CASE NOS. SC21-917 & SC21-918
L.T. CASE NO. 1D19-2819

In the Supreme Court of Florida

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

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' JOINT REPLY BRIEF

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INTRODUCTION

The State respondents (hereafter, the "State") sidestep the central issue raised in this appeal, namely, that the Penalty Provisions are an unprecedented attack on fundamental principles of democracy under the guise of preemption. The Penalty Provisions are no less troubling than an act of Congress that sought to punish individual state legislators for voting in favor of legislation that is subsequently determined to be unconstitutional. This Court should properly be troubled by legislative efforts, however intentioned and wherever originating, that try to expand the carefully restricted powers of the judiciary to intrude into the inherently political legislative decision-making process. The Florida Constitution does not afford the Legislature such authority.

The attempt to impose dire financial consequences on local governments, whose elected officials exercise their inherent, discretionary authority to adopt legislation *later* determined to be preempted, fares no better. Contrary to the State's position, the Legislature did *not* entirely preclude local governments from exercising legislative discretion on matters affecting firearms and ammunition. Indeed, the State concedes that some of the firearm-related local legislation Petitioners proposed in the trial court was "largely uncontested as permissible." Answer Brief ("AB") at 2 n.1. Moreover, section 790.33(4) expressly creates "exceptions" to the

preemption, and its terminology has created sufficient confusion in application that it cannot be said that avoiding preemption is a purely ministerial function, divorced from the exercise of discretion.

ARGUMENT

I. THE PENALTY PROVISIONS CANNOT OVERRIDE THE LEGISLATIVE IMMUNITY ENJOYED BY LOCAL ELECTED OFFICIALS.

A. The legislative immunity enjoyed by local elected officials is not grounded merely in common law, but rather is grounded in the Florida Constitution.

The State devotes considerable effort to arguing that the Legislature can freely abrogate local elected officials' legislative immunity because such immunity is purportedly a creature solely of the common law. AB at 11-13, 16-19. This argument, however, ignores both the text of the Florida Constitution and a fundamental principle underlying Justice Thomas' opinion, on behalf of a unanimous United States Supreme Court, in *Bogan v. Scott-Harris*, 523 U.S. 44 (1988).

In *Bogan*, the local elected officials challenged the district court's determination that they lacked legislative immunity for adopting a budget ordinance eliminating a position (a traditionally legislative act) because they did so in retaliation for an employee's exercise of First Amendment rights. 523 U.S. at 47-48. After the First Circuit affirmed that ruling, the Supreme Court reversed, upholding

the "venerable tradition" of legislative immunity as applied to local legislators. *Id.* at 49. More germane here is Justice Thomas's approving quotation of the Mississippi Supreme Court in *Jones v. Loving*, 55 Miss. 109 (1877): "[W]henever the officers of a municipal corporation *are vested with legislative powers*, they hold and exercise them for the public good, and *are clothed with all the immunities of government, and are exempt from all liability for their mistaken use.*" 523 U.S. at 50-51 (emphasis added) (quoting *Jones*, 55 Miss. at 111).

The *Bogan* Court went on to re-emphasize that point, explaining that "[w]here the *officers of a municipal corporation are invested with legislative powers*, they are *exempt from individual liability* for the passage of any ordinance within their authority, *and their motives in reference thereto will not be inquired into*." 523 U.S. at 51 (citing 1 J. Dillon, Law of Municipal Corporations § 313, pp. 326-27 (3d ed. 1881)). This "rightful exemption," the Court thought, was "very plain" and applied to members of "inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like." *Id.* (citing T. Cooley, Law of Torts 376 (1880)).

To the extent the State might cite *Bogan* to argue that a preempted ordinance is necessarily not "within [the local governments'] authority," *id.*, that argument is belied by the facts in *Bogan*. There, the elected officials plainly had the legislative authority to adopt the budget eliminating the position at issue (a

"quintessentially legislative" act, *id.* at 55), even though a jury found they were individually improperly motivated by a desire to retaliate against the exercise of First Amendment rights. The jury and appellate court concluded that they acted in violation of the First Amendment (namely, that the employee's constitutionally protected speech was a substantial or motivating factor in the elimination of the position). *Id.* at 47-48. Notwithstanding the violation of First Amendment rights, the Supreme Court reversed, rejecting the elected officials' liability on legislative immunity grounds. *Id.* at 55-56. Significantly, the Court held, "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54.

Similarly, here, even if an ordinance is *later* found by a court to be invalid because it is preempted, those voting for it nevertheless have legislative immunity because they had the legislative authority to enact the ordinance when they voted for it. *Id.* (holding the Court of Appeals "erroneously relied on petitioners' subjective intent in resolving the *logically prior question* of whether their acts were legislative") (emphasis added).

The takeaway from *Bogan* is that legislative immunity is *inherent* in the exercise of legislative authority granted to city and county elected officials by the Florida Constitution. It does not exist merely in some common law ether. And contrary to the State's

position, so long as municipalities and counties exist, the Legislature is *not* at liberty to strip away the legislative nature of what municipal and county elected officials do without violating the Florida Constitution.

Article VIII, sections 1 and 2 expressly provide that counties and municipalities shall have governing *legislative* bodies. Art. VIII, §§ 1(e)-(g), 2(b), Fla. Const. The State, unsurprisingly, does not dispute this point. AB at 25. By necessity, then, local elected officials are "vested with legislative powers," not merely by the common law or the largess of the Legislature, but by the Florida Constitution. They enjoy, therefore, legislative immunity as derived from the Florida Constitution when they vote for and adopt ordinances, a "quintessentially legislative" act. *Bogan*, 523 U.S. at 55.

The State's recurrent theme—that it holds superior authority over local governments and may abolish them—is at best a clever bit of legal misdirection. Petitioners have never disputed that the Legislature may preempt substantive areas of the law or that local laws must yield to state statutes; those are unremarkable propositions. And as for abolishment, when and if the State chooses to abolish a local government, the implications may be addressed at that time. So long as those local governments exist, though, they do so as provided by Article VIII, and the Legislature may not alter either that structure or the implications inherent in that structure.

The State overreaches when it argues that the Legislature has the power "to supersede and control 'all powers of local self-government,'" citing Article VIII, sections 1(g) and 2(b), AB at 14, as if to suggest that the Legislature may somehow eliminate the fundamental legislative nature of local elected bodies. But the plain text of Article VIII contains no such language. At most, Article VIII, sections 1(g) and 2(b) state, respectively, that counties "shall have all powers of local self-government not inconsistent with general law," and municipalities "may exercise any power for municipal purposes except as otherwise provided by law." These provisions merely recognize that the Legislature may preempt substantive areas of law from local control by counties and municipalities. They do not, *in any way*, address individual legislative immunity or imply that local elected officials cease to act legislatively or may, by State fiat, be stripped of all legislative authority.

The State's reliance on *United States v. Gillock*, 445 U.S. 360 (1980), AB at 18-19, to overcome legislative immunity is unavailing. The federal criminal statute at issue in *Gillock* did not concern itself with the substance of a legislator's vote, but rather with the corruption of the legislative process by the acceptance of a bribe. *Id.* at 370, 374. The statute did not punish the legislators for *how* they voted, but instead for accepting a bribe before the vote.

That the Legislature, and even local governments, may preclude local elected officials from voting *at all* when they act in their own self-interest, violate conflict of interest laws, or act outside the Sunshine (AB at 21-22), does nothing to undermine the foregoing constitutional argument. Conflict of interest laws seek to regulate (and if necessary, punish) conduct when a legislator acts in furtherance of her or his personal interests instead of in the public interest. Similarly, Government-in-the-Sunshine laws limit the circumstances in which official government action can be taken or discussed. Unlike the Penalty Provisions, these other regulatory statutes do not concern themselves with the specifics of a legislator's vote, but rather the circumstances *under which voting or discussion may take place at all*. Conflict of interest laws, for example, are no more anathema to a local legislator's invocation of legislative immunity than they are to a state legislator's invocation of same—both sets of elected officials are subject to the same laws. *See, e.g.*, § 112.3143(2)(a), Fla. Stat.[1]

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[1] With respect to the State's citation to section 129.08, Florida Statutes, and this Court's recent decision in *Alachua County v. Watson*, No. SC19-2016, 2022 WL 247086, at *3 (Fla. Jan. 27, 2022), AB at 20, this Court did not have occasion to consider a claim of legislative immunity in *Watson*. Rather, the issue in that case was whether *a sheriff* was allowed to transfer money within the sheriff's budget in light of section 129.08. *Id.* at *1. The Court's explanatory observation about the "teeth" in section 129.08, *id.* at *3, said nothing about the provision's validity in the face of a legislative

(continued . . .)

While it is true that legislative immunity finds historical roots in the common law—*see Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 403 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)—the immunity does not exist solely in that realm. As the State concedes, "the States . . . are free to adopt different principles governing legislative immunity at the state level." AB 17 (internal quotation marks omitted). The Florida Constitution does so by vesting legislative authority in local elected governmental bodies, and with that investiture comes an inviolable legislative immunity.[2] *Bogan*, 523 U.S. at 50-51.

B. The Legislature cannot expand the judicial power beyond the confines of the separation of powers doctrine.

The Penalty Provisions do not "merely" authorize the courts "to enforce statutory penalties," AB at 25, but rather require the judiciary, *without* a constitutional foundation, to engage in a non-

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immunity challenge. The Court should not bootstrap the validity of the Penalty Provisions based on considerations of whether section 129.08 suffers from comparable defects.

[2] The State's sole acknowledgment of this issue arises at the conclusion of its legislative immunity argument, when it recharacterizes what the Florida Constitution does as vesting "policymaking authority." AB at 26. That is not what the Florida Constitution says or does—it confers *legislative* authority. Various persons, from managers to department directors, can sometimes set "policies." Only elected bodies enact *legislation*.

judicial act—an inquiry into the motivations of legislators.[3] § 790.33(4), Fla. Stat. The imposition of fines under section 790.33(3)(c) requires a court to determine that a violation of the preemption was, with respect to each local elected official's vote, "knowing and willful." § 790.33(3)(c), Fla. Stat.

Florida cases are legion holding that, under the separation of powers doctrine, the judicial power does not extend to such inquiries. *See, e.g., Wallace v. Dean*, 3 So. 3d 1035, 1053-54 (Fla. 2009) (expressing concern that courts not become "entangled" in "nonjusticiable political questions"); *City of Pompano Beach v. Big Daddy's, Inc.*, 375 So. 2d 281, 282 (Fla. 1979) ("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 . . . are irrelevant."); *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla. 2d DCA 2005) ("[T]he limitation on the exercise of judicial

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[3] For this reason, the limited abrogation of legislative privilege in *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013), is inapplicable here, because judicial inquiry in that case was ostensibly mandated by a constitutional provision prohibiting "improper partisan and discriminatory intent" in redistricting. *Id.* at 148. Even so, and notwithstanding the constitutional language relied upon by the majority, the dissent objected on separation of powers grounds. *League of Women Voters*, 132 So. 3d at 157 (Canady, J., dissenting) ("Due respect for the separation of powers precludes the judicial branch from requiring that legislators and legislative employees submit to an inquisition conducted to ferret out evidence of an improper purpose in the legislative process.").

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)); *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."). This doctrine is no creature of common law: it is grounded in Article II, section 3 of the Florida Constitution.

The State fails to cite a single case that has upheld the expansion of the judicial power into the wholly *political* inquiry (called for by the Penalty Provisions) of a legislator's motivations in voting in favor of specific legislation. This is perhaps unsurprising given the unprecedented and undemocratic nature of the Penalty Provisions. As the cases cited above reflect, it is difficult to imagine a more inherently political inquiry than the motivations of a local legislator in voting for legislation. *Wallace*, 3 So. 3d at 1053-54.

The Court should reject the First District's conclusion that a vote in favor of legislation that is later found to be preempted is unworthy of legislative immunity. *State v. City of Weston*, 316 So. 3d 398, 406-07 (Fla. 1st DCA 2021). A subsequent finding of invalidity of legislation does not retroactively change the legislative nature of

the original vote. *See, e.g., 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."); *Bogan*, 523 U.S. at 54 (determining that the legislative nature of an action is the "logically prior question" that must be answered before considering immunity); *Tenney*, 341 U.S. at 377 ("The claim of an *unworthy purpose does not destroy the [legislative] privilege*.") (emphasis added); *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.").

Respect for the separation of powers doctrine and its inherent constitutional boundaries on the exercise of judicial power requires that the provisions penalizing local elected officials for how they voted be invalidated.

II. THE ENACTMENT OF LOCAL LEGISLATION IN THE FACE OF SECTION 790.33 IS NOT A MINISTERIAL FUNCTION, BUT REQUIRES THE EXERCISE OF LEGITIMATE LEGISLATIVE DISCRETION.

The First District's decision and the State's argument on appeal both put the proverbial cart before the horse. They begin with the premise that if particular legislation is found to be preempted, then, by necessity, the local government's enactment of the legislation in the first instance could not have been discretionary. *City of Weston*,

316 So. 3d at 405; AB at 33-34.[4] The ultimate invalidity of legislation, however, does not change the inherently discretionary nature of the initial legislative enactment. *See, e.g., Com. Carrier*, 371 So. 2d at 1019 ("Public policy and maintenance of the integrity of our system of government necessitate this immunity, *however unwise, unpopular, mistaken or neglectful a particular decision or act might be*.") (emphasis added); *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.").

Section 790.33 creates its own exceptions to the preemption set forth in the statute. § 790.33(4), Fla. Stat. Additionally, and critically, the proscriptions set forth in the statute are not so clear in scope and application that no room exists for reasonable minds to differ on whether proposed legislation is preempted. *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

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[4] Interestingly, the State acknowledges that "the result might be different" if section 790.33 imposed "traditional tort liability," but concludes that because there is no element of "reasonableness" in a local government's enactment of preempted legislation, *Wallace* is inapplicable. AB at 34 n.9 (citing *Wallace*, 3 So. 3 at 1053) (citing *Com. Carrier*, 371 So. 2d at 1020). As explained herein, that assumption is incorrect; "reasonableness" is merely a substitute for the concept of "discretion" in the enactment of legislation.

devices after Florida's Attorney General opined to the contrary that the regulation was not preempted by section 790.33). As the State concedes in its answer brief, certain local legislation touching on firearms is not preempted.[5]

The State's approach of assuming, first, that legislation is preempted and then, based upon that finding, imposing a penalty on legislators who lacked the predictive foresight to know that a future court would invalidate the law, renders this Court's four-part test in *Commercial Carrier* (and the *Wallace* Court's elaboration of the test) a pointless endeavor.[6] In many instances, absent litigation, it is

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[5] The State also fails to note that it did not appeal the trial court's ruling that certain other local gun laws were, in fact, *not* preempted. *See, e.g.,* R. 2018 ("Second, the local governments may establish policies related to firearms in their capacities as employers and proprietors. The local governments' authority to act as proprietors is limited to internal government operations (e.g., workplace rules under Section 790.33(4)(c)) and private market participation (e.g., leasing, contracting, and operation of a traditionally private business).").

[6] The test: (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? *Com. Carrier*, 371 So. 2d at 1019.

impossible for local legislators to know in advance whether legislation they voted in favor of may be preempted.[7]

Under the State's view of the test and its *post*-invalidity application, the fourth question in *Commercial Carrier* would *always* be answered in the negative. But in a scenario such as the one contemplated by section 790.33(3)(f)—where financial liability from private-party litigation is to be imposed for a discretionary function such as enactment of legislation—the *Commercial Carrier* test must be applied *before* the court may exercise jurisdiction to decide the question of the legislation's validity.

The State's argument that the reason the judiciary cannot inquire into nonjusticiable political questions, as *Wallace* confirms, is that doing so invades the province of the *state* Legislature, rests on a false premise. AB at 36 n.11. The ability of the judicial branch to inquire into political questions is not dependent upon the level of government at which they arise; rather, and without regard to the level of government, political questions are simply not what judges are suited or permitted to decide. *Carter*, 468 So. 2d at 957 ("Deciding which laws are proper and should be enacted is a legislative function.

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[7] Notably, the State does not dispute that local governments have the authority to enact legislation. AB at 31 n.7 ("[T]hey of course do."). It also does not contest that the first three questions of the *Commercial Carrier* test may be answered in the affirmative. AB at 30.

How and in what manner those laws are enforced is, in most instances, a judgmental decision of the executive branch. The judicial branch should not trespass into the decisional process of either."). The prohibition on judicial trespass is *not*, as the State implies, because the Legislature may step in and address the same political question. *See Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985) ("Clearly, . . . commissions, boards, city councils . . . by their enactment of . . . laws or regulations, . . . are acting pursuant to basic governmental functions performed by the legislative . . . branch[] of government."); *Com. 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.").

In *Wallace*, this Court further elaborated on the four-part test, noting 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. The State may dislike asking the fourth question of the test at such a "level of high generality," AB at 31 n.7, but the *Wallace* Court's inquiry into the sheriff's authority would not make sense unless the question was intended to address *broadly* whether the authority to act exists. Under the State's application of the test, the question in *Wallace* would not have been asked as the Supreme Court

of Florida asked it—"[D]oes the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?"—but rather as a circular question, "Does the sheriff have the authority to respond to 911 calls within his jurisdiction in a negligent manner?"

Finally, the State's reliance on jurisprudence arising under 42 U.S.C. § 1983 is unwarranted because, under federal law, discretionary function immunity is purely a product of the common law. *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). Congress may abrogate the immunity for purposes of federal law. Under Florida law, however, the immunity arises as a non-waivable *constitutional* concern that cannot be overridden by statute. *Com. Carrier*, 371 So. 2d at 1021. Unlike general sovereign immunity, which is derived solely 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; *see also Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989); *City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 690 (Fla. 1st DCA 2013), *remanded on other grounds, Beach Cmty. Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014) (stating that the judiciary may not entangle itself in fundamental questions of policy and planning).

CONCLUSION

The State's argument, if adopted, would undermine core principles of democracy. The Florida Constitution and the separation of powers doctrine preclude the Legislature from expanding the judicial power in Florida to inquire into the motivations of local elected officials and punish such officials simply because of how they voted on legislation that, at the time, had not yet been determined to be preempted. The Court should also decline to recede from decades of jurisprudence, also grounded in the Florida Constitution, that precludes the imposition of financial liability on a local government because of its discretionary decision to enact legislation.

Petitioners respectfully request that the Court quash the decision of the First District.

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