IN THE SUPREME COURT OF FLORIDA

Case Nos. SC21-917 & 918
L.T. Case No. 1D19-2819

NICOLE "NIKKI" FRIED, ET AL.

Petitioners,

v.

STATE OF FLORIDA, ET AL.

Respondents.

BRIEF OF AMICI CURIAE FLORIDA LEAGUE OF CITIES AND FLORIDA ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

Michael Spellman
FBN 0937975
Sniffen & Spellman, P.A.
123 North Monroe Street
Tallahassee, FL 32301
Tel: (850) 205-1996
Fax: (850) 205-3004

Kraig Conn
FBN 793264
Rebecca O'Hara
FBN 15792
Florida League of Cities, Inc.
Post Office Box 1757
Tallahassee, FL 32302
Tel: (850) 222-9684
Fax: (850) 222-3806

Edward G. Labrador
FBN 0821233
Florida Association of Counties
100 South Monroe Street
Tallahassee, FL 32301
Tel: (850) 922-4300
Fax: (850) 488-7501

Attorneys for Amici Curiae
Florida League of Cities and the Florida Association of Counties

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STATEMENT OF INTEREST

The Florida League of Cities (the "League") is a voice for Florida's municipal governments. It serves Florida's cities and promotes local self-government in the state. The League was founded on the belief that self-government is the keystone of American democracy. The League represents more than 400 cities, towns and villages in Florida.

The Florida Association of Counties ("FAC") is a state-wide association and not-for profit corporation organized and existing under Chapter 617 of the Florida Statutes for the purpose of representing county government in the State of Florida and protecting, promoting, and improving the mutual interests of all counties in the state. Among the express purposes for which FAC was organized is to defend the rights of county government under any constitutional provision and statute. Each of Florida's 67 counties is a member of FAC.

The League and FAC and their respective memberships have a direct interest in the outcome of this matter, given that it has the potential to impact judicially-recognized immunities supported by the greater weight of historical judgment, sound public policy and the fundamental doctrine of separation of powers embodied in the Florida Constitution. A decision by this Court that countenances the First

District Court of Appeal's holding that the penalty provisions of section 790.33, Florida Statutes, are constitutional, threatens democracy in municipalities and counties statewide and impermissibly erodes the power of Florida local governmental entities.

SUMMARY OF THE ARGUMENT

Historical, structural, and public policy reasons justify the legislative and governmental function immunities. Of course, the state legislature has the power and authority to preempt local government control by general law, but the penalty provisions in section 790.33 do more than that. The Florida Legislature has chosen not just to preempt local government regulation and provide a mechanism to enjoin the enforcement of preempted regulations, it also has imposed civil penalties on any person, including an elected official, who violates the preemption law. The penalties for knowing and willful violations include civil fines against individual officials and a prohibition on the use of public funds to defend officials subject to suit.

In a representative government, which the Florida Constitution requires of local governmental entities, unrestrained and unhindered lawmaking is vital to effectuating the voice of the people through their elected officials. The penalty provisions of section 790.33 take an

unprecedented swipe at the ability of local government officials to effectuate the will of their constituents. The consequence of the penalty provisions is to eradicate centuries of history and tradition guaranteeing the immunities afforded to legislators at every level of government and create *ex ante* incentives for elected officials to refrain from doing that which they were elected to do and which the Florida Constitution calls on them to do: legislate.

The trial court correctly found that the attempt to abridge the legislative and government function immunities by the Florida Legislature through the enactment of the penalty provisions of section 790.33 was unconstitutional. The First District Court of Appeal's finding otherwise is simply out of step with not only the greater weight of the law, as argued by the Petitioners, but also with the historical and public policy foundation of the important immunities central to this case.

ARGUMENT

I. THE HISTORY OF THE DEVELOPMENT OF THE IMMUNITIES AT PLAY SUPPORT QUASHING THE FIRST DISTRICT'S DECISION.

The historical foundations of the doctrine of legislative immunity highlight its importance to legislators and the political process.

Legislative immunity is not a concept unique to this country, but rather finds its origins dating back to sixteenth century England. Its importance to the democratic growth of England and the United States cannot be overstated.

The seminal United States Supreme Court decision in Tenney v. Brandhove explored the historical foundations of legislative immunity. 341 U.S. 367, 372 (1951). There, the Supreme Court explained that the origins of the doctrine stemmed from the Parliamentary struggles to gain independence from the English Crown during the sixteenth and seventeenth centuries. Id. at 372.

Two cases epitomize the struggle in England for the recognition of this right: those of Richard Strode and Sir John Eliot. See J. Robert Robertson, The Effects of Consent Decrees on Local Legislative Immunity, 56 U. Chi. L. Rev. 1121, 1125-26 (1989). In the early sixteenth century, Richard Strode, a Member of the House of Commons, was convicted and imprisoned for merely proposing legislation. See id. (citing Barnett Cocks, ed, Erskine May's Treatise on The Law, Privileges Proceedings and Usage of Parliament at 49-50 (Butterworth, 17th ed 1964); 4 Henry 8 c 8 (1512).). The English Parliament overturned Strode's conviction under the rationale that its

members had immunity "for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament." See id. at 1125, citing Cocks, at 49-50.

Another English statesman, Sir John Eliot, met a different fate. Sir Eliot was imprisoned by King Charles I for advancing the rights of Parliament as a body independent from the Crown. Eliot languished and eventually perished in prison after the Crown charged him for a speech he made protesting the imposition of "tonnage and poundage without grant of Parliament." See id. at 1126 (citing Harold Hulme, The Life of Sir John Eliot 1592 to 1632: Struggle for Parliamentary Freedom 226-64, 312 (George Allen & Unwin Ltd, 1957); Proceedings against Sir John Elliot, 3 Howell's St Trials at 293-294 (KB 1629)). The Court of the King's Bench convicted Sir Eliot; his defense was that "these offenses are supposed to be done in parliament, and ought not to be punished in this court, or in any other, but in parliament." See id. (citing 3 Howell's St Trials at 294; Hulme, The Life of Sir John Eliot at 316-38). Eliot's objective in his opposition was to defend the independence of the House of Commons from the Crown's influence and as he explained in his "Apologie for Socrates," his positions were taken "for fear of the public privilege and prejudice, not in jealousy of

himself, that [he] exposed his fortune and his person to preserve the right of the Senate." See id. at 1127 (citing Sir John Eliot, Apologie for Socrates 15, reprinted in 3 Old South Leaflets No 59 (Directors of the Old South Work, 1896)).

Ultimately, the English Parliament enacted resolutions that cemented its immunity from the Crown. This included recognition by the House of Commons in 1667 that members of Parliament are protected "for and touching any bills, speaking, reasoning, or declaring of any ... matters, in and concerning the parliament." 3 Howell's St Trials at 314-315; see also Tenney, 341 U.S. at 372. In 1689, the English Bill of Rights declared: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." Tenney, 341 U.S. at 372 (citations omitted).

The Framers of the US Constitution, no doubt cognizant of the struggles of English lawmakers, also adopted legislative immunity as "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." Id. at 372-373. As the Supreme Court held, the doctrine of legislative immunity is deeply rooted in our history and

is necessary to the efficient operation of a democratic form of government. Id. at 376. Indeed, the doctrine of legislative immunity was written into the Articles of Confederation and later into the Constitution. Id. at 372-373.

This history demonstrates that legislative immunity is necessary to enable and encourage representatives to act on behalf of the public at large without fear of civil or criminal prosecution. See Tenney, 341 U.S. at 377. As the Supreme Court described in Tenney:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they 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.

Id. at 377.

Based on these same considerations and rationales, the Supreme Court has extended legislative immunity to regional legislators and local governmental officials. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405-406 (1979) (extending legislative immunity to regional legislators); Bogan v. Scott–Harris, 523 U.S. 44, 49 (1998) (extending legislative immunity to local government

legislators). These cases have held that legislators, including local legislators, are entitled to absolute legislative immunity for all actions taken within the "sphere of legitimate legislative activity." Bogan, 523 U.S. at 49 (quoting Tenney, 341 U.S. at 376).

Florida courts have similarly recognized immunity for legislative acts, as well as the related government function immunity that provides protection to local governments when governmental actors perform discretionary governmental functions. These immunities are related to and encompass the privilege from testifying afforded by Florida courts when legislators are called to testify regarding actions taken in the course of their legislative duties. Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517, 524 (Fla. 1st DCA 2012). These privileges, as applied to local governments, inure to local legislators by virtue of the Florida Constitution, which has a specific provision concerning the separation of powers between governmental branches and specific provisions requiring local governments to be a representative form of government with elected officials.

The penalty provisions in section 790.33 disregard these constitutional provisions and the long history and tradition of legislative immunity in this country and in our state by imposing

significant penalties on the very act of legislating. Worse still, the penalty provisions prohibit the use of public funds to represent the government official that allegedly enacted or enforced a preempted regulation if that conduct is found to be "knowing and willful." Those types of regulations that could potentially be preempted are described in the statute in a general way, with open-ended language. Local government legislators, when faced with any arguably preempted regulation, will surely be cognizant of this potential threat. That cognizance will undoubtedly interfere with the obligations of elected officials to represent their constituents and threaten the very form of representative democracy of local governments embodied in the Florida Constitution.

In a representative government the elected legislature is the public voice. The Federalist No. 10 (James Madison) (J. Cooke ed. 1961). This is especially true where constituents are closer to their elected officials. Alexander Hamilton explained this in Federalist 17:

> It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards

> the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter.

The Federalist No. 17 (Alexander Hamilton) (J. Cooke ed. 1961). This closeness is best embodied in the relationship between local government officials and their constituents.

Speech, debate, and lawmaking must be left unrestrained by punitive threats to the lives and livelihood of local government officials for the public voice to be carried out, and for the benefits of representative government to be realized. History and tradition provide the foundation for the immunities unlawfully stripped away by the penalty provisions of section 790.33. Local legislators represent the most immediate embodiment of the political will of the people. Therefore, historical precedent supports that they be shielded from personal liability for fulfilling a function the Founding Fathers recognized to be central to American democracy.

II. THE LEGISLATIVE AND GOVERNMENTAL FUNCTION IMMUNITIES ARE VITAL TO LOCAL GOVERNMENT DEMOCRATIC PROCESS.

Strong public policy rationales also counsel against a finding that the penalty provisions are constitutional. If this Court holds that the purely punitive penalty provisions of section 790.33, Florida Statutes,

are constitutional and that legislative and governmental function immunity do not shield local government lawmakers from liability and exposure, the will of the people through elected local government officials will be thwarted.

Clearly, the penalty provisions create perverse pecuniary disincentives to local government officials doing the job they are elected to do, which is to govern in accordance with the will of their constituents. The provisions of section 790.33 subject local government officials to fines that will deter elected officials from considering and implementing any regulation, ordinance or code that even arguably touches upon subject areas preempted by the statute. The record on appeal contains ample support for this fact.

United States Supreme Court jurisprudence recognizes this dilemma. The absence of immunity for legislators creates a fear of personal liability and restricts the exercise of legislative discretion. See Spallone v. United States, 493 U.S. 265, 279 (1990) (noting that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"). As the Supreme Court has also noted, these rationales are even more heightened at the local government level.

Bogan, 523 U.S. at 52-53. Indeed, "the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator is common." Id. at 52. Further, "the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability." Id. (citation omitted). Finally, and as previously explained, legislators at the local level are often more accountable and more closely responsible to the electorate. Id. at 53.

Analysis of trends related to constitutional takings litigation involving local governments provides some useful context for the analysis of the effects of the penalty provisions on local government officials' actions, given that such litigation is not covered by insurance in most every state. In this realm, local governmental action is discouraged to avoid even meritless litigation for which there is no insurance coverage. Christopher Serkin, Insuring Takings Claims, 111 Nw. U. L. Rev. 75, 78–79 (2016). This is true even if the regulation will have positive effects and the likelihood of litigation is remote. Id. Some local governments that self-insure might be willing to take on the risk of litigation, but smaller governments may not want to do so. See id. at

79; see also Christopher Serkin, Big Differences for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. REV. 1624, 1668 (2006) ("Government risk aversion therefore correlates more to the size than to the wealth of the tax base, and it is inversely related to the number of taxpayers over whom the risk is spread.").

Here though, these disincentives for local elected officials to abstain from voting on or proposing regulations that are not preempted, but could be challenged as such, are even more pronounced and of a different nature. This is because the preemption statute's penalty provisions expressly subject individual local government elected officials to personal liability. This is especially chilling for local elected officials who, as the Supreme Court noted, typically receive modest compensation for their work and serve on a part-time basis. See Cities 101 -- Council Powers, National League of Cities <https://www.nlc.org/resource/cities-101-council-powers> (last visited January 2, 2020). As noted by one scholar, these punitive preemptive provisions are so chilling because they have the effect of dissuading a legislator from supporting legislation even if he or she does not believe that legislation to be preempted. See Richard

Briffault, The Challenge of the New Preemption, 70 Stan. L. Rev. 1995, 2022–23 (2018). This is a chilling effect that the legislative immunities at issue were meant to address and which the trial court correctly held were unconstitutionally abridged by section 790.33.

Ultimately, the penalty provisions draw a very hazy line in the sand for local government officials to toe. If that line is breached, though, the consequences are severe. The penalty provisions are simply not warranted to effectuate the preemption of local governmental action in this field and they erode the will of the people, as expressed through their elected local representatives. A finding by this Court that the penalty provisions in the statute are constitutional would allow these perverse disincentives to stand and undermine representative democracy.

CONCLUSION

For the reasons cited herein, the League and FAC urge this Court to quash the decision of the First District Court of Appeal.

Respectfully submitted this 24th day of November 2021.

/s/ Michael P. Spellman
MICHAEL P. SPELLMAN
Florida Bar No.: 0937975
SNIFFEN & SPELLMAN, P.A.
123 N. Monroe Street
Tallahassee, Florida 32301
Tel: (850) 205-1996
Fax: (850) 205-3004
mspellman@sniffenlaw.com

KRAIG CONN
Florida Bar No.: 793264
REBECCA O'HARA
Florida Bar No.: 15792
FLORIDA LEAGUE OF CITIES, INC.
Post Office Box 1757
Tallahassee, Florida 32302
Tel: (850) 222-9684
Fax: (850) 222-3806
kconn@flcities.com
rohara@flcities.com

EDWARD G. LABRADOR
Florida Bar No.: 0821233
FLORIDA ASSOCIATION OF COUNTIES
100 South Monroe Street
Tallahassee, FL 32301
Tel: (850) 922-4300
Fax: (850) 488-7501
elabrador@fl-counties.com

Counsel for the Florida League of Cities and the Florida Association of Counties

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November 2021, a true and correct copy of the foregoing has been electronically filed with the Supreme Court of Florida via Florida Courts E-Filing Portal which will serve it via transmission of Notices of Electronic Filing generated by the ePortal System on counsel of record on the Service List below.

SERVICE LIST

Amit Agarwal Amit.agarwal@myfloridalegal.com Daniel W. Bell Daniel.Bell@myfloridalegal.com James H. Percival James.percival@myfloridalegal.com Jenna.Hodges@myfloridalegal.com Jennifer.Bruce@myfloridalegal.com Office of the Attorney General The Capitol, PL-01 Tallahassee, FL 32399 *Counsel for the State of Florida, the Attorney General, the Commissioner of Agriculture, and the FDLE Commissioner*	Colleen Ernst Colleen.ernst@eog.myflorida.com Nicholas A. Primrose Nicholas.primrose@eog.myflorida.com John MacIver John.maciver@eog.myflorida.com James Uthmeier James.uthmeier@eog.myflorida.com Executive Office of the Governor PL-05, The Capitol Tallahassee, FL 32399 *Counsel for Governor Ron DeSantis*

Genevieve Hall Genevieve.hall@FDACS.gov Steven Hall Steven.hall@freshfromflorida.com Florida Department of Agriculture and Consumer Services The Capitol 400 South Monroe Street, PL-10 Tallahassee, FL 32399 *Counsel for Commissioner Nicole "Nikki" Fried*	*Edward G. Guedes (FBN 768103)* *Jamie A. Cole (FBN 767573)* *Weiss Serota Helfman Cole & Bierman, P.L.* *2525Ponce de Leon Blvd. Ste. 700* *Coral Gables, Florida 33134* *Telephone: (305) 854-0800* *eguedes@wsh-law.com* *jcole@wsh-law.com* *Counsel for the Weston, Miramar, Pompano Beach, Pinecrest, South Miami, Miami Gardens, Cutler Bay, Lauderhill, Boca Raton, Surfside, Tallahassee, North Miami, Orlando, Fort Lauderdale, Gainesville, St. Petersburg, Maitland, Key Biscayne, Turkel, West Palm Beach, North Miami Beach, Safety Harbor, Village of Palmetto Bay, Dunedin, and Riviera Beach Plaintiffs*
Abigail G. Corbett acorbett@stearnsweaver.com Veronica L. De Zayas vdezayas@stearnsweaver.com Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. 150 West Flagler St. Suite 2200 Miami, FL 33130 *Counsel for the City of Coral Gables*	Clifford B. Shepard cshepard@shepardfirm.com Shepard, Smith, Kohlmyer & Hand, P.A. 2300 Maitland Center Parkway Suite 100 Maitland, FL 32751 *Co-Counsel for the City of Maitland*

Dexter W. Lehtinen dwlehtinen@aol.com Claudio Riedi criedi@Lehtinen-Schultz.com Asalmon@Lehtinen-Schultz.com LEHTINEN SCHULTZ, PLLC 1111 Brickell Avenue Suite 2200 Miami, FL 33131 *General Counsel for Village of Palmetto Bay*	Jacqueline M. Kovilaritch eservice@stpete.org Jacqueline.kovilaritch@stpete.org Joseph P. Patner joseph.patner@stpete.org Office of the City Attorney for the City of St. Petersburg P.O. Box 2842 St. Petersburg, FL 33731 *Co-Counsel for City of St. Petersburg*
Andrew J. Meyers ameyers@broward.org René D. Harrod rharrod@broward.org Nathaniel A. Klitsberg nklitsberg@broward.org Joseph K. Jarone jkjarone@broward.org Broward County Attorney 115 S. Andrews Ave. Suite 423 Fort Lauderdale, FL 33301 *Counsel for Broward County, Vice- Mayor Michael Udine, and Commissioners Mark D. Bogen, Dale V.C. Holness, Nan H. Rich, and Beam Furr*	Altanese Phenelus Altanese.phenelus@miamidade.gov Shanika A. Graves sgraves@miamidade.gov Angela F. Benjamin Angela.benjamin@miamidade.gov Abigail Price Williams, Miami Dade County Attorney Stephen P. Clark Center Suite 2810111 NW 1st Street Miami, FL 33128 *Counsel for Miami-Dade County, Members of the Miami Dade County Board of County Commissioners, and Mayor of Miami-Dade County*

Herbert W.A. Thiele countyattorney@leoncountyfl.gov Lashawn Riggans riggansl@leoncountyfl.gov tsonose@leoncountyfl.gov 301 South Monroe Street Ste. 202 Tallahassee, FL 32301 *Counsel for Leon County, Florida*	John B. Thompson (Pro Se) amendmentone@comcast.net 5721 Riviera Drive Coral Gables, FL 33146
Aleksandr Boksner AleksandrBoksnerEservice@miam ibeachfl.gov Raul J. Aguila, City Attorney City of Miami Beach 1700 Convention Ctr. Dr., 4th Fl. Miami Beach, FL 33139 *Counsel for the Miami Beach Plaintiffs*	Brook Dooley David J. Rosen drosen@keker.com Andrew S. Bruns Keker, Van Nest & Peters LLP 633 Battery Street San Francisco, CA 94111 *Counsel for Giffords Law Center to Prevent Gun Violence*

Michael Cardozo mcardozo@proskauer.com Chantel L. Febus cfebus@proskauer.com Matthew Triggs mtriggs@proskauer.com florida.litigation@proskauer.com Proskauer Rose LLP One Boca Place 2255 Glades Rd., Suite 421 Atrium Boca Raton, FL 33431 Eric A. Tirschwell etirschwell@everytown.org Everytown Law 450 Lexington Ave, #4184 New York, NY 10017 *Counsel for Dan Daley, Frank C. Ortis, Rebecca A. Tooley, Justin Flippen, City of Coral Springs, City of Pembroke Pines, City of Coconut Creek, and City of Wilton Manors*	Philip R. Stein pstein@bilzin.com Kenneth Duvall kduvall@bilzin.com Ilana Drescher idrescher@bilzin.com Bilzin Sumberg Baena Price & Axelrod, LLP 1450 Brickell Avenue, Suite 2300 Miami, Florida 33131 *Counsel for Amici Curiae League of Women Voters of Florida, Giffords Law Center to Prevent Gun Violence Brady, and Equality Florida Institute, Inc.*
Davis Cooper pdcooper@cooperkirk.com J. Joel Alicea Cooper & Kirk, PLLC 1523 New Hampshire Ave., N.W. Washington, D.C. 20036 *Counsel for Amicus Curiae National Rifle Association of America, Inc.*	

/s/ Michael P. Spellman
MICHAEL P. SPELLMAN

CERTIFICATE OF FONT AND FORMATTING COMPLIANCE AND COMPLIANCE WITH WORD COUNT LIMITATIONS

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/s/ Michael P. Spellman
MICHAEL P. SPELLMAN