CASE NOS. SC21-917, SC21-918
(Consolidation Pending)
L.T. CASE NO. 1D19-2819

In the Supreme Court of Florida

NICOLE "NIKKI" FRIED, COMMISSIONER OF AGRICULTURE AND CONSUMER SERVICES and CITY OF WESTON, et al.,

Petitioners,

v.

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

Respondents.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' JOINT BRIEF ON JURISDICTION

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INTRODUCTION

Florida courts have repeatedly held that local legislators and governments are entitled, under the Florida Constitution, to traditional legislative and governmental immunities that limit the Legislature's authority to punish local lawmaking. The First District's decision ("Decision"), which upholds the penalties contained in sections 790.33(3) and 790.335(4)(c), Florida Statutes ("Penalty Provisions"), cannot be reconciled with precedents recognizing these immunities. It also threatens fundamental principles of representative democracy enshrined in the Florida Constitution. Without these immunities, the risk of a subsequent, adverse judicial determination of preemption will chill the ability of local governments and their respective officials to fashion laws they reasonably believe are both necessary to protect public health and safety and not preempted.

In its validation of the Penalty Provisions, the Decision expressly and directly conflicts with precedents of this Court and other district courts of appeal. Moreover, the Decision is particularly concerning because there have been genuine disagreements and confusion as to

what is and is not preempted under section 790.33, Florida Statutes ("Preemption Law").[1]

STATEMENT OF THE ISSUES

This appeal presents the following issues: (1) whether local legislators' historically-recognized legislative immunity for purely legislative activities may be stripped away by virtue of the State's preemption of an area of law, without violating separation of powers principles; and (2) whether the discretionary function immunity enjoyed by local governments and long recognized by this Court may be vitiated by state statute, without violating separation of powers principles. In addition, should this Court grant review, Petitioners will ask the Court to consider and reconcile the U.S. Supreme Court's

[1] For example, the City of South Miami enacted a gun-locking device ordinance that the Attorney General had opined was not preempted, but was later invalidated as violating the Preemption Law. *See Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504, 505–06 (Fla. 3d DCA 2002). Had the Penalty Provisions been in effect then, the city and the legislators who voted for the bill could have been, respectively, liable for substantial damages and potentially fined. Conversely, Broward County delayed enacting an ordinance requiring documentation of compliance with criminal records history because the State insisted such an ordinance was preempted. The trial court in this case, though, declared such an ordinance *not* preempted, a ruling Respondents did not appeal.

determination as to local legislative immunity in *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998).

STATEMENT OF THE CASE AND FACTS

Petitioners—consisting of 30 municipalities, 3 counties, more than 59 elected officials, and one private citizen—commenced the consolidated actions below seeking a declaration that the Penalty Provisions are invalid and unconstitutional on various grounds.[2] Those provisions provide that local elected officials who vote for a regulation that is subsequently deemed preempted could, upon a judicial inquiry into their motivations, be subjected to a $5,000 fine and be personally responsible for their legal defense costs and fines. § 790.33(3)(c)-(d), Fla. Stat. The provisions also provide that passage of a local law later found to be preempted could subject the enacting jurisdiction to damages of up to $100,000 per plaintiff, plus attorney's fees, irrespective of its good faith belief in the law's validity or the opinion of counsel. § 790.33(3)(f), Fla. Stat. Additionally, section 790.335(4)(c) would allow a $5 million fine against a local

[2] The more than 90 petitioners are identified in the notices to invoke filed on June 16, 2021. Florida Commissioner of Agriculture and Consumer Services, Nicole "Nikki" Fried, became a petitioner after *supporting* the trial court's ruling before the First District.

government for knowingly maintaining a list, record, or registry of firearms or their owners.

Following cross-motions for summary judgment, the trial court found the Penalty Provisions violated the doctrines of legislative and discretionary function immunity. Defendants—except Commissioner Fried (who has joined this brief)—appealed, but did not challenge three rulings adverse to them, including a declaration that certain proposed measures Petitioners wished to take are not preempted and that the gubernatorial removal power under section 790.33(3)(e) is invalid.

The First District reversed, holding "that neither discretionary-function nor legislative immunity shields local governments and officials from the challenged statutes" and "that these statutes are valid and enforceable." A. 21. Petitioners' motion for certification was denied on May 17, 2021, and Petitioners timely filed their notices to invoke this Court's jurisdiction on June 16, 2021.

JURISDICTION

This Court has discretionary jurisdiction to review a decision of a district court of appeal that, as here, expressly declares a state statute valid and that expressly and directly conflicts with the

decisions of other district courts of appeals and of the Florida Supreme Court on the same question of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(i), (iv).

ARGUMENT

The Decision conflicts with this Court's precedents recognizing that the separation of powers doctrine proscribes judicial interference with (i) purely legislative activities and legislative motivations, and (ii) local discretionary governmental actions, such as enacting or enforcing ordinances that local governments and their officials believe are permissible. The Decision, which strips local officials and governments of immunities, prevents local governments from functioning properly and has grave consequences for local governments and elected officials throughout the state.

I. THE DECISION'S FAILURE TO APPLY SEPARATION OF POWERS PRINCIPLES CONFLICTS WITH PRECEDENT.

Once the Legislature has created a local government, art. VIII, §§ 1, 2, Fla. Const., the Florida Constitution mandates that it have a legislative body comprised of elected officials. *Id.* at §§ 1(e), (g), 2(b). Because local governments and local elected officials are afforded the same immunities for their legislative activities as the State

Legislature and its legislators, upholding the delegation of authority to the judiciary to question and punish local legislative motivations violates this constitutional mandate.

This Court has held that article II, section 3, of the Florida Constitution immunizes legislators for their purely legislative, discretionary actions. *See League of Women Voters of Fla. v. Fla. House of Reps.*, 132 So. 3d 135, 143 (Fla. 2013).[3] Similarly, because local governments are also exercising legislative power, this Court has held 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, e.g.*, *Wallace v. Dean*, 3 So. 3d 1035, 1047, 1053–54 (Fla. 2009) (collecting cases).[4]

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[3] While not germane to the conflict analysis, the First District reached a similar conclusion in *Fla. House of Reps. v. Expedia, Inc.*, 85 So. 3d 517, 524 (Fla. 1st DCA 2012).

[4] The Decision misconstrues and expands the significance of the statement in *Locke v. Hawkes* that Florida's separation of powers provision "was not intended to apply to local governmental entities and officials." 595 So. 2d 32, 36 (Fla. 1992). That case involved a question of whether the judiciary could order the Legislature to produce records under the public records act. The application of the separation of powers doctrine to local governments or local elected officials was not at issue.

The Decision contradicts precedent and eschews this constitutional non-interference principle by upholding a statute that mandates judicial intrusion into an inherently political process. It does so by creating a cause of action against local governments that enact laws later found to have run afoul of the Preemption Law and by imposing fines on local elected officials based on an inquiry into their motivations.

II. THE DECISION'S FAILURE TO RECOGNIZE THAT LEGISLATIVE IMMUNITY APPLIES TO LOCAL LEGISLATORS CONFLICTS WITH PRECEDENT.

In holding that local officials are not protected by legislative immunity, the Decision conflicts with other Florida Supreme Court and district court cases that find that legislative immunity and legislative privilege are protected by Florida's constitutional separation of powers. *See League of Women Voters*, 132 So. 3d at 144–46.[5]

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[5] *League of Women Voters* addressed legislative privilege, which is "closely related" to legislative immunity and based upon the same policy considerations. In fact, "legislative privilege is derived from the principles underlying legislative immunity." 132 So. 3d at 147 n.11.

The concept that legislative immunity protects local legislators only against "traditional tort liability" (App. 16) conflicts with multiple district court of appeal decisions.[6] For example, the Fourth District Court of Appeal has held that local officials are immune not just from tort liability but "from civil suits for their acts done within the sphere of legislative activity." *City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co.*, 942 So. 2d 455, 456–57 (Fla. 4th DCA 2006). In a non-tort breach of contract case, the Second District Court of Appeal unequivocally held that city council members "enjoy absolute immunity in civil rights actions when acting in a legislative capacity." *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 740 (Fla. 2d DCA 1989). Most recently, the Third District Court of Appeal held in a case involving statutory and non-tort claims that a local legislator "enjoy[s] absolute legislative immunity when acting in a legislative capacity." *Carollo v. Platinum Advisors, LLC*, 46 Fla. L. Weekly D632 (Fla. 3d DCA Mar. 24, 2021). *See also McNayr v. Kelly*, 184 So. 2d 428, 430

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[6] The United States Supreme Court also has concluded that "[t]he rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators." *Bogan v. Scott -Harris*, 523 U.S. 44, 52 (1998). The First District ignored *Bogan*.

(Fla. 1966) (noting "absolute immunity" for defamatory statements "extends to county and municipal officials in legislative … activities").

The Decision disregards how inquiring into local elected officials' motivations violates legislative immunity because it authorizes the judiciary's interference with the purely legislative activities of local elected officials. *Cf. Rainbow Lighting, Inc. v. Chiles*, 707 So. 2d 939, 940 (Fla. 3d DCA 1998) ("This determination neither the trial court (not this Court) can make as the City commissioners' motives in adopting ordinances are not subject to judicial scrutiny.").

The foregoing cases support the broader proposition that courts cannot punish local elected officials for voting in favor of an ordinance subsequently deemed to be preempted by inquiring into the motivations of the legislators to determine whether a violation of the preemption was "knowing and willful." *See* § 790.33(3)(c)-(d), Fla. Stat.

III. THE DECISION'S FAILURE TO RECOGNIZE THAT DISCRETIONARY FUNCTION IMMUNITY APPLIES TO LOCAL GOVERNMENTS CONFLICTS WITH PRECEDENT.

Whether an act is discretionary and protected by discretionary function immunity turns on the nature of the act and whether it involved policy-making and planning—not on whether a particular

act is ultimately determined to be preempted. *See Wallace*, 3 So. 3d at 1053. The Decision conflicts with precedents of this Court and the other district courts of appeal by erroneously focusing on Petitioners' "attempt to invoke immunity" as "a direct violation of state preemption" instead of asking whether the act of legislating is a discretionary act. A. 19.

Other Supreme Court and district court of appeal decisions recognize that enacting an ordinance or regulation is a discretionary, planning-level act. *See, e.g., Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) (holding judicial interference with planning level 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"); *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.... The judicial branch should not trespass into [this] decisional process."); *Detournay v. City of Coral Gables*, 127 So. 3d 869, 873 (Fla. 3d DCA 2013) ("[U]nder the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of

government absent a violation of constitutional or statutory rights."). Enactment cannot be a basis for liability—"however unwise, unpopular, mistaken, or neglectful a particular decision … might be." *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1019 (Fla. 1979).

Rather than ask whether the act is a discretionary, planning level function, the Decision incorrectly looks only to whether the legislative act implicates preemption, which is not the appropriate test. Even if a court were to later find that a preempted ordinance had been enacted, governmental immunity would apply to that discretionary act. This Court has noted that a city would have immunity in connection with enacting or enforcing even an unconstitutional ordinance. *Elrod v. City of Daytona Beach*, 180 So. 378, 380 (Fla. 1938). The Decision conflicts with that precedent.

Were the First District's interpretation the correct rule, a state law penalizing local action in preempted areas would prevent local governments from taking *any* action, even in adjacent, non-preempted fields, for fear of financial or professional ruin. By ruling that no act can be discretionary if it *implicates* preemption, the Decision conflicts with *Trianon Park* and *Carter* .

Moreover, even if voting on or enacting local ordinances were not quintessentially discretionary, this Court has indicated that the proper analysis to distinguish between discretionary and non-discretionary functions is a four-part test. *See Trianon*, 468 So. 2d at 919. But the Decision considers only one prong of this test and applies that prong in a manner that conflicts with other precedent.

First, it neglects to address whether the act: (1) involves a "basic governmental policy, program, or objective"; (2) is "essential to the realization or accomplishment of that policy, program, or objective"; or (3) requires "the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved." *Id.* at 918. Second, the Decision addresses only whether the government agency possessed the authority to do the challenged act—the factor which has been framed by this Court as having "limited value." *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So. 2d 258, 260 (Fla. 1988). The Decision then misapplies that factor by conflating the general *authority* to act (*i.e.*, local governments' authority to enact legislation) with the *validity* of the actions taken—which it presupposes are violations of the Preemption Law and thus unlawful.

CONCLUSION

The Decision, by ruling that arguably non-preempted actions are not protected by legislative or discretionary function immunity if a court *subsequently* determines the act to be preempted, would dramatically expand the authority of the judiciary to interfere with local legislative functions. The Decision will have significant adverse effects on local governance and democracy. This is particularly concerning as the Legislature has shown an increasing propensity to enact new state preemptions. Because the Decision conflicts with decisions of this Court and other district courts of appeal on the applicability of discretionary function and legislative immunity, and in light of the urgent, statewide importance of this issue, Petitioners respectfully request that review be granted.

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I certify that a copy of this brief on jurisdiction was filed and served via the E-Portal on June 25, 2021, on the individuals listed in the accompanying service list.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(A) and consists of 2,422 words.

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