IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D19-2819
L.T. CASE NOS.: 2018-CA-699, 2018-CA-882, 2018-CA-1509

STATE OF FLORIDA ET AL.,

Appellants,

v.

CITY OF WESTON, FLORIDA ET AL.,

Appellees.

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

APPELLANTS' REPLY BRIEF

ASHLEY MOODY
Attorney General

AMIT AGARWAL
Solicitor General

JAMES H. PERCIVAL
Deputy Solicitor General

JOE JACQUOT
General Counsel to Governor Ron DeSantis

COLLEEN ERNST
Deputy General Counsel to Governor Ron DeSantis

Counsel for Appellants

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ARGUMENT

I. THE TRIAL COURT ERRED BY CONCLUDING THAT SUBSECTIONS 790.33(3)(C), (D), AND (E) VIOLATE LEGISLATIVE IMMUNITY.

Plaintiffs do not dispute that the Florida Legislature intended to abrogate local legislative immunity. They also appear to agree that the Florida Legislature has the authority to abrogate common law rules. *See* Br. of Appellees 14–15; Br. of Appellants 23. But they argue that three other supposed sources of local legislative immunity—(1) "federal common law"; (2) "Article II, section 3" of the Florida Constitution; and (3) "Article VIII" of the Florida Constitution[1]—render the Legislature without power to abrogate the legislative immunity of local government officials. Br. of Appellees 14–15. Plaintiffs are wrong.

A. Plaintiffs' position is inconsistent with *McNayr v. Kelly*.

In *McNayr v. Kelly*, the Florida Supreme Court considered whether a Dade County official could be sued for libel based on statements made "in connection with [his] office." 184 So. 2d 428, 429 (Fla. 1966). The Court concluded that the official was immune because immunity had existed historically and the "legislative branch" had not "carved out" that immunity. *Id.* at 429–30. The Court then noted that "[t]he

[1] Plaintiffs appear to concede that the Speech or Debate Clause of the U.S. Constitution is not a source of local legislative immunity. *See* Br. of Appellees 23 n.8 ("[T]he trial court's reasoning" was not "based" on "the Speech or Debate Clause.").

Legislature . . . could extend absolute immunity to certain high state, county[,] or municipal officials[,] or do away with the immunity altogether." *Id.* at 430 n.6.

In their initial brief, Defendants argued that *McNayr* establishes the State Legislature's power to abrogate local legislative immunity. Br. of Appellants 23. Plaintiffs offer no counterargument. Plaintiffs cite *McNayr* only insofar as it discusses the common law default rule of local legislative immunity. Br. of Appellees 9. Regardless, Plaintiffs' additional arguments fail.

B. Abrogation of local legislative immunity does not violate "federal common law."

Plaintiffs argue that "local legislative immunity cannot be abrogated because it derives from federal common law." Br. of Appellees 22. Plaintiffs are wrong because they conflate "federal common law," a legal term of art, with federal decisional law and our common law tradition.

Plaintiffs rely principally on the U.S. Supreme Court's decisions in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), *Tenney v. Brandhove*, 341 U.S. 367 (1951), and related cases. *See* Br. of Appellees 22–23. In *Bogan*, the Court considered the scope of 42 U.S.C. § 1983, a federal statute authorizing, among other things, lawsuits for damages against certain state officials who violate a person's constitutional rights. *See Bogan*, 523 U.S. at 49. The Court held, as a matter of statutory interpretation, that "Congress did not intend" to authorize suits against local officials where "the common law accorded local legislators" immunity. *Id.* (citing *Tenney*, 341 U.S. at

376).[2] In reaching this conclusion, the Court reasoned that "Congress" used "general language," and should not be read as altering this historical rule absent clearer language. *Bogan*, 523 U.S. at 49.

Bogan's interpretation of the federal statute at issue in that case is, of course, binding on state courts. Thus, if a plaintiff filed a Section 1983 case in state court, the court would be bound by the *Bogan* Court's determination regarding the scope of that statute. But *Bogan* did not hold that federal law prevents state legislatures from abrogating local legislative immunity. *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 404 (1979) (making clear that *Tenney*, a precursor to *Bogan*, "reflected the Court's interpretation of federal law" and that not all States have decided to "adopt similar clauses in their own constitutions").

This is so because "federal common law," in the way Plaintiffs use it, only exists in areas where there are "uniquely federal interests" or where Congress has, pursuant to its constitutional power, "given the courts the power to develop substantive law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quotations omitted). This distinct category of "federal common law" abrogates contrary state law because there is an overriding federal interest. *See* U.S. Const. art. VI. Plaintiffs have not identified an interest of the United States in this

[2] *Tenney* addressed the same question but with respect to state-level officials. *See* 341 U.S. at 370–72. The issue in *Bogan* was whether Section 1983 should be interpreted differently with respect to local officials. *See* 523 U.S. at 49.

case.

Republic of Ecuador v. Philip Morris Companies, Inc., cited by Plaintiffs for the proposition that "the Florida Legislature has no authority under the supremacy clause to eradicate a federal common law rule," *see* Br. of Appellees 24 (quoting 188 F. Supp. 2d 1359, 1366 (S.D. Fla. 2002)), illustrates this point. That case addressed a number of claims that were, in substance, an attempt "to enforce Ecuadorian tax laws" in federal court. *Republic of Ecuador*, 188 F. Supp. 2d at 1363. In dismissing the complaint, the court relied on the "federal common law" rule that "one sovereign will not enforce unadjudicated tax claims of other sovereigns." *Id.* at 1362, 1366 (citations omitted). The court also noted that, to the extent Florida law authorized such a suit, that law would be preempted by "federal common law," *id.* at 1366, because such a suit would interfere with "the [federal] Executive and Legislative" branches' "authority . . . to administer foreign relations," *id.* at 1364 (citing U.S. Const. art. I, art. II); *see* Br. of Appellants 25 (discussing "relations with foreign nations" as one of the narrow areas of "federal common law").

To be sure, decisions like *Bogan* are "federal," in that they involve a federal court interpreting federal law, and they are "common law," in the sense that they involve judicial determinations that are precedential and rely on common law traditions inherited from England. It is thus no surprise that some courts have referred to decisions like *Bogan* as "federal common law" in the casual sense. *E.g.*,

Bryant v. Jones, 575 F.3d 1281, 1304 (11th Cir. 2009). But treating these cases as "federal common law" in the distinct sense of preempting state law is not only inconsistent with precedent, it also raises Tenth Amendment concerns because, absent an identifiable federal interest grounded in a provision of the U.S. Constitution, "powers . . . are reserved to the States respectively, or to the people." U.S. Const. amend. X.

"Federal common law," in the way Plaintiffs use it, is not a source of local legislative immunity, and thus it does not support the district court's erroneous conclusion that the Legislature may not abrogate that immunity.

C. Abrogation of local legislative immunity does not violate Article II, section 3 of the Florida Constitution.

Plaintiffs argue that "local legislative immunity cannot be abrogated because it derives from Florida's separation of powers provision." Br. of Appellees 15. Noticeably absent from this section of Plaintiffs' brief is a discussion of (much less a quotation of) the text of Article II, section 3. *See* Br. of Appellees 15–22. Article II, section 3 refers only to the "powers of the *state government*." Art. II, § 3, Fla. Const. (emphasis added). This explains why the Florida Supreme Court stated in *Locke v. Hawkes* that "Article II, section 3, identifies the branches of our *state government*," 595 So. 2d 32, 36 (Fla. 1992) (emphasis added), and held that "our

separation of powers provision was not intended to apply to local government entities and officials." *Id.* at 36.[3]

Further, the U.S. Supreme Court has expressly rejected the analogous argument that the *federal* "separation of powers doctrine" would "support . . . the grant of a privilege to *state legislators*." *United States v. Gillock*, 445 U.S. 360, 370 (1980) (emphasis added). Plaintiffs do not discuss *Gillock*, nor do they explain why Florida's separation of powers provision commands a different result. If anything, the question in this case is easier because local governments' rights vis-à-vis the state government are diminished compared to the rights of the States vis-à-vis the federal government. *Compare Lake Worth Utils. Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985) (discussing the Florida Legislature's "all-pervasive power" over local governments), *with* U.S. Const. amend. X (discussing the powers of the States). Indeed, the Florida Supreme Court has recognized that the State Legislature is the "suprem[e]" state policymaking body and that power given to local governments under the Florida Constitution is by no means absolute. *Lake Worth Utils. Auth.*, 468 So. 2d at 217.[4]

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[3] Plaintiffs characterize this sentence as "mere dictum." Br. of Appellees 21. But the Florida Supreme Court expressly referred to this sentence as its "hold[ing]." *Locke*, 595 So. 2d at 36.

[4] *Lake Worth Utilities Authority* and related cases, *see* Br. of Appellants 2, directly contravene Plaintiffs' unsupported assertion that "the Legislature has no

In support of their argument, Plaintiffs rely on the Florida Supreme Court's decision in *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013), and this Court's decision in *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012). *See* Br. of Appellees 15. But those cases do not support Plaintiffs' position because they address only the immunity of state legislators, not local legislators.[5] *See League of Women Voters*, 132 So. 3d at 145 ("[B]ecause of the role that the principle of separation of powers plays in the structure of Florida's *state government* . . . [we] hold that *state legislators* . . . do possess a legislative privilege under Florida law." (emphases added)); *accord Expedia*, 85 So. 3d at 519.[6]

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constitutional authority to introduce coercive interference into local legislative activities." *See* Br. of Appellees 10.

[5] These cases address legislative privilege rather than legislative immunity, but the doctrines are related. *See* Br. of Appellees 15.

[6] Plaintiffs present two additional arguments in support of their separation of powers argument. *First*, they cite the federal cases they use to support their "federal common law" theory. *See* Br. of Appellees 16–17. These cases say nothing about the separation of powers provisions in the Florida Constitution, and they do not support Plaintiffs' position for the reasons discussed in Section I.B. *Second*, Plaintiffs cite cases discussing governmental function immunity. *See* Br. of Appellees 17–18. Governmental function immunity and legislative immunity are discrete concepts. Regardless, for the reasons discussed in Section II, those cases do not support Plaintiffs' position.

Article II, section 3 of the Florida Constitution does not apply to local governments and, therefore, does not withdraw from the Legislature the power to abrogate local legislative immunity.

D. Abrogation of local legislative immunity does not violate Article VIII of the Florida Constitution.

Plaintiffs argue that "Article VIII of the Florida Constitution . . . provides an independent, constitutional source of legislative immunity for local government officials." Br. of Appellees 10. Plaintiffs refer to this theory as one of "inherent legislative immunity." Br. of Appellees 20. That position lacks any basis in the Florida Constitution's text. Under Article VIII, sections 1–2, political subdivisions "do not possess any indicia of sovereignty" and are "subject to the legislative prerogatives in the conduct of their affairs." *See* Br. of Appellants 2 (discussing relevant cases and constitutional text). The exception is where the Florida Constitution expressly says otherwise.

Although the Legislature has the authority to abolish local governments entirely, *see* Br. of Appellants 29; Br. of Appellees 10, Plaintiffs argue that two provisions of the Florida Constitution expressly withdraw from the State Legislature the power to abrogate local legislative immunity. For counties, Plaintiffs rely on the constitutional requirement that counties have a "board of county commissioners." *See* Art. VIII, § 1(e)–(g), Fla. Const.; Br. of Appellees 10. For municipalities, Plaintiffs rely on the constitutional requirement that "[e]ach municipal legislative

body shall be elective." *See* Art. VIII, § 2(b), Fla. Const.; Br. of Appellees 10. Plaintiffs' position appears to assume that, merely by virtue of belonging to a "legislative" body in some sense of that word, Br. of Appellees 10, local officials' immunity cannot be abrogated by the State Legislature. Plaintiffs are wrong for several reasons.

First, neither of these provisions addresses local legislative immunity. In seeking to base such a substantial withdrawal of authority from the State Legislature on these provisions, Plaintiffs assume that the Florida electorate would "alter . . . fundamental details" of the State Government in "vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). But Floridians, like the United States Congress, do not "hide elephants in mouseholes." *Id.*

Second, if Plaintiffs are correct that separation of powers principles are inherent in the existence of a legislative body, then Article II, section 3's separation of powers provision would be surplusage because Article III, section 1 states that the "*legislative power* of the state shall be vested in a legislature of the State of Florida" (emphasis added). *See Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996) (discussing the need to interpret constitutional provisions "so as not to render any language superfluous"); *accord Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) (discussing the need to "give effect to every word" in a statute).

Third, even if certain separation of powers principles were inherent in these local government bodies, those principles would only apply to co-equal branches of local government, such as a local government executive official like a mayor. They would not limit the State Legislature's authority over local governments. *See Lake Worth Utils. Auth.*, 468 So. 2d at 217 (discussing the State Legislature's "all-pervasive power" over local governments); *see also Gillock*, 445 U.S. at 370 (noting that the federal "separation of powers doctrine" has no bearing on the relationship between the federal government and state officials).

Fourth, the text of the cited provisions suggests the opposite of Plaintiffs' position. Article VIII states that counties may enact ordinances that are "not inconsistent with general or special law," Art. VIII, § 1(f)–(g), Fla. Const., and that municipalities "may exercise any power for municipal purposes except as otherwise provided by law," *id.* § 2(b). Far from aiding Plaintiffs' position, these provisions indicate that local officials must operate within the boundaries of state law.

Because Plaintiffs' position is unsupported by the text of the Florida Constitution, it would turn the structure of the State Government on its head. Local governments exist for the administrative convenience of the State. They are controlled by legislative acts, *Locke*, 595 So. 2d at 36, and the Legislature's power over them is supreme. *Lake Worth Utils. Auth.*, 468 So. 2d at 217. The State thus retains ultimate authority over its subservient entities, including the power to

abrogate local legislative immunity as it did in this case.

II. THE TRIAL COURT ERRED BY CONCLUDING THAT SECTIONS 790.33(3)(F) AND 790.335(4)(C) VIOLATE GOVERNMENTAL FUNCTION IMMUNITY.

Plaintiffs argue that the challenged provisions "violate the governmental function immunity of local governments." Br. of Appellees 25. But the cases Plaintiffs rely on apply only to tort liability. And because the separation of powers rationale for these cases does not apply where the conduct at issue is prohibited by statute, there is no reason to expand that immunity to this case.

A. Florida's governmental function immunity cases are specific to tort.

Florida's doctrine of governmental function immunity originated with *Commercial Carrier Corporation v. Indian River County*, 371 So. 2d 1010 (Fla. 1979). In that case, the Court addressed Section 768.28, Florida Statutes, which "waive[d] sovereign immunity for liability for torts" pursuant to Article X, section 13 of the Florida Constitution. *Commercial Carrier Corp.*, 371 So. 2d at 1013. At issue was whether there was an exception for tort liability under this statute for "discretionary acts" given that Section 768.28, unlike the Federal Tort Claims Act, does not "contain[] an express exception." *Commercial Carrier Corp.*, 371 So. 2d at 1017. The Court held that, "even absent an express exception," certain "governmental functions cannot be the subject of traditional tort liability." *Id.* at 1020.

Plaintiffs identify no case applying this doctrine outside the tort context.[7] Instead, Plaintiffs assume—but do not affirmatively argue—that governmental function immunity is not limited to tort liability. *See* Br. of Appellees 25–40. Plaintiffs thus ignore a dispositive threshold question—whether governmental function immunity should be expanded to apply to the willful violations of state law at issue in this case.

B. The principles underlying the governmental function immunity doctrine do not apply to the challenged provisions.

The governmental function immunity doctrine should not be expanded to invalidate the challenged provisions because those provisions impose liability only where local governments violate a statutory prohibition. The rationale behind governmental function immunity is that "the question of tort liability" would "entangle the Court in a nonjusticiable political question" that "fall[s] within the exclusive domain of the legislative and executive branches." *Wallace v. Dean*, 3 So.

[7] *See Wallace v. Dean*, 3 So. 3d 1035, 1053–54 (Fla. 2009) (discussing "tort liability"); *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 915 (Fla. 1985) (same); *accord City of Freeport v. Beach Comty. Bank*, 108 So. 3d 684 (Fla. 1st DCA 2013); *Hennagan v. Dep't of Highway Safety & Motor Vehicles*, 467 So. 2d 748 (Fla. 1st DCA 1985); *Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928 (Fla. 2004); *McGhee v. Volusia Cty.*, 679 So. 2d 729 (Fla. 1996); *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989); *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988); *Carter v. City of Stuart*, 468 So. 2d 955 (Fla. 1985); *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981); *Miami-Dade Cty. v. Jones*, 232 So. 3d 1127 (Fla. 3d DCA 2017); *Willingham v. City of Orlando*, 929 So. 2d 43 (Fla. 5th DCA 2006).

3d 1035, 1053–54 (Fla. 2009). Tort cases ask the fact-finder to put himself in the defendant's "shoes at the time of the act or omission complained of" and determine whether the defendant's behavior was "reasonable." *See Belue v. State*, 199 Mont. 451, 455 (Mont. 1982) (quoting F. Harper & F. James, *The Law of Torts* 929 (1956)).

While the judiciary is not competent to put itself in the shoes of elected officials and determine whether it would have made the same policy decisions, determining whether a defendant "violat[ed] . . . constitutional or statutory rights" is squarely within a court's wheelhouse.[8] *See Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985). The challenged provisions ask courts to do only that. *See* Br. of Appellants 16.

To be sure, the governmental function immunity cases frame the concern as one of "separation of powers," even when discussing the immunity of local governments. *See Trianon*, 468 So. 2d at 918; *Commercial Carrier*, 371 So. 2d at 1019. But those cases do not endorse the view that any inquiry by the State Judiciary into local legislative conduct—even where expressly authorized by the State Legislature—violates Article II, section 3. Rather, the governmental function immunity cases refer to the "separation of powers" because "[t]he nonjusticiability

[8] Plaintiffs do not appear to dispute this point. *See* Br. of Appellees 7 ("a declaratory judgment action challenging the validity of a particular law on preemption grounds" is "entirely consistent with separation of powers principles").

of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 211 (1962). In other words, the separation of powers concern animating the torts cases is that only the State Legislature, not the State Judiciary, is competent to second guess the policy decisions of local governments. Here, the State Legislature defined what conduct is prohibited. *See* Br. of Appellants 16. It did not, as would be true if it imposed tort liability, seek to delegate that determination to the judiciary. *See State v. Atlantic Coast Line R. Co.*, 47 So. 969, 976 (Fla. 1908) ("The Legislature may not delegate the power to enact a law, or to declare what the law shall be.").

Finally, Plaintiffs surmise that the State Legislature's accommodation of local governments, in creating exceptions to liability where they do not act "knowingly and willfully" or where they act in "good faith" or with "advice of counsel," is problematic. Br. of Appellees 27–28. But Plaintiffs do not explain why "the state of mind and intent of local legislators" presents a non-justiciable political question where they have violated a statutory prohibition. *See* Br. of Appellees 28. In fact, Plaintiffs' position would withdraw from the State Legislature the power to prohibit local government officials from, for example, "knowingly and willfully" taking a bribe related to conduct in their official capacity. This would be an absurd result. *See Gillock*, 445 U.S. at 373 (finding that a state legislator had no legislative privilege where he was charged with bribery because that privilege would "impair the

legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process").[9]

For these reasons, the doctrine of governmental function immunity should not be expanded to apply in this case. Even if the Court determines that it should be expanded, the challenged provisions are valid for the reasons expressed in the Defendant's Initial Brief. *See* Br. of Appellants 17–19.[10]

CONCLUSION

For these reasons, and those expressed in the Defendants' Initial Brief, the judgment of the trial court should be reversed insofar as it declares that the penalty provisions of Sections 790.33(3) and 790.335(4)(c) violate the doctrines of legislative immunity and governmental function immunity.

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[9] Plaintiffs' legislative immunity argument, Br. of Appellees 17–18, is wrong for the same reason. *See supra* note 6.

[10] In response to Defendants' argument that an act outside "the government's lawful authority and duty" is not discretionary, Br. of Appellants 17 (quotations omitted), Plaintiffs argue that case law mandates "further inquiry" because the "four-part test" is not dispositive. *See* Br. of Appellees 33 & n.13 (quotations omitted). But this "further inquiry" merely asks "whether, under the circumstances, the question of tort liability will or will not entangle the Court in a nonjusticiable political question." *Wallace*, 3 So. 3d at 1054. For the reasons discussed above, and in the Defendants' Initial Brief, the challenged provisions will not do so.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *James H. Percival*
JAMES H. PERCIVAL (FBN 1016188)
Deputy Solicitor General
AMIT AGARWAL (FBN 125637)
Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3818; (850) 410-2672 (fax)
james.percival@myfloridalegal.com
amit.agarwal@myfloridalegal.com

Counsel for the State of Florida, Attorney General Ashley Moody, and FDLE Commissioner Richard L. Swearingen

/s/ Colleen Ernst
COLLEEN ERNST (FBN 112903)
Deputy General Counsel
JOE JACQUOT (FBN 189715)
General Counsel
Executive Office of the Governor
The Capitol, PL-05
Tallahassee, Florida 32399-0001
Phone: (850) 717-9310
Colleen.Ernst@eog.myflorida.com
Joe.Jacquot@eog.myflorida.com

Counsel for Governor DeSantis

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was filed through the Florida Courts E-Filing Portal on this 22nd day of January, 2020, and thereby furnished by electronic service to the following Service List:

Jamie A. Cole
Edward G. Guedes
Adam M. Hapner
Weiss Serota Helfman Cole & Bierman, P.L.
200 East Broward Blvd., Ste. 1900
Fort Lauderdale, FL 33301
(954) 763-4242
jcole@wsh-law.com
eguedes@wsh-law.com
ahapner@wsh-law.com

Matthew Triggs
Matthew Rochman
Proskauer Rose LLP
One Boca Place
2255 Glades Road, Suite 421 Atrium
Boca Raton, Florida 33431
(561) 995-4736
mtriggs@proskauer.com
mrochman@proskauer.com
florida.litigation@proskauer.com

Michael A. Cardozo
Chantel L. Febus
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036-8299
(212) 969-3000
mcardozo@proskauer.com
cfebus@proskauer.com

Eric A. Tirschwell
Everytown Law
450 Lexington Avenue, #4184
New York, New York 10017
(646) 324-8222
etirschwell@everytown.org

René D. Harrod
Nathaniel A. Klitsberg
Joseph K. Jarone
Claudia Capdesuner
Andrew J. Meyers, Broward County Attorney
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301
(954) 357-7600
rharrod@broward.org
nklitsberg@broward.org
jkjarone@broward.org
clcapdesuner@broward.org

Altanese Phenelus
Shanika A. Graves
Angela F. Benjamin
Abigail Price-Williams
Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 NW 1st Street
Miami, Florida 33128
(305) 375-5151
Altanese.Phenelus@miamidade.gov
sgraves@miamidade.gov
Angela.benjamin@miamidade.gov

Abigail G. Corbett
Veronica L. De Zayas
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, FL 33130
(305) 789-3200
acorbett@stearnsweaver.com
vdezayas@stearnsweaver.com

Aleksandr Boksner
Raul J. Aguila
City of Miami Beach
1700 Convention Center Drive, 4th Floor
Miami Beach, Florida 33139
(305)673-7470
AleksandrBoksnerEservice@miamibeachfl.gov

Herbert W.A. Thiele
Lashawn Riggans
301 South Monroe Street, Suite 202
Tallahassee, Florida 32301
(850) 606-2500
countyattorney@leoncountyfl.gov
riggansl@leoncountyfl.gov
tsonose@leoncountyfl.gov

Clifford B. Shepard
Shepard, Smith, Kohlmyer & Hand, P.A.
2300 Maitland Center Pkwy. Ste. 100
Maitland, FL 32751
(407) 622-1772
cshepard@shepardfirm.com

Dexter W. Lehtinen
Claudio Riedi
Lehtinen Schultz, PLLC
Village of Palmetto Bay, Florida
1111 Brickell Avenue, Ste. 2200
Miami, FL 33131
Telephone: (305) 760-8544
dwlehtinen@aol.com
criedi@Lehtinen-Schultz.com
asalmon@Lehtinen-Schultz.com

Jacqueline M. Kovilaritch
Joseph P. Patner
Office of the City Attorney for the City of St. Petersburg
P.O. Box 2842
St. Petersburg, FL 33731
(727) 893-7401
eservice@stpete.org
Jacqueline.kovilaritch@stpete.org
Joseph.patner@stpete.org

Brook Dooley
David J. Rosen
Andrew S. Bruns
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188
drosen@keker.com

Philip R. Stein
Kenneth Duvall
Ilana Drescher
BILZIN SUMBERG BAENA PRICE
& AXELROD LLP
1450 Brickell Avenue, Suite 2300
Miami, Florida 33131
Telephone: 305.374.7580
Facsimile: 305.374.7583
pstein@bilzin.com
kduvall@bilzin.com
idrescher@bilzin.com

Davis Cooper
J. Joel Alicea
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
pdcooper@cooperkirk.com

John B. Thompson
5721 Riviera Drive
Coral Gables, Florida 33146
(305) 666-4366
amendmentone@comcast.net

Stephen Hall
Genevieve Hall
Florida Department of Agriculture
and Consumer Services
407 South Calhoun Street; Suite 520
Tallahassee, FL 32399-0800
(850) 245-1000
(850) 245-1001 (fax)
Steven.hall@FDACS.gov
Genevieve.hall@FDACS.gov

/s/ *James H. Percival*
James H. Percival

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ *James H. Percival*
James H. Percival