Case Nos. SC21-917, SC21-918 (consolidated)

In the Supreme Court of Florida

NICOLE "NIKKI" FRIED ET AL.,
Petitioners,

v.

STATE OF FLORIDA ET AL.,
Respondents.

On Petition for Discretionary Review from the
First District Court of Appeal
DCA No. 1D19-2819

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

1. Article II, Section 3 of the Florida Constitution requires the separation of powers among the three co-equal branches of "the state government." *See* Art. II, § 3, Fla. Const. In *League of Women Voters of Florida v. Florida House of Representatives*, this Court held that Article II, Section 3 "codified" the doctrine of legislative privilege for members of the Florida Legislature. 132 So. 3d 135, 143 (Fla. 2013). The question is whether that provision clothes local officials with immunity from suit for actions taken in a legislative capacity.

2. This Court has held that "certain [quasi-legislative] policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." *Wallace v. Dean*, 3 So. 3d 1035, 1053 (Fla. 2009) (quoting *Com. Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1020 (Fla. 1979)). The question is whether the Legislature may subject local governments to liability for violating a statutory prohibition of conduct that would otherwise be discretionary.

TABLE OF CONTENTS

STATEMENT OF THE ISSUES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iiii

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 4

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL. 5

CONCLUSION 11

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Cases

Bifulco v. Patient Bus. & Fin. Servs., Inc.,
39 So. 3d 1255 (Fla. 2010) 6

Bogan v. Scott-Harris,
523 U.S. 44 (1998) 5, 6

City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co.,
942 So. 2d 455 (Fla. 4th DCA 2006) 7

Com. Carrier Corp. v. Indian River Cnty.,
371 So. 2d 1010 (Fla. 1979) ..... i, 8

Elrod v. City of Daytona Beach,
180 So. 378 (1938) 10

League of Women Voters of Fla. v. Fla. House of Representatives,
132 So. 3d 135 (Fla. 2013) ..... i, 7

Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency,
440 U.S. 391 (1979) 6

Locke v. Hawkes,
595 So. 2d 32 (Fla. 1992) 4, 7

Maggio v. Fla. Dep't of Labor & Emp. Sec.,
899 So. 2d 1074 (Fla. 2005) 6

Masone v. City of Aventura,
147 So. 3d 492 (Fla. 2014) 5

McNayr v. Kelly,
184 So. 2d 428 (Fla. 1966) 6

Metro. Dade Cnty. v. Chase Fed. Hous. Corp.,
737 So. 2d 494 (Fla. 1999) 1, 10

Tenney v. Brandhove,
341 U.S. 367 (1951) 6

Trianon Park Condo. Ass'n, Inc. v. City of Hialeah,
468 So. 2d 912 (Fla. 1985) 9

Wallace v. Dean,
3 So. 3d 1035 (Fla. 2009) ..... i, 8

Statutes and Constitutional Provisions

Art. II, § 3, Fla. Const ..... passim

Art. V, § 3, Fla. Const 4

Art. VIII, § 1, Fla. Const 1, 10

Art. VIII, § 2, Fla. Const 1, 10

§ 790.33, Fla. Stat ..... passim

§ 790.335, Fla. Stat 3, 9

STATEMENT OF THE CASE AND FACTS

The Florida Constitution expressly grants the Legislature plenary authority over the State's local governments, which have only those "powers of local self-government not inconsistent with general law." Art. VIII, § 1(g), Fla. Const. (counties); *id.* § 2(b) (municipalities). As this Court has explained, if the rule were otherwise, the State's "political subdivisions would have the power to frustrate the ability of the Legislature to set policies for the state." *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

The Legislature has exercised its power to preempt local regulation in several fields, including—since 1987—"the whole field of regulation of firearms and ammunition." § 790.33(1), Fla. Stat. By 2011, the Legislature became concerned that the traditional remedies available in the event of a violation—declaratory and injunctive relief—were insufficient "to deter and prevent the violation of [the preemption] and the violation of rights protected under the constitution and laws of this state related to firearms." *Id.* § 790.33(2)(b) (as amended in 2011). The Legislature therefore amended the statute to provide in subsection (3)(a) that:

Any person, county, agency, municipality, district, or

> other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein.

§ 790.33(3)(a), Fla. Stat.

Subsections (3)(c) through (3)(f) create penalties for the violation of subsection (3)(a), some of which may be imposed against local government entities and others of which may be imposed against local officials. Subsection (3)(f) creates a private right of action that adversely affected citizens and organizations may bring against local government entities for actual damages suffered (up to $100,000), as well as legal fees and costs. § 790.33(3)(f), Fla. Stat. As for local officials, "knowing and willful" enactment of a preempted firearms regulation may result in a "civil fine of up to $5,000." *Id.* § 790.33(3)(c). The Legislature further determined that "public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated this section." *Id.* § 790.33(3)(d).

In the wake of the tragic shooting at Marjory Stoneman Douglas High School in February 2018, officials at all levels of government

worked together to enact the Marjory Stoneman Douglas High School Public Safety Act—comprehensive firearms legislation that the Attorney General has successfully defended in state and federal court. Unsatisfied with that legislation, Petitioners challenged Section 790.33's penalty provisions in an effort to avoid liability for stricter rules they sought to adopt at the local level.[1] Petitioners also challenged Section 790.335(4)(c), Florida Statutes, which subjects local government entities to a substantial civil fine if they keep "any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms." § 790.335(2), Fla. Stat.

The trial court invalided the challenged provisions on the grounds that (1) the penalties against local officials violate their legislative immunity and (2) the penalties against local government

[1] In their Jurisdictional Brief, Petitioners claim that they seek "to fashion laws they reasonably believe are both necessary to protect public health and safety and not preempted." Pet. Br. at 1. But most of the proposed ordinances they identified during the trial court proceedings were clearly preempted, such as "regulation of firearms 'components' and 'accessories'" like rifle stocks and large-capacity magazines, R.2019, regulation of firearms on local government property, R.2018, and establishment of gun-free zones, *id.* The trial court ruled that such ordinances would be preempted, and Petitioners did not appeal that ruling. *See* Pet. Br. at 4.

entities violate their immunity for discretionary government functions. The First District reversed, rejecting Petitioners' government-function immunity claim because that doctrine "protects only lawful and authorized planning-level activity" and "the actions penalized in the challenged statutes are, by definition, violations of statutes." App'x at 17. Accordingly, "[t]he Florida Legislature is authorized to prescribe penalties for violations" of those statutes "and the judicial branch can (and must) enforce them." *Id.* The court likewise rejected Petitioners' claim that Article II, Section 3 clothes local officials with legislative immunity, as that provision "was not intended to apply to local governmental entities and officials, such as those identified in articles VIII and IX and controlled in part by legislative acts." App'x at 18-19 (citing *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992)).

ARGUMENT

This Court has jurisdiction because the decision below "expressly declares valid a state statute." Art. V, § 3(b)(3), Fla. Const. The decision below, however, is both entirely correct and fully consistent with the decisions of this Court and the other District Courts of Appeal. The Court should therefore deny discretionary

review.

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL.

A. Legislative Immunity

In the decision below, the First District upheld statutory penalties for local officials who flout the Legislature's preemption of local laws respecting firearms and ammunition. That decision is correct and consistent with both precedent and the text and structure of the Florida Constitution, which "establishes the constitutional superiority of the Legislature's power over [local] power." *Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014).

Petitioners contend that the First District's decision is inconsistent with the doctrine of "legislative immunity." Pet. Br. at 5-9. But "legislative immunity," as it applies to local officials, is at most a common law default rule that the Legislature may abrogate, as it has validly done here. The U.S. Supreme Court's decision in *Bogan v. Scott-Harris*, on which Petitioners rely, *see* Pet. Br. at 2-3, confirms the point. In *Bogan*, the Court held that local officials acting in a legislative capacity "were entitled to absolute immunity from suit" under 42 U.S.C. § 1983 because they had such immunity "at

common law and Congress did not intend the general language of § 1983" to change that tradition. 523 U.S. 44, 49 (1998). Nothing in *Bogan* suggests a constitutional basis for the immunity.[2] And because legislative immunity is a common law doctrine, the First District was faithful to this Court's precedents in concluding that the Legislature was free to "do away with the immunity altogether." *McNayr v. Kelly*, 184 So. 2d 428, 430 n.6 (Fla. 1966). The Legislature did so by creating penalties expressly applicable to any "person" who violates the preemption by "enacting" a local firearms regulation. § 790.33(3)(a), Fla. Stat.[3]

Petitioners also argue that the First District's decision conflicts

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[2] While the Speech and Debate Clause of the United States Constitution confers legislative immunity on U.S. Senators and members of Congress, *see Tenney v. Brandhove*, 341 U.S. 367, 373-76 (1951), the immunity enjoyed by local officials is derived from the common law, *see Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403 (1979).

[3] *See Bifulco v. Patient Bus. & Fin. Servs., Inc.*, 39 So. 3d 1255, 1257 (Fla. 2010) (explaining that, by identifying "the State" as an "employer" under Florida's workers' compensation regime, the Legislature waived "sovereign immunity for workers' compensation retaliation claims when the State and its subdivisions are acting as employers"); *Maggio v. Fla. Dep't of Labor & Emp. Sec.*, 899 So. 2d 1074, 1078-79, 1081 (Fla. 2005) (explaining that the inclusion of the State as an "employer" subject to liability under the Florida Civil Rights Act was "a waiver of sovereign immunity").

with *League of Women Voters of Florida v. Florida House of Representatives*, which held that Article II, Section 3 of the Florida Constitution clothes members of the Legislature with a qualified legislative privilege. 132 So. 3d 135, 143 (Fla. 2013). As the First District concluded, however, a qualified privilege is a far cry from absolute immunity to suit, which this Court has never expressly recognized for legislators at any level. App'x at 18. In any event, Article II, Section 3 "was not intended to apply to local governmental entities and officials, such as those identified in articles VIII and IX and controlled in part by legislative acts." App'x at 18-19 (citing *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992)). None of the cases cited by Petitioners concludes otherwise. Those cases merely apply common law legislative immunity where (unlike here) the Legislature left the immunity intact. *See* Pet. Br. at 8.[4] The First District's decision is fully consistent with those precedents.

[4] The Fourth District has cited *Tenney*, in *dicta*, for the proposition that "[s]tate and local officials are immune 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). The question at issue there—whether Article II, Section 3 "supports recognition of a legislative testimonial privilege"—was presented prematurely, so the court declined to address it. *Id.* at 457.

B. Government-Function Immunity

Petitioners claim that they are entitled to government-function immunity under this Court's precedents and that, accordingly, Section 790.33(3)(f) is invalid, simply because adopting a local regulation involves "policy-making and planning." Pet. Br. at 9. That is incorrect.

Properly understood, government-function immunity is a separation of powers doctrine borne out of recognition that the judicial branch may not engage in policymaking. The doctrine therefore asks not whether local governments are "entitled" to protection, Pet. Br. at 1, but whether adjudication of a particular case would require the judiciary to engage in policymaking.

As this Court has explained, the basis for the immunity is that, in "a tort action alleging that careless conduct contributed to the governmental decision" regarding a "discretionary function," "the question of tort liability will . . . entangle the Court in a nonjusticiable political question" that "fall[s] within the exclusive domain of the legislative and executive branches." *Wallace v. Dean*, 3 So. 3d 1035, 1053-54 (Fla. 2009) (citing *Com. Carrier Corp. v. Indian River Cnty.*,

371 So. 2d 1010, 1019-21 (Fla. 1979)). In other words, the courts cannot adjudicate such tort suits without "second guess[ing] the political and police power decisions of the other branches of government," which "would violate the separation of powers doctrine." *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985). That is so, however, only "absent a violation of constitutional or statutory rights." *Id.* Where, as here, a plaintiff's claim against a governmental entity is premised on a statutory violation, there is no separation of powers issue. The court need only enforce the Legislature's policy determination, not make policy in the first instance.[5]

Petitioners offer no basis in the text or history of the Florida Constitution why it would exceed the scope of the judicial power for courts to enforce a statutory restriction on local government authority by way of penalties duly enacted by the Legislature. Nor do they explain how their position is consistent with Florida's

[5] Plaintiffs claim that Section 790.335(4)(c) is invalid under the same doctrine, and that claim fails for the same reason. Section 790.335(4)(c) prohibits the governmental conduct in question, so the courts need only enforce that policy judgment.

government structure, which subjects local governments to plenary legislative control. *See* Art. VIII, § 1(g), Fla. Const. (counties); *id.* § 2(b), Fla. Const. (municipalities). Penalties, including financial penalties, are the traditional mechanisms by which the State enforces compliance with rules, and Petitioners offer no reason why "political subdivisions" should uniquely "have the power to frustrate the ability of the Legislature to set policies for the state." *Metro. Dade Cnty.*, 737 So. 2d at 504.

Unsurprisingly, Petitioners have identified no case holding that courts exceed their authority by enforcing a duly enacted statute that restricts local government power. Petitioners point instead to cases "recogniz[ing] that enacting an ordinance or regulation is a discretionary, planning-level act." Pet. Br. at 10. But those cases are inapposite because they do not involve an ordinance or regulation the enactment of which violates state law.[6] Accordingly, the First

[6] Petitioners claim that the First District's decision conflicts with *Elrod v. City of Daytona Beach*, which holds that a city is "not liable for injuries resulting from the enforcement of [an unconstitutional] ordinance." 180 So. 378, 380 (1938). But the basis for that decision was the city's "performance of a governmental function *delegated by the Legislature*." *Id.* at 381 (emphasis added). Here, by contrast, local governments seek to act in violation of state law.

District's decision is consistent with this Court's government-function immunity precedents.[7]

CONCLUSION

This Court should deny review.

[7] In *City of West Palm Beach v. Haver*, the State submitted an amicus brief urging the Court to "take this opportunity to clarify what Article II, Section 3's text makes plain—that it does not apply to local governments." Brief of Amicus Curiae the State of Florida, No. SC20-1284, at 2 (Dec. 10, 2020). Here, as in *Haver*, Petitioners advance a separation of powers argument that is divorced from the text, structure, and history of the Florida Constitution and depends entirely on imprecise language from *Commercial Carrier Corp.* and its progeny. The Court may wish to defer its decision on jurisdiction in this case pending resolution of *Haver* and grant review here if it does not clarify the separation of powers doctrine there.

Dated: August 2, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 2216 words.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was furnished via the e-Filing Portal to the attorneys identified in the following service list on this **second** day of August 2021.

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