *et al*.

Plaintiffs/Appellants,

v.

Case No. 1D20-2036

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

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

Defendants/Appellees.

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

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STATEMENT OF THE CASE AND FACTS

Eight young Floridians ("Appellants")[1] appeal the order of the circuit court granting the state defendants' ("Appellees")[2] motion to dismiss their constitutional claims. The circuit court took the extraordinary position that Florida courts lack jurisdiction to hear and decide claims alleging infringements of fundamental rights, a proposition that contradicts decades of Florida jurisprudence and the foundation of Florida's democratic system of government. Appellants contend that Appellees' actions, by and through the energy system that they created and control, are exposing them to increasingly dangerous harms that jeopardize their life and liberty in Florida. Appellees should be required to respond to Appellants' well-framed allegations that, as government actors, they have exceeded their constitutional authority and infringed these children's fundamental rights. The Florida Supreme Court has established that:

> [i]t 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

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[1] The children who bring this case include Delaney R., Levi D., Isaac A., Jose P., Luxha P., Oliver C., Valholly F., and Oscar P., who were ages 11-20 at the time the suit was filed. R. at 706-716, ¶¶ 13-41.

[2] The Appellees include the State of Florida, Governor DeSantis, the Florida Department of Environmental Protection ("FDEP") and its Secretary, the Florida Department of Agriculture and Consumer Services ("FDACS") and its Commissioner, the Florida Board of Trustees of Internal Improvement Trust Fund ("BOT"), and the Public Service Commission ("PSC"), the state government entities who control and implement the state's energy system. R. at 717-724, ¶¶ 42-53.

> 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) (emphasis added). It is this foundational principle that is at issue in this case.

One of the core protections embedded in both the Florida and U.S. Constitutions is the right to petition the government. *See* Art. I, § 5, Fla. Const. ("The people shall have the right . . . to petition for redress of grievances."); Art. I, § 21, Fla. Const. (enshrining the right to access the courts); *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (citations omitted) ("We have recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights,' and have explained that the right is implied by '[t]he very idea of a government, republican in form'."). It is the circuit court's role to protect the right of access to courts by exercising judicial review of the Appellees' conduct, and if warranted, issuing an order declaring such conduct to be unconstitutional. § 86.011, Fla. Stat. (2020). However, the circuit court dismissed Appellants' claims for lack of jurisdiction, holding that their constitutional claims were a political question requiring a resolution the circuit court was ill equipped to make. R. at 1548:12-18. The court admitted that despite the importance, urgency and "legitimacy" of Appellants' claims, they were just too hard to resolve. An individual's right to redress constitutional violations cannot rest on the complexity of the issue at hand. For centuries, our courts have grappled with upholding the inalienable rights of the

people of this Nation, irrespective of whether the issue is a long-recognized right, like the right to assistance of counsel, or a right accompanied with the complexity of a change to the status quo, like the right to equality based on the color of one's skin.

In closing the courthouse door to these children, the circuit court's decision, if upheld, effectively nullifies Floridians' ability to go to court to seek a remedy for constitutional violations. The court, in our balance-of-powers system, acts as a check on the executive and legislative branches of governments for constitutional compliance. Appellants have thus appropriately requested that the court declare the extent of the youth's constitutional and public trust rights and order the government Appellees to comply with their constitutional obligations.

I. The Unconstitutional Government Conduct Challenged in this Case

Appellants are eight youth from across the State of Florida, each of whom are experiencing profound harms to their lives and liberties as a result of the state energy system that Appellees collectively oversee and operate. Appellees are governmental entities that have created and implemented a state energy system that causes and contributes to dangerous climate disruption in violation of Appellants' constitutional rights. Specifically, Appellants alleged that the science is unequivocal that dangerous climate change is occurring due to human activities, primarily from the extraction and burning of fossil fuels. R. at 724-738, ¶¶ 54-92. Appellants have alleged Appellees' long-standing knowledge about how the release of anthropogenic

greenhouse gases ("GHGs") into the atmosphere is already triggering a host of adverse consequences in Florida, including dangerously increasing temperatures, changing precipitation patterns, increasing droughts and extreme weather events, increasing the frequency and severity of hurricanes, sea level rise, and coastal erosion, and causing numerous adverse health and economic risks, which disproportionately harm children. R. at 738-767, ¶¶ 93-147, 149(m). Appellees' energy system, controlled and operated by Appellees, causes significant emissions of dangerous levels of pollution and GHGs, making Florida the 27th largest emitter of carbon dioxide ("CO_2") in the world. R. at 762-772, ¶¶ 148-150. All of these well-pleaded factual allegations are accepted as true at this stage in the proceeding. *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 210 So. 2d 750, 752 (Fla. 4th DCA 1968). Thus, Appellants have alleged specific facts showing the state's energy system is being executed in a way that causes and contributes to Appellants' constitutional injuries.

For example, Appellant Levi, who is only 13 years old, has been forced to evacuate his coastal home in Satellite Beach and faced school closures due to hurricanes, which contain more moisture and are becoming more extreme and damaging with rising temperatures. R. at 708-710, ¶¶ 17-21. Levi's home will be completely underwater within his lifetime due to increasingly frequent and severe flooding, sea level rise, and coastal erosion. R. at 708, ¶ 17. Appellant Valholly, a

descendant of the Panther Clan of the Seminole tribe, is losing her cultural autonomy and familial affiliation because the Everglades, the sanctum of her community, are disappearing with rising seas and habitat loss. R. at 715-716, ¶¶ 37-39. Increasing temperatures and drought conditions are devastating Appellant Isaac's ability to grow food and raise animals on his farm outside of Gainesville. R. at 710-711, ¶¶ 22-26. These are only three examples of the many profoundly personal harms to each of the youth Appellants and their ability to live their individual lives and enjoy liberty in Florida. R. at 706-716, ¶¶ 13-41.

Despite longstanding knowledge of these dangers to Appellants, Appellees have adopted and are implementing, a statewide energy system that causes, contributes to, and exacerbates these children's harms. R. at 762-772, ¶¶ 148-149 (describing the challenged statewide "energy system").[3] By engaging and persisting in a systemic practice of affirmatively permitting, authorizing, promoting, and facilitating activities that result in dangerous levels of GHG emissions, Appellees'

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[3] The energy system alleged to be unconstitutional in this case includes "all components related to the production, conversion, delivery and use of energy" and encompasses the Appellees' actions taken to implement the system. R. at 762-772, ¶¶ 148-149 (alleging the energy system is under the care and control of Appellees; quantifying the amount of GHG emissions that result from the system; describing how Appellees have prioritized fossil fuels over renewable energy; identifying specific activities taken by Appellees as part of the energy system, such as authorizing fossil fuel infrastructure and approving energy plans that lock in dangerous GHG emissions into the future; rejecting economically and technically feasible alternatives to a fossil fuel-based energy system).

conduct infringes upon Appellants' constitutional rights to life and liberty, fundamental rights explicitly protected from government intrusion by Fla. Const. Art. I, §§ 1, 2, and 9. Through this action, Appellants ask the judiciary to fulfill its duty to assess the constitutionality of Appellees' affirmative acts in implementing the state energy system, and to declare Appellants' fundamental rights under Florida's Constitution. R. at 772-784, ¶¶ 151-206; Prayer for Relief.

II. Summary of Procedural History

On April 16, 2018, Appellants filed this declaratory judgment action against the state Appellees in the Circuit Court of the Second Judicial Circuit in Leon County, calling on Florida's judiciary to assess Appellees' actions in operating the state energy system for compliance with Florida's constitutional guarantees of fundamental rights. R. at 013-074. Specifically, Appellants allege that, by and through Appellees' actions in implementing the energy system, Appellees continue to endanger and harm Appellants in violation of their public trust rights under Article X, §§ 11 and 16 of the Florida Constitution, R. at 772-782, ¶¶ 151-198 (Counts I, II), and substantive due process rights under Article I, §§ 1, 2, and 9 of the Florida Constitution, R. at 782-784, ¶¶ 199-206 (Counts III, IV). On July 6, 2018, Appellees filed three separate motions to dismiss. R. at 090-171. Appellants filed a consolidated response to all three motions on September 17, 2018. R. at 174-219. A hearing on Appellees' motions to dismiss was set for October 4, 2018. On October

1, 2018, the hearing was canceled due to the Honorable John C. Cooper's recusal from the case. R. at 291-293.

Appellants filed their First Amended Complaint on December 26, 2018, substituting newly elected Governor Ron DeSantis and FDACS Commissioner Nikki Fried as defendants and adding new allegations to the Complaint based upon the release of the Trump Administration's most recent National Climate Assessment, which bolstered the allegations of harm to the Appellants and underscored the danger of the state's energy policy. R. at 322-405. Appellees again moved to dismiss the case. R. at 411-500. Appellants filed a consolidated response to all three motions on March 8, 2019. R. at 530-608.

On October 16, 2019, Appellants moved to supplement the First Amended Complaint with new information about Appellees' recent actions that confirmed their control of, and illustrated their pattern and practice of perpetuating, an energy system that contributes to and exacerbates Appellants' injuries. R. at 682-1299. The circuit court accepted the supplemental first amended complaint as the Appellants' operative briefing on January 6, 2020. R. at 1320-21. Appellants then filed a supplemental memorandum of law in accordance with a court order, explaining how the supplemental allegations support Appellants' legal arguments in response to the motions to dismiss. R. at 1322-37. On January 27, 2020, Appellees FDEP and BOT filed a reply to the supplemental memorandum of law and Appellants subsequently

filed a surreply on February 11, 2020 to address the new legal arguments raised in the reply brief. R. at 1364-1405.

III. Disposition in Lower Tribunal

On June 1, 2020, the Honorable Kevin J. Carroll heard oral argument on the motions to dismiss. Although he acknowledged that Appellants' counsel "made a compelling argument" and had "tempt[ed]" him "to deny the motions to dismiss and go ahead," Judge Carroll "reluctantly" ruled that:

> The claims are inherently political questions that must be resolved by the political branches of government. Further, because this Court has found that the relief requested involves non-justiciable political questions and separation of powers, the Complaint's flaws cannot be corrected by amendment . . . .

R. at 1406. The order did not determine the rights of the parties, nor did it contain any factual findings or conclusions of law. *Id.* Appellants filed their Notice of Appeal on July 1, 2020.

SUMMARY OF ARGUMENT

At stake in this appeal is these young Floridians' right to access the courts to vindicate their fundamental constitutional rights. The circuit court erred in several key ways that merit this court's intervention and correction.

First, although the circuit court acknowledged Appellants' concerns as "legitimate," R. at 1548:1, it erroneously denied Appellants' the ability to seek a declaration of rights under the law. Appellants have established a justiciable

controversy under the Declaratory Judgment Act. Circuit courts have jurisdiction to declare rights and render judgments on the existence or nonexistence of "any immunity, power, privilege, or right." § 86.011(1), Fla. Stat. (2020). When a constitutional right is at stake, the court has a duty to declare the law. *Montgomery v. State*, 55 Fla. 97, 45 So. 879, 881 (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.").

Second, the circuit court dismissed the Appellants' claims on perceived "inherent" political question doctrine grounds, erroneously applying the doctrine to alleged infringements of fundamental rights by the political branches of government over an area of governance *not* constitutionally dedicated to any one branch of government. The U.S. Supreme Court has rejected the notion that cases can be dismissed merely "because the issues have political implications." *INS v. Chadha*, 462 U.S. 919, 943 (1983). The proper standard for evaluating whether the political question doctrine applies to Appellants' claims is derived from *Baker v. Carr*, 369 U.S. 186, 217 (1962), and under the formulations outlined therein (which the circuit court did not address), there is no basis for finding Appellants' claims nonjusticiable.

Third, the court erred in dismissing Appellants' claims on separation of powers grounds. The true threat to the separation of powers is the court's abdication

of its assigned role in hearing claims involving fundamental rights, as established by the Florida Constitution. Art. II, § 3, Fla. Const.; *see also State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000) (interpreting Art. II, § 3 as traditionally enforcing a strict separation of powers).

Fourth, the lower court incorrectly concluded that, separate from the justiciability of the constitutional claims, Appellants' requested relief "involves non-justiciable political questions and separation of powers" concerns. R. at 1406. The circuit court denied Appellants the ability to develop a record on the viability of and need for various remedies Appellants sought, including declaratory relief. The court erred further by disregarding precedent of multiple courts ordering the political branches to craft plans, an ordinary remedy for constitutional violations. *See, e.g., League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 400 (Fla. 2015).

Fifth, the other potential grounds presented by Appellees for denying Appellants their day in court, but not addressed by the circuit court, including sovereign immunity, primary jurisdiction, and lack of proper parties, are all unfounded. The effect of the circuit court's decision is to close the courthouse doors to children who have no other means of petitioning their government for redress. On all of the above grounds, we ask that this court reverse the circuit court's dismissal of Appellants' case.

ARGUMENT

I. Standard of Review

"Unlike other actions, a motion to dismiss a petition for declaratory judgment does not go to the merits but goes only to the question of whether or not the plaintiff is entitled to a declaration of rights – not to whether or not he is entitled to a declaration in his favor." *Mills v. Ball*, 344 So. 2d 635, 638 (Fla. 1st DCA 1977). "A complaint for declaratory judgment should not be dismissed if the plaintiff established the existence of a justiciable controversy cognizable under the Declaratory Judgment Act . . . ." *Murphy v. Bay Colony Prop. Owners Ass'n*, 12 So. 3d 924, 926 (Fla. 2d DCA 2009). A decision granting a motion to dismiss is reviewed de novo, and the court "may look only to the four corners of the complaint." *Ruiz v. Brink's Home Sec., Inc.*, 777 So. 2d 1062, 1064 (Fla. 2d DCA 2001). The court "must accept the material allegations as true . . . ." *Murphy*, 12 So. 3d at 926.

II. Appellants Have Established A Justiciable Controversy Under the Declaratory Judgment Act.

The Appellants seek a declaration of their rights under the Florida Constitution and public trust doctrine, and the Court has jurisdiction over such questions under the Declaratory Judgment Act, which grants courts:

> jurisdiction . . . 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. (2020). "The purpose of the declaratory judgment statute is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations, and it should be liberally construed." *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991). Furthermore—

> [T]o 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. v. Y Pers., 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993) (internal citations omitted); *Hialeah Race Course*, 210 So. 2d at 752. Here, the live controversy is whether these youth have rights that Appellees are unconstitutionally infringing, when Appellees deny both the existence of Appellants' rights and, even if the rights do exist, any wrongdoing with respect to those rights.

In the circuit court, Appellees never addressed Appellants' right to seek a declaratory judgment, and the circuit court erroneously failed to make any factual

findings or conclusions of law. *Sears, Roebuck & Co. v. Forbes/Cohen Fla. Properties, L.P.*, 223 So. 3d 292, 298 (Fla. 4th DCA 2017) ("Under the [Declaratory Judgment Act] . . . conclusory final judgments on declaratory judgment claims, which are devoid of factual findings or conclusions of law, are inadequate."). There is a present need for a declaration in this case. As such, Appellants' case should be remanded so the circuit court can take evidence and determine the rights of the parties. *Id.*; *Local 532 of Am. Fed'n of State, Cty. & Mun. Emp., AFL-CIO v. City of Fort Lauderdale*, 273 So. 2d 441, 442, 445 (Fla. 4th DCA 1973) (finding trial court "erred in entering final judgment for the defendant without a declaration of the rights of the parties" and advising the trial court to evaluate "all facts and circumstances" on remand).

Appellants' declaratory judgment claims challenge the constitutionality of the Appellees' conduct in operating a state energy system that is causing and contributing to Appellants' injuries and thereby violating their rights. R. at 717-723, 762-772, ¶¶ 42-50, 148-150. The threats to the Appellants' constitutional rights are documented in the Complaint. R. at 738-761, 772-784, ¶¶ 93-147, 151-206. Appellees dispute that (1) Appellants' constitutional rights to life and liberty are infringed, (2) such rights encompass a right to a stable climate system, (3) the public trust doctrine includes the atmosphere and a duty to refrain from substantially impairing essential resources, and (4) the court can declare a violation of those rights.

R. at 411-500, 1364-1383. Appellants have thus alleged an "immediate, substantial and actual justiciable controversy" between themselves and Appellees. *Wilson v. County of Orange*, 881 So. 2d 625, 631 (5th DCA 2004). This controversy of whether Appellees' conduct is lawful is of immense consequence to the personal health, security, and safety of the young Appellants. Appellants are entitled to "relief from [their] insecurity and uncertainty with respect to" the constitutionality of Appellees' conduct. *People's Tr. Ins. Co. v. Franco*, ___ So. 3d ___, No. 3D18-2178, 2020 WL 1870361, at *3 (Fla. 3rd DCA April 15, 2020).

III. The Court Erred in Dismissing Appellants' Claims on Political Question Grounds.

The circuit court's conclusion that Appellants' constitutional claims are barred by the political question doctrine is flawed for two reasons. First, Appellants allege the political branches of government have infringed their fundamental rights; claims not subject to the political question doctrine because they invoke the judiciary's quintessential responsibility to say what the law is and protect individual rights. The court's duty to decide constitutional claims does not vanish simply because the case may have political implications. Second, analysis of Appellants' claims under the *Baker* formulations, which the circuit court did not do, illustrates that the court has an obligation to hear and decide Appellants' claims.

A. The Protection of Fundamental Rights is Not a Political Question.

The political question doctrine is a narrow exception to the general rule that the judiciary "has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The Florida Supreme Court has clearly articulated the role of courts in protecting individual constitutional rights:

> Courts are created (1) to enforce the laws and (2) to resolve disputes. Courts in the American legal system have a third distinct and extremely important responsibility; that is to safeguard the Constitution and protect individual rights. THE FEDERALIST No. 78 (Alexander Hamilton). What makes our legal system so different is the ability of lawyers to challenge the constitutionality of government conduct before a separate, independent judicial branch of government.

In re Amendments to Rules Regulating the Fla. Bar 1-3.1(a) & Rules of Jud. Admin.-2.065 (Legal Aid), 598 So. 2d 41, 42-43 (Fla. 1992). Resolving Appellants' constitutional claims on the merits falls squarely within the judiciary's central purpose to protect individual rights. *State v. Kuntzwiler*, 585 So. 2d 1096, 1098 (Fla. 4th DCA 1991) (Glickstein, J., concurring specially) (quoting The Honorable Sol Wachtler, Chief Judge of the State of New York) ("'Alexander Hamilton, another author of THE FEDERALIST PAPERS, contemplated in No. 17 that the state would remain the principal protector of individual rights – the 'immediate and visible guardian of life and property.''").

In Florida, the political question doctrine has been applied only in a few discrete contexts; all involving issues the Constitution textually commits to the political branches: the adequacy of public education, the conduct of elections, and allocation of government funding.[4] *See, e.g.*, *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127 (Fla. 2019) (per curiam) ("*Citizens*") (finding the adequacy of funding public education under Art. IX, § 1(a), Fla. Const. a political question); *Harden v. Garrett*, 483 So. 2d 409 (Fla. 1985) (finding a challenge to legislative election results a political question); *Partridge v. St. Lucie County*, 539 So. 2d 472 (Fla. 1989) (holding challenge to the necessity and affordability of public street and drainage improvements to be political question); *Johnson v. State*, 660 So. 2d 637 (Fla. 1995) (challenge to the death penalty on cost-effectiveness grounds is political question); *Penn v. Fla. Def. Finance and Accounting Serv. Ctr. Auth.*, 623 So. 2d 459 (Fla. 1993) (challenge to government fundraising and funding allocation

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[4] *See* section (III)(B)(i), *infra*. The adequacy of the state's education and school funding policies are under the exclusive discretion of the legislature under Article IX, § 1(a) of the Florida Constitution. Similarly, the legislature is endowed with the exclusive power to "judge . . . the elections . . . of its members." Art. III, § 2, Fla. Const. Notably, in cases involving executive elections, which do not implicate the same constitutional allocation of power to the legislature, courts have resolved the disputes on the merits. *See, e.g.*, *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev'd on other grounds*, 531 U.S. 98 (2000). Finally, the allocation of government funding is also explicitly allocated to the legislative branch in the Florida Constitution, which outlines procedures for state budgeting, planning and appropriations. Art. III, § 19, Fla. Const.

for improving locally-sited Department of Defense facilities is political question). Even in areas the doctrine has been applied, "it is error to suppose that every case or controversy which touches" such topics "lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

Substantive due process and public trust claims have been resolved by Florida courts for decades. *See, e.g.*, *State ex rel. Furman v. Searcy*, 225 So. 2d 430 (Fla. 4th DCA 1969) (deciding on the merits that regulation violates the substantive due process rights of the plaintiff); *BB Inlet Prop., LLC v. 920 N. Stanley Partners, LLC*, 293 So. 3d 538 (Fla. 4th DCA 2020) (deciding public trust claim on the merits). Appellants allege infringements of individual fundamental rights under the public trust doctrine and substantive due process, alleging harms to their access to trust resources, personal security, human dignity, familial and cultural autonomy, and bodily integrity. R. at 708-710, 711, 715-716, 745, 757, 760, 781, 783, ¶¶ 19-20, 25, 39, 116, 137, 144, 192, 203. As such, Appellants' constitutional claims must be addressed by the court.[5] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 2.6 n.7 (5th ed. 2007) ("If a litigant claims that an individual right has been invaded, the

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[5] *See also De Leon v. Perry*, 975 F.Supp.2d 632, 657 (W.D. Tex. 2014) (internal citations omitted) ("contrary to Defendants' assertion that the [substantive due process] issues before this Court are 'inherently political questions,' . . . this Court finds that it must determine: (1) what individual rights are at stake in this case; (2) whether those rights are protected by the United States Constitution; (3) and if so, whether [the challenged conduct] impermissibly infringes on those constitutional rights.").

lawsuit by definition does not involve a political question.") (quoting HOWARD FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 231 (2d ed. 1987)).

The circuit court suggested that it lacked authority to hear Appellants' constitutional claims because climate change is an issue that must be solved by the political process "through their elected representatives." R. at 1546:24-25. Energy issues certainly have political implications, as do other systemic issues like school desegregation and marriage equality. These landmark cases required judicial intervention to stop the government's perpetuation of constitutional harms. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Where fundamental rights are at stake, the courts cannot abdicate their duty simply because the harms involved are perceived to have some general political valence.[6] *Rose v. Palm Beach Cty.*, 361 So. 2d 135, 137 (Fla. 1978) ("[W]here the fundamental rights of individuals are concerned, the judiciary may not abdicate its

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[6] U.S. Supreme Court, *The Court and Constitutional Interpretation*, https://www.supremecourt.gov/about/constitutional.aspx ("Hamilton had written that through the practice of judicial review the Court ensured that the will of the whole people, as expressed in their Constitution, would be supreme over the will of a legislature, whose statutes might express only the temporary will of part of the people. And Madison had written that constitutional interpretation must be left to the reasoned judgment of independent judges, rather than to the tumult and conflict of the political process. If every constitutional question were to be decided by public political bargaining, Madison argued, the Constitution would be reduced to a battleground of competing factions, political passion and partisan spirit.").

responsibility and defer to legislative or administrative arrangements."); *Chadha*, 462 U.S. at 943 ("[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . ."); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

B. Analysis Under the *Baker* Formulations Shows that Appellants' Claims are Justiciable.

As established by the U.S. Supreme Court in *Baker v. Carr*, and endorsed by the Florida Supreme Court, unless one of the six formulations discussed in the following sections is "inextricable from the case at bar," there can be no dismissal on political question grounds. *Baker*, 369 U.S. at 217; *Coalition for Adequacy of Fairness in School Funding v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996). The circuit court erred in dismissing the case as a political question in the absence of a *Baker* analysis and because none of the *Baker* formulations is inextricable from the instant case. The *Baker* formulations are "listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion).

i. There is No Textual Constitutional Commitment to a Political Department.

Under the first and most important *Baker* formulation, a claim raises a nonjusticiable political question if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." *Baker*, 369 U.S. at 217. Appellants' claims involving Florida energy policy do not implicate issues expressly committed to the legislature. Nothing in the Florida Constitution expressly commits issues involving energy to the political branches.

Nor do the constitutional provisions under which Appellants' claims arise contain *any* suggestion of an exclusive textual commitment of the issues to coordinate branches. To the contrary, Florida's courts have consistently interpreted Florida's due process clause as vesting authority over claimed infringements in the judiciary. *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991). Article I, § 9, under which counts 3 and 4 are brought, provides:

> No person shall be deprived of life, liberty or property without due process of law . . . .[7]

Unlike other provisions of the Florida or U.S. Constitution held to evidence a commitment of issues to other branches,[8] this section does not contain *any* language

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[7] *See also* Fla. Const. Art. I, § 2 ("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 . . . .").

[8] For example, in federal court, claims that involve the military or foreign affairs are oft found to raise a political question. *See, e.g.*, *Aktepe v. U.S.*, 105 F.3d 1400, 1403

to suggest that Florida's energy system, resulting in harms to Appellants, is not subject to constitutional review by the judiciary.

While the legislature has authority to enact laws and implement policies to provide its citizens with energy pursuant to its police powers, the judiciary retains the authority and duty to determine whether government actions comply with the constitution, including actions that concern energy policy. *See, e.g.*, *State v. Walker*, 444 So. 2d 1137 (Fla. 2d DCA 1984), *affirmed and lower court opinion adopted*, 461 So. 2d 108 (Fla. 1984) (quoting *Patch Enterprises v. McCall*, 447 F.Supp. 1075, 1081 (M.D. Fla. 1978)) ("'despite a state's wide discretion, and the cautious restraint of the courts, there remain basic restrictions and limits on a state's legislative power to intrude upon individual rights, liberties, and conduct. To exceed those bounds

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(11th Cir. 1997) (holding that a negligence suit challenging a U.S. military strike presented nonjusticiable political question because "the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government."). Constitutional claims against the military have been found not to be political questions. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding a plaintiff's First Amendment challenge to a rule against wearing yarmulkes while in uniform to be justiciable); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding a plaintiff's Fifth Amendment challenge to a gender-based draft requirement to be justiciable); *Brown v. Giles*, 444 U.S. 348 (1980) (holding a plaintiff's First Amendment challenge to a regulation restricting the circulation of petitions on air force bases to be justiciable); *Parker v. Levy*, 417 U.S. 733 (1974) (holding a court-martialed captain could bring a habeas corpus proceeding seeking discharge from his confinement); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding a plaintiff's Fifth Amendment challenge to the enforcement of a statute governing allowances for spouses of servicemembers to be justiciable).

without rational justification is to collide with the Due Process Clause.'"). 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 County Classroom Teachers Ass'n, Inc. v. Legislature*, 269 So. 2d 684, 688 (Fla. 1972). Appellees have chosen a policy course with the state's energy system, and affirmative conduct implementing that policy is not textually committed to a political branch and is thus judicially reviewable for constitutional compliance. The first *Baker* formulation is not implicated here. *See Davis v. Passman*, 442 U.S. 228, 242 (1979) (citations omitted) (quoting *Baker*, 369 U.S. at 217) ("in the absence of 'a textually demonstrable constitutional commitment' . . . we presume that justiciable constitutional rights are to be enforced through the courts.").

ii. There are Judicially Manageable Standards.

Under the second *Baker* formulation, a claim could implicate a political question if there are a "lack of judicially discoverable and manageable standards for resolving it . . . ."[9] *Baker*, 369 U.S. at 217. Florida courts have clear and well-

[9] Since the political question doctrine was first conceived, no majority of the Supreme Court has deemed a case nonjusticiable based *solely* on a lack of judicially manageable standards. The U.S. Supreme Court has only found a nonjusticiable political question in part on the basis of a lack of judicially manageable standards only in the following contexts: (1) the recognition of state governments, *Luther v.*

established standards for resolving each of Appellants' claims here. First, as to Appellants' public trust claims, Florida courts look to whether the state has "materially impaired" or "abdicate[d] general control" of the trust resource. *State v. Gerbing*, 47 So. 353, 355 (Fla. 1908). As the Supreme Court of Hawaii recently held:

> [P]recedents interpreting the State's constitutional trust obligations and the widely developed common law of trusts provide many judicially discoverable and manageable standards for determining whether the State has breached its trust duties . . . '[Such a determination] is a matter to be determined by the courts, as a part of their inherent jurisdiction.'

Ching v. Case, 449 P.3d 1146, 1173 (Haw. 2019) (quoting *Kapiolani Park Pres. Soc'y v. City & County of Honolulu*, 751 P.2d 1022, 1024 (Haw. 1988)).[10]

Florida has precedent that establishes analogous discoverable and manageable standards entitling Appellants to a declaration as to their public trust rights. *Lee v. Williams*, 711 So. 2d 57, 60 (Fla. 5th DCA 1998) ("[T]he 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

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Borden, 48 U.S. 1 (1849); (2) state ratification of constitutional amendments, *Coleman v. Miller*, 307 U.S. 433 (1939); (3) validity of impeachment convictions, *United States v. Nixon*, 418 U.S. 683 (1974); (4) partisan gerrymandering, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); and (5) the composition, training, equipping, and control of the military, *Gilligan v. Morgan*, 413 U.S. 1 (1973).

[10] *See also Chernaik v. Kitzhaber*, 328 P.3d 799 (Or. 2014) (finding "[p]laintiffs' requests for 'bare' declarations regarding the scope of the state's present obligations, if any, under [the public trust] doctrine are, therefore, justiciable."); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) ("It is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority.").

legislative directive."). Florida case law clearly furnishes the "judicially discoverable and manageable standards" needed to resolve Appellants' public trust doctrine claims.

Likewise, when assessing whether governmental actions and policies abridge 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." *Real Property*, 588 So. 2d at 960. When the state engages in conduct "that infringes on fundamental rights, courts will review the law under a strict scrutiny test and uphold it only when it is 'narrowly tailored to serve a compelling state interest.'" *Jackson v. State*, 137 So. 3d 470, 475 (Fla. 4th DCA 2014) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *Mitchell v. Moore*, 786 So. 2d 521, 527-28 (Fla. 2001) (strict scrutiny applies "if the interest which is being taken is a fundamental interest."). As in *Baker*, this Court need only apply these well-established standards governing individual constitutional rights to the facts alleged. *See Wyatt v. Aderholdt*, 503 F.2d 1305, 1314 (5th Cir. 1974) (affirming courts can formulate "workable [judicial] standards" for declaring and remedying systemic due

process violations); *Juliana v. United States*, 947 F.3d 1159, 1174 n.9 (9th Cir. 2020), *petition for rehearing en banc pending*, No. 18-36082, Dkt. Entry 156 (March 2, 2020) (finding substantive due process and equal protection challenge to federal government's energy policy does not raise political question).

Furthermore, Florida courts have consistently held that judicially manageable standards can be drawn from the Florida Constitution in cases involving fundamental rights. *Membreno v. City of Hialeah*, 188 So. 3d 13, 21 (Fla. 3rd DCA 2016) (stating that in cases involving fundamental rights, "courts also have at least a modicum of guidance from existing constitutional rules and constitutional policies whether a legislative choice should be replaced by a judicial choice."). For example, in *League of Women Voters*, 172 So. 3d at 375-76, the court used the legal standard in Article III, § 20(a) of the Florida Constitution to rule that the Florida Legislature had engaged in unconstitutional partisan gerrymandering. The standard applied in *League of Women Voters*, *i.e.*, unconstitutional partisan legislative intent, is far more difficult to apply than the standards presented in this case. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . .").[11]

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[11] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("We are governed by laws, not by the intentions of legislators."); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119

Here, on the merits the circuit court need not wade into political motive, but will instead rely on scientific evidence to assess the impact of the government's affirmative conduct in light of the clear constitutional standards of review for substantive due process and public trust violations. *See* Stephen Breyer, *Science in the Courtroom*, *Issues in Science and Technology* (University of Texas at Dallas 2000) https://issues.org/breyer/ (detailing the duty of the judiciary to confront scientific and technical analysis in deciding "basic questions of human liberty."). As Appellants have alleged, the evidence will demonstrate that Appellees' conduct has resulted in GHG emissions at a level that already causes harm to these children and, if left unabated, is consistent with catastrophic and irreversible harm in the imminent future. R. at 728, 730, 736-747, ¶¶ 65, 69, 86-123. Appellants will argue that such conduct constitutes an interference with Appellants' fundamental rights to life and liberty, that there is no compelling justification for the infringement, and that there are less restrictive alternatives to Appellees' energy policy. Thus, the standard to assess the constitutionality of Appellees' conduct will be based on scientific evidence about what level of GHG emissions is consistent with avoiding catastrophic harms arising from climate change. R. at 736-738, ¶¶ 86-92. The wide variety of substantive due process and public trust cases that courts have decided on

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Harv. L. Rev. 1274, 1286 (2006) ("some Justices, judges, and commentators believe that intent tests prescribe an incoherent inquiry.").

the merits confirms the court's ability to apply the relevant legal standards in varying circumstances, including here. *See Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) ("Judicial standards for evaluating compliance with the constitutional dictates of due process . . . are well developed, although they have not often been applied to these facts."); *Alperin v. Vatican Bank*, 410 F.3d 532, 552, 555 (9th Cir. 2005) ("[t]he crux of this inquiry is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint," but rather whether "a legal framework exists by which courts can evaluate these claims in a reasoned manner.").

Appellants' constitutional claims are unlike those presented in *Citizens*, where the constitutional provision at issue contained language that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." Art. IX, § 1(a), Fla. Const.; 262 So.3d 127. In *Citizens*, the court found that the term "high quality" does not present the courts with a judicially manageable standard to decide "Petitioners' blanket [funding] challenge to the educational system . . . ." 262 So.3d at 142; *see also Coalition for Adequacy & Fairness in School Funding, Inc.*, 680 So. 2d at 408 (finding challenge to funding of school system nonjusticiable because "appellants have failed to demonstrate . . . an appropriate standard for determining 'adequacy' . . . ."). In addition to having the benefit of a well-developed

factual record by which to gauge the usefulness of varying standards (which does not exist yet in the present case), no fundamental rights were at stake in the school funding cases. *Id*. at 138 (noting that the 1998 constitutional amendments to Article IX did not declare education to be a fundamental right). Moreover, the terms "adequacy" and "high quality" are inherently subjective in nature, while there are objective, generally accepted, science-based standards that can be used to gauge Appellees' conduct in this case. R. at 736-738, ¶¶ 86-92 (describing scientific consensus on how to address climate change). Thus, this case differs from the political questions found in *Coalition* and *Citizens* for at least four clear reasons: (1) decisions about funding education are constitutionally dedicated to the legislature; decisions about the energy system are not; (2) there are long-standing standards for evaluating substantive due process and public trust claims that apply equally here; such standards have not been established for Art. IX, § 1(a); (3) the rights being infringed here are fundamental; education has not been deemed a fundamental right; and (4) *Coalition* and *Citizens* had a substantial factual record on which to base these decisions; no record has been developed here.

iii. Appellants' Claims Do Not Require the Court to Make Initial Policy Determinations.

In resolving Appellants' claims, the 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. The third *Baker* formulation is only

applicable where a court "cannot resolve a dispute in the absence of a yet-unmade policy determination . . . ." *Zivotofsky*, 566 U.S. at 204 (Sotomayor, J., concurring). Rather than calling for such initial policy determinations, Appellants' claims call on this court to engage in the familiar and traditional judicial role of assessing the political branches' existing actions and policies, which have already been developed and are being implemented, for compliance with well-established and oft-applied constitutional standards. R. at 727-728, 728-729, 739-741, 746, 747, 749-755, 757, 762-770, ¶¶ 63, 66, 97-101, 119, 122, 131, 137, 149(c), (h), (i), (k), (m)-(t); § 377.601, Fla. Stat. (2020) (describing how the political branches of government have already made the energy policy determination as to how to supply Floridians with energy and are actively implementing that policy); R. at 762-772, ¶¶ 148-149 (specifying how Appellees' *existing* energy system, and their actions in furtherance thereof, are causing harm to the Appellants). These factual allegations are required to be accepted as true, and it would be Appellants' burden at trial to establish precisely how Appellees' actions are causing and contributing to Appellants' injuries. *Brown v. Plata*, 563 U.S. 493, 517 (2011) (quoting *Lilly v. Virginia*, 527 U.S. 116, 148 (1999) (Rehnquist, C.J., concurring)) (affirming lower court's finding that in challenge to prison's medical care system overcrowding was the primary cause of Appellants' constitutional injuries and stating "[t]he ultimate issue of

primary cause presents a mixed question of law and fact; but there, too, 'the mix weighs heavily on the 'fact' side.'").

iv. The Court Can Resolve this Case Without Implicating Any of the Remaining *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[,]"[12] nor the likelihood of "embarrassment from multifarious pronouncements by various departments on one question," such as would implicate the fourth, fifth, and sixth *Baker* formulations, respectively. 369 U.S. at 217.

The U.S. Supreme Court has repeatedly ruled that the final three formulations, the least determinative of the *Baker* set, are not implicated when a court is called upon, as here, to resolve the constitutionality of the conduct of another branch of government. *See, e.g.*, *Zivotofsky*, 566 U.S. at 196-97; *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990) (finding 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 established the judiciary as a co-equal branch with

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[12] The Supreme Court has stated that the "unusual need" *Baker* formulation typically only arises in the area of foreign affairs, which is not implicated by Appellants' state constitutional claims. *County of Oneida, New York v. Oneida Indian Nation*, 470 U.S. 226, 250 (1985).

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*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (citations omitted).

The circuit court dismissed this case challenging Florida's energy system in part because Judge Carroll "believe[s] . . . that the people, through their elected representatives, will eventually get this climate thing right." R. at 1546-47. Judge Carroll's faith in the electorate, no matter how earnest and well-placed, cannot override the requirement that Appellants' well-pleaded allegations to the contrary be taken as true, namely that the political branches have long been, and are actively, infringing the rights of their youngest citizen beneficiaries.[13] *See, e.g.,* R. at 727-728, 728, 728-729, 739-741, 746, 747, 749-755, 757, ¶¶ 63, 65, 66, 97-101, 119, 122, 131, 137. Justiciability tests based on the possibility of constitutionally-compliant policies being enacted in the future would foreclose all suits, constitutional or otherwise, against government action. Alexander Hamilton explained "the job of the judge is to enforce the supreme and enduring law of the Constitution over the current

[13] On a motion to dismiss, the Court is required to accept Appellants' factual allegations as true. *Murphy*, 12 So. 3d at 926.

will of the majority." Justice Neil Gorsuch, *A Republic, If You Can Keep It*, 186 (1st ed. 2019. Constitutional limitations on a majoritarian government "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." THE FEDERALIST No. 78 (Alexander Hamilton). The core judicial function is to check encroachment upon individual liberties by the other branches of government—that is the very essence of judicial review. *Petition of Fla. State Bar Ass'n*, 40 So. 2d 902, 907 (Fla. 1949) ("[I]n those matters which are purely and essentially judicial, the judiciary may chart its course without interference from other departments.").

IV. The Court Erred in Dismissing Appellants' Claims on Separation of Powers Grounds.

The circuit court erred in holding that the Appellants' claims cannot be redressed "due to the Separation of Powers Clause of the Florida Constitution." R. at 1406. The separation of powers doctrine is a bedrock of the Florida Constitution, and "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const.; *Barnett v. Antonacci*, 122 So. 3d 400, 404-5 (Fla. 4th DCA 2013). "This framework for separation of powers recognizes that the judicial branch's power and responsibility to determine whether a law violates substantive due process and equal

protection are at their maximum regarding laws that establish suspect classes . . . or infringe on fundamental rights." *Membreno*, 188 So. 3d at 21.

"Th[e] doctrine of inherent judicial power 'exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights,'" which is what is squarely at issue in this case. *Pub. Defender, Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 271-72 (Fla. 2013) (citations omitted).[14] Under Florida's tripartite system of government, the judiciary has inherent power and responsibility to decide whether state actions, systems, and policies—such as those challenged here—infringe upon fundamental individual rights safeguarded by the constitution. The judiciary cannot abdicate this responsibility, nor can it "defer to legislative or

[14] "'If the separation of powers is to be maintained, it is essential that the judicial branch of government not be throttled by either the legislative or administrative branches, and that the courts be empowered to mandate what is reasonably necessary to discharge their duties.'" *Rose*, 361 So. 2d at 137 n.6 (quoting *McAfee v. State ex rel. Stodola*, 284 N.E.2d 778, 782 (Ind. 1972)). "It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court. Courts from time immemorial have been the refuge of those who have been aggrieved and oppressed by official and arbitrary actions under the guise of governmental authority. It is the protector of those oppressed by unwarranted official acts under the assumption of authority. . . . Justice, as well as the security of human rights and the safety of free institutions requires freedom of action of courts in hearing cases of those aggrieved by official actions, to their injury. *Id*. at n.7 (quoting *Carlson, et al. v. State ex rel. Stodola*, 220 N.E.2d 532, 533-34 (Ind. 1966)).

administrative arrangements" when it concerns the fundamental rights of individuals. *Rose*, 361 So. 2d at 137. Similarly, the judiciary may not countenance stripping Article I, §§ 2 and 9 "of any legal and practical significance" because to do so "conflicts with the 'presumption against ineffectiveness' canon, which 'ensures that a text's manifest purpose is furthered, not hindered.'" *See Thompson v. DeSantis,* ___ So.3d ___, No. SC20-985, 2020 WL 5048539, *4-5 (Fla. Aug. 27, 2020) (Florida Supreme Court) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (St. Paul: West 2012)).

The circuit court mischaracterized Appellants' claims as seeking to circumvent "governance in a representative republic." R. at 1546. In fact, the inverse is true. If the judiciary declines to review Appellants' constitutional claims, the political branches would have unfettered authority to act in contravention of the Florida Constitution. The circuit court's contention that the claims presented were "not an issue for the Court," *id.* undermines the judiciary's primary function and constitutional obligation to interpret constitutional provisions and serve as a check on the conduct of the other branches. *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992). Art. V, Fla. Const. The true threat to liberty stems from the court's abdication of its role in interpreting and upholding the constitution. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Bowsher v. Snyar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))

("The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'"). The legal claims that the court is called upon to decide in this declaratory judgment action fit squarely within the judiciary's most central and traditional constitutional role. The court's failure to hear the youth's claims was in itself an unconstitutional abdication of the court's essential responsibilities under the separation of powers doctrine.

V. The Court Erred by Prematurely Focusing on Appellants' Requested Relief.

It is premature to speculate now, like the circuit court did, as to whether any relief that might ultimately be ordered, after a determination on the merits, would implicate the separation of powers concerns underlying the political question doctrine. *Baker*, 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."); *see also League of Women Voters*, 172 So. 3d at 413, 419 (remedy needs to be "commensurate with the constitutional violations found in th[e] case."). Rather than speculate as to the remedy that would follow should Appellants prevail on the merits, R. at 1406, the court should have focused on whether there is *any* relief that could be awarded. *Powell*, 395 U.S. at 517-18. The

degree to which Appellants' injuries can be minimized, and the scope of remedy necessary to achieve that mitigation, involve disputed issues of material fact to be resolved on a full record after trial, not on a motion to dismiss where the facts underlying Appellants' are assumed to be true. *Murphy*, 12 So. 3d at 926. Appellants have alleged that Appellees' conduct that perpetuates an energy system based on fossil fuels, in spite of the known danger to the lives and liberties of these children, harms Appellants and that there are workable alternatives to Appellees' unconstitutional conduct. R. at 770, ¶ 149(u). This is all that is needed at this stage in the proceedings. *State v. J.P.*, 907 So. 2d 1101, 1107-8 (Fla. 2004) (applying strict scrutiny to claim involving alleged infringement of fundamental rights of children).

By assuming the requested relief "involves non-justiciable political questions and separation of powers," the circuit court appears to have disregarded Appellants' request for declaratory relief in the first instance. R. at 1406. The U.S. Supreme Court has long acknowledged the important role of declaratory relief in resolving persisting constitutional controversies. *See Evers v. Dwyer*, 358 U.S. 202, 202-04 (1958) (ongoing governmental enforcement of segregation laws created actual controversy for declaratory judgment); *Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (declaratory relief changes the legal status of the challenged conduct, sufficient for redressability); *Powell*, 395 U.S. at 499 ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus."). In *Brown v. Board of*

Education, "the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education."[15] 347 U.S. at 495.

Even as a freestanding remedy, a declaratory judgment carries an expectation that even non-defendant government officials "'would abide by an authoritative interpretation of the . . . constitution[.]'" *Utah*, 536 U.S. at 463-64 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)); *Brown*, 349 U.S. at 298 ("All provisions of federal, state, or local law requiring or permitting such discrimination must yield" to court's declaration that "racial discrimination in public education is unconstitutional."); *accord Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) ("[A] declaratory judgment is a real judgment, not just a bit of friendly advice . . . ."). Courts have a "duty to decide the appropriateness and the merits of [a] declaratory request irrespective of its conclusion as to the propriety of the issuance of [an] injunction." *Zwickler v. Koota*, 389 U.S. 241, 254 (1967); *Powell*, 395 U.S. at 519 ("We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued."); *see also* Harvard Law Review

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[15] In fact, *Brown* was actually decided in two phases. The first case "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional" and the second determined "the manner in which relief is to be accorded." *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 298 (1955).

Association, *Substantive Limits on Liability and Relief*, 90 Harv. L. Rev. 1190, 1248-49 (1977) (explaining that, consistent with U.S. Supreme Court practice in systemic constitutional cases, "[t]he court's first step should be to issue a form of declaratory judgment, placing the defendants on notice of the constitutional violation" so they can "remed[y] the violations on their own initiative" and that the necessity of further relief should be considered if defendants fail to abide by declaratory relief).

Should it prove necessary – an issue premature for consideration by the court at this stage of the proceedings – Appellants' requested injunctive relief is consistent with the judiciary's broad authority to "fashion practical remedies when confronted with complex and intractable constitutional violations." *Brown*, 563 U.S. at 526 (approving Eighth Amendment remedy ordering California to develop and implement plan to reduce state-wide prison population to no more than 137.5% of design capacity); *Hills v. Gautreaux*, 425 U.S. 284, 290, 306 (1976) (approving order for a comprehensive plan to remedy unconstitutional public housing system created by government); *see also Brevard Land Materials, Inc. v. Boruch-David, LLC*, 135 So. 3d 578 (Fla. 5th DCA 2014) (recognizing trial courts possess "broad equitable powers"). Far from requesting that this Court address "non-justiciable political questions," R. at 1406, Appellants ask that the court exercise its routine equitable powers to remedy constitutional violations. Just because the state energy system is complex and multifaceted does not mean the Court is unable to craft a remedy to

redress Appellants' constitutional claims. *See Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1081, 1083 (1982) (rejecting the contention that the claims were nonjusticiable because "an appropriate judicial remedy cannot be molded," and clarifying that there exists "no principle of law that would relate the availability of judicial review inversely to the gravity of the wrong sought to be redressed" or "the size of the remedy" requested); *In re Flint Water Cases*, 960 F.3d 303, 334 (6th Cir. 2020) (citations omitted) (upholding broad, prospective injunctive relief against Governor to redress ongoing violations of constitutional rights stemming from Flint Water Crisis and finding that such remedial measures "'are plainly designed to wipe out continuing [harms] produced by' the unconstitutional acts of Defendants-Appellants.").

To state a cause of action for injunctive relief, plaintiffs must allege "ultimate facts which, if true, would establish (1) irreparable injury (that is, injury which cannot be cured by money damages), (2) a clear legal right, (3) lack of an adequate remedy at law and (4) that the requested injunction would not be contrary to the interest of the public generally." *Weekley v. Pace Assembly Ministries, Inc.*, 671 So. 2d 220, 220 (Fla. 1st DCA 1996). Appellants sufficiently alleged each element to survive a motion to dismiss. *See* R. at 779-780, 782-784, ¶¶ 181-187; 200-206.

If, after the issuance of declaratory relief in the first instance, there is a need for injunctive relief, the Florida Supreme Court has already held that it possesses the

authority to order a political branch to adopt a plan in order to remedy a constitutional violation. In *League of Women Voters*, the court determined that "the appropriate remedy" for gerrymandering that violated Florida's Constitution was "to require the Legislature to redraw the map, based on the directions set forth by this Court." 172 So. 3d at 413. Similarly here, Appellants seek a court order directing Appellees to come up with *their own plan*, using whatever tools they deem necessary, to revise the energy system, and the actions it takes in implementing the system, so it does not result in further infringements of children's constitutional rights. The lower court therefore erred in prematurely considering and finding that Appellants' requested relief is improper. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978) (finding that a "court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one.").

VI. Appellees Presented No Other Basis to Deny the Children Their Day in Court.

A. Primary Jurisdiction

Appellees argued below that the primary jurisdiction doctrine bars Appellants' constitutional claims. Appellees did not indicate which agency has special expertise over Appellants' constitutional claims nor did they identify any statutes or administrative actions the court should defer to. Although not addressed by the circuit court, the 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). "[T]he application of the doctrine of primary jurisdiction is a matter of deference, policy and comity, not subject matter jurisdiction." *Id.* at 1037-38.

Appellees cited no statute or rule giving them specific authority to define the scope of Appellants' constitutionally-established substantive due process and public trust rights. In fact, any attempt to do so would violate the separation of powers doctrine.[16] *See supra* Section IV; *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("It seems contrary to the fundamental principles of separation of powers to permit the person who promulgates the law to interpret it as well."); *Hous. Opportunities Project v. SPV Realty, LC*, 212 So. 3d

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[16] Frank Shepard, et. al., *The Demise of Agency Deference: Florida Takes the Lead,* FL B.J., January/February 2020, at 18, https://www.floridabar.org/the-florida-bar-journal/the-demise-of-agency-deference-florida-takes-the-lead/ (explaining the criticism of deference to agencies "stemmed primarily from its contribution to the erosion of individual liberty in the face of the vastly expanding power of administrative agencies. It also posed grave due process and separation of powers issues. The notion that a court should defer to one litigant's statutory or regulatory interpretation is incompatible with our constitutional guarantees of due process of law, especially when its natural workings afforded enhanced power to the executive branch, the very institution the Florida Constitution's Declaration of Rights was enacted to protect the citizenry against.").

419, 425 n.9 (Fla. 3d DCA 2016) ("There is no reason for [agency deference] when we are as capable of reading the statute or rule as the agency, which may well have its own . . . agenda."). Moreover, the recent adoption of Art. V, § 21 to the Florida constitution eviscerates Appellees' primary jurisdiction argument because the Court is now explicitly prohibited from doing what Appellees ask: deferring to an administrative agency's statutory interpretation.[17] Not only do Appellants' constitutional claims not require statutory construction, Appellees relied on inapposite cases to support their claim that this case must be deferred due to the application of primary jurisdiction.[18] The case before this Court is more in line with *Wilson*, 881 So. 2d at 631 (finding a civil rights cause of action under 42 U.S.C. § 1983 justiciable and holding that "failure to exhaust administrative remedies is an

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[17] 'In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo." Fla. Const. Art. V, § 21.

[18] *Flo-Sun, Inc.*, 783 So. 2d 1029 (cause of action brought under clearly-established statutes delegating authority to DEP that the Court needed to interpret to resolve the claims in the case, unlike in the instant case, which involves no "comprehensive legislative scheme" and what little legislation has been enacted was largely repealed or gone unenforced by Appellees. *See* R. at 763, 766, 767-770, ¶¶ 149(c), (h), (i), (k), (m)-(t)); *Fla. Fish & Wildlife Conservation Comm'n v. Pringle*, 838 So. 2d 648 (Fla. 1st DCA 2003) (involving a constitutional challenge to specific administrative rules promulgated by the Commission, unlike the instant case in which Appellants are not challenging specific agency rules, but rather Appellees' collective pattern and practice); *Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1983) (dealing with specific agency actions that were reviewable and appealable under the APA, unlike here).

affirmative defense that is not apparent on the face of the complaint" and is not "a valid basis for dismissal.").

Appellees further contend that Appellants' claims can be adjudicated under the Florida Administrative Procedure Act ("APA"), Ch. 120, Fla. Stat., but Appellants challenge Appellees' fossil fuel-based energy system which is systemic in nature and does not—and cannot—meet constitutional requirements. Constitutional challenges to systemic government conduct can rightfully proceed outside of the APA. *See, e.g., Juliana*, 947 F.3d at 1167-68 (constitutional due process challenge to systemic government conduct can proceed outside the APA); *Carey v. Klutznick*, 637 F.2d 834, 838-39 (2d Cir. 1980) (internal citation omitted) ("Here, rather, appellees allege an impairment of their 'right to a vote free of arbitrary impairment,' a matter which cannot, of course, be foreclosed from judicial review by operation of the Administrative Procedure Act.").

Moreover, limiting Appellants' claims to the strictures of the APA would violate Appellants' procedural due process right to meaningful review. *See State v. Gleason*, 12 Fla. 190, 209 (1868) (a legislative cause of action is not needed "to enable this court to exercise its constitutional jurisdiction."); *Pedraza v. Reemployment Assistance Appeals Comm'n*, 208 So. 3d 1253, 1257 (Fla. 3rd DCA 2017) (Shepherd, J., concurring) ("deference to an agency's construction or application of a statute implicates important due process and separation of powers

questions deserving of serious contemplation by future members of this and other courts around the state."). Indeed, some of Appellees' unconstitutional acts as challenged in the complaint are not "agency actions" subject to the APA. *See, e.g.,* R. at 766-767, ¶¶ 149(i), (j), (k), (l), (m). Any review of piecemeal agency action would be limited to the agency record, which would foreclose consideration, review, and redress of the systemic nature of the conduct that has led to the constitutional violations at issue.

All of the issues in this case—whether Appellees' actions unconstitutionally infringed upon Appellants' due process and public trust rights, the extent of Appellants' injuries, and the appropriate remedy—are of a type commonly adjudicated by the courts. Contrary to Appellees' arguments, resolving these questions will not require extensive interpretation of agency regulations or a detailed technical analysis beyond the sort in which this Court ordinarily engages when considering the evidence presented by the parties. Judicial efficiency militates in favor of treating the Appellants' claims as a single systemic challenge as well, rather than as a myriad of challenges to individual agency actions over time. Even if that process were feasible, which it is not, it would prove costly, inefficient, and unduly burdensome for all parties and the court, compared to this single judicial process.

B. Sovereign Immunity

Appellees are not immune from this suit. "[S]overeign immunity will not bar a claim against the State from a challenge based on violation of the state or federal constitution." *Fla. Fish & Wildlife Conservation Comm'n v. Daws*, 256 So. 3d 907, 912 (Fla. 1st DCA 2018); *see also Smith v. Dep't of Pub. Health*, 410 NW.2d 749, 794 (Mich. 1987), *aff'd sub nom Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (Boyle, J., concurring in part and dissenting in part) (internal citation omitted) ("The curious doctrine of sovereign immunity in America, subject to great criticism over the years . . . should as a matter of public policy, lose its vitality when faced with unconstitutional acts of the state."). Appellees admit that "Florida courts have allowed claims for equitable or declaratory relief when a government entity takes an illegal act that deprives a citizen of constitutional rights . . . ." R. at 485. Since this is precisely what Appellants allege, Appellees are not immune from Appellants' constitutional claims.

C. Proper Parties

Appellees State of Florida, Governor DeSantis, Department of Agriculture and Consumer Services, and the Public Service Commission sought dismissal on the grounds that they were not proper parties to this declaratory judgment action.[19]

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[19] Appellees DEP and BOT did not seek dismissal on proper party grounds and thus cannot raise that argument on appeal. R. at 475-500. *See Abrams v. Paul*, 453 So. 2d

However, the current Appellees are all proper parties because they have "either taken a present, adverse, and antagonistic position to that espoused by [Appellants] 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.*, 680 So. 2d at 403. This action involves a constitutional constraint that implicates specific responsibilities of each of the named Appellees. *County of Volusia v. DeSantis*, ___ So. 3d ___, 2020 WL 4745280, *3 (Fla. 1st DCA Aug. 17, 2020) ("A state official is a proper party in a declaratory judgment action if the official is charged with enforcing the legal provision at issue in the litigation.").

Appellants have alleged that Appellees create, control and implement Florida's energy system, which is the source of Appellants' constitutional injuries. R. at 762-772 ¶ 149. Each Appellee has played and continues to play a role in taking actions to implement the energy system in a way that causes the constitutional injuries alleged in the complaint, and each Appellee has the authority to alter the actions it is taking that cause and contribute to the harm. *See, e.g.,* R. at 717-718, ¶ 43 (Governor); R. at 720-721, 723, 723-724, ¶¶ 46-47, 51, 53, 149 (FDACS); R. at 719, 719-720, 727-728, 728-729, 739-741, 746, 747, 749-755, 757, 762-772, ¶¶ 44,

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826, 827 (Fla. 1st DCA 1984) (appellate court does not entertain issues raised for the first time on appeal).

45, 63, 66, 97-101, 119, 122, 131, 137, 149 (FDEP); R. at 769-770, ¶ 149(t) (PSC); R. at 721-22, ¶ 49 (BOT). Florida has declared its energy policy a state function via state law, § 377.601, Fla. Stat. (2020) so the state is naturally a proper party in a challenge to the constitutionality of a state-established system. *State ex rel. Shevin v. Kerwin*, 279 So. 2d 836, 838 (Fla. 1973). The Court has the authority to consider Appellants' claims, and ultimately, issue declaratory and such other relief as may be necessary to prevent Appellees from further infringements of Appellants' constitutional rights. *Brown v. Butterworth*, 831 So. 2d 683, 690 (Fla. 4th DCA 2002) (holding that a proper party is one with "a cognizable interest in the action.").

Furthermore, because Appellants seek declaratory relief, all Appellees are proper parties as they have an interest that would be affected by the declaration. § 86.091, Fla. Stat. (2020). In carrying out their existing statutory responsibilities with respect to the state's energy system, Appellees can only implement their authority in a manner that is compliant with the Florida Constitution, a restriction Appellees continue to transgress through their actions perpetuating an energy system that is demonstrably harming these children. Appellees are therefore proper parties in this action.

VII. Youth Appellants' Right to Petition Their Government to Have Their Injuries Redressed Must be Protected.

"The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Art. I, § 21, Fla. Const.; *see*

also DR Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach, 819 So. 2d 971, 974 (Fla. 4th DCA 2002) ("[T]he 'right to go to court to resolve our disputes is one of our fundamental rights.'") (quoting *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992)).[20] Telling these youth Appellants, the majority of whom do not have suffrage rights, that their fundamental rights are subject to the will of their elected representatives, effectively denies them of their ability to protect their rights. R. at 1546:23-1547:1. If this Court refuses to hear Appellants' constitutional claims, these children will be without redress for the grievous harms they are experiencing at the hands of the government and such a result would be contrary to Article I, § 21 of the Florida Constitution and violate the separation of powers doctrine. *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1275 (Fla. 2013). This Court has jurisdiction to hear Appellants' constitutional claims.

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[20] *See also Getzen v. Sumter County*, 103 So. 104, 106 (Fla. 1925) ("[T]he constitution requires the courts to give a 'remedy' 'for any injury done' to personal or property rights, which includes an injury caused by an arbitrary or an unreasonable exercise of authority conferred, as well as by action taken without any authority whatever."); *Mays, et al. v. Governor of Michigan, et al.*, ___ N.W. 2d ___, 2020 WL 4360845, *29 (Mich. Supreme Court July 29, 2020) (McCormack, J. & Cavanagh, J., concurring) (quoting *Marbury*, 5 U.S. at 163) ("What good is a constitutional right without a remedy? 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.'").

CONCLUSION

The circuit court took the unprecedented position that Florida courts have no jurisdiction to hear and decide constitutional due process and public trust claims, a proposition that contradicts decades of Florida jurisprudence and the very foundation of Florida's democratic system of government. Appellees are collectively overseeing and operating an energy system that is causing real harm to these children's fundamental constitutional rights to life, liberty, and access to essential public trust resources. The Court should not carve out a new justiciability exception for constitutional cases based on a court's personal belief that the political winds may change direction. *See Wyatt*, 503 F.2d at 1315 ("[T]he obligation of the [government defendants] to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what [defendants] may actually be able to accomplish. If [state government] is going to operate a [] System, it is going to have to be a system that is countenanced by the Constitution . . . ."). The Circuit Court's approach is judicial activism at its worst and authorizes unfettered governmental intrusion into the lives and liberties of Floridian children. THE FEDERALIST No. 78 (Alexander Hamilton) ("[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . ."); *Krischer v. McIver*, 697 So. 2d 97, 113 (Fla. 1997) (Kogan, C.J, dissenting) ("In Florida, our judiciary

likewise is the one branch that emphatically must protect the basic rights of individuals against government overreaching. We guard liberty's sanctuary. It is our greatest duty to the people of Florida.").

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

Respectfully submitted this 9th day of September, 2020,

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CERTIFICATE OF SERVICE

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

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

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