CASE NO. SC19-2047

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES, *et al.,*

Appellants,

v.

JOSEPH DOLLIVER, *et al.,*

Appellees.

Appeal from a Decision of the Florida Second District Court of Appeal
Affirming an Order Declaring Sections 11.066(3) and (4),
Florida Statues, Unconstitutional *as Applied*, and Writ of Mandamus,
of the Twentieth Judicial Circuit, in and for Lee County, Florida
L.T. Nos. 2D18-1393, 362003CA001947A001CH

INITIAL BRIEF OF APPELLANTS, FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES AND FLORIDA COMMISSIONER OF AGRICULTURE

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January 24, 2020

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TABLE OF CONTENTS

Page

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CLARKE SILVERGLATE, P.A.
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TABLE OF CITATIONS

CASES **Page**

CLARKE SILVERGLATE, P.A.
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STATUTES

OTHER

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STATEMENT OF THE CASE AND OF THE FACTS

This case raises the issue whether a circuit court can order a Florida state agency to pay money to satisfy judgments without an appropriation from the Florida Legislature – indeed, where an appropriation was denied – and whether the budgetary statutes intended to protect against such payments are unconstitutional.

The Department wishes to pay the judgments, but, lacking an appropriation, has no lawful way to do so. If the Legislature appropriates funds to pay the judgments, the Department will quickly pay the judgments, as it has done in two related lawsuits in Broward County and Palm Beach County.

On appeal is the decision of the Second District Court of Appeal declaring §§ 11.066(3) and (4), Florida Statutes,[1] unconstitutional as applied. *Dolliver v. Fla.*

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[1] Sections 11.066(3) and (4), Florida Statutes, provide in full:

> (3) Neither the state nor any of its agencies shall pay or be required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law. To enforce a judgment for monetary damages against the state or a state agency, the sole remedy of the judgment creditor, if there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment.
>
> (4) Notwithstanding s. 74.091, a judgment for monetary damages against the state or any of its agencies may not be enforced through execution or any common-law remedy against property of the state or its agencies, and a writ of execution therefor may not be issued against the state or its agencies. Moreover, it is a defense to an alternative writ of mandamus issued to enforce a judgment for

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Dep't of Agric. & Consumer Servs., 283 So. 3d 953 (Fla. 2d DCA 2019) (A0481-0501).[2] The decision affirms an order providing for a writ of mandamus against the Florida Department of Agriculture and Consumer Services and the Florida Commissioner of Agriculture (the "Department") and a writ of execution on property of the Department (A0007-0066, the "§ 11.066 Order"). Finally, the decision affirms the trial court's subsequent peremptory writ of mandamus (A0068-0069, the "Writ of Mandamus"), requiring payment (or a request for payment to the Chief Financial Officer of Florida), on pain of contempt of court.

No funds exist to pay the judgments. An appropriation therefor was vetoed by the Governor in 2017 and did not pass the Legislature in 2018 and 2019.

The Judgments Held by Appellees

Under a citrus canker eradication program that began in the 1990's, and ran through 2006, the Legislature required the Department to remove citrus exposed to citrus canker. Section 581.184, Florida Statutes (2002). Appellees hold three unsatisfied judgments against the Department for compensation for residential citrus trees in Lee County destroyed under this program, and related attorneys' fees

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> monetary damages against the state or a state agency that there is no appropriation made by law to pay the judgment.

[2] The Appendix hereto is cited as "A" followed by the page number. The appellate record is the Certified Copies of Appeal Papers, filed on January 3, 2020, and cited as "AR," followed by the page number. The trial court record is the Record on Appeal, filed on the same day, and cited as "LTR," followed by the page number.

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and costs (the "Lee Judgments"). (A0071-0078). The trial court deferred allowing execution on the judgments pending a further order. (A0072, 0075, 0078).

The first judgment, for compensation for citrus trees in the amount of $13,625,249, was entered on August 18, 2014, and was stayed until the district court affirmed the judgment and issued a mandate on June 29, 2016. Fla. R. App. P. 9.310(e). The second judgment, for attorneys' fees and costs, in the amount of $821,993, was entered on March 18, 2015. The third judgment, for appellate attorneys' fees, in the amount of $70,893, was entered on December 22, 2016.

At the time Appellees sought mandamus in the trial court, the judgments had been pending 11 months, 15 months, and 6 months, respectively.

Related Citrus Canker Compensation Cases

This case is one of five related class actions wherein homeowners sued for compensation for removal of canker-exposed citrus in a canker eradication program, prosecuted by the same counsel under the same theory. They were filed in Lee (this case), Broward, Palm Beach, Orange and Miami-Dade Counties.

The initial payments to Appellees in this case (and the related lawsuits) came through the Shade Florida compensation program, § 581.1845, Florida Statutes (2003). It paid each residential citrus owner $100 for the first tree removed and $55 for each subsequent tree removed. Section 581.1845(3).

Judgments against the Department for additional compensation over and

above the Shade Florida program payments were entered in Lee, Broward, Palm Beach, and Orange Counties. In Broward and Palm Beach Counties, plaintiffs sought to collect on the judgments, generating opinions by the Fourth District Court of Appeal. No appellate court in these other cases held §§ 11.066(3) or (4) unconstitutional or issued a peremptory writ of mandamus against the Department.

Judgment in favor of the Department and against the plaintiffs was entered in the Miami-Dade County case – by far the largest – where the court found no liability for the removal of the citrus. This judgment is currently on appeal to the Third District Court of Appeal in Case No. 3D17-2077.[3]

Appellees' Complaint for Mandamus

On June 8, 2017, Appellees filed their Post-Judgment Motion (Complaint) for Writ of Mandamus, or, in the Alternative, to Declare Sections 11.066(3) and (4), Fla. Stat., Unconstitutional as Applied (the "Complaint for Mandamus"). (A0080-0144). Appellees asked the lower court to issue a writ of mandamus commanding the Department to "pay [the judgments] or issue the necessary vouchers authorizing payment by the Chief Financial Officer of the State of Florida," and also sought "issuance of writs of execution." (A0081). Alternatively, if the writ of mandamus did not issue due to the provisions of §§ 11.066(3) and (4),

[3] The district court mistakenly states that the Department received a "defense verdict" in Miami-Dade County. (A0485 n.5). The trial court there found the Department not liable for the removal of the canker-exposed citrus. The case never went to a compensation trial before a jury and there was no verdict. (LTR914-60).

Appellees asked the trial court to find the statutes unconstitutional. (A0091-0107).

The Legislature's Attempt to Pay the Lee Judgments in the 2017 Session

In the 2017 session, the Legislature appropriated funds to pay the Lee Judgments (along with judgments in Broward County) in the General Appropriations Act of 2017, Senate Bill 2500, Special Category 1437B. (A0175). (This bill applied to fiscal year 2017-18.) However, Governor Scott vetoed this appropriation. (A0082). Appellees petitioned this Court for a writ of mandamus, seeking to invalidate the veto. *Bogorff v. Scott*, 223 So. 3d 1000 (Fla. 2017). This Court "dismiss[ed] th[e] petition without prejudice to seek redress in the pending circuit court actions" – that is, this case and the related Broward case – "if those courts determine that relief is commanded by the facts and law." *Id.* at 1001.

The Department's Response to Complaint for Mandamus

The trial court issued an alternative writ of mandamus (an initial writ preceding the final writ). (A0168-0169). In response, the Department timely answered the Complaint for Mandamus, pleading it had no funds to pay the judgments and was barred by law from doing so without an appropriation pursuant to chapter 216, Florida Statutes, which governs the budgetary process in the Florida Legislature, and by §§ 11.066(3) and (4), Florida Statutes, which govern payment of monetary damages by state agencies in certain instances. (A0146-0159). Appellees replied, claiming that the provisions of ch. 216 were

unconstitutional. (A0161-0166).

The Evidentiary Hearing in the Trial Court

The trial court conducted an evidentiary hearing on the Complaint for Mandamus on February 6, 2018.[4] The hearing focused on the budgetary process of Florida government. The trial court found the evidence was "largely undisputed." (A0019). The principal testimony was provided by Derek Buchanan, the Department's Director of Policy and Budget. (A0237-0281, 0355-0437). Mr. Buchanan testified that all expenditures of the Department require an appropriation. (A0246-0247, A0261). He testified he was unable to pay, or request the Chief Financial Officer to pay, the judgments because the appropriation therefor did not exist, Special Category 1437B having been vetoed by the Governor. (A0246, A0269-0370, LTR2281-82). There was no other appropriation to pay the judgments, and appropriations for other items cannot be re-allocated to pay the judgments. (A0368-0372). Mr. Buchanan testified that he could not physically obtain a voucher that would result in the payment of the judgments due to the lack of an appropriation. (A0245-0246). Attempting to designate an incorrect appropriation (which would be unlawful under chapter 216, A0372), would result in rejection of the request and an audit. (A0393-0398). Mr. Buchanan was required to implement the budget passed by the Legislature, and would pay the judgments if

[4] The transcript of the hearing is found at A0207-0399.

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the Legislature appropriated such funds, approved by the Governor. (A0238-0239, 0261). The Department routinely reported the existence of the Lee Judgments to the Legislature and the Governor's Office. (A0228).

The trial court also considered the testimony of the Florida Department of Financial Services, which administers the risk management trust fund that pays tort claims against state agencies, and the Department of Transportation, which deals with claims arising out of condemnation of real property. They testified that they likewise needed an appropriation to pay a judgment. (LTR2434, 2446-47, 2450; LTR2533-34, 2538-39, 2541).

The Legislature's Attempt to Pay the Lee Judgments in the 2018 Session

In the 2018 session of the Florida Legislature, the House passed a general appropriations bill that contained an appropriation for payment of the Lee Judgments, and the judgments in the three related cases. (A0183-0184). The Senate passed a general appropriations bill containing no such appropriation. (A0184). The conference committee reported a general appropriations bill that contained appropriations in full for the judgments in the Broward and Palm Beach cases, totaling $52,094,171, but not the Lee Judgments. (*Id.*). (These bills applied to fiscal year 2018-19.) This bill passed the Florida Legislature and was approved by the Governor. Ch. 2018-9, Laws of Fla., Items 1433A and 1433B. Although § 216.192(1), Florida Statutes, typically provides for quarterly disbursements of

appropriations, the Department obtained a budget amendment under the statute so that the full amount of the appropriations was disbursed within the first quarter of fiscal year 2018-19. (RJN0020-0065).[5]

The § 11.066 Order and the Writ of Mandamus

The trial court entered the 60-page § 11.066 Order (A0007-0066) declaring §§ 11.066(3) and (4) unconstitutional, and providing for a writ of mandamus ordering the Department to immediately pay the Lee Judgments or issue vouchers authorizing the Chief Financial Officer of Florida to pay them. (A0064-0065). The trial court then issued the Writ of Mandamus. (A0068-0069).

At no point did the trial court below find an appropriation (or other funds) to be available for payment of the Lee Judgments.

The § 11.066 Order provided that if the Writ of Mandamus was not satisfied, the trial court would "consider entry of an Order to Show Cause Why Respondents Should Not Be Held in Contempt." (A0065). The § 11.066 Order also provided that the court would consider issuance of a writ of execution against property of the Department, and authorized Appellees to conduct a deposition in aid of execution to provide the court with a list of the Department's property so that the court could determine on what property Appellees may execute. (A0066).

[5] The Department's Request for Judicial Notice of Recent and Current Legislative Matters Referenced in its Initial Brief, filed herewith, will be cited as "RJN," followed by the page number.

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The Department's Request for an Appropriation in the 2019 Session

Pursuant to § 216.023, Florida Statutes, the head of each state agency must annually "submit a final legislative budget request to the Legislature and to the Governor, as chief budget officer of the state." The Department requested an appropriation from the Legislature to pay the Lee County Judgment in full in its Legislative Budget Request ("LBR") for fiscal year 2019-20. (RJN0012-0013; AR00847-00848). House Bill 5001, the appropriations bill of the Florida House of Representatives in the 2019 regular session, included an appropriation to pay the judgments in full. (RJN0015-0018). However, the final appropriations bill, based on Senate Bill 2500, did not contain an appropriation. Ch. 2019-115, Laws of Fla.

The Department's Request for an Appropriation in the 2020 Session

The Department has requested an appropriation from the Legislature to pay the Lee County Judgments in its LBR for fiscal year 2020-21. (RJN0008-0010; AR01626-01627).[6] The legislative session began January 14, 2020.

The Decision of the District Court

The Second District Court of Appeal affirmed the § 11.066 Order and the Writ of Mandamus on November 13, 2019 (A0481-0501) and granted attorneys'

[6] The Commissioner of Agriculture also made a related slide presentation to the Florida House Agriculture and Natural Resources Appropriations Subcommittee in a meeting on September 18, 2019. She listed the appropriation to pay the Lee County Judgments, together with an appropriation to pay similar judgments in Orange County, in the combined amount of $61 million, as a request of the Department for plant pest and disease control. (RJN0010; AR01628).

fees (A0503). This appeal timely followed. (AR00007-00070).

The § 11.066 Order, the Writ of Mandamus, and the decision of the district court are stayed pursuant to Fla. R. App. P. 9.310(b)(2).

SUMMARY OF ARGUMENT

Sections 11.066(3) and (4), Florida Statutes, essentially provide that no writ of execution may issue against State property. Instead, a judgment creditor must either obtain an appropriation from the Legislature or file a claim bill under the Legislature's rules. A state agency may not pay or be required to pay a judgment without such an appropriation or claim bill. It is undisputed that there was neither here. The trial court nonetheless issued a writ of mandamus commanding the Department to pay Appellees' judgments and, to do so, issued an order declaring the statutes unconstitutional. The district court affirmed. Both the Writ and the § 11.066 Order were erroneous.

The Writ. A "present ability to pay" is a threshold prerequisite to a writ of mandamus commanding payment. The Department lacks the ability to pay, both legally and factually, because there is no appropriation made by law (passed by the Legislature and approved by the Governor) for these judgments. As a matter of law, the lack of such an appropriation is a defense to a writ of mandamus under § 11.066(4). In addition, two other statutes, §§ 216.292 and 216.179, bar such payment. The former requires an "appropriation" for the specific purpose of the

payment, and the latter precludes an agency from reinstating a vetoed appropriation. The 2017-18 appropriation for these judgments was vetoed by the Governor, and the 2018-19 and 2019-20 attempts to appropriate for them did not survive legislative conference. As a matter of fact, the evidence was undisputed, indeed conceded, that the Department cannot physically "write a check" or "get a voucher authorization" to pay these judgments without an appropriation for this in its budget. The Writ therefore commands the Department to do the impossible, and thus cannot stand.

Exhaustion of remedies and ripeness. Mandamus does not lie when the petitioner has other available remedies. And before a constitutional challenge may be considered by the courts, the attacker must exhaust his other remedies and obtain a "final decision" thereon to ripen his claim. Appellees here have not done this because the Legislature still has the ability to make an appropriation to pay these judgments, as it has already done for canker judgments in two other counties. The Legislature currently has before it, in the session convened on January 14, 2020, a Legislative Budget Request by the Department for full payment of the judgments. Further, § 11.066 offers Appellees another remedy – a claim bill – which they have not yet even attempted. Until they exhaust these alternative remedies, neither mandamus nor a declaration of unconstitutionality is appropriate.

The § 11.066 Order. Even if the constitutional attack were ripe, the courts

below erred in holding § 11.066(3) and (4) unconstitutional.

Takings Clause. The statutes do not deny Appellees full compensation in violation of the Takings Clause because: (1) sovereign immunity allows the State to set the terms under which it will pay claims against itself; (2) constitutional rights in general, and the right to full compensation for a taking in particular, are subject to reasonable restrictions, such as these statutes, as to the manner of their exercise; and (3) the statutes do not deny compensation but permissibly regulate the means for obtaining payment of such compensation by disallowing execution and allowing only an appropriation made by law or a claim bill.

Separation of powers – the statutes. The statutes do not encroach on the judicial branch's authority to "determine" full compensation. Rather, they reasonably regulate the means for payment after such compensation has been judicially determined. Judicial determination of the amount of compensation occurred with the entry of the judgments, and that judicial determination is not implicated by these statutes.

Separation of Powers – the Writ and the § 11.066 Order. The Writ and § 11.066 Order violate the separation of powers doctrine by intruding upon the exclusive powers of the legislative and executive branches. Only the Legislature may, consistent with the Constitution, appropriate State funds. Each executive

agency of the State is constrained to live within its budget but has sole control over how it spends funds within that budget. Courts may not order an agency to spend money it does not have or to spend its appropriated funds in any particular fashion. Nor may they inquire into the agency's budgetary decision-making process, including its efforts to obtain an appropriation, as the courts did here.

Execution. Because execution may not issue against State property, the Order, which provides therefor, violates the common law, as well as § 11.066.

Attorneys' fees. The courts below erred in awarding attorneys' fees to Appellees based upon §§ 73.131(2) and 73.092(2), Florida Statutes, because these provisions apply only "in eminent domain" actions. This is not an eminent domain action. It is an action seeking mandamus and a declaration of statutory invalidity, containing no issue in eminent domain.

The Department will pay Appellees' judgments in accordance with the law – and as quickly as possible – once the Legislature makes an appropriation.

ARGUMENT

STANDARD OF REVIEW

Mandamus. Issues relating to statutory interpretation or legal requirements in a mandamus proceeding are reviewed de novo. *Jones v. Miami Herald Media Co.*, 198 So. 3d 1143, 1145 (Fla. 1st DCA 2016) (in appeal of order on request for mandamus and injunctive relief, "[b]ecause the issue framed by this appeal is one

of statutory interpretation, our standard of review is de novo"); *Conner v. Mid-Florida Growers, Inc.*, 541 So. 2d 1252, 1254, 1257 (Fla. 2d DCA 1989) (holding, on review of writ of mandamus, that lower court had "erred" as to procedural and legal requirements and "revers[ing]" the writ).

Constitutional issues. Statutes must be presumed constitutional and "construed in a manner that avoids a holding" of unconstitutionality. *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004) (quoting *Gray v. Cent. Fla. Lumber Co.*, 104 Fla. 446, 140 So. 320, 323 (1932)). "[E]very doubt as to [a statute's] constitutionality must be resolved in its favor." *Id.* A decision declaring a statute unconstitutional is reviewed *de novo*, *Atwater v. Kortum*, 95 So. 2d 85, 90 (Fla. 2012), and this standard governs as-applied constitutional challenges, *Citrus Cnty. Hosp. Bd. v. Citrus Mem'l Health Found., Inc.*, 150 So. 3d 1102, 1107 n.4 (Fla. 2014). If the issue involves both factual and legal questions, the trial court's factual findings are reviewed for competent, substantial evidence, while the legal issues are reviewed *de novo*. *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013).

Attorneys' fees. "A party's entitlement to an award of attorney's fees under a statute or procedural rule is a legal question subject to de novo review." *Nathanson v. Morelli*, 169 So. 3d 259, 260 (Fla. 4th DCA 2015).

I. THE COURTS BELOW ERRED IN AFFIRMING ISSUANCE OF THE WRIT OF MANDAMUS BECAUSE THERE IS NO PRESENT ABILITY TO PAY THE JUDGMENTS.

If the Legislature appropriates funds to pay the Lee Judgments, the Department will quickly and fully pay them, as it did when the Legislature appropriated funds to pay the Broward and Palm Beach judgments. (RJN0020-0065). Without an appropriation, the Department has no present ability to pay, a complete defense to mandamus.

A. Under *Conner v. Mid-Florida Growers*, a Present Ability to Pay is Required for Issuance of a Writ of Mandamus.

In *Conner v. Mid-Florida Growers, Inc.*, 541 So. 2d 1252, 1255 (Fla. 2d DCA 1989), the Second District reversed and remanded a peremptory writ of mandamus ordering payment of a judgment for compensation for citrus destroyed in a citrus canker eradication program in the 1980's. The court held that, even where a monetary judgment is final, "the present ability to pay" a judgment "should be demonstrated before the peremptory writ may issue." *Id.* at 1255-56 n.7. *Mid-Florida* is consistent with basic principles of mandamus that require a present ability to act on the part of the government official. *See State v. Amos*, 131 So. 122, 123 (Fla. 1930).

B. Legally, No Present Ability to Pay the Judgments Exists.

1. Section 216.292, Florida Statutes, Requires an Appropriation to Pay the Judgments, and No Appropriation Exists.

The district court disregarded the principal barrier to the Department's ability to pay the judgments: chapter 216, Florida Statutes, which provides for

"Planning and Budgeting" by the Legislature, and generally governs the process of legislative appropriation. Section 216.292, Florida Statutes, provides in pertinent part:

> **Appropriations nontransferable; exceptions.–**
> (1)(a) Funds provided in the General Appropriations Act … shall be expended only for the purpose for which appropriated, except that such moneys may be transferred as provided in this section where it is determined to be in the best interest of the state....

Section 216.292(1)(a). This statute thus commands that funds appropriated by the Legislature may be used "only for the purpose for which appropriated."

By vetoing Item 1437B for fiscal year 2017-18 (LTR2281-82), the Governor eliminated the source of funds "for the purpose of" paying the Lee Judgments. Under § 216.292(1)(a), funds appropriated for other purposes could not be used to pay the judgments absent one of the statutorily-enumerated exceptions allowing a transfer of funds. Appellees never suggested in the trial court that any of the transfer exceptions applied, but argued on appeal that a transfer from other sources could be made to pay the judgments. (AR00798-00799). They are wrong. Transfers are highly regulated. §§ 216.292(2)-(5). First, § 216.292(2)(a) requires that there must be a line item to transfer to, and there was no such line item for payment of the Lee County judgments. (A0372). Second, under § 216.292(2)(a), a transfer is limited to five percent of the original item, which is simply insufficient to pay the judgments. (A0368-0369).

2. Section 216.179, Florida Statues, Precluded Reinstatement of a Vetoed Appropriation, and the Appropriation for the Lee County Judgments Was Vetoed in 2017.

There is a second provision of chapter 216 that barred payment of the Lee Judgments. Section 216.179 is entitled "Reinstatement of vetoed appropriations by administrative means prohibited." It provides:

> After the Governor has vetoed a specific appropriation for an agency ... neither the Governor, the Chief Justice of the Supreme Court, nor a state agency, in their various statutory and constitutional roles, may authorize expenditures for or implementation in any manner of the programs that were authorized by the vetoed appropriation.

Once a "specific appropriation" has been vetoed by the Governor, it may not be revived, "in any manner." The Governor vetoed the appropriation for the Lee Judgments in Senate Bill 2500 for fiscal year 2017-18. (A0082; LTR2281-82). The Department therefore did not have the ability to "authorize expenditures" to pay the judgments.

Because the § 11.066 Order and Writ of Mandamus are based on the Department's non-payment of the judgments during the fiscal year for which the Governor vetoed the appropriated funds, § 216.179 is a complete defense to mandamus.

The Department asserted §§ 216.292 and 216.179 as defenses in its answer (A0154) and Appellees challenged the constitutionality of the statutes in their reply (A0161-0162), but never argued the issue further. The Department pressed these

defenses in its briefing to the trial court (LTR861-65) and the district court (AR00227-00228, 00845-00846), but neither court even mentioned the statutes.

C. Factually, No Present Ability to Pay Exists.

The district court states that "the Department has not established that it lacks the ability to satisfy the judgments," but that "the Department's position is that it is not legally authorized (or required) to pay the judgments until the legislature appropriates the funds...." (A0487). This is not correct. The Department has always contended it lacks the ability to mechanically pay the judgments, and proved this at the hearing through the testimony of Derek Buchanan. (A0237-0281, 0355-0437). The district court's opinion simply ignores the undisputed facts from the hearing, which demonstrate that the Department had at that time, and continues to have, no ability to pay the Lee Judgments. This inability has extended from the time the judgments became payable, in 2016, through the instant appeal.

The Legislature has completed three regular sessions since the Lee Judgments became payable. The 2020 session commenced on January 14, 2020. The actions in regard to the judgments are summarized below.

Legislative Session	*Action by FDACS*	*Action by Legislature*	*Action by Governor*
2017	Reported to Legislature.	Passed Lee appropriation.	Vetoed.
2018	Reported to Legislature.	Passed Broward & Palm Beach appropriations; Lee appropriation dropped in conference committee.	

2019	Reported to Legislature. Made request in LBR.	Lee appropriation dropped in conference committee.	
2020	Reported to Legislature. Made request in LBR. Made request in present-ation to Senate Budget Committee.	Pending.	

The Legislature and the Governor – not the Department – control payment of the Lee Judgments. In the 2017 and 2018 sessions, the Department did not ask for an appropriation – but the Legislature appropriated the funds to pay judgments without a request. And when the Department did ask for an appropriation (the 2019 session), it did not get one. Appropriations were blocked by the Governor once and dropped in conference committee twice. Whether the Department asks for the funds or not does not affect the outcome. It is illogical to compel the Department to act when other branches of government block the Department's actions, on the one hand, or act without the Department's involvement, on the other.

Politics seems to be at play in the Legislature and the Governor's office, and appropriations of funds are "political questions best resolved in the political arena." *Citizens For Strong Schools, Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 132 (Fla. 2019). The "courts [will] overstep their bounds … [if they] evaluate, and either affirm or set aside appropriations decisions…." *Id.* at 142 (quoting *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996)). Indeed, the special concurrence in the district court's

decision proposes a legislative solution to this situation. (A0498-0501).

Thus attempts have been made every year to obtain payment for the Lee Judgments, but no appropriation has become law. At the evidentiary hearing, representatives of the Department, the Division of Financial Services, and the Department of Transportation explained why an appropriation from the Legislature was necessary for a state agency to pay funds. (LTR2434, 2446-50, 2533-41).

Derek Buchanan, the Director of Policy and Budget for the Department, was the principal witness on the operation of the budgetary process in Florida. (A0237-0281, A0355-0437). Mr. Buchanan testified that he could not pay the judgments because the appropriation therefor had been vetoed. (A0246, A0369-0370, LTR2281). No other appropriation existed for payment, and appropriations for other items could not lawfully be transferred to pay the judgments. (A0368-0372). "Without an appropriation" the Department could not even physically obtain a voucher that would result in payment of the Lee Judgments. (A0245-0246). Mr. Buchanan testified that he "cannot mechanically write a check, make a disbursement without budget, and that's all disbursements of any state agency." (LTR2405). Appellees agreed that they were "not arguing" with his "inability to mechanically make a disbursement." (*Id.*)

Currently, there is no appropriation to pay the judgments. The Department has no "present ability to pay," which precludes issuance of a writ of mandamus.

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Mid-Florida, 541 So. 2d at 1256 n.7.

The district court roundly criticizes the Department for not doing enough to seek payment of the judgments: The Department has not made "the most basic of efforts," did "absolutely nothing to secure such an appropriation" to pay the judgments," and has not paid the judgments even "in part," and thus the courts below "will not countenance further delays." (A0488, 0483, 0487, 0498 (quoting the § 11.066 Order)).

The Department is and was barred by law from paying the Lee Judgments without an appropriation under §§ 11.066(3) and (4) and ch. 216. The Department is currently under no obligation otherwise because the orders of the lower tribunals are stayed. Fla. R. App. P. 9.310(b)(2). The Department has taken the one action permitted by law to assist in obtaining an appropriation: making Legislative Budget Requests to the Legislature. There are no other lawful steps the Department can take. The Department has no more ability to pay the judgments "in part" than it does in full. There are no secret backdoors available to the Department. Government in Florida takes place in the sunshine. Ch. 286, Florida Statutes.

The district court took judicial notice that the Legislature did not appropriate funds to pay the Lee Judgments in the 2019 session, but declined to take judicial notice that the Department had asked for such an appropriation in its LBR for that session. (A0487, n.3; RJN0012-0013).

The district court states that "Commissioner Adam Putnam had made public statements suggesting that the Department was still challenging the judgments," which led the Governor to veto the appropriation for the Lee Judgments in 2017. (A0485.) There is no substantial, competent evidence for this finding. The Commissioner of Agriculture responded to an inquiry from a news reporter. (LTR2306). The Commissioner correctly stated that the Department wanted this Court to ultimately consider the citrus canker lawsuits (it still does), and that the jury verdicts in citrus canker litigation had been "wildly different." (LTR2306). There is no evidence that the Governor's veto was based on the Commissioner's response. In any event, this argument was rejected in Appellees' extraordinary writ proceeding before this Court to overturn the Governor's veto. *Bogorff v. Scott*, 223 So. 3d 1000 (2017). The Governor "may exercise his veto power for any reason whatsoever," *Brown v. Firestone*, 382 So. 2d 654, 668 (Fla. 1980), and the only restrictions on the Governor's line-item veto power relate to the manner in which it is exercised, *Fla. House of Reps. v. Martinez*, 555 So. 2d 839 (Fla. 1990).

The Department stopped litigating against Appellees on the merits when the Lee Judgments were affirmed by the district court in June 2016. The Department agrees the judgments should be paid. (A0248). If the Department had wanted to fight payment of the Lee Judgments, it would have contested the judgment for appellate attorneys' fees (A0077-0078) and appealed both judgments for attorneys'

fees. (A0074-0078). Such appeals would likely have delayed payment of the judgments for a year because the Legislature's policy is not to consider payment of judgments until all judicial proceedings are concluded. (LTR2568, 2691-92, 2738).

Appellees have acknowledged that the Department cannot "mechanically make a disbursement" to pay the Lee Judgments without an appropriation. (LTR2405). Appellees need the Legislature to appropriate funds, which is not an available remedy in this lawsuit since the Legislature is not a party. Mandamus is misused when the objective is not to compel an official to take an act "that [he] has the ability ... to perform," *Amos*, 131 So. at 123, but instead to put pressure on a separate and coordinate branch of government.

The Department has stated it "would be happy to pay the three judgments," as the district court concedes (A0482), and the Department will pay them – quickly and fully – just as it paid the Broward and Palm Beach judgments, once it receives an appropriation. Courts necessarily are reluctant to issue a writ of mandamus against a state agency for non-payment of a judgment unless there are signs of "resist[ance]," "obstinance," or "recalcitrance." *Gates v. Collier*, 616 F.2d 1268, 1271-72 (5th Cir. 1980) (federal district court has authority to order payment of judgment by virtue of Supremacy Clause of United States Constitution, and may do so when "[t]he defendants have made it abundantly clear that they intend to resist the judgment until the bitter end"). *See Comer v. City of Palm Bay*, 147 F.

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Supp. 2d 1292, 1295-96, 1299-1300 (M.D. Fla. 2001) (mandamus denied because of existence of remedy by way of "legislative recovery" in Florida Legislature and State's lack of "unwillingness" to pay judgment).

II. THE COURTS BELOW ERRED IN HOLDING APPELLEES EXHAUSTED THEIR LEGAL REMEDIES PRIOR TO SEEKING MANDAMUS AND IN HOLDING THE CONSTITUTIONAL CHALLENGES TO BE RIPE.

For mandamus to issue, "the petitioner must have no other adequate remedy available." *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000). For this same reason, Appellees' as-applied constitutional challenge "is not ripe until the plaintiff has obtained a final decision...." *Dep't of Agric. & Consumer Servs. v. Mendez*, 98 So. 3d 604, 609 (Fla. 4th DCA), *rev. denied,* 107 So. 3d 405 (Fla. 2012).

Appellees did not exhaust their remedies, and did not ripen their constitutional challenges, because (a) Appellees did not pursue a legislative claim bill (or any other "petition"), as mandated by § 11.066(3), and (b) the Legislature may still appropriate funds to pay the Lee Judgments. The district court erred in holding that exhaustion occurred and that the constitutional challenge was ripe.

A. Appellees Have Not Exhausted the Statutorily-Required Remedy of a Claim Bill.

Appellees' remedies are unexhausted and their constitutional challenges are not ripe because they have not "petition[ed] the Legislature in accordance with its rules to seek an appropriation" to pay the judgments, as § 11.066(3) requires for

their "sole remedy."

1. "Petition[ing] the Legislature in Accordance With Its Rules" Means Filing a Claim Bill.

The Second District followed the Fourth District in holding that the phrase "to petition the Legislature in accordance with its rules" in order to "enforce [their] judgment for monetary damages against the state or a state agency" does not mean filing a claim bill. (A0488). In *Bogorff,* the Fourth District rejected the argument that the plaintiffs in the related Broward action "must pursue a claim bill," stating: "Had the Legislature required a claim bill [in § 11.066(3)], it would have said so. It did not." 191 So. 3d at 515.

The Fourth District erred in its holding. It neglected the clear law pronounced when this Court definitively construed § 11.066 in *Florida Department of Environmental Protection v. ContractPoint Parks, LLC*, 986 So. 2d 1260 (Fla. 2008). Interpreting the statute by reference to its legislative history, this Court considered the tape recording of a Florida Senate Appropriation Committee hearing on March 14, 1991. *Id.* at 1267 & n.5. Based on the proceedings in the committee hearing, the Court held that an "impetus" for the enacting of § 11.066 was "citrus canker claims" on which the "judicial branch had awarded judgments for citrus canker activities by the State." *Id.* This Court further noted that "the Legislature's apparent intent in section 11.066 is to preclude payment of judgments for monetary damages arising out of the State's exercise of its police powers unless

an appropriation exists." *Id.* at 1266.

The committee hearing concerned Senate Bill 2128, which, as House Bill 2313, enacted § 11.066 (except for subsection (5), enacted in 2001). *See ContractPoint*, 986 So. 2d at 1266, 1267 nn. 5, 6; ch. 91-109, Laws of Fla. § 40. The presiding Chair of the Committee, Senator Winston Gardner, twice explained that portion of the bill that became §§ 11.066. He first expressly stated that a claim bill was required if a general appropriation had not been made:

> [The bill] specifies that financial claims and judgments against the state may only be settled by legislative action either through a claims bill or in the general appropriations act — that's a very important item.

(A0177). He second stated:

> Let me explain that — what has taken place recently especially since we've had the situation with citrus canker is that the judicial branch has issued orders, awarded judgments and then threatened to move against state owned property or place elected officers in jail if payment was not made. The Constitution, Article 7, clearly states that the legislature has the responsibility for appropriating the funds of the state, not the judicial branch. For as long as I can remember there has been an accepted procedure for handling claims against the state of Florida and it is through what we know as the claims bill process. What this particular section would say is that all claims are going to be handled the same way, through the claims bill process and we're not going to allow the judicial to appropriate funds.

(A0177-0178).

In accordance with *ContractPoint*, the pertinent portions of the March 1991 tape recording of the committee hearing were transcribed, and the tape and the transcript were admitted into evidence in the trial court. (A0177-0178).

This is the legislative history on which this Court relied in construing § 11.066 in *ContractPoint*. Accordingly, "to petition the Legislature in accordance with its rules" in § 11.066(3) means to bring a claim bill. The Legislature's "rules" governing a claim bill are set forth in each chamber's rules of procedure, which were also in evidence at the hearing: the *Rules of the Florida House of Representatives* (LTR2544-32), Rule 5.6, "Claim Bills" (LTR2568), and the *Florida Senate Rules and Manual* (LTR2633-34), Rule 4.81, "Claim bills" (LTR2691-92). The legislative houses jointly publish a manual with "policies, procedures and information" on claim bills, which is called the *Legislative Claim Bill Manual*. It was also in evidence. (LTR2735-68). The manual expressly designates § 11.066 as a statute authorizing a claim bill. (LTR2738, 2742).

Appellees therefore have a remedy they have not pursued: a claim bill.

The district court adopts the reasoning of the Fourth, but also notes one other matter. "Moreover, the evidence before the trial court established that the Department had not previously raised section 11.066 as an impediment to paying other judgments." (A0488). Quite correctly, the Department has not raised § 11.066 as an impediment to the "other judgments" because they were not judgments arising out of citrus canker eradication programs. (A0299-0301, 0322).

The only other court to consider this issue, the United States Court of Appeals for the Eleventh Circuit, held that § 11.066 "describ[es] procedures

relating to the enactment of a claims bill." *Bradshaw v. School Bd. of Broward Cnty., Fla.*, 486 F.3d 1205, 1212 (11th Cir. 2007).

The Legislature intended that "petition[s] ... in accordance with its rules" pursuant to § 11.066 are claim bills, and this Court should continue to respect the Legislature's expressed intent, as it did in *ContractPoint*.

2. Even if § 11.066 Does Not Refer to a Claim Bill, Appellees Still Have Not Petitioned the Legislature.

Under the "supremacy-of-text principle" applied by this Court in *Advisory Opinion to the Governor re: Implementation of Amendment 4, the Voting Restoration Amendment*, 2020 WL 238556, *6 (January 16, 2020), and the dissent in *ContractPoint*, 924 So. 2d at 1272, Appellees still have not exhausted their remedies because they literally did not "petition the Legislature in accordance with its rules...." Such a petition is not a general or special appropriation bill, terms which are defined in § 11.066(1), and treated expressly and separately in §§ 11.066(3) and (4). Appellees have not made the petition required by § 11.066(3).

B. Appellees Have a Remedy by Way of the Florida Legislature Paying the Lee Judgments.

The Florida Legislature is going to pay the Lee Judgments. Mandamus was not and is not necessary. The Legislature has always paid citrus canker judgments and has already paid the judgments from two related cases. In the instant case, the

first opportunity for the Legislature to act was in the 2017 regular session, when the Legislature appropriated funds for the judgments, but the Governor vetoed the appropriation. In the 2018 session, the Legislature considered a bill to pay the Lee Judgments, but instead paid related judgments in Broward and Palm Beach Counties. In the 2019 session, the Department requested payment in full of the judgments in its LBR, the Legislature considered a bill to pay the judgments, but the appropriation disappeared in conference committee. For the 2020 session, the Department has again made a request for payment in full in its LBR. (*See supra* part I(B) of this brief.) The Legislative session began on January 14, 2020.

Historically, in citrus disease eradication programs, the Legislature does not appropriate funds in advance of the program for compensation because the value of the trees removed, if any, cannot be known. *See Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35 (Fla. 1990) (citrus exposed to citrus canker not compensable, but amount of compensation for unexposed citrus determined by jury). After the spreading decline disease eradication program in the 1950's, the legislature created a compensation program in 1957. *Cunningham v. State Plant Board of Florida*, 112 So. 2d 905 (Fla. 2d DCA 1959). Following the 1980's citrus canker eradication program, the Legislature enacted a compensation program. *See Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24 (Fla. 1990). When mandamus litigation arose from an unpaid judgment, *Mid-Florida Growers*, 541

So. 2d 1252, this Court stayed proceedings in the lower court to allow the Florida Legislature to appropriate funds for payment. *State ex rel. Dep't of Agric. and Consumer Servs. v. Second Dist. Court of Appeal*, Case No. SC60-73586 (Fla. filed January 18, 1989).

In the citrus canker eradication program that began in 1995, the Legislature funded the "Shade Florida" compensation program, providing a fixed amount of compensation per tree, § 581.1845, Florida Statutes (2003), but litigation still ensued. The value of citrus as determined in compensation lawsuits in five different counties has ranged from zero dollars per tree (in Miami-Dade County, where the most residential trees were removed, on appeal in Case No. 3D17-2077 in the Florida Third District Court of Appeal) to more than two hundred dollars per tree (in the instant case in Lee County, and in Orange County, where the fewest trees were removed).

This Court should allow the Florida Legislature to consider payment of the judgments in the current session. The Department has requested payment in full, and will pay any appropriated funds as quickly as possible, as it did for the related Broward and Palm Beach judgments in 2018.

The Department is not suggesting that "plaintiffs must wait an indeterminate, if not infinite, number of legislative sessions," A0500 (Badalamenti, J., concurring). Citrus canker judgments have always been paid by the Legislature,

but they have never been paid immediately.

The instant case is similar to the situation in Broward and Palm Beach counties, where judgments arising out of the same citrus canker eradication program were pending. In *Bogorff*, the Fourth District ruled that the plaintiffs in that case had exhausted their legislative remedies as to payment of judgments from 2008 when their attempt at an appropriation was unsuccessful. 191 So. 3d at 514. Shortly thereafter, the Legislature appropriated funds to pay the judgments in full and the Department disbursed the funds to the plaintiffs. (RJN0020-0065).

III. THE COURTS BELOW ERRED IN HOLDING §§ 11.066(3) AND (4) UNCONSTITUTIONAL AS APPLIED.

In holding §§ 11.066(3) and (4) unconstitutional as applied, the district court "adopted the trial court's analysis," which stated four grounds for this holding "in its entirety," though the district court opinion itself discusses only two of those grounds. (A0489). This brief addresses these two grounds. Argument as to the other two grounds is found in the record in the district court. (AR00251-00253).

A. The Statutes Do Not Deny Appellees Full Compensation in Violation of the Takings Clause.

The district court's opinion quotes extensively from the trial court's order, adopting the latter's reasoning that the statutes prevent Appellees from receiving "full compensation" in eminent domain, as provided for in the Takings Clause, art.

X, § 6(a), Fla. Const. (A0489-91). The opinion then rejects the Department's arguments that (1) the statutes are not constitutionally infirm in that they are premised on the bedrock principle of sovereign immunity, which is waived only to the extent the legislature decides, (2) they do not completely forbid payment of the judgments but merely provide a valid and reasonable regulation and procedure for payment, and (3) no case invalidates a statute which merely provides a process for payment. (A0491-0493).

1. The Doctrine of Sovereign Immunity Sustains the Statutes and Is Waived Only to the Extent the Statutes Allow.

While legislation often yields to constitutional provisions, this does not "necessarily" follow – contrary to the holding below – at least where the legislation, as here, is founded on the more fundamental ground of sovereign immunity. (A0489). *See ContractPoint,* 986 So. 2d at 1260, 1266-71 (discussing § 11.066 as a "reassertion of limited sovereign immunity" and statutory limitation on collection of judgments arising from the State's exercise of its police power, such as canker judgments, but not judgments arising from breach of contract). The Department does not suggest that it is entirely "immune from the obligation to pay full compensation" for a taking (A0492), but only that § 11.066 legitimately retains the State's sovereign right to determine the method of paying that compensation, that is, not execution but only an appropriation made by law or a claim bill.

"[S]overeign immunity is the rule, rather than the exception, as evidenced by

article X, section 13 of the Florida Constitution: 'Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.'" *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984). Thus, any waiver of sovereign immunity must be strictly construed, "for the obvious reason that the immunity of the sovereign is a part of the public policy of the state ... enforced as a protection of the public against profligate encroachments on the public treasury." *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1958). *See Daly v. Marion Cnty.*, 265 So. 3d 644, 650 (Fla. 1st DCA 2018) (rejecting application of sovereign immunity to bar refund payments because a statute "specifically allows plaintiffs to obtain refunds from the State," and thus the "state has consented to be sued, and the immunity has been waived") (emphasis added); *Corcoran v. Geffin*, 250 So. 3d 779, 786 (Fla. 1st DCA 2018) ("sovereign immunity does not apply to suits on express, written contracts, into which the state agency has statutory authority to enter").

The roots of this immunity extend to medieval England and spring from the ancient notion that the sovereign cannot be sued in its own courts without its permission. *See Cauley v. City of Jacksonville*, 403 So. 2d 379, 381-84 (Fla. 1981) (tracing the history of sovereign immunity law in Florida).

In *Cauley*, this Court construed a statute partially waiving Florida's sovereign immunity, holding that § 768.28(5) was constitutional, even though it

provided that the State would not be "liable to pay" any tort judgment in excess of $50,000, any punitive damages, or any prejudgment interest. *Cauley*, 403 So. 2d at 380 & n.1. Like § 11.066, the statute expressly provided that judgments disallowed by the statute "may be paid … only by further act of the Legislature," thus providing a claim bill remedy. *Cauley*, 403 So. 2d at 380, 381 n.5. The challengers there asserted some of the same constitutional defects Appellees urge here, *see id*. at 384, but the statute was nonetheless upheld. *Id.* at 387. In doing so, this Court found it "important to note" that, although the statute imposed a ceiling on recovery, "the section specifically provides" that a creditor with a judgment in excess of that ceiling "may seek additional relief by petition to the legislature" in the form of a claim bill. *Id.* at 387, 381 n.5.

The district court opinion below distinguishes *Cauley,* noting first that "the government is not immune from the obligation to pay full compensation" under the Takings Clause. (A0492). The Department does not suggest otherwise, of course, urging only that § 11.066, as suggested in *ContractPoint*, legitimately retains the State's sovereign right to determine the method of paying that compensation.

Next, the opinion asserts that this statute, unlike the one in *Cauley*, "completely deprived" Appellees of their right to compensation. (A0492). This assertion is compromised by the actual payment in full of the judgments in the Broward and Palm Beach cases. (RJN0020-0065).

Third, the opinion states that the restriction in *Cauley* was "subject to further legislative action." (A0492). Section 11.066 similarly contemplates such legislative action, in exactly the same form: a claim bill option if payment beyond the statutory strictures is desired.

Lastly, the opinion mischaracterizes the Department's actions. It is not merely the Department's "position" that it will "make no payment" of the judgments absent specific legislative appropriation (A0492) but the express command of the Legislature in § 11.066(3): "Neither the state nor any of its agencies shall pay ... monetary damages under the judgment of any court except pursuant to an appropriation made by law." Should there be any doubt of what the Legislature intended, § 11.066(1) dispels it: "the term "appropriation made by law" has the same meaning as in s. 1(c), Art. VII of the State Constitution and means money allocated for a specific purpose by the Legislature ... in a general appropriations act or a special appropriations act." (Emphasis added). In short, the law categorically forbids the Department to pay the judgments without an appropriation for that purpose. As to the Department's alleged "obligation to secure" an appropriation and the Legislature's right to "decide whether to make an appropriation" (A0492), under the doctrine of separation of powers, the judicial branch may not direct the executive branch to seek particular appropriations or even make inquiry as to its budgetary decision-making (s*ee supra* part IV of this

brief). And the Legislature has the exclusive authority to appropriate the revenues of the State as it sees fit, without judicial oversight, supervision, or reallocation, even when constitutional matters are at stake.

Section 11.066 must be viewed as expressing the State's inveterate interest in its sovereign immunity. At the same time, § 11.066(3), like the statute upheld as constitutional in *Cauley*, expressly provides a remedy to judgment creditors such as Appellees in the form of an appropriation or a claim bill. That the legislatively provided remedy does not take the precise form Appellees prefer does not render the statute constitutionally deficient. The sovereign alone has the right to enact procedures for how and where it will allow judgments against itself to be paid.

2. Section 11.066 is a Valid Regulation of the Means by Which a Judgment Against the State May Be Paid.

The lower court's conclusion that statutes may only enhance – but never restrict – a constitutional right (A0489-0090) is erroneous. In fact, statutes may permissibly regulate or restrict the means of exercising constitutional rights, cases so holding are legion, and the legitimate scope of such regulations in the otherwise highly regulated scheme of eminent domain is especially far-reaching.

Constitutional rights are restricted and limited in many ways in many contexts. *See Buss v. Reichman*, 53 So. 3d 339, 344 (Fla. 4th DCA 2011) ("The Florida Supreme Court has repeatedly recognized that like other constitutional rights, the right to habeas relief is subject to reasonable restrictions."); *District of*

Columbia v. Heller, 554 U.S. 570 (2008) (recognizing reasonable restrictions on second amendment right to bear arms); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (approving reasonable restrictions on privacy rights); *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664 (Fla. 1993) (approving reasonable time, place, and manner restrictions on first amendment right to free speech), *rev'd in part, Madsen v. Women's Health Ctr.*, *Inc.,* 512 U.S. 753 (1994); *Town v. State ex rel. Reno*, 377 So. 2d 648 (Fla. 1979) (approving restrictions on use of cannabis in religious practices despite first amendment's free exercise clause); *Khoury v. Carvel Homes S., Inc*., 403 So. 2d 1043, 1046 (Fla. 1st DCA 1981) (approving restrictions on availability of attorneys' fees in workers' compensation statute despite constitutional right to contract).

Moreover, the Lee Judgments result from a takings claim, an area of law heavily and legitimately bound by statutory requirements. Chapter 73, Florida Statutes, regulates all aspects of takings procedures, from presuit negotiations (§ 73.015), through pretrial and trial (§ 73.061, .071), to post-trial (§§ 73.111, .121) and appeal (§ 73.131).

Numerous statutory restrictions already exist on the right to compensation for takings without the court expressing any hint that they may be unconstitutional. The right to sue for a constitutional taking may itself may be superseded by statutory regimes conferring alternative remedies. *See Patchen v. Fla. Dep't of*

Agric. & Consumer Servs., 906 So. 2d 1006 (Fla. 2005) (applying § 581.1845). Takings claims may be dismissed for incorrect venue. *See Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach*, 829 So. 2d 928, 931 (Fla. 4th DCA 2002) (applying § 73.021). Florida law completely extinguishes a cause of action in eminent domain four years after it accrues, yet the application of limitations to a constitutional right has been held constitutional. *McCole v. City of Marathon*, 36 So. 3d 750, 752 (Fla. 3d DCA 2010) ("Claims for inverse condemnation fall within the four-year limitations period set forth by Chapter 95.…"). "While the government ... does not have the luxury of avoiding ... payment of its constitutional obligations," it does "ha[ve] the ability to establish procedures for payment...." *Bogorff*, 191 So. 3d at 516.

Procedures for administration of judgments based on constitutional claims are also highly constrained on the federal level. For example, a claim against the United States can only be brought in federal court pursuant to a legislatively-enacted scheme: the Big Tucker Act, the Little Tucker Act, the Indian Tucker Act, or a statutory regime displacing these acts. 14 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3657 (4th ed. August 2019). The principal statute, the Big Tucker Act, 28 U.S.C. § 1491, and case law thereunder, regulate the exercise of remedies for violation of constitutional rights. *United States v. Mitchell*, 463 U.S. 206 (1983).

It is therefore neither surprising nor unconstitutional that Florida provides a "procedure for payment," *Bogorff*, 191 So. 3d at 516, of a takings judgment, specifically the claim bill process outlined above, "if there has not otherwise been an appropriation made by law." § 11.066(3). In this situation, "the sole remedy of the judgment creditor" is to "petition the Legislature" under that claim bill procedure pursuant to the Legislature's rules. Because the statute expressly provides Appellees a remedy, it is a lawful exercise of the power to regulate the procedures for obtaining payment, particularly in the context of the highly regulated field of eminent domain.

The district court's opinion recognizes that reasonable restrictions on constitutional rights are lawful, but it mistakenly holds that the § 11.066 restrictions "completely" deprive Appellees of payment. (A0492-0493). This conclusion is undermined by the fact that other citrus owners have been paid in full, despite the statute, through legislative appropriations. (RJN0020-0065).

3. The Cases Relied on by the Courts Below Do Not Support a Finding that the Statute Is Unconstitutional.

No Florida case has held a statute providing a process for payment of a government obligation to be unconstitutional, and the cases upon which the courts below relied do not support such a holding. Indeed, in *ContractPoint*, this Court recognized that "the Legislature's apparent intent in § 11.066 is to preclude payment of judgments for monetary damages arising out of the State's exercise of

its police powers" – and particularly canker judgments – "unless an appropriation exists," never suggesting this was unconstitutional. 986 So. 2d at 1266, 1267.

Notami Hospitals of Florida, Inc. v. Bowen, 927 So. 2d 139, 142 (Fla. 1st DCA 2006), and this Court's affirmance in *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 493 (Fla. 2008), are cited (A0489-0490) for the unremarkable – and here inapplicable – proposition that statutes which "conflict" with "mandates of the Constitution" (or those which "collide" or "are inconsistent with" the Constitution) "must fall." The statute there, however, expressly eliminated access to records that the Constitution "expressly states are discoverable." *Id*. at 1413. In the instant case, the Constitution is silent about the manner of paying takings judgments, and this statute, by specifying such a procedure, therefore conflicts with nothing in the Constitution.

Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assocs., 493 So. 2d 417 (Fla. 1986) (A0490), did not involve issues of eminent domain or full compensation. This Court expressly rejected the argument that the statute could be construed as "authorizing a taking and requiring payment of just compensation," because, *inter alia*, the legislature did not "establish[] the power of eminent domain in cable television companies." *Id*. at 419-20. And unlike § 11.066, the statute there did not set out procedures for payment of compensation; it simply blocked all compensation entirely.

Drake v. Walton County, 6 So. 3d 717, 719 (Fla. 1st DCA 2009) (A0490), involved the existence, *vel non*, of a taking, That issue is not present here; the only issue now is the procedural means for enforcing the judgments for the previously-established taking, to which *Drake* does not speak.

None of the cases relied on by the courts below held or even suggested that a statute may not constitutionally regulate the means of exercising a constitutional right generally, or the method for enforcing payment of a takings judgment specifically. Under the extreme analysis below, all procedural requirements could be unconstitutional since all in some sense restrict or limit a right, if only because the orderly work of government inherently requires adherence to rules, and rules by definition restrict and limit. Such rules or regulations are ubiquitous and constitutional, particularly where, as here, the regulation involves the Legislature's inherent power to implement appropriate procedural requirements – such as a claim bill – as to its own internal workings and the discharge of its duties in appropriating state funds.

B. Section 11.066 Does Not Interfere with the Power of the Judiciary to Determine Just Compensation in Violation of the Separation of Powers Doctrine.

The courts below also held that the statute interfered with the power of the judiciary under art. V, § 1 to determine just compensation, thus violating the separation of powers provision of art. II, § 3. (A0493-0496). There is no dispute

that "the determination of what is just compensation" for a taking "is a judicial function that cannot be performed by the Legislature." *Daniels v. State Rd. Dep't*, 170 So. 2d 846, 851 (Fla. 1964) (emphasis added). "Determination," however, means "judicial determination of the amount." *Id*. at 852 (emphasis added). The amount of compensation was, in fact, judicially determined upon the entry of the judgments, and thus § 11.066 in no way impinges on that judicial function.

The statutes invalidated in the authorities cited by the courts below all involve amounts, caps, or maximums set by the legislature, rather than by the judiciary. (A0493-0496). Section 11.066, in contrast, fixes no monetary amount or cap of any kind. Instead, it relates solely to the method of payment and the appropriation of State funds for the amounts previously judicially determined. The district court's opinion acknowledges this distinction between determination and payment (A0496), recognizing that the judicial function of determination of amount has occurred, but nonetheless finding that the statute unconstitutionally "thwarted payment of full compensation, determined through court proceedings." (Emphasis added).

The payment of money from state funds, however, is a matter within the exclusive purview of the legislative, not the judicial, branch. As explained in part IV of this brief, it is, in fact, the trial court's order that violates the doctrine of separation of powers by asserting judicial authority over the budgetary and

decision-making processes of the executive branch, while also intruding upon the Legislature's power over the purse strings of the State.

It further follows from the Legislature's exclusive power over appropriations that the Legislature may prescribe by law or rule the procedure that must be followed by any party seeking an appropriation to satisfy a judgment against a state entity, and that the judicial branch must defer to the Legislature's procedures and rules on this subject. The law specifying that procedure is § 11.066, which directs the judgment creditor, if there has not otherwise been an appropriation to pay the judgment, to petition the Legislature "in accordance with its rules" for an appropriation. In the same way that the judicial branch must defer to the Legislature's exclusive power to make appropriations, it must likewise defer to the Legislature's power to set its own internal rules regarding appropriations. *See Moffitt v. Willis*, 459 So. 2d 1018, 1022 (Fla. 1984) ("It is a legislative prerogative to make, interpret and enforce its own procedural rules.... Just as the legislature may not invade our province of procedural rulemaking for the court system, we may not invade the legislature's province of internal procedural rulemaking."); *Orr v. Trask*, 464 So. 2d 131, 135 (Fla. 1985) ("Just as we would object to the intrusion of the executive or legislative branches into this Court's authority to promulgate rules of court procedures …, we must be equally careful to respect the constitutional authority of the other branches.").

IV. THE § 11.066 ORDER AND WRIT OF MANDAMUS VIOLATE THE DOCTRINE OF SEPARATION OF POWERS BY INTRUDING UPON THE EXECUTIVE BRANCH'S AUTHORITY TO BUDGET AND THE LEGISLATIVE BRANCH'S AUTHORITY TO APPROPRIATE FUNDS.

A. The Trial Court's § 11.066 Order.

The Department wishes to pay the Lee Judgments and publicly stated that the Department "would be happy to pay" the judgments "as efficiently as possible" once the Legislature funded them. (LTR2306-07). Nevertheless, the § 11.066 Order holds that the Department, in the absence of an appropriation available only from the Legislature, has an obligation to make "affirmative efforts" to seek payment of the judgments from the Legislature. (A0011).

The trial court found that the Department and the Commissioner "feel no obligation or compunction to make the simplest effort" (A0011), and that the Commissioner in particular "feels no obligation" to seek payment of the judgments (A0011, 0021). The trial court found that the Commissioner's opinion that the compensation in the five class actions – ranging from zero per tree in Miami-Dade to more than $300 per tree in Orange – are wildly different "contributed to the ongoing delay in payment" of the Lee Judgments. (A0012-0013). According to the trial court, the Department claims "(astonishingly) that they have no affirmative obligation to seek an appropriation to pay." (A0030; parenthetical adverb in original). The court speculated that the Commissioner "may even be thwarting

efforts of payment [*sic*]" (A0011), although the record lacks evidence of this. The trial court's views were mirrored in the district court's opinion. (A0487-0488).

In requiring a state agency to expend funds without an appropriation, or to take "affirmative efforts" in that regard, the § 11.066 Order and Writ of Mandamus violate the doctrine of separation of powers because it is the Legislature's exclusive prerogative to appropriate funds and the Department's to control its own budget within the law. The judicial branch lacks power to order the Department to operate in any particular fashion, such as to seek particular appropriations. The orders thus "interfere with both legislative discretion in determining the funds required of an agency and executive discretion in spending those appropriated funds, in derogation of the doctrine of separation of powers." *Dep't of Juvenile Justice v. C.M.*, 704 So. 2d 1123, 1125 (Fla. 4th DCA 1998) (reversing order requiring DJJ to pay for particular services where agency "had no appropriated funds to pay for this expense").

Florida's Constitution separates the powers of state government among three branches: "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." Art. II, § 3, Fla. Const. Under this doctrine, "the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of

government." *Fla. Dep't of Children & Families v. J.B.*, 154 So. 3d 479, 481 (Fla. 3d DCA 2015).

B. The Legislative Power to Control and Appropriate State Funds

Article VII, § 1(c), of the Florida Constitution commits the payment of State funds to the exclusive authority of the Legislature: "No money shall be drawn from the treasury except in pursuance of appropriation made by law." Importantly, § 11.066 is directly grounded on the legislature's constitutional power. Subsection (1) specifically provides that the term, "appropriation made by law," as used in § 11.066, "has the same meaning as in § 1(c), Art. VII of the State Constitution." Subsection (3) then mirrors the constitutional directive by providing that "[n]either the state nor any of its agencies shall pay or be required to pay" a money judgment "except pursuant to an appropriation made by law." The term "appropriation made by law," as used in the statute, thus originates in the Constitution itself.

Section 11.066 not only expressly incorporates the constitutional provision, but it is fully in keeping with long-standing constitutional principles stated by the courts. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 474 (Fla. 2005) ("The state may not employ state funds unless such use of funds is made pursuant to an appropriation by the Legislature."); *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) ("[I]t is well-settled that the power to appropriate state funds is assigned to the

legislature."); *State v. Fla. Police Benevolent Ass'n,* 613 So. 2d 415, 418 (Fla. 1992) ("[E]xclusive control over public funds rests solely with the legislature."); *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 265 (Fla. 1991) ("[T]his Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes.").

In *Daly v. Marion County*, 265 So. 3d 644, 649 (Fla. 1st DCA 2018), the First District recognized that "[a] court interferes with the legislative branch where it requires funds to be spent by an executive agency *in a manner not authorized by statute*" or "interferes with an executive agency's discretion in the spending of appropriated funds." In that case, however, unlike the instant case, there was a "legislative mandate requiring funds to be spent in a particular way." *Id*. Thus, a court has the "authority to order an agency to comply" with that specific statute, and the order directing payment "did not violate the separation of powers because the order enforces a legislative mandate." *Id*. at 649, 650. Importantly. it was "undisputed" that the agency had "sufficient cash" for the payment, *id.* at 650, while here, it is undisputed that the Department does not have the funds for the payment sought. And, not only is there no statute expressly requiring the agency to pay the judgments, but there are specific statutes, § 11.066 and chapter 216, that forbid that payment absent an appropriation.

Even when the lack of legislative funding may cause a constitutional crisis,

it is not the "function" of Florida courts "to decide what constitutes adequate funding and then order the legislature to appropriate such an amount." *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1136 (Fla. 1990). In that case, the "woefully inadequate funding of the public defenders' offices" had resulted in substantial delays in the filing of briefs for indigent defendants – a "clear violation of the indigent state defendant's constitutional right to effective assistance of counsel" – thus creating a "serious constitutional dilemma." 561 So. 2d at 1131-32. Although this Court noted that it was the "legislature's failure to adequately fund the public defender's offices" which was "the heart of this problem," and that the "legislature should live up to its responsibilities and appropriate an adequate amount for this purpose," *id*. at 1136, the Court could, consistent with separation of powers, only "strongly recommend that the legislature … provide sufficient funds," or opine that it "would be helpful for the legislature to fund a commission to examine the funding." *Id.* at 1138-39. It lacked the power to "order the legislature to appropriate those funds." *Id.* at 1139.

Likewise, in *Corcoran v. Geffin*, 250 So. 3d 779, 783, 784 (Fla. 1st DCA 2018), the First District reaffirmed that "the doctrine of separation of powers" is the "cornerstone of American democracy" and "has been strictly construed in Florida." A court order which impinges on the legislature's "exclusive control over public funds" by attempting to constrain legislative appropriations violates that

doctrine and is "illegal." *Id*. at 784. The doctrine applied even to arguments that the "Legislature was constitutionally required to appropriate specific funds for a specific purpose" – there to comply with the constitutional requirement for "adequate provision for schools." *Id*. at 785, 787-88 (emphasis added).

These cases dispose of the argument that because the provision for "full compensation" is of constitutional dimension, the decisions below are exempt from scrutiny under the principle of separation of powers. As the *Corcoran* court held: "this argument violates the separation of powers doctrine, because asking the trial court to find that the Legislature was constitutionally required to appropriate specific funds for a specific purpose is akin to asking the court to dictate appropriations. The judiciary lacks the authority to do so." 250 So. 3d at 785.

C. Executive Power to Determine Agency's Budget and Spending.

Under the principle of separation of powers, the judicial branch must allow both the legislative and executive branch discretion over payment of government obligations. Courts have thus frequently held that a judicial order "compelling a government department or agency to pay for a service or to incur another expense to the benefit of a private party interferes with both legislative discretion in determining the funds required of an agency and executive discretion in spending those appropriated funds, in derogation of the doctrine of separation of powers." *Dep't of Children and Families v. K.R.*, 946 So. 2d 106, 107 (Fla. 5th DCA 2007).

This Court recently reaffirmed the doctrine, against a constitutional challenge. In *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, 262 So. 3d 127 (Fla. 2019), the Court held that judicial adjudication of a challenge to the state's constitutional duty to provide a uniform, efficient, and high quality system of free public schools would violate separation of powers as to both other coordinate branches because this "strict" principle requires "judicial deference to the legislative and executive branches" in appropriating funds for public schools and formulating educational policies. *Id.* at 134 (emphasis added). The Court declined to "overstep [its] bounds" by intruding on the "Legislature's appropriations power" to determine funding or to "inject itself into education policy making and oversight." *Id.* at 142.

Nor is it "the role of the judiciary to juggle the books of government agencies." *Palm Beach Cnty. Sheriff v. State*, 854 So. 2d 278, 280, 282 (Fla. 4th DCA 2003) (an order requiring DCF to reimburse the Sheriff for expenses of housing certain criminal defendants for whom DCF did not have bed space, due to lack of legislative funding "violates the separation of powers doctrine;" rejecting Sheriff's argument that DCF "had failed to request additional funding for more bed space, that it had enough space to add beds, and that [DCF] was well aware of its statutory obligation to add additional beds" as "interfer[ing] with both legislative discretion in determining the funds required of an agency and executive discretion

in spending those appropriated funds.").

The transfer or expenditure of appropriated monies among agency programs is "strictly within [the] agency's discretion," and a "member of [the] judiciary may not direct an executive agency to spend its money in a particular way." *Fla. Dep't of Children & Family Servs. v. Birchfield*, 718 So. 2d 202, 203 (Fla. 4th DCA 1998). In *Birchfield*, the Fourth District reversed an order finding DCF in contempt for failing to place a child in a program ordered by the trial court, holding the court "violated the separation of powers doctrine" by considering whether DCF could move funds in order to comply with its mandate. Such an order was "tantamount to an order directing the agency how to spend its funds." 718 So. 2d at 203.

Not only does a court lack jurisdiction to order an executive agency to spend monies not appropriated by the legislature, but a court lacks the power to even inquire of the agency's head regarding the agency's "making of budgetary decisions." In *State Department of Health & Rehabilitative Services v. Brooke*, 573 So. 2d 363, 366, 370-71 (Fla. 1st DCA 1991), HRS established that it had no funds available to comply with court orders regarding the placement of certain dependent children and that HRS was prohibited by statute "from expending or committing funds in excess of the approved budget allocation." 573 So. 2d at 366, 371. The orders reversed on appeal were entered by two separate trial judges, who the First District described as "dismayed by the Department's budgetary decision-making

and concerned with its ability to transfer funds to accomplish the appropriate placements." *Id.* at 370. Judge Brooke, "highly agitated and frustrated by" the Department's position that it had no funds, wanted the Department to explain whether it had "available alternatives such as the transfer of monies from other programs." *Id.* at 366. Judge Pate, indicating that "either the legislature was wrong in failing to appropriate sufficient funds or the Department was wrong in failing to request sufficient appropriations," wanted to "inquire into the Department's efforts to obtain appropriations" to comply with the court-ordered placements. *Id.* at 367.

Once it was established, however, that no funds were available for the placements ordered, the courts lacked jurisdiction to require expenditures by an agency "where appropriations [are] insufficient." *Id.* at 369-71. Both potential "transfers of appropriated monies among agency programs" and "budgetary-decision making," which includes the "responsibility for making budget requests for submission to the Legislature and the Governor," are "strictly within the secretary's executive discretion." *Id*. at 370. Thus, any inquiry therein would be "an unlawful violation ... in derogation of the doctrine of separation of powers." *Id.* "Courts cannot demand" that the agency head "transfer funds" or otherwise "force his hand in making discretionary budgetary decision." *Id*. at 371.

Many Florida cases apply the same prohibition against judicial interference

in agency budgetary matters.[7]

The courts below therefore erred in ordering the Department to pay the Lee Judgments, or make affirmative efforts to seek payment, because these actions encroach on the legislative and executive powers of appropriation and budgeting.

D. The District Court's Determination Regarding Separation of Powers Is Erroneous.

The district court's opinion accepts the conventional approach of separation of powers, acknowledging that "generally, the judicial branch may not either interfere with the legislative branch by requiring funds to be spent by an executive agency in a manner not authorized by statute, nor interfere with an executive agency's discretion in the spending of appropriated funds." (A0496-0497). Then,

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[7] *See Dep't of Children & Families v. J.B.*, 154 So. 3d at 481 (order requiring DCF to pay certain expenses quashed; "the judicial branch may not either interfere with the legislative branch by requiring funds to be spent by an executive agency in a manner not authorized by statute, nor interfere with an executive agency's discretion in the spending of appropriated funds"); *Dep't of Health & Rehab. Servs. v. State*, 593 So. 2d 328 (Fla. 5th DCA 1992) (reversing order holding HRS in contempt for failing to assume financial responsibility for child's placement because it is "not the judiciary's role to revise legislative appropriations or to interfere with an agency's discretionary budgetary decisions," and a Florida statute forbids any state agency to "spend money in excess of the amount appropriated"); *Dep't of Health & Rehab. Servs. v. V.L.*, 583 So. 2d 765, 766 (Fla. 5th DCA 1991) ("it is not the judiciary's role to revise legislative appropriations or to interfere with an agency's discretionary budgetary decisions"; trial court's observation that HRS "could find the funds" to pay for the child's treatment because it had a $22 million appropriation ignored that the treatment program at issue had a deficit, as well as the "budgetary and fiscal responsibility requirements of governmental operations" under which "services are limited by the funds appropriated for those services").

in a mere two sentences, the opinion undermines the doctrine.

The opinion states that "by specifying a defense to issuance of a writ of mandamus, section 11.066(4) itself recognizes the authority of the judicial branch to issue a writ of mandamus compelling a state agency to pay a valid judgment against it," and that mandamus "is an appropriate enforcement mechanism...." (A0497) (emphasis added). While this much may be true, the statute goes further, negating both of those general propositions for judgments specifically within its purview. Acknowledging the ordinary availability of mandamus to compel payment of a government obligation, the statute specifically proscribes the mandamus remedy in an action within its parameters: "it is a defense to an alternative writ of mandamus issued to enforce a judgment for monetary damages against the state or a state agency that there is no appropriation made by law to pay the judgment." § 11.066(4) (emphasis added). Read in its entirety, the statute therefore does not authorize mandamus relief when, as here, there is no appropriation for the judgment; on the contrary, it provides that the lack of an appropriation for the judgment precludes any mandamus relief otherwise available.

Indeed, in *ContractPoint,* this Court held that "issuance of the writ of mandamus is an appropriate enforcement mechanism in this case," but only because it found that § 11.066 did not apply to the breach of contract judgment there at issue. 986 So. 2d at 1271. In this case, § 11.066 does apply to bar

mandamus relief because the judgment is of another type, the very type suggested by *ContractPoint* to be the statute's impetus.

V. THE § 11.066 ORDER UNLAWFULLY PROVIDES FOR EXECUTION ON THE DEPARTMENT.

The § 11.066 Order provides that the court "will also consider issuing a Writ of Execution authorizing Petitioners to execute on [the Department's] specific tangible and real property" if the Department does not comply with the Writ of Mandamus. (A0065). The Order allows Appellees to conduct a deposition in aid of execution and to submit a list of executable property to the trial judge. (A0065).

The district court ruled that statutory and common law barring execution against the State "yield" to the Lee Judgments. (A0497). The district court also held that the challenge by the Department was "premature," but only because the trial court had not "decide[d] which, if any, of the Department's property may be subject to a writ of execution." (A0497).

The district court erred. The State is not subject to execution without its consent under any circumstances.

A. Section 11.066(4), Florida Statutes, Precludes Execution on Property of the Department.

Section 11.066(4), Florida Statutes, provides: "a judgment for monetary damages against the state or any of its agencies may not be enforced through execution ..., and a writ of execution therefor may not be issued against the state or

its agencies." In *Mendez*, the Fourth District held that § 11.066(4) "precludes the issuance of a writ of execution against the Department." 98 So. 3d at 606. The Department is not subject to execution under principles of sovereign immunity as set forth in part III(A)(1) of this brief.

B. The Common Law Precludes Execution Against the State.

The Department's immunity to execution existed prior to and exists independently of § 11.066(4). Appellees have no right to execution because that right has never existed at common law. This Court has held that "all property of whatever nature" held by governmental entities for public or governmental purposes is held by them in trust for the public use and "exempt from seizure and sale under execution." *City of Coral Gables v. Hepkins*, 144 So. 385, 387 (1932). *See ContractPoint,* 986 So. 2d at 1271 n.12 ("It has long been, and continues to be, the law of this State, that levy and execution may not be had against public property."); *Berek v. Metropolitan Dade County*, 396 So. 2d 756, 759 (Fla. 3d DCA 1981) ("A judgment creditor may not obtain a lien against or levy execution against the property or funds of a state, county or municipal corporation in the absence of express authorization."), *approved*, 422 So. 2d 838 (Fla. 1982).

The district court's holding that "both authorities cited by the Department yield" to Appellees' judgments (A0497), entails rejection of this Court's contrary holding in *Hepkins* and *ContractPoint,* the two cases relied on by the Department

in its briefing in the district court (AR00264).

The Department's challenge to execution is not premature. The district court has held that execution may be had, and the only issue remaining is the identification "of the Department's property ,,, subject to a writ of execution." (A0497). Appellees already have identified some such property. At the hearing in the trial court, Appellees used the examples of execution on the "state farmers market in Hillsborough County" (A0460) and the "receipts or property or both" of the Department (A0476). The threat of execution is thus being used to coerce the Department to comply with the Writ of Mandamus.

Execution on the property of the Department would interfere with the operation of the Department and likely injure the citizens of Florida. As the largest agency of the State of Florida protecting the second largest industry of Florida, the Department has a number of critical regulatory and law enforcement responsibilities. *See generally* ch. 570, Fla. Stat. The Department's vital mission is to protect agriculture as that term is broadly defined by law, *see* § 570.02(1), and thus ensure the continuing safety of the food supply of this State and the many agricultural products sold within the State and in interstate commerce. Those "functions, powers, and duties" which the Department "shall have and exercise" are enumerated in § 570.07, Florida Statutes, in 43 separate sections. All of these responsibilities of the Department require it to use and operate property. The

issuance of a writ of execution allowing seizure of such property will likely hinder or destroy the Department's ability to honor its responsibilities, and injure the people of this State, putting at risk the health and welfare of Florida's citizens and adversely impacting the State's economy.

The trial court stated it would allow the Appellees "to submit to the court a list of the Department's properties that would satisfy the judgments. The court would review the list, conduct a duly noticed hearing, and decide which, if any, of the properties may be subject to a writ of execution." (A0486). If this Court affirms, Appellees could be executing on property of the State within days.

VI. THE DISTRICT COURT ERRED BY AWARDING ATTORNEYS' FEES TO APPELLEES ON THE COMPLAINT FOR MANDAMUS.

Appellees moved in the trial court and the district court for attorneys' fees based on § 73.131(2) and § 73.092(2), Florida Statutes, both eminent domain statutes. (A0107, AR00759-00760). The courts awarded fees. (A0065, A0503).

Section 73.092(2), Florida Statutes, does not grant a right to appellate attorneys' fees, leaving § 73.131(2) as the sole basis therefor. *Fla. Dep't of Transp. v. Skinners Wholesale Nursery, Inc.*, 736 So. 2d 3, 6 (Fla. 1st DCA 1998).

This Court has held that § 73.131(2) applies only to eminent domain actions and is not read "broadly." *Dep't of Transp. v. Gefen*, 636 So. 2d 1345, 1347 (Fla. 1994). Moreover, a "landowner claiming inverse condemnation is only entitled to appellate attorney's fees if the claim is ultimately successful." *Id.*

Attorneys' fees should not have been awarded, even if Appellees are successful and certainly not if they are unsuccessful. Sections 73.092(2) and 73.131(2) are contained in chapter 73, Florida Statutes – the principal Florida eminent domain chapter – and require an action in eminent domain for an award of attorneys' fees. *See* § 73.092(1) ("[T]he court, in eminent domain proceedings, shall award attorney's fees...."), and § 73.131(1) ("Appeals in eminent domain actions shall be taken in the manner prescribed by law....") (emphasis added).

This is not an "eminent domain" action. The Complaint for Mandamus sought mandamus and a declaration that §§ 11.066(3) and (4) were unconstitutional. (A0080-0145). There was no issue of eminent domain. The prior complaint for inverse condemnation was "in eminent domain," and Appellees received awards of attorneys' fees thereon. (A0074-0078).

The district court described "[t]he question before this court" as "whether the trial court erred in declaring sections 11.066(3) and (4) unconstitutional as applied to the Lee Homeowners' takings judgments and in issuing a writ of mandamus compelling payment." (A0483). The district court uses the term "eminent domain" only once – in describing a claim involving § 74.091, Florida Statutes, that was not considered on appeal. (A0489).

The awards of fees from the trial court and the district court were error.

CONCLUSION

Mandamus is unlawful and unnecessary. The Department is committed to paying the Lee Judgments as soon as the Legislature appropriates the money.

This Court should reverse the decision of the district court, reverse the § 11.066 Order, quash the Writ of Mandamus, reverse the awards of attorneys' fees, and dismiss the Complaint for Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was filed with the Court through eDCA and served by e-mail, pursuant to Fla. R. Jud. Admin. 2.516, this 24th day of January, 2020, upon the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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