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

CASE NO. 1D19-2819

L.T. NOS.: 2018-CA-000699, 2018-CA-000882, 2018-CA-001509

STATE OF FLORIDA, GOVERNOR RON DESANTIS, ATTORNEY GENERAL ASHLEY MOODY, AND FDLE COMMISSIONER RICHARD L. SWEARINGEN

Appellants,

v.

CITY OF WESTON, FLORIDA, DAN DALEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE CITY OF CORAL SPRINGS, FLORIDA, BROWARD COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, ET AL.,

Appellees.

BRIEF OF LOCAL GOVERNMENT LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae local government law professors include individuals with an interest in protecting Florida's home rule, as set forth in the Florida Constitution, and promoting and protecting local democratic action.

Paul A. Diller is a Professor of Law at Willamette University College of Law and the director of its certificate program in law and government. He teaches and writes in the field of local government law, with an emphasis on state-local conflict.

Sarah Fox is an Assistant Professor at the Northern Illinois University College of Law. Her primary research and teaching interests are at the intersections of environmental law, property, and land use.

Laurie Reynolds is the Prentice H. Marshall Professor Emerita at the University of Illinois College of Law, where she regularly taught State and Local Government Law from 1982 until 2016. She is co-author of the textbook *State and Local Government Law* (West Academic Pub., 8th ed. 2016).

Erin Scharff is an Associate Professor of Law at Arizona State University's Sandra Day O'Connor College of Law, where she teaches state and local tax law and writes about local government law.

Richard Schragger is the Perre Bowen Professor, Joseph C. Carter, Jr. Research Professor of Law, at the University of Virginia School of Law, where

he has taught State and Local Government Law and Urban Law and Policy since 2002.

Rick Su is a Professor of Law at the University of North Carolina School of Law where he teaches local government law and immigration. His research focuses on preemption and the relationship between localities, the states, and the federal government.

ARGUMENT

I. INTRODUCTION

The trial court properly concluded that the civil penalty provisions of Section 790.33, Florida Statutes, violate both the Florida Constitution and the U.S. Constitution. *Amici* submit this brief not to expound on the merits of the trial court's opinion, but rather to highlight for this Court the implications of punitive preemption provisions like those in Section 790.33 on local authority in Florida. Specifically, the punitive provisions of Section 790.33 would undermine the Florida Constitution's broad grant of home rule to Florida localities by having a chilling effect on localities' exercise of their rights, limiting localities' ability to express policy preferences through local legislation, and making it more difficult for localities to defend their local enactments in court. Ultimately, *Amici* contend that the punitive provisions of Section 790.33, if upheld, will silence local voices

and deprive local governments of their basic right to engage in local democracy and policymaking without threat of state reprisal.

II. PUNITIVE PREEMPTION UNDERMINES HOME RULE AS ENSHRINED IN THE FLORIDA CONSTITUTION.

The punitive provisions of Section 790.33 would undermine the Florida Constitution's broad home rule protections for local government found in the 1968 Home Rule Amendment. Where the Florida Constitution's Home Rule Amendment granted broad policymaking initiative powers to the State's local governments, punitive preemption provisions like those at issue would chill the valid exercise of those local powers. Moreover, the punitive provisions of Section 790.33 would, as a whole, narrow the scope of local authority and freedom that the Florida Constitution has guaranteed to local governments since 1968.

a. Home Rule Emerged in Florida to Grant Localities Broad Substantive Legislative Authority.

The 1968 Home Rule Amendment to the Florida Constitution fundamentally altered the state-local relationship in Florida. Fla. Const. Art. VIII, § 2(b). The Amendment established broad home rule authority for local governments in the State and narrowed the State Legislature's role in local decision-making. As shown below, decades of Florida court decisions have recognized and protected this broad grant of power to localities. This Court should not allow the punitive provisions at issue in this case to ignore and subvert

the balance of power enshrined in Article VIII, Section 2 of the Florida Constitution.

Prior to the 1968 revision to the Florida Constitution, the State operated under what is known as "Dillon's Rule."[1] *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992), *modified sub nom. Collier Cty. v. State*, 733 So. 2d 1012 (Fla. 1999), and *holding modified by Sarasota Cty. v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995) (noting that under the 1885 Florida Constitution, the state's courts "consistently followed Dillon's Rule"). Under the Dillon's Rule system, localities could only exercise powers that were specifically granted to them by the State, and such grants were strictly and narrowly construed.[2]

Beginning in the late 19th century, however, many states began to recognize the value of municipal government initiative and flexibility in responding to local problems. Rejecting Dillon's Rule, state constitutions increasingly granted localities home rule powers that enabled them to respond to

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[1] "Named for John F. Dillon, the Iowa Supreme Court (later, federal circuit) judge who published an influential treatise on municipal corporations shortly after the Civil War, the eponymous rule held that local units of government were mere administrative conveniences of the state with no inherent lawmaking authority." Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1122 (2007).

[2] As a general rule of strict statutory construction, Dillon's Rule allowed municipalities powers expressly granted, necessarily or fairly implied, and essential to the accomplishment of local power granted by the State. *See* Richard Briffault and Laurie Reynolds, *Cases and Materials on State and Local Government Law* 327 (8th Ed. 2016).

their own needs and priorities without state interference.[3] Under home rule regimes, localities generally received broad grants of power, and it was presumed that local regulations were a valid exercise of that power. By the middle of the 20th Century, most states had adopted some version of home rule. *See* Rick Su, Intrastate Federalism, 19 U. Pa. J. Const. L. 191, 235 (2016).

In 1968, Florida joined this national movement towards home rule when the Florida Constitution was amended to grant municipalities the authority to "exercise any power for municipal purposes except as otherwise provided by law." Fla. Const., Art. VIII, § 2(b). With the State's grant of broad power to municipalities, localities no longer needed to obtain specific State authorization for each regulatory initiative they sought, and were instead freed to engage in substantive local policymaking on their own. This grant of home rule authority to municipalities demonstrated a recognition that communities across the State vary widely in terms of their geographic, demographic, and economic make-up, and that localities should have the flexibility to tailor local policies to their particular situations. Indeed, the push for home rule in Florida was triggered by the post-World War II growth in population in the State and the increasingly complex and localized problems for

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[3] *See, e.g.*, National League of Cities, Cities 101 – Delegation of Power, https://www.nlc.org/resource/cities-101-delegation-of-power (last viewed Dec. 4, 2019).

which a statewide solution would not be appropriate. *See City of Boca Raton*, 595 So. 2d at 27.

In the words of Florida's preeminent constitutional commentator, with the emergence of home rule, "[t]he power to make local government decisions [wa]s increasingly removed from the legislature . . . and given to local officials." Talbot D'Alemberte, *The Florida State Constitution* 254 (2d ed. 2016). Since 1968, decades of Florida court decisions have recognized and emphasized the broad grant of home rule authority enshrined in the Home Rule Amendment. *See, e.g.*, *Boschen v. City of Clearwater*, 777 So. 2d 958, 963 (Fla. 2001) (observing that the Home Rule Amendment "has been construed repeatedly as giving municipalities broad home rule powers"); *City of Casselberry v. Orange County Police Benevolence Ass'n*, 482 So. 2d 336, 339 n.2 (Fla. 1986) (noting that while the Home Rule Amendment did not address the authority to create a civil service system, the authority to create such a system "is inherent within [the Home Rule Amendment's] broad grant of power" and explaining that home rule municipalities have broad authority to regulate "all activities essential to the health, morals, protection, and welfare of municipalities"); *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1280 (Fla. 1983) (clarifying that the Home Rule Amendment sought to allow municipalities to enact regulations "unless otherwise *limited* by law," as opposed to only when "those powers [are] expressly *granted*

by law") (emphasis in original); *State v. City of Sunrise*, 354 So.2d 1206, 1209 (Fla. 1978) (noting that, because the only state constitutional limitation on municipal home rule authority is that it be exercised for a "valid municipal purpose" and that "[i]t would follow that municipalities are not dependent upon the Legislature for further authorization" to enact particular statutes).

b. Punitive Preemption Undermines Home Rule by Chilling Valid Acts of Local Authority, Limiting Localities' Ability to Use Local Legislation to Express Policy Preferences, and Making It More Difficult for Localities to Defend Local Enactments in Court.

By imposing onerous penalties on cities and local officials that enact ordinances ultimately found to be preempted, punitive preemption chills even *valid* exercises of local authority, limits local governments' ability to use the local democratic process to express policy preferences, and makes it more difficult for local governments and their officials to assert their home rule rights and defend their local policies in court.

The punitive provisions of Section 790.33 would personally fine legislators who enact a preempted ordinance, deny them the ability to use public funds to defend the enactment of said ordinance, and subject them to removal from office by the Governor. Fla. Stat. § 790.33(3)(c)–(e). Together, they make the exercise of legislative powers granted under the Florida Constitution's Home Rule Amendment a highly risky endeavor. A local legislator, particularly one

without significant personal wealth, will have to weigh the potential personal, financial ramifications of every vote exercising legislative discretion that could run counter to the State's preemption. It is reasonable and foreseeable therefore that local officials operating under Section 790.33's punitive provisions will hesitate to enact any ordinances that *might* be preempted, even if they believe in good faith that those ordinances are not, in fact, preempted by state law. *See* Erin Adele Scharff, Hyper Preemption: A Reordering of the State-Local Relationship?, 106 Geo. L.J. 1469, 1494 (2018) (noting that "[punitive preemption] statutes try to dissuade cities from exercising their policymaking authority in the first place"). In this case, Appellees have, in fact, stated that "Appellees wish to enact numerous safety measures that they believe are not preempted . . . [but] have not voted on or enacted such restrictions . . . because they fear such actions could . . . subject[] them to the severe punishments of [Section 790.33]." Appellee's Answer Br. at 2.

Punitive preemption also closes off important avenues for discussion of local policy and deprives citizens and municipalities of the right to articulate local policy preferences. Scharff, at 1506 (arguing that "[punitive] preemption statutes limit local governments' ability to use their lawmaking authority symbolically or as an organizing tool," which is how "[l]egislation at the state and local level often functions"). If local officials cannot risk exercising their legislative

discretion for fear of having to defend those decisions personally in court or for fear of abruptly losing their jobs, city halls and other local legislative bodies will fail to fully serve their constituents. More specifically, those local government bodies cannot fully debate pressing local problems, cannot adopt solutions that make sense when a statewide approach does not fit all, and cannot risk voicing their concerns through symbolic legislation that can also form part of a larger organizing and political effort. Ultimately, by ensuring that local governments will not dare to act, the punitive provisions of Section 790.33 would effectively undermine the promise of home rule and role of local government in Florida under the Home Rule Amendment's broad grant of authority.

Finally, the punitive provisions of Section 790.33 attempt to reorder the state-local relationship by establishing a new adversarial process to determine whether a local ordinance is preempted, and that process is one that is tilted heavily in favor of the State. Rather than allowing city officials to defend their position on preemption concerning a particular ordinance in state court on equal footing with the State or other party, the provisions create a process that subjects local officials to extreme personal liability and extra-judicial punishment (removal from office) by a governor to whom they are not directly accountable. Thus, rather than preserve a process that can weigh the merits of parties' claims when a question of preemption emerges, the punitive provisions of Section 790.33 put local officials in a position where they may

not be able to pursue a case, much less an appeal to the Florida Supreme Court, due to personal financial constraints. Local officials, especially those without substantial personal wealth, will also likely refrain from asserting the rights of local governments under Florida's Home Rule Amendment, much less pursuing appeals, if it will mean risking their job. By seeking to deprive local governments of their day in court when they believe they have properly exercised their rights, the penalty provisions at issue fundamentally distort the state-local relationship established by Article VIII, Section 2 of the Florida Constitution and upheld by decades of Florida Supreme Court jurisprudence.

The Florida Legislature's attempt to erode home rule through punitive preemption provisions like the ones at issue echo the very abuses of state power that led to the adoption of home rule in the first place. States like Florida adopted home rule to combat and prevent state meddling and interference. For example, "[o]ne notorious abuse of the [pre-home rule] period was the practice by rural-dominated state legislatures of adopting 'ripper bills'—laws that wrested municipal functions out of urban hands and transferred them to state appointees." Richard Briffault, Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as Case Study in the Dilemmas of Local Self-Determination, 92 Colum. L. Rev. 775, 805–06 (1992) (citations omitted) ("Home rule was intended to . . . protect cities from opportunistic, partisan state

meddling, and thus to vindicate the principle of local self-government."). Instead of using a brazen tool like a "ripper bill" to dominate local governments empowered by home rule, the Florida Legislature has turned to punitive preemption.

In determining the validity of the punitive preemption provisions of Section 790.33, *Amici* urge this court to consider the history of home rule in Florida, the expected consequences for home rule outlined here, and the threat that upholding these punitive preemption provisions poses to the broad grant of home rule in Florida's Constitution and local democracy more broadly.

c. This Court Should Reject Arguments That Punitive Preemption Provisions Like Those in Section 790.33 Are Necessary to Achieve Statewide Uniformity.

Beyond the fact that punitive preemption undermines home rule, it is simply not necessary to achieve the goal of statewide uniformity in a given policy area, contrary to the claims of the State and *Amicus* National Rifle Association (NRA). *See* Appellants' Initial Br. at 1; Br. of Amicus Curiae Nat'l Rifle Ass'n of America in Supp. of Appellants at 2 ("The penalty provisions [at Section 790.33] are necessary to preserve and protect the Florida Legislature's prerogative to occupy the field of firearm regulation to preempt unlawful local action.").

The system of home rule in Florida has established processes for assessing the validity of local ordinances when preemption claims or questions emerge. *See, e.g.*, Richard C. Schragger, The Attack on American Cities, 96 Tex. L. Rev. 1163, 1181–82 (2018) (noting that, "[t]raditionally, [home rule] cities with preempted ordinances simply stopped enforcing those ordinances and might repeal them after express preemption"). If the State is concerned that a locality has enacted a preempted law, it could, for example, authorize the Attorney General to seek a declaratory judgment on the validity of the local enactment. Scharff at 1505–06. Decades of court decisions in Florida have also demonstrated that parties can challenge a particular policy on the basis of preemption in court,[4]

[4] *See, e.g.*, *D'Agastino v. City of Miami*, 220 So. 3d 410, 413 (Fla. 2017) (considering consolidated cases, including a case where a police union filed a declaratory action, involving the question of whether state statutes preempted certain local ordinances concerning police conduct); *Masone v. City of Aventura*, 147 So. 3d 492, 494 (Fla. 2014) (considering consolidated cases involving question of "whether municipal ordinances imposing penalties for red light violations detected by devices using cameras were invalid because they were preempted by state law"); *Fla. Power Corp. v. Seminole Cty.*, 579 So. 2d 105, 108 (Fla. 1991) (in a declaratory and injunctive action, the court invalidated certain local ordinances regarding the placement of power lines); *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984) (finding that the Florida Legislature has "clearly preempted local regulation vis-a-vis delay in the release of public records" and finding local public records law preempted); *Wednesday Night, Inc. v. City of Fort Lauderdale*, 272 So. 2d 502, 505 (Fla. 1972) (upholding local ordinance regulating the hours for sales of alcoholic beverages in case brought by Florida corporation).

and emergency or preliminary injunctions remain available remedies,[5] when necessary. Moreover, the State can ask a court to hold a local official in contempt for failing to following a court order to repeal or stop enforcing a preempted ordinance. Scharff, at 1506.

Thus, this Court should reject any claim by the State or *amicus* parties like the NRA that the punitive preemption provisions at issue are somehow necessary to ensure statewide uniformity. State processes (like those outlined above) have long existed to address preemption questions. The punitive provisions at issue would serve only to create a threatening and hostile atmosphere in which local voices are silenced, one that undermines the broad grant of home rule under the 1968 Home Rule Amendment.

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[5] *City of Miami v. AIRBNB, Inc.*, 260 So. 3d 478, 484 (Fla. Dist. Ct. App. 2018) (reversing temporary injunction initially granted by trial court as overbroad in case assessing whether local resolution on short-term rentals was preempted by state law); *City of Miami v. AIRBNB, Inc.*, 260 So. 3d 478, 484 (Fla. Dist. Ct. App. 2018) (affirming trial court preliminary injunction in case involving question of whether local ordinance concerning the regulation of underground petroleum storage tanks was preempted by state law); *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1023 (Fla. Dist. Ct. App. 2005) (affirming lower court judgment denying preliminary injunction, concluding that local fireworks ordinance at issue was not expressly or impliedly preempted by state law).

III. CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the trial court's order declaring the penalty provisions of Section 790.33 invalid.

Dated: December 27, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing with the Clerk of the Courts on December 27, 2019, by using the E-Filing Portal, which will send a notice of electronic filings to all counsel of record.

/s/ Kenneth Duvall
Kenneth Duvall

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210(b).

/s/ Kenneth Duvall
Kenneth Duvall