IN THE SUPREME COURT OF FLORIDA

CITY OF WESTON, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.
_____/

Nos. SC 21-917 & 918
(consolidated)

DCA No. 1D19-2819

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

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

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ARGUMENT

I. INTRODUCTION

The First District Court of Appeals improperly overturned the decision made by Leon County's Circuit Court of the Second Judicial District. The Circuit Court had struck down the civil penalty provisions of Section 790.33, Florida Statutes, for violating the Florida Constitution because of reasons set forth by the Petitioners. *Amici* submit this brief not to support a particular policy outcome, but to highlight for this Court the implications of punitive preemption provisions—those that not only block

or nullify local measures but also impose harsh penalties on elected officials and localities that propose or enact laws that might be preempted—on local authority in Florida writ large. The punitive provisions at issue here would create personal civil liability for local legislators who enact a preempted ordinance, deny them the ability to use public funds to defend the enactment of said ordinance, and subject them to removal from office by the Governor. Fla. Stat. § 790.33(3)(c)-(e). While the subject matter of this case happens to involve gun regulations, the First District's holding opens the door to the Florida Legislature's use of punitive preemption on a variety of other topics.

Specifically, *Amici* argue that the punitive provisions of Section 790.33 undermine the Florida Constitution's broad grant of home rule to Florida localities by chilling localities from exercising legislative authority, limiting localities' ability to express policy preferences through local legislation, and making it more difficult for localities to defend their local enactments in court. Ultimately, *Amici* contend that the punitive provisions of Section 790.33, if upheld, will silence local voices and deprive local governments of their authority to engage in local democracy and policymaking without threat of state reprisal.

These punitive measures are so radical that, according to *Amici's* research, the State is asking this Court to make an unprecedented ruling: no other court in the country has ever validated the imposition of personal liability on local legislators simply because they passed a preempted law. As a matter of judicial restraint, this Court should refrain from becoming the first such court.

The First District wholly failed to engage with the foregoing arguments, stating that these considerations "are factors for the Legislature alone to evaluate and resolve." *State v. City of Weston*, 316 So. 3d 398, 408 n.2 (Fla. 1st DCA 2021). But *Amici* are not simply contending that the Legislature's policy here is "unnecessary or unwise." *Id*. Rather, punitive preemption is inconsistent with the Florida Constitution, and no statute—wise or unwise—is allowed to violate the Constitution. It is this Court's duty (not the Legislature's) to review statutes for fidelity to the Constitution and, when necessary, strike down unconstitutional laws. Deferring to the State Legislature concerning questions about home rule powers would put the proverbial fox in charge of the hen house, empowering the State to completely abrogate local autonomy.

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

The punitive provisions of Section 790.33 should be struck down not because they privilege any particular policy outcome, but because they undermine the Florida Constitution's broad protections for local government found in the 1968 Home Rule Amendment. Where the Florida Constitution's Home Rule Amendment granted broad policymaking initiative powers to the State's local governments, punitive preemption provisions like those at issue would chill the *valid exercise* of those local powers. That is, given the harsh penalties and significant litigation risk created by Section 790.33, many local elected officials may be—and indeed, have stated that they are—reluctant to endorse or enact regulations that *may* be prohibited under state law, even if those regulations are in fact lawful. Moreover, the punitive provisions of Section 790.33 would, as a whole, narrow the scope of local authority that the Florida Constitution has guaranteed to local governments since 1968.

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

The 1968 Home Rule Amendment to the Florida Constitution, Fla. Const. Art. VIII, § 2(b), fundamentally altered Florida's state-local relationship=. The Amendment established broad home rule authority for

local governments in the State and narrowed the State Legislature's role in local decision-making. As shown below, decades of decisions by this Court have recognized and protected the Florida Constitution's broad grant of power to localities. This Court should not allow the punitive provisions at issue in this case to subvert the balance of power enshrined in Article VIII, Section 2.

Prior to the 1968 revision to the Florida Constitution, the State operated under what is known as "Dillon's Rule."[1] Under Dillon's Rule, localities could only exercise powers that were specifically granted to them by the State, and such grants were strictly and narrowly construed.[2] Beginning in the late nineteenth century, however, many states began to recognize the value of municipal government initiative and flexibility in responding to local problems. Rejecting Dillon's Rule, state constitutions increasingly granted localities home rule powers that enabled them to respond to their own needs

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

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

and priorities without state interference.[3] Under home rule, localities were generally given a broad grant of power, and it was presumed that local regulations were a valid exercise of that power. By the middle of the twentieth century, most states had adopted some version of home rule.[4]

In 1968, Florida joined the national movement towards home rule, amending the Florida Constitution to grant municipalities the authority to "exercise any power for municipal purposes except as otherwise provided by law." Fla. Const., Art. VIII, § 2(b). With the State's grant of broad power to municipalities, localities were released from the need to obtain specific State authorization for each regulatory initiative they sought, and were instead freed to engage in substantive local policymaking on their own. This grant of home rule authority to municipalities demonstrated a recognition that communities across the State vary widely in terms of their geographic, demographic, and economic make up, and that localities should have the flexibility to tailor local policies to their particular situations. Indeed, the push for home rule in Florida was triggered by the post-World War II growth in

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[3] *See, e.g.*, National League of Cities, Cities 101 – Delegation of Power, https://www.nlc.org/resource/cities-101-delegation-of-power (last viewed Nov. 14, 2021).

[4] *See* Rick Su, *Intrastate Federalism*, 19 U. Pa. J. Const. L. 191, 235 (2016).

population in the State and the increasingly complex and localized problems for which a statewide solution would not be appropriate. *See Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 2002).

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

(clarifying that the Home Rule Amendment sought to allow municipalities to enact regulations "unless otherwise *limited* by law," as opposed to only when "those powers [are] expressly *granted* by law") (emphasis in original); *State v. City of Sunrise*, 354 So.2d 1206, 1209 (Fla. 1978) (noting that, since the only state constitutional limitation on municipal home rule authority is that it be exercised for a "valid municipal purpose" and that "[i]t would follow that municipalities are not dependent upon the Legislature for further authorization" to enact particular statutes).

It is clear from the history and text of the 1968 Home Rule Amendment that the Florida Constitution granted localities broad legislative powers. While the Legislature certainly has the authority to simply preempt local measures, subject to other provisions of the Florida Constitution, it should not be allowed to wield the specter of such egregious *punitive* preemption to completely undermine the grant of powers to localities enshrined in the Constitution.

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

By imposing onerous penalties on cities and local officials that enact ordinances ultimately found to be preempted, punitive preemption

overbroadly chills even *valid* exercises of local authority, limits local governments' ability to use the local democratic process to express policy preferences, and makes it more difficult for local governments and their officials to assert their home rule rights and defend their local policies in court.

The punitive provisions of Section 790.33 would personally fine legislators who enact a preempted ordinance, deny them the ability to use public funds to defend the enactment of said ordinance, and subject them to removal from office by the Governor. Fla. Stat. § 790.33(3)(c)-(e). Together, they make the valid exercise of local legislative powers granted under the Florida Constitution's Home Rule Amendment a highly risky endeavor. A local legislator, particularly one without significant personal wealth, will have to weigh the potential personal, financial ramifications of every vote exercising legislative discretion that could run counter to the State's preemption. It is reasonable and foreseeable that local officials operating under Section 790.33's punitive provisions will hesitate to enact any ordinances that *might* be preempted, even if they believe in good faith that those ordinances are not, in fact, preempted by state law. *See* Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 Geo. L.J. 1469, 1494 (2018) (noting that punitive

preemption "statutes try to dissuade cities from exercising their policymaking authority in the first place"). In this case, Petitioners have, in fact, stated that they "wish to enact numerous safety measures that they believe are not preempted . . . [but] have not voted on or enacted such restrictions . . . because they fear such actions could . . . subject[] them to the severe punishments of [Section 790.33]." Appellee's Answer Br. at 2.

Punitive preemption also closes off important avenues for discussion of local policy and deprives citizens and municipalities of the right to articulate local policy preferences. Scharff, at 1506 (arguing that "[punitive] preemption statutes limit local governments' ability to use their lawmaking authority symbolically or as an organizing tool," which is how "[l]egislation at the state and local level often functions"). If local officials cannot risk exercising their legislative discretion for fear of having to defend those decisions personally in court or for fear of abruptly losing their job, city halls and other local legislative bodies will fail to fully serve their constituents. More specifically, those local government bodies cannot fully debate pressing local problems, they cannot adopt solutions that make sense when a statewide approach does not fit all, and they cannot risk voicing their concerns through symbolic legislation that can also form part of a larger organizing and political effort. Ultimately, by

ensuring that local governments will not dare to act, the punitive provisions of Section 790.33 would effectively undermine the promise of home rule and role of local government in Florida given the Home Rule Amendment's broad grant of authority.

Finally, the punitive provisions of Section 790.33 attempt to reorder the state-local relationship by establishing a new adversarial process to determine whether a local ordinance is preempted, and that process is one that is tilted in favor of the State. Rather than allowing city officials to defend their position on preemption concerning a particular ordinance in state court on equal footing with the State or other party, the provisions create a process that subjects local officials to personal liability and extra-judicial punishment (removal from office) by a governor to whom they are not directly accountable. Thus, rather than preserve a process that can weigh the merits of parties' claims when a question of preemption emerges, the punitive provisions of Section 790.33 put local officials in a position where they may not be able to pursue a case, much less an appeal to the Florida Supreme Court, due to personal financial constraints. Local officials will also likely refrain from asserting the rights of local governments under Florida's Home Rule Amendment, much less pursuing appeals, if it will mean risking their job. By depriving local officials of their day in court when they believe they

have properly exercised their rights, the penalty provisions at issue fundamentally distort the state-local relationship established by Article VIII, Section 2 of the Florida Constitution and upheld by decades of Florida Supreme Court jurisprudence.

Ultimately, the Florida Legislature's attempt to erode home rule through punitive preemption provisions like the ones at issue echo the very abuses of state power that led to the adoption of home rule in the first place. States like Florida adopted home rule as a reaction to overly intrusive state interference with local governance. For example, "[o]ne notorious abuse of the [pre-home rule] period was the practice by . . . state legislatures of adopting 'ripper bills'—laws that wrested municipal functions out of urban hands and transferred them to state appointees." Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as Case Study in the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev. 775, 805–06 (1992) (citations omitted). Under these laws, state legislatures could essentially prevent local governments from governing. Home rule, on the other hand, was "intended to . . . protect cities from opportunistic, partisan state meddling, and thus to vindicate the principle of local self-government". *Id*. Instead of using a brazen tool like a

"ripper bill" to dominate local governments empowered by home rule, the Florida Legislature has turned to punitive preemption.

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

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

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

The system of home rule in Florida has established processes for assessing the validity of local ordinances when preemption claims or questions emerge. *See, e.g.*, Richard C. Schragger, *The Attack on American Cities*, 96 Tex. L. Rev. 1163, 1181–82 (2018) (noting that, "[t]raditionally, [home rule] cities with preempted ordinances simply stopped enforcing those ordinances and might repeal them after express preemption."). If the State is concerned that a locality has enacted a preempted law, it could, for example, authorize the Attorney General to seek a declaratory judgment on the validity of the local enactment. Scharff, supra p. 8, at 1505–06. Decades of court decisions in Florida have also demonstrated that parties can challenge a particular policy on the basis of preemption in court,[5] and emergency or preliminary

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

injunctions remain available remedies,[6] when necessary. Moreover, the State can ask a court to hold a local official in contempt for failing to following a court order to repeal or stop enforcing a preempted ordinance. *Id*. at 1506.

Thus, this Court should reject any claim by the State or *amicus* parties like the NRA that the punitive preemption provisions at issue are somehow necessary to ensure statewide uniformity. First, those punitive provisions invalid for the reasons the Appellees have articulated in their briefs. Additionally, state processes, like those outlined here, have long existed to address preemption questions, those punitive provisions would

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Lauderdale, 272 So. 2d 502, 505 (Fla. 1972) (upholding local ordinance regulating the hours for sales of alcoholic beverages in case brought by Florida corporation).

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

create a threatening and hostile atmosphere in which local voices are silenced, undermining the broad grant of home rule under the 1968 Home Rule Amendment, as *Amici* articulate above.

III. CONCLUSION

For the foregoing reasons, *Amici* urge the Court to reverse the appellate court's order upholding the penalty provisions of Section 790.33.

Dated: November 24, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing with the Clerk of the Courts on November 24, 2021, by using the E-Filing Portal, which will send a notice of electronic filings to all counsel of record, including the individuals listed in the accompanying service list.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Arial 14-point font, contains 3,968 words, and otherwise complies with the requirements of Florida Rules of Appellate Procedure 9.210(a) and 9.045.

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