CASE NO. SC21-918

L.T. CASE NO. 1D19-2819

In the Supreme Court of Florida

NICOLE "NIKKI" FRIED, FLORIDA COMMISSIONER OF AGRICULTURE AND CONSUMER SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' JOINT INITIAL BRIEF

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INTRODUCTION

This appeal presents a fundamental question: whether local elected officials and governments, acting within the scope of their respective authorities, enjoy legislative and governmental function immunity for their actions, precluding them from being subject to punitive measures for those actions. The answer is and should remain yes. Under the Florida Constitution, local elected officials and local governments possess legislative and governmental immunity.

Petitioners in these consolidated cases brought suit after the Florida Legislature amended section 790.33, Florida Statutes, by adopting several unprecedented punitive provisions in 2011 (the "Penalty Provisions") which sought to discourage local governments from adopting any measures related to firearms in their respective localities. Petitioners do not dispute that most local regulations of firearms and ammunition have been preempted by state law since 1987—meaning a local measure that improperly regulates firearms or ammunition can be immediately declared unlawful and enjoined by the judiciary.

Instead, Petitioners contend that the Florida Constitution protects their right to enact local laws that are arguably not

preempted and to engage in traditional legislative activities secure in the knowledge they may not be punished for doing so. Indeed, section 790.33 specifically allows local governments to regulate firearms in specific scenarios. Yet the Florida Legislature enacted the onerous Penalty Provisions that make duly elected local officials and governments subject to fines and damages for enacting regulations later found to be preempted.

The well-recognized and long-honored doctrines of legislative immunity and governmental function immunity preclude the Legislature's imposition of the Penalty Provisions. Improperly distinguishing binding precedent from this Court, and notwithstanding clear guidance from the United States Supreme Court, the First District Court of Appeal held that the Penalty Provisions are valid and enforceable against local governments and their legislators.

Petitioners ask this Court to recognize a fundamental principle of democratic governance: local elected officials acting in their legislative capacities are entitled to the same immunities and protections historically afforded to all legislators in this country, and the judicial power of the state does not extend to impose financial

liability on local governments for the performance of discretionary governmental functions. While the judiciary can, and should, exercise its power to determine whether a local law is preempted (and thus invalid), it may not punish local governments or their elected officials for their legislative actions as is contemplated by the Penalty Provisions. This Court should reverse the First District's decision.

STATEMENT OF THE CASE AND FACTS

I. FACTUAL BACKGROUND

In 1987, the Florida Legislature enacted section 790.33, Florida Statutes, which generally preempts local government regulations of firearms and ammunition (the "Preemption Statute"). Section 790.33(1) provides that the state legislature has occupied "the whole field of regulation of firearms and ammunition . . . to the exclusion of all existing and future county . . . or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto." The statute contains several exceptions to state preemption, which permit local governments to issue firearm regulations involving local zoning ordinances, law enforcement usage, and employee work in the course of their employment. § 790.33(4), Fla. Stat.

In 2011, the Legislature amended the Preemption Statute to add the Penalty Provisions, an unprecedented series of penalties that can be imposed on any "person, county, agency, municipality, district, or other entity" that "enact[s] or caus[es] to be enforced any local ordinance or administrative rule or regulation" in conflict with the preemption. § 790.33(3)(a), Fla. Stat. Under the newly adopted statute, if a court determines that the actions of a local elected or appointed official in voting for the local law constituted a "knowing and willful" violation of the Preemption Statute, the court is required to assess a personal fine of up to $5,000 against the elected official. § 790.33(3)(c), Fla. Stat. Indemnification for these fines and the costs of defense by the local government is prohibited. § 790.33(3)(d), Fla. Stat.

The Legislature also created a private right of action for adversely affected individuals and groups to enforce the Preemption Statute against localities. § 790.33(3)(f)1, Fla. Stat. The new law provides that if the local law or regulation is found to be preempted the locality is liable for damages of up to $100,000 per plaintiff, plus uncapped attorney's fees with a contingency fee multiplier. *Id.*

The Final Bill analysis in 2011 asserted that the Penalty Provisions were needed due to local governments' continued attempts to regulate firearms despite the state's preemption of the subject. *See* R. 1012–13. It cited several examples, none of which involved cities or counties passing or attempting to pass ordinances that elected officials knew or thought were preempted. *See generally* R. 1011–17. Since passage of the Penalty Provisions, local elected officials—while expressing their belief that particular regulations would not be precluded by the Preemption Statute—have avoided enacting such regulations for fear of the Penalty Provisions. *See, e.g.*, R. 575–76.

II. PROCEDURAL HISTORY

Petitioners in these consolidated cases—consisting of thirty municipalities, three counties, more than seventy elected representatives of those entities (the "Elected Officials"), and one private citizen—brought suit in the Circuit Court for Leon County seeking declaratory judgments that the Penalty Provisions were invalid. R. 84–133; 1604–1649; 1800–1841.

A. The Trial Court Proceedings.

Petitioners commenced three actions in 2018 against the Governor, the State of Florida, and various other state officeholders

(collectively, the "State").[1] R. 84, 1604, 1753. The complaints alleged that Petitioners wished to enact various safety measures related to firearms or ammunition that they believed were not precluded by the Preemption Statute, but that they had refrained from acting for fear of the Penalty Provisions if the measures were ultimately deemed preempted. *See, e.g.*, R. 102–104.

The complaints alleged that the Penalty Provisions violate bedrock principles of American democracy. All three suits asserted, among other arguments,[2] that the Penalty Provisions violate the

[1] Adam Putnam, the then Commissioner of Agriculture, was a defendant named in the original Complaints. Petitioner Nicole "Nikki" Fried, the current commissioner, declined to join the State's appeal from the trial court's ruling, supported that ruling before the First District, and has aligned with Petitioners in this proceeding.

[2] The complaints made various other allegations against the Penalty Provisions. One set of plaintiffs, for example, claimed that the removal provision in § 790.33 violated their federal and state constitutional right to be free from impairment of contracts. R. 1621–1624. The trial court issued rulings on these points—some in favor of petitioners and some for the State—which were not appealed by the State and therefore are not at issue on this appeal. See R. 2011–19; A.R. 352–370.

doctrines of legislative and governmental function immunity.[3] *See* R. 107–16; R. 1625–30; R. 1814–18.

After discovery and consolidation of the three cases, all parties moved for summary judgment. R. 503–63. As relevant here, Petitioners argued that legislative immunity arises from the Florida Constitution and separation of powers principles. R. 511. The State countered that the state legislature maintains ultimate authority over local governments, and that by preempting the field and enacting the Penalty Provisions the State had abrogated any and all immunities, all of which, it argued, are premised only upon the common law and not upon any constitutional provisions.

The trial court granted Petitioners' summary judgment motion in part. R. 2005–19. It held that article II, section 3 of the Florida Constitution (the "Separation of Powers Provision"), gives rise to an immunity that cannot be abrogated by statute. R. 2007–08. Rejecting the State's arguments, the trial court concluded that "once local governments are established[,] the Constitution" requires the

[3] Governmental function immunity is sometimes referred to as "discretionary function immunity." *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985).

creation of legislative county commissions and municipal legislative bodies to which the requirements of the Florida Constitution apply as they do to the state legislature. R. 2009.

Because legislative immunity is founded on nonwaivable principles inherent in the Constitution and applies equally to properly established localities, *see* R. 2007, the trial court held that the Penalty Provisions violate that legislative immunity, *see* R. 2009.

In addition, the trial court found that the doctrine of governmental function immunity applies to the local governments. R. 2010. Accordingly, (1) discretionary decisions inherent in the act of governing may not be challenged in court; (2) enacting legislation constitutes an inherently discretionary governmental function; and thus (3) the penalty provisions violated the Petitioners' governmental function immunity, which, like legislative immunity, stems from the Florida Constitution. R. 2009–11.

The State then appealed to the First District Court of Appeal.

B. First District Court of Appeal Proceedings.

On appeal, the State challenged only the trial court's legislative and governmental function immunity holdings, abandoning the other issues. While conceding that the governmental function immunity is

rooted in article II, section 3 of the Florida Constitution, A.R. 354,[4] the State contended that the Legislature can abrogate that constitutionally-derived immunity by statute so long as it does not do so with respect to "traditional tort liability," A.R. 353-54. Liability created by general statute, they argued, is a different matter entirely. According to the State, local government actions that violate state statutes can never be subject to such an immunity. It makes no difference, the State argued, that the Florida Constitution provides that local governments must have legislative bodies because the Legislature can simply abolish those localities.

The First District agreed with the State and concluded that Petitioners were entitled to invoke neither legislative nor governmental function immunity, holding that the trial court had "overlook[ed]" the "State's superior authority" over local governments. *State v. City of Weston*, 316 So. 3d 398, 404 (Fla. 1st DCA 2021). The First District reasoned that because the state legislature can abolish counties and municipalities by general law, *id.*, separation of powers

[4] References to the record compiled by the First District will appear as "A.R."

principles inherent in the Constitution "mean[] only that no judge or jury can impose 'traditional tort liability' on a local government for planning-level activity." *See id.* at 404-05. Nonetheless, after asserting a limited application of the doctrine to local governments, the First District observed that the "boundary exists to keep courts from become entangled in 'fundamental questions of policy and planning.'" *Id.* at 405 (quoting *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989)).

Under the First District's reasoning, actions taken by local legislative bodies that are later found to be in violation of the Preemption Statute are, "by definition, violations of statutes." *Id.* at 405. And since those actions were determined to be unlawful, they cannot be protected by any immunity. *Id.* at 405–06. Thus, the First District upheld the validity of the Penalty Provisions and concluded governmental function immunity does not shield local governments from liability.

With respect to legislative immunity, the First District held that the separation of powers doctrine does not confer any legislative immunity on local officials. *Id.* at 407. Any testimonial privilege, which the First District had previously applied in *Florida House of*

Representatives v. Expedia, Inc., 85 So. 3d 517 (Fla. 1st DCA 2012), does not extend to officials who violate state statutes. *City of Weston*, 316 So. 3d at 406–07. According to the court, "[t]he separation of powers doctrine does not defeat validly enacted general law," and the First District determined that the trial court's reasoning was "inconsistent" with the general rule that local governments cannot act in areas the state legislature has preempted. *Id.* at 405.

The First District also discounted "whether local government officials have legislative immunity in the first place," noting that this Court in *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992), had concluded the Separation of Powers Provision "was not intended to apply to local governmental entities and officials." The court then characterized Petitioners' argument as "partak[ing] of state legislative immunity handed down to them when the Florida Legislature delegated part of its legislative authority to local governments."[5] 316 So. 3d at 407.

[5] To be clear, Petitioners have never asserted as much.

Upon denial of Petitioners' motion for certification of questions of great public importance, Petitioners promptly invoked the discretionary jurisdiction of this Court, which granted review.

SUMMARY OF THE ARGUMENT

The district court erred in concluding that the elected officials were not entitled to legislative immunity for their purely legislative acts. Legislative immunity is and has always been a core component of American democracy, the interference with which undermines the legislative process and the rights of the people to have their will represented. This immunity has always been understood to apply to local legislators and is implicitly recognized under the Florida Constitution. The Penalty Provisions violate the elected Petitioners' legislative immunity by potentially subjecting them to personal liability for their purely legislative acts.

The district court also erred in finding that governmental function immunity is inapplicable. Local governments have the authority to legislate and the act of legislating is a discretionary function—regardless of whether such legislation is later found to be preempted. Local governments are, therefore, immune from liability arising out of legislating. The Penalty Provisions, in particular section

790.33(3)(f), Florida Statutes, violate this provision by essentially creating a new tort that requires judicial interference with the discretionary functions of local governments and results in the imposition of financial liability for those same functions.

STANDARD OF REVIEW

The standard of review is de novo. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126-27 (Fla. 2000).

ARGUMENT

I. THE FIRST DISTRICT ERRED IN CONCLUDING THAT THE ELECTED OFFICIALS WERE NOT ENTITLED TO LEGISLATIVE IMMUNITY.

The First District concluded that the Elected Officials were not entitled to legislative immunity with respect to the potential $5,000 fines authorized by section 790.33(3)(c), Florida Statutes, because (i) the Legislature's statutory preemption of the field of regulation of firearms and ammunition somehow stripped away the legislative immunity of the Elected Officials, and (ii) the separation of powers doctrine did not preclude the Legislature from statutorily abrogating that immunity. *See Weston*, 316 So. 3d at 407. Neither conclusion is supported by law.

A. Local Legislative Immunity Generally.

The Florida Constitution reposes ultimate political power in the people: "All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." Art. I, § 1, Fla. Const. That political power manifests itself, in part, in the democratic election of representatives, at *all* levels of government, to be the voice of the electorate in legislative matters.

No Florida court has ever held that, from the perspective of a functioning democracy, the exercise of that political power by the people is any less important at the county or municipal level than at the state level. *See, e.g., State ex rel. Ayres v. Gray*, 69 So. 2d 187 (Fla. 1953) (noting that the "political power" provides for the election of not only state officers, but also local government officers); *see also Wright v. City of Miami Gardens*, 200 So. 3d 765, 775 (Fla. 2016) (noting in office qualifications dispute, "The right of the people to select their own officers is their sovereign right . . . ."). Indeed, the Florida Constitution expressly recognizes in Article VIII, sections 1 and 2 that counties and municipalities shall have governing legislative bodies. Art. VIII, §§ 1(e)–(g), 2(b), Fla. Stat.

The Elected Officials, then, when acting in their legislative capacities, are protected by the doctrine of legislative immunity, which is an essential characteristic of American democracy. *See Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). For centuries, all legislators in America have enjoyed absolute immunity from suit and from damages for all actions taken within the sphere of legislative activity. *Id.*; *see also Woods v. Gamel*, 132 F.3d 1417, 1419, n.4 (11th Cir. 1998) ("[A]bsolute legislative immunity has been extended further to include local legislators. . . . Even if the commissioners acted out of evil intent, the legislative nature of the act still controls.") (citations omitted). The purpose of this immunity is clear and noncontroversial: "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972).

It is simply "not consonant with our scheme of government for a court to inquire into the motives of legislators," *Tenney*, 341 U.S. at 788, or for legislative discretion to be "distorted by the fear of personal liability," *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). As the U.S. Supreme Court observed in *Spallone v. U.S.*, 493 U.S. 265, 79 (1990), in the context of *local* legislative action, "[A]ny restriction

on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process."

In Florida, the law is clear that local government officials are entitled to absolute legislative immunity. Florida courts have often concluded that local elected officials are immune from suit when acting in a legislative capacity. *See, e.g.*, *Carollo v. Platinum Advisors, LLC*, 319 So. 3d 686, 688 (Fla. 3d DCA 2021) ("A city commissioner enjoys absolute legislative immunity when acting in a legislative capacity."); *City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co., LLC*, 942 So. 2d 455, 456 (Fla. 4th DCA 2006) ("State and local officials are immune from civil suits for their acts done within the sphere of legislative activity."); *see also Junior v. Reed*, 693 So. 2d 586, 589 (Fla. 1st DCA 1997) ("The protection afforded by absolute immunity is available to local governmental officials as well as to those officials performing legislative functions at the federal and state levels."); *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 740 (Fla. 2d DCA 1989) ("City council members enjoy absolute immunity in civil rights actions when acting in a legislative capacity.").

When local elected officials vote on ordinances or resolutions, they are undeniably engaging in "quintessentially legislative" action, and they must be free to perform their legislative duties without fear of undue interference by other branches of government. *See Bogan*, 523 U.S. at 55; *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1063 (11th Cir. 1992); *see also Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985) ("Deciding which laws are proper and should be enacted is a legislative function.").

B. The Florida Constitution Recognizes Legislative Immunity.

The foregoing cases recognize that local governments are a distinct and important feature of Florida's system of governance. As previously noted, that principle is enshrined in two distinct articles of the Florida Constitution. Article VIII expressly provides counties and municipalities with political powers to address matters of local concern. Art. VIII, §§ 1–2, Fla. Const. These powers enable local governments to enact laws that benefit the public and to provide important public services for Floridians. *See Cauley v. City of Jacksonville*, 403 So. 2d 379, 386 (Fla. 1981) ("Municipalities can no longer be identified as partial outcasts as opposed to other

constitutionally authorized local governmental entities."). So long as they exist, the Florida Constitution *mandates* that those local governments include a *legislative* body that is composed of elected officials who exercise those political powers. *See* Art. VIII, § 1(e), Fla. Const. ("the governing body of each county shall be a board of county commissioners composed of" elected officials); *id.* § 1(f)–(g) (providing legislative powers to the governing bodies of counties); *id.* § 2(b) ("Each municipal *legislative* body shall be elective.") (emphasis added).

Article II, section 3, codifying separation of powers principles for the three branches of state government, enshrines that there are limitations on the "judicial power." In *League of Women Voters*, this Court held that "a legislative privilege exists in Florida, based on the principle of separation of powers codified in article II, section 3, of the Florida Constitution." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 143 (Fla. 2013).[6] This Court offered

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[6] In *Expedia*, the First District similarly reasoned that "[o]ur state government could not maintain the proper 'separation' required by Article II, section 3 if the judicial branch could compel" legislators to appear in court and to "explain why they voted a particular way or to describe their process of gathering information on a bill." *Fla. House*

several reasons to support its holding, including the protection of the integrity of the legislative process, and "protecting legislators 'from the burdens of forced participation in private litigation.'" *Id.* at 146 (quoting *Kerttula v. Abood*, 686 P.2d 1197, 1202 (Alaska 1984)).

Legislative immunity, like legislative privilege, is based upon separation of powers principles. In *League of Women Voters*, this Court reviewed the case law addressing both legislative immunity and legislative privilege and explained that "legislative privilege is derived from the principles underlying legislative immunity." 132 So. 3d at 147 n.11; *see also Expedia*, 85 So. 3d at 522–23 (explaining that legislative privilege and legislative immunity are "closely related" and based upon the same policy considerations).[7]

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of Representatives v. Expedia, Inc., 85 So. 3d 517, 524 (Fla. 1st DCA 2012).

[7] The First District took issue with Petitioners' reliance on *Expedia* because "preemption was not at issue" in that case and "the state's preemption authority eliminates [Petitioners'] privilege defense." *Weston*, 316 So.3d at 406. But the First District's assumption that preemption necessarily destroys the legislative immunity associated with local officials voting on ordinances finds no support in existing precedent. *See infra* at Section I.D. (discussing abrogation).

The First District's reliance on *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), to avoid the separation of powers implications of its ruling is misplaced. In *Locke*, the Court stated that Florida's Separation of Powers Provision "was not intended to apply to local governmental entities and officials." *Id.* at 36. That statement, however, is neither controlling nor applicable in this context.

The Court in *Locke* certainly did not address a claim of legislative immunity, and no local government or official was a party to that case. In *Locke*, the Court addressed the applicability of Florida public records laws to individual members of the House of the Florida Legislature. *Id.* at 33. The House of Representatives argued that the judiciary is without jurisdiction over the internal operating procedures of the Legislature. *Id.* at 34. As such, one of the issues before the Court was whether the separation of powers doctrine prohibited the judicial branch from construing Florida law to apply to the Legislature. *Id.* at 36.

In response to the House's argument, the Court held that it does not violate the separation of powers doctrine when it construes a statute that adversely affects either the executive or legislative branch. *Id.* The Court's statement regarding the application of the

Separation of Powers Provision to local governments was *obiter dictum*, however, because it was not essential to reach (or even relevant to) its holding.[8] *See State v. Johnson*, 295 So. 3d 710, 715 (Fla. 2020) (defining dicta). In the twenty-nine years since *Locke* was decided, and until the First District relied on it in this case, no Florida court had ever cited *Locke* for the proposition that the separation of powers principles in the Florida Constitution do not apply to local governments.

Nor did the dictum in *Locke* overrule *sub silentio* established precedent recognizing the application of separation of powers principles to local governments.[9] *E.g.*, *Everton v. Willard*, 426 So. 2d

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[8] Even if it were not *dictum*, the statement cannot be divorced from its context. The Florida Constitution enshrines the principle of access to public records, Art. I, § 24(a), Fla. Const., but *expressly* confers authority on the Legislature to create exemptions from public access, *id.* § 24 (c). In the context of interpreting Florida's public records laws, the Court may have concluded that legislative intrusion into local governmental affairs would not involve a separation of powers concern. Such legislative action would have a constitutional foundation. However, in the context of the local legislative function mandated by article VIII, there is no comparable authorization for the Legislature to carve out exceptions.

[9] *City of Miami v. McGrath*, 824 So. 2d 143, 152 (Fla. 2002) (noting the Florida Supreme Court does not overrule itself *sub silentio*).

996, 1001 (Fla. 1983) ("[T]here are areas inherent in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine.") (quoting *State v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982) (quoting *Comm. Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1019 (Fla. 1979)).

It is possible that the Court's observation in *Locke*, whether dictum or not, and whether it may be extended to this case or not, was merely a passing observation that article II, section 3 of the Florida Constitution is written in terms of the "branches" of the "*state* government." Art. II, § 3, Fla. Stat. (emphasis added). Undoubtedly, municipal and county governments are not one of the three *state* branches. But that acknowledgment does not end the inquiry. What decades of jurisprudence applying separation of powers principles to local governments demonstrates is that the separation of powers doctrine has implications not merely *between* the branches of state government, but *within* each one as well (especially when it comes to recognizing the limitations of judicial power).[10] *See City of West Palm*

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[10] *See* Neil Gorsuch, *A Republic, If You Can Keep It*, Crown Forum (September 10, 2019) ("The design of our founders doesn't just disperse power; *it also has implications for how power should be*

Beach v. Haver, No. SC20-1284, 2021 WL 4467768, *2 (Fla. Sept. 30, 2021) (rejecting that the judiciary may compel municipal code enforcement and approving the *result* in *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013)).[11]

In any event, legislative immunity necessarily flows from article VIII, which grants counties the authority to enact ordinances that are "not inconsistent with general [or special] law," Art. VIII, § 1(f)–(g), Fla. Const., and provides that municipalities "may exercise any power for municipal purposes *except as otherwise provided by law*," *id.* § 2(b) (emphasis added). The phrases "not inconsistent with general law" and "except as otherwise provided by law" are understood to authorize the Legislature to preempt substantive areas of law to the State.[12] *See generally Masone v. City of Aventura*, 147

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exercised in each branch. … The founding generation did not have the luxury of overlooking the importance of the separation of powers, but I sometimes wonder if we are at risk of forgetting or discounting it today.").

[11] The Court specifically declined to reach the "potentially complicated issues" surrounding *Detournay*'s reliance on the separation of powers doctrine. *Id.* at *6.

[12] Whether the Legislature has the authority to abolish a local government by statute is an open question that is not at issue in this

So. 3d 492 (Fla. 2014). Significantly, though, the constitutional provisions requiring local governing boards of elected officials, exercising legislative powers, do *not* contain similar limiting language. *See* Art. VIII, §§ 1(e), 2(b), Fla. Const. In other words, local elected bodies and their activities do not lose their legislative character simply because they enact local legislation later determined to be preempted. Article VIII of the Florida Constitution thus provides an independent, constitutional source of legislative immunity for local government officials.

C. The Penalty Provisions Violate the Elected Officials' Legislative Immunity.

Under the terms of the Preemption Statute, Florida courts are required to step outside of their constitutionally limited role of construing the applicability or validity of local government enactments. If a court determines that a violation of section 790.33(1) "was knowing and willful, the court *shall* assess a civil fine of up to $5,000 against the elected or appointed local government official," §

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case. In any event, no language in the Florida Constitution grants the Legislature the authority to introduce coercive measures into local legislative activities.

790.33(3)(c), Fla. Stat. (emphasis added), and public funds may not be used to defend or reimburse the official for the fees or costs of the lawsuit, *id.* § 790.33(3)(d). The Penalty Provisions thus violate the legislative immunity of local elected officials because they require the judicial branch to impose personal penalties against local government officials for performing purely legislative activities, including voting for an ordinance that is later found to be preempted, and to do so by inquiring into the motivations of local legislators.

For a court to determine whether a local legislator "knowingly and willfully" violated the statute, local legislators and their staff will be forced to defend themselves and "explain why they voted a particular way or to describe their process of gathering information on a [resolution or ordinance]," which are inquiries clearly outside the permitted parameters of judicial scrutiny. *Expedia*, 85 So. 3d at 524. In fact, as this Court in *City of Pompano Bch. v. Big Daddy's, Inc.*, 375 So. 2d 281 (Fla. 1979), held: "It is a fundamental tenet of municipal law that when a *municipal ordinance of legislative character* is challenged in court, the motives of the commission and the reasons before it which induced passage of the ordinance are irrelevant." *Id.* at 282 (emphasis added); *see also Rainbow Lighting,*

Inc. v. Chiles, 707 So. 2d 939, 940 (Fla. 3d DCA 1998) ("[T]he trial court was being requested to determine . . . that the City commissioners' votes were cast for some other motive. This determination neither the trial court (nor this Court) can make as the City commissioners' motives in adopting ordinances are not subject to judicial scrutiny.").

As the U.S. Supreme Court observed in *Tenney*, "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." 341 U.S. at 377. Allowing such judicial inquiries into legislative motives necessarily threatens the independence and integrity of the legislative process. A court's inquiry, mandated by the Penalty Provisions, will require an unprecedented spectacle where the judiciary must hale legislators into court to make factual findings about their state of mind and intent when they considered and voted on the subject legislation.

The First District erred in reversing the trial court's invalidation of the Penalty Provisions for violating the absolute legislative immunity of local elected officials. The Penalty Provisions are an

affront to Florida's established system of government because they intentionally create fear of outside interference into political matters of local concern and "undermine[] the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone*, 493 U.S. at 279. In fact, the record establishes that the mere existence of the Penalty Provisions has had a chilling effect on the exercise of local legislative functions throughout the state, including the enactment of regulations that arguably do *not* violate the Legislature's preemption of regulation of firearms and ammunition.[13] *See, e.g.,* R. 575–76.

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[13] For example, at least one government petitioner wishes to pass a local ordinance that would require gun dealers within city limits to report to local law enforcement if someone tries to buy a gun but fails a background check, so that the police can decide whether further investigation is warranted. R. 639–43. In fact, section 790.33(2) makes it clear that "local jurisdictions [are required] to enforce state firearms laws." § 790.33(2), Fla. Stat. Although the record reflects a belief on the part of these local elected officials that such an ordinance—aimed at assisting law enforcement in investigating and preventing potential criminal acts—would not be preempted, the possibility that they might be hauled into court, examined as to their motives and beliefs in passing the local law, and that a court might later disagree and financially penalize them personally has prevented these officials from acting. R. 628–33.

The First District's conclusion that the Penalty Provisions do not violate the Elected Officials' legislative immunity because local governments are subject to preemption is incorrect. In essence, the court held that the state judiciary has the constitutional authority to inquire into the state of mind of, and personally penalize, local legislators for their legislative activities, but not state legislators. Such a distinction lacks support in both history and reason.

The First District below cited to *League of Women Voters* to support its conclusion that inquiry into legislators' intent is permissible where "improper intent is a proper legal inquiry." *Weston*, 316 So. 3d at 406–07 (citing *League of Women Voters*, 132 So. 3d at 148)). But the court failed to distinguish that the inquiry into the legislators' intent in *League of Women Voters* was ostensibly compelled by a Florida *constitutional* provision, not a statute. 132 So. 3d at 148 (noting the action sought to "determine whether the Florida Legislature violated an *explicit constitutional provision* outlawing improper partisan and discriminatory *intent* in the redistricting process") (emphasis added). Weighing the privilege, grounded as it is in the separation of powers, against the constitutional prohibition against "improper partisan and discriminatory intent" in

redistricting, the Court concluded the former had to yield to the latter. *Id.* at 151–52. That situation does not exist here; there is no constitutional mandate requiring an inquiry into the Elected Officials' motivations in voting for certain ordinances.

In *Bogan*, Justice Thomas, writing for the Supreme Court, specifically explained that the "rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators." 523 U.S. at 52. "*Regardless of the level of government*," the Court held, "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Id.* at 53 (emphasis added). The Court thought this was particularly important to local legislators, "where the part-time citizen-legislator remains commonplace," because of the massive amount of "time and energy required to defend against a lawsuit" that would be required. *Id.* "[T]he threat of liability," the Court feared, "may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability." *Id.*; *see also Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009) ("In later decisions, the Court acknowledged that the legislative immunity federal and state legislators enjoy are

essentially coterminous."). Because these features arise from separation of powers principles inherent in the Florida Constitution, the immunity must apply to the Elected Officials in this case.

Additionally, this Court has explained that the "judicial power" set out in article V of the Florida Constitution does *not* include the authority to interfere with the legislative activities of local governments. *See Wallace v. Dean*, 3 So. 3d 1035, 1053–54 (Fla. 2009) (collecting cases and expressing concern that courts not become "entangled" in a "nonjusticiable political question that is more appropriately committed to the resolution of a coordinate or constituent *branch of government* (e.g., the Legislature, the executive branch, *or a county or municipality*)") (emphasis added).

Those activities are essentially nonjusticiable. *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla. 2d DCA 2005) ("[T]he limitation on the exercise of judicial power to the decision of justiciable controversies has been attributed to judicial adherence to the doctrine of separation of powers.") (citing *Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236 (Fla. 1953)). That concept of non-justiciability is the constitutional barrier that prevents judges, exercising their Article V authority, from re-writing local ordinances

(as opposed to merely determining their legality). *See Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) ("We find that it is impossible to preserve the constitutionality of the Tampa ordinance without effectively rewriting it, and we decline to 'legislate' in that fashion. Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments."); *Metro. Dade Cty. Fair Hous. & Emp't Appeals Bd. v. Sunrise Vill. Mobile Home Park, Inc.*, 511 So. 2d 962, 965 (Fla. 1987) ("Courts may not substitute their social and economic beliefs for the judgment of legislative bodies which are elected to pass laws . . . ."). Thus, Florida law establishes that, based on separation of powers principles, courts have no authority to interfere with local legislative bodies in the exercise of their legislative functions.[14]

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[14] Numerous courts outside of Florida have also upheld the same principle that the judicial power does not include the authority to influence, interfere with, or second-guess the legislative activities of local officials. *See, e.g.*, *Kawananakoa v. City & Cty. of Honolulu*, 413 P.3d 403, 404 (Haw. Ct. App. 2018) (rejecting argument that the political-question doctrine does not apply to the actions of the city's legislative and executive activities because they are not "co-equal" branches of government); *Steiner v. Superior Ct.*, 50 Cal. App. 4th 1771, 1785 (Ct. App. 1996) (stating that the principles "of the separation of powers doctrine regarding legislative acts apply to local government bodies, including boards of supervisors, when they act

Local governments, moreover, are subdivisions of the state that perform political functions independent from the judiciary. Although local governments are "controlled in part by legislative acts," *Locke*, 595 So. 2d at 36, this does not mean that the Legislature can ignore fundamental principles of government structure or trample on democracy at a local level. Petitioners are unaware of any Florida precedent authorizing the Legislature to confer by statute on the judiciary powers outside the confines of Article V. Although the *exercise* of home rule authority in certain areas can be circumscribed by the Legislature's authority to preempt to itself particular subject matters—thus allowing the judiciary to inquire into the validity of local legislation—the Legislature does *not* have the constitutional authority to reach down and strip away inherent legislative immunity from local, elected legislative bodies, by directing the judiciary to

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in a legislative capacity."); *Skokos v. Corradini*, 900 P.2d 539, 541 n.3 (Utah Ct. App. 1995) ("Municipalities, as political subdivisions of the state, are also subject to separation of powers notions in the context of their legislative/administrative operations and the state judiciary." (citation omitted)); *Bd. of Com'rs of Marion Cty. v. Jewett*, 184 Ind. 63, 110 N.E. 553, 556 (1915) ("The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction.").

inquire into local legislative motives. *See* Art. VIII, §§ 1(e), 2(b), Fla. Const.

The First District summarily rejected this argument without elaboration or citation to authority. *Weston*, 316 So. 3d at 407. Certainly, the Legislature can preempt substantive areas of law. But the Legislature cannot abrogate legislative immunity arising out of article VIII of the Florida Constitution. The First District's conclusion potentially leads to untenable results.

Presumably, the court did not mean by its ruling to suggest that the Legislature would be authorized through its preemption authority to enact a statute that prohibits local governments from enacting *any* legislation, thus preempting all subject matters to the Legislature. The possibility of such wholesale preemption, however, begs the question of how the Florida Constitution could mandate the existence of local legislative bodies without any legislative powers (and the corresponding legislative immunity that arises therefrom).

D. The Legislature Cannot Abrogate the Elected Officials' Legislative Immunity.

The State did not dispute below that the Penalty Provisions purport to create personal liability for actions taken within the sphere

of legislative activity. Neither did it dispute that the Penalty Provisions effectively require local "legislators . . . [to] submit to an inquisition conducted to ferret out evidence of an improper purpose in the legislative process." *League of Women Voters*, 132 So. 3d at 157 (Canady, J., dissenting). Rather, the State's sole argument in support of the Penalty Provisions is that local legislative immunity derives exclusively from general common law and that the Legislature abrogated that immunity when it enacted the Penalty Provisions. A.R. 361. The Court should reject that conclusion.

The constitutional mandate for local legislative bodies set out in article VIII alone defeats that conclusion. The Florida Constitution specifically contemplates that local governments shall be governed by elected bodies with legislative powers. The Legislature, then, cannot disregard that fundamental structure of local government through the enactment of a statute. The Legislature may, through preemption, be able to restrict local governments from legislating within a particular field, but the act of voting for legislation later found to be preempted remains a legislative act. The First District's conclusion otherwise, *Weston*, 316 So. 3d at 405–06, finds no support in the law. No Florida or federal court has ever held that the

legislative character of voting hinges on whether the result of the legislative process is ultimately upheld or invalidated, whether on preemption grounds or any other basis.

Indeed, the opposite is true. In *Tenney*, the U.S. Supreme Court, in discussing legislative immunity, held: "The claim of an *unworthy purpose does not destroy the [legislative] privilege*. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." 341 U.S. at 377 (emphasis added). The Court's prior holding "that it was not consonant with our scheme of government for a court to inquire into the motives of legislators . . . remained unquestioned." *Id.* Stated differently, it does not matter for purposes of applying legislative immunity that the legislative activity was engaged in for an improper or "unworthy" purpose. So long as the conduct is legislative in nature, the inquiry ends there.

The First District cited to *Florida Power Corp. v. Seminole Cty.*, 579 So. 2d 105 (Fla. 1991), in support of its contrary conclusion. *Weston*, 316 So. 3d at 405. *Florida Power*, however, merely stands for the unremarkable proposition that "cities and counties have no authority to act in areas that the legislature has preempted." 579 So.

2d at 107. Petitioners have never disputed that point. But *Florida Power* in no way stands for the proposition that individual legislators stop acting in a legislative capacity and lose legislative immunity if they vote for legislation later deemed to be preempted. Petitioners are unaware of any precedent holding that the existence of individual legislative immunity depends on whether the subject matter of local legislation is preempted. On the contrary, the very purpose of legislative immunity is "to protect the integrity of the legislative process by insuring the independence of *individual* legislators." *Brewster*, 408 U.S. at 507.

The First District also relied on *McNayr v. Kelly*, 184 So. 2d 428 (Fla. 1966), and only that decision, for the proposition that the Legislature may abrogate legislative immunity. *Weston*, 316 So. 3d at 407. *McNayr* does not stand for that proposition. At issue in that case was a defamation claim against a county manager and his immunity from liability. 184 So. 2d at 428–29. The *McNayr* Court noted "the difficulty of the question presented and the desirability—or practical necessity—of extending to the executive branch at *all levels* the same immunity that has for ages been accorded the legislative and judicial branches." *Id.* at 429–30 (emphasis added).

In *that* context, the Court—in dictum contained in a footnote—observed that the Legislature "could extend absolute immunity to certain high state, county or municipal officials or do away with *the* immunity altogether."[15] *Id.* at 430 n.6 (emphasis added). "The immunity" that may be "do[ne] away with" is not a reference to legislative immunity; rather, it is a reference to "whether executive officials of county government are absolutely privileged as to defamatory publications made in connection with their office." *Id.* at 429–30. Nothing regarding legislative immunity may be inferred from *McNayr*.

The trial court here correctly rejected Respondents' argument that the Legislature reigns supreme over established local governments, even in light of separation of powers principles, because the Legislature cannot change the fundamental aspects of separation of powers. R. 2009. As the trial court astutely explained, "Because local governments must have what amounts to small legislatures, and because courts cannot interfere in legislative

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[15] The First District inexplicably omitted the article "the" as a qualifier of "immunity" when quoting *McNayr*. *Weston*, 316 So. 3d at 405.

processes, neither this court, nor any other court in Florida, can enforce the civil penalty provisions of Section 790.33 against local legislators." *Id.*

For these reasons, the First District erred in concluding that the Penalty Provisions do not violate the doctrine of legislative immunity based upon the Florida Constitution.

II. THE FIRST DISTRICT INCORRECTLY HELD THAT THE PENALTY PROVISIONS DO NOT VIOLATE THE GOVERNMENTAL FUNCTION IMMUNITY OF LOCAL GOVERNMENTS.

The First District's conclusion that governmental function immunity is unavailable to Petitioners rests upon a flawed premise. The court concluded that because *any* consideration of possible local legislation touching upon issues addressed in section 790.33 is "by definition" a violation of the statute, *Weston*, 316 So. 3d at 405, no governmental function immunity could attach—regardless of whether the local government in good faith believed the proposed legislation was not preempted. This conclusion, however, ignores the Legislature's express acknowledgment that local governments *may*, in fact, legislate and regulate with respect to certain subject matters relating to firearms. *See* §§ 790.33(4)(a)–(c), Fla. Stat.

Moreover, because section 790.33 contains these enumerated exceptions to the Legislature's default preemption of firearms regulation, and also contains poorly worded and vague statutory definitions, genuine disagreements have arisen, and will continue to arise, at the local level regarding what is and is not preempted under section 790.33. *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504, 505–06 (Fla. 3d DCA 2002) (invalidating as preempted local regulation requiring locking devices after Florida's Attorney General opined to the contrary that the regulation was *not* preempted by section 790.33).[16] The process of determining what is and is not preempted remains, therefore, inherently discretionary.

While the First District focused considerably on (i) the supremacy of the Legislature to preempt local legislation (a point never disputed by Petitioners); and (ii) the ability of the Legislature to abolish local governments (something that has not occurred with respect to any Petitioner), no court has previously held that a local

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[16] Had the penalty provisions been in place when South Miami followed the advice of the Attorney General, at a minimum, the city could have been subjected to multiple lawsuits for damages and attorneys' fees by those claiming to be adversely affected by the local regulation later found to be preempted.

government could be subjected to financial liability simply because a court subsequently determines that enacted legislation is, in fact, preempted.

A. Governmental Function Immunity Generally.

In Florida, counties and municipalities have immunity for their planning level decisions because judicial interference with those decisions would require the judiciary to "second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine." *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985). "Accordingly, where governmental actions are deemed discretionary, as opposed to operational, the government has absolute immunity from suit." *City of Freeport v. Beach Comm. Bank*, 108 So. 3d 684 (Fla. 1st DCA 2013), *remanded on other grounds*, *Beach Comm. Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014). "Planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy." *Comm. Carrier*, 371 So. 2d at 1021.

Governmental function immunity is a distinct feature of sovereign immunity that cannot be waived by statute. *See Comm.*

Carrier, 371 So. 2d at 1021. Unlike general sovereign immunity, which is derived from the common law and codified by statute, *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005), governmental function immunity "derives entirely from the doctrine of separation of powers" as a limitation on judicial power. *Wallace*, 3 So. 3d at 1045; *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989); *see also City of Freeport*, 108 So. 3d at 690 (stating that the judiciary may not entangle itself in fundamental questions of policy and planning). This separation of powers principle is enshrined in the Florida Constitution, and the Legislature does not have the authority to undermine a constitutional provision through the enactment of a general law. *See State v. Raymond*, 906 So. 2d 1045, 1052 (Fla. 2005); *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 269 (Fla. 1991); *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 33 (Fla. 1st DCA 2008).

In this case, the State cannot plausibly contest the applicability of governmental function immunity to local governments. Indeed, Florida courts routinely apply the immunity to local governments based upon separation of powers principles. *See Trianon*, 468 So. 2d at 919; *Comm. Carrier*, 371 So. 2d at 1022; *Cauley*, 403 So. 2d at

386–87; *City of Freeport*, 150 So. 3d at 1114; *Carter*, 468 So. 2d at 956–57; *Miami-Dade Cty. v. Jones*, 232 So. 3d 1127, 1130 (Fla. 3d DCA 2017). Under Florida law, the decision to enact or enforce a regulation is a paradigmatic discretionary governmental function. *Trianon*, 468 So. 2d at 918.

These actions are "inherent in the act of governing" and cannot be performed by private individuals. *Id.* at 919–20. The decision to enact an ordinance obviously requires careful planning and judgment. *See* § 125.66, Fla. Stat. (county procedure); § 166.041, Fla. Stat. (municipal procedure). In fact, the decision to enact an ordinance is the creation of policy and thus cannot be operational. Likewise, a local government's discretionary choice to enforce laws, including the priority and manner of enforcement, is a planning-level, judgmental decision. *See Carter*, 468 So. 2d at 957; *Trianon*, 468 So. 2d at 919 ("How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care.").

B. The Penalty Provisions Conflict with Governmental Function Immunity.

Under section 790.33(3)(f), any person or organization may file suit against a local government for declaratory and injunctive relief *and* for damages based solely upon an allegation that the local government enacted a local ordinance or administrative rule or regulation impinging upon the Legislature's exclusive occupation of the field of regulation of firearms and ammunition.[17] § 790.33(3)(f), Fla. Stat. The statute provides that "[a] court *shall* award the prevailing plaintiff in any such suit" any actual damages up to $100,000, and reasonable attorney's fees and costs, including a contingency multiplier. *Id.* (emphasis added).

The existence of the damages provision in section 790.33 removes this case from the traditional framework governing legal challenges to arguably preempted laws. Although a court may determine at the outset whether the local regulation at issue falls within the ambit of the statutory prohibition and thus may result in

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[17] Petitioners do not dispute the right of adversely affected individuals to seek declaratory and injunctive relief with respect to the validity or invalidity of any local legislation. Petitioners' dispute is with the imposition of potential monetary liability.

a permissible declaration and injunction, in a suit for damages, the court (or a jury) would *also* have to determine whether damages are warranted.

Not only will this determination threaten the independence and integrity of local legislators, *see supra* at 13-17, it will also subject discretionary policy decisions to scrutiny by judge or jury as to the wisdom of their enactment. To determine whether the local government should be liable for damages, the court (or a jury) must determine whether the decision to enact or enforce a particular regulation should have been made in the first place, which is a quintessential political question that falls within the exclusive domain of the local governments. *See Comm. Carrier*, 371 So. 2d at 1019.

The State agreed below that section 790.33 did not (and could not) waive governmental function immunity because the doctrine is a "narrow exception" to the Legislature's general authority to waive sovereign immunity in article X, section 13. A.R. 349, 353. Notwithstanding the State's agreement on this point, the First District concluded the opposite, and found that because the

Legislature can waive sovereign immunity by statute, it may also waive governmental function immunity. *Weston*, 316 So. 3d at 405.

Aside from disregarding the agreement of the parties, the First District's determination ignores that the "narrow exception" to the Legislature's authority to waive immunity derives from the separation of powers doctrine, not the common law. As such, the Legislature cannot waive governmental function immunity by enacting a statute.

Instead, the State argued below—and the First District agreed—that governmental function immunity simply does not apply to the governmental action at issue. *See* A.R. 353. The First District incorrectly asserted that *any* action taken in a preempted field is not discretionary and thus may not be entitled to governmental function immunity. *Weston*, 316 So. 3d at 405. It held section 790.33 preempts the enactment or enforcement of firearms regulation, and thus no immunity exists. *Id.* at 406.

Section 790.33 obligates local governments to respect the substantive preemption, but it does not impose a ministerial duty on local governments or their officials that would foreclose all exercise of discretion. *See Shea v. Cochran*, 680 So. 2d 628, 629 (Fla. 4th DCA 1996) ("A duty or act is defined as ministerial when there is no room

for the exercise of discretion, and the performance being required is directed by law."). It merely declares a policy that the Legislature is occupying the field of regulation of firearms and ammunition and creates a private right of action if a local government enters that field. §§ 790.33(1), (3)(f), Fla. Stat. Notwithstanding section 790.33(1), local governments retain considerable authority and discretion to enact regulations that are related to firearms and ammunition, but that are not preempted.[18] As the trial court correctly found below, R. 2010–11, the mere possibility that local officials may ultimately be mistaken about the validity of the law does not transform their original planning-level, discretionary decision to enact the law into an "operational" act. *See Comm. Carrier*, 371 So. 2d at 1019 ("Public policy and maintenance of the integrity of our system of government

[18] For example, the statute itself provides exceptions for zoning ordinances that encompass firearms businesses and for regulations pertaining to the carrying of firearms and ammunition by an employee during and in the course of the employee's official duties. § 790.33(4), Fla. Stat. Additionally, local governments retain discretion to act in their proprietary capacity to limit gun shows in public venues, *Florida Gun Shows, Inc. v. City of Fort Lauderdale*, No. 18-62345-FAM, 2019 WL 2026496, at *2 (S.D. Fla. Feb. 19, 2019), to pass local business taxes that affect gunsmiths or gun dealers, *see* Op. Att'y Gen. Fla. 11–20 (2011), and to take many other actions that are arguably not preempted by the statute.

necessitate this immunity, however unwise, unpopular, mistaken or neglectful a particular decision or act might be.").[19]

The decision to enact a regulation is "discretionary" within the meaning of the governmental function immunity doctrine. This Court has "repeatedly recognized that a duty analysis is *conceptually distinct* from any later inquiry regarding whether the governmental entity remains sovereignly immune." *Wallace*, 3 So. 3d at 1044; *see also Kaisner*, 543 So. 2d at 737 ("[G]overnmental immunity derives entirely from the doctrine of separation of powers, not from a duty of care or from any statutory basis"). Thus, even "if a duty of care is owed, it must then be determined whether sovereign immunity bars an action for an alleged breach of that duty," and the Florida Supreme Court has determined that basic judgmental or

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[19] *See also Cent. Advert. Co. v. City of Novi*, 283 N.W.2d 730, 734 (Mich. Ct. App. 1979) ("[T]he mere fact that an ordinance has been invalidated does not strip the city of its mantle of governmental immunity."); *J. S. K. Enterprises, Inc. v. City of Lacey*, 493 P.2d 1015, 1015–16 (Wash. Ct. App. 1972) ("Public policy and good government require that a legislative body be free to enact good faith legislation without incurring tort liability, even though that legislation be subsequently held to be unconstitutional."). Both *Central Advertising* and *J. S. K. Enterprises* were cited with approval in *Trianon*. 468 So. 2d at 919.

discretionary governmental functions, including the enactment and enforcement of regulations, are immune from legal action. *See Pollock v. Fla. Dep't of Hwy. Patrol*, 882 So. 2d 928, 933 (Fla. 2004).

The First District, however, rejected this argument, concluding that because of the substantive preemption, local governments had no discretion whatsoever to act. But that analysis ignores that section 790.33(4) itself creates exceptions to the preemption. It also ignores that there may be other areas where the law might permit local government regulation without running afoul of the substantive preemption. *See supra* at n.18. In any event, a local government's effort to understand the parameters of the law and enact arguably permissible local legislation remains an inherently discretionary governmental function, even if at the end of the day, that legislation is deemed preempted. In such a scenario, while a plaintiff might be entitled to obtain declaratory and injunctive relief to invalidate the ordinance, he or she should not be entitled to financial damages and a mandatory award of fees simply for prevailing.[20] Such an

[20] If a local government's defense of an ordinance so clearly violates section 790.33 preemption, then a plaintiff challenging the validity of the ordinance would have a remedy for attorney's fees

entitlement runs afoul of *Trianon* and its many progeny, and therefore, conflicts with separation of powers principles by entangling the judiciary in political determinations of local governments.

The First District further attempted to distinguish cases like *Trianon*, *Commercial Carrier*, and *Wallace* by noting that those cases all involve tort claims. 316 So. 3d at 405. But that distinction is one without a difference. In enacting section 790.33(3)(f), the Legislature has effectively created a cause of action for tort liability.[21] It announces a duty of care—the duty to abide by the statutory preemption—owed to adversely affected individuals, but then seeks to impose financial liability solely based on a local government's exercise of inherently discretionary authority, namely, the enactment of local legislation.

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pursuant to section 57.105, Florida Statutes, without the need for the fee provision in section 790.33(3)(f). *See* § 57.105(1), Fla. Stat. (requiring an award of fees to the prevailing party if an asserted claim or defense was not supported by the materials fact or would not be supported by the application of then-existing law).

[21] The elements of an action in tort are (i) the existence of a duty of care owed by a defendant to the plaintiff, (ii) the breach thereof, (iii) injury to the plaintiff resulting from the breach, and (iv) damages as a result of that injury. *Barnett v. Dep't of Finan. Servs.*, 303 So. 3d 508, 513 (Fla. 2020).

The First District's categorical conclusion that "lack of discretion" automatically means that there is no governmental function immunity is counter to the four-part test announced in *Commercial Carrier*. This Court adopted that test "to assist in distinguishing between the discretionary planning or judgment phase, and the operational phase of government." *Trianon*, 468 So. 2d at 918; *Comm. Carrier*, 371 So. 2d at 1022. Specifically, this Court's inquiry focused on a group of four related questions:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Comm. Carrier, 371 So. 2d at 1019 (quoting *Evangelical United Brethren Church of Adna v. State*, 407 P.2d 440, 445 (1965)). "In applying this test to a particular set of circumstances, if all the questions can be answered in the affirmative, then the governmental conduct is discretionary and 'nontortious.'" *Trianon*, 468 So. 2d at

918. However, "[i]f one or more questions call for a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved."[22] *Id.* at 918–19.

If the four-part *Commercial Carrier* test had been correctly applied to this case, it would have supported the trial court's reasoning as to why the Penalty Provisions violate governmental function immunity. The State below did not dispute that the first three questions can be clearly and unequivocally answered in the affirmative.[23] *See* A.R. 356. The only remaining question, therefore, is whether local governments "possess the requisite constitutional,

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[22] Because the First District did not mention this four-part test, it did not engage in any "further inquiry," as directed by this Court. Even outside the confines of the test, the enactment of regulations by local governments is a core governmental function that has *always* been recognized as "discretionary." *See Comm. Carrier*, 371 So. 2d at 1015–16 ("Immunity was always deemed to have existed for legislative, quasi-legislative, judicial and quasi-judicial acts of municipalities."). However, since the First District appears to have focused *solely* on the fourth factor in the test, Petitioners examine the test in greater detail.

[23] The decision to enact or enforce local legislation necessarily involves a basic governmental policy, is essential to the realization or accomplishment of that policy, and requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental entity involved.

statutory, or lawful authority and duty to" make the decision to enact or enforce regulations that are subsequently found to be preempted. *See Comm. Carrier*, 371 So. 2d at 1019.

In *Department of Health & Rehabilitative Services v. Yamuni*, 529 So. 2d 258 (Fla. 1988), this Court explained that "[q]uestion number four has limited value under Florida's statutory waiver of immunity because the answer will almost invariably be *yes* unless the government employees, officers, or agents are acting without authority outside the scope of their office or employment." *Id.* at 260 n.1 (emphasis added). In *Wallace*, for example, the Court found that "the Sheriff has the unquestioned authority to respond to 911 calls within his jurisdiction," even though the actions of his deputies were allegedly improper and decidedly operational. 3 So. 3d at 1054.

Here, local governments clearly have the general authority to enact and enforce regulations in Florida. *See* Art. VIII, §§ 1–2, Fla. Const.; §§ 125.66, 166.021, Fla. Stat. Moreover, when local elected officials vote for legislation from the dais, they are clearly acting

within the scope of their employment at that time.[24] *See, e.g., Hennagan v. Dep't of Highway Safety & Motor Vehicles*, 467 So. 2d 748, 751 (Fla. 1st DCA 1985) ("Conduct is within the scope of employment if it occurs substantially within authorized time and space limits, and it is activated at least in part by a purpose to serve the master."). Thus, applying *Commercial Carrier*, all four questions strongly indicate that the decision to enact or enforce a regulation, including those subsequently determined to be preempted, are discretionary governmental functions. *See Yamuni*, 529 So. 2d at 260 n.1.

The First District's conclusion to the contrary conflates the discretionary authority to enact or enforce legislation with the validity of the legislation, itself. This is particularly true given that section 790.33(4) expressly authorizes local regulation under specific circumstances. § 790.33(4), Fla. Stat. Under the First District's reasoning, if a local government regulation is ultimately found to be preempted, then the local government never had the discretionary

[24] If they were not, then the local government would be immune from suit for a different reason. *See Wallace*, 3 So. 3d at 1054 n.27.

authority to enact or enforce the regulation in the first place. This puts the proverbial cart before the horse. To determine whether a government is acting within the scope of its discretionary authority, "[t]he inquiry is not whether it was within the [government's] authority to commit the allegedly illegal act." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1282 (11th Cir. 1998) (considering issue in the context of government official's exercise of discretionary authority). "Framed that way, the inquiry is no more than an 'untenable' tautology." *Id.* Contrary to the Court's explanation in *Yamuni*, the answer to the fourth question in the test will always be "no" if the question presupposes that the challenged conduct was unlawful.

In the First District's view, whether a lawmaker has the discretion to take an action in the first instance is decided retroactively by a court. Respectfully, that position is logically inconsistent and, if accepted, would effectively render the fourth-factor inquiry meaningless. In a different context, it would mean that a police officer does not have the discretionary authority to arrest a suspect if the arrest is subsequently found to lack probable cause. But, even if the arrest is an operational act for other reasons, it does

not follow that the government actor did not possess the basic authority to make the arrest. *See, e.g.*, *McGhee v. Volusia Cty.*, 679 So. 2d 729, 732 (Fla. 1996) ("The officer's misconduct, though illegal, clearly was accomplished through an abuse of power lawfully vested in the officer, not an unlawful usurpation of power the officer did not rightfully possess."); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004) (rejecting the misconception that "violating someone's constitutional rights is never a legitimate job-related function or within the scope of a government official's authority or power").

Emphasizing the hierarchical relationship between the state and local governments—as the First District did, *Weston*, 316 So. 3d at 404—to suggest that local governments may frustrate the Legislature's ability to set policies for the state does not resolve the issue. Instead, as the trial court expressly acknowledged, the Legislature maintains the ability to preempt local governments from regulating the field of firearms and ammunition and left that portion of the statute in place. R. 2006. The Legislature clearly retains the ability to set policies for the state and to prevent local governments, through traditional declaratory and injunctive remedies, from

entering fields of regulation that are reserved exclusively to the Legislature.

The trial court's ruling, then, did not render the statute "toothless." A.R. 366. It did not materially affect the Legislature's policy objectives; as the State recognized, A.R. 349, the order left citizens free to seek declaratory and injunctive relief against measures believed to be preempted. The trial court merely applied the well-established principle that local governments cannot be punished financially simply for making a mistake in the ordinary course of their discretionary governmental functions. R. 2010.

Doing so, it found, would violate the constitutional doctrine of separation of powers as to constituent local government's legislative decisions. *See* R. 2010. The First District's rejection of the trial court's ruling defeats important public policies of this state because the trial court's ruling is faithful to "[t]he cornerstone of American democracy," *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004), protects the public treasury, and promotes the maintenance of the orderly administration of local governments, *see Trianon*, 468 So. 2d at 922–23 (stating that substantial encroachments on the public treasury would "inevitably restrict the development of new programs,

projects, and policies and would decrease governmental regulation intended to protect the public and enhance the public welfare"); *State Rd. Dep't v. Tharp*, 1 So. 2d 868, 869 (Fla. 1941) ("If the [government] could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked."). Accordingly, the First District's decision should be reversed and the trial court's judgment reinstated.

CONCLUSION

Because Petitioners are entitled to legislative immunity and government function immunity, Petitioners respectfully request that the Court quash the decision of the First District Court of Appeal.

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I certify that a copy of this brief on jurisdiction was filed and served via the E-Portal on November 15, 2021, on the individuals listed in the accompanying service list.

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