IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D19-2819
L.T. CASE NOS.: 2018-CA-699, 2018-CA-882, 2018-CA-1509

STATE OF FLORIDA ET AL.,

Appellants,

v.

CITY OF WESTON, FLORIDA ET AL.,

Appellees.

ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

APPELLANTS' INITIAL BRIEF

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INTRODUCTION

Section 790.33 reserves the "field of regulation of firearms and ammunition" to the State Legislature and preempts local regulation in that field. § 790.33(1), Fla. Stat. Plaintiffs have not disputed that Section 790.33, which has been in effect for decades, is a lawful exercise of the Legislature's constitutional authority to restrict local government power, and the trial court did not rule otherwise. Instead, Plaintiffs challenged (and the trial court invalidated) penalties that the Legislature added to the statute because it determined that the available remedies—declaratory and injunctive relief—were insufficient to deter officials who insist on acting outside the scope of their lawful authority.

Although the trial court correctly rejected most of Plaintiffs' claims, the court erred by concluding that local governments and their officials have immunity when acting in a legislative capacity, even where, as here, the local legislation at issue is barred by state law and therefore *ultra vires*. The court agreed with Defendants that "[l]ocal governments are indeed subject to 'legislative prerogatives in the conduct of their affairs,'" R.2010 (quoting *Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971), but disagreed that "local governments can be penalized by the courts for acting, or attempting to act, outside the scope of the legislature's preemption"—*i.e.*, outside the scope of their lawful authority, R.2010.

The trial court's decision is premised on unsupported theories of immunity

inconsistent with the constitutional supremacy of the State's authority over its counties and municipalities. If allowed to stand, the decision will not only invite the development of a patchwork regulatory regime in the area of firearms but also render the Legislature impotent to deter power grabs by local officials in other areas. Accordingly, the trial court's decision must be reversed.

STATEMENT OF THE CASE AND THE FACTS

I. LEGAL BACKGROUND

"The respective counties of this State do not possess any indicia of sovereignty; they are creatures of the legislature, created under Art[icle] VIII, § 1, of the State Constitution, and accordingly are subject to the legislative prerogatives in the conduct of their affairs." *Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971); *see* Art. VIII, §§ 1(f)-(g), Fla. Const. The same is true of the State's municipalities. *See* Art. VIII, § 2(b), Fla. Const.; *Lake Worth Utilities Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985) ("The clear purpose of the 1968 revision embodied in article VIII, section 2 was to give the municipalities inherent power to meet municipal needs. But 'inherent' is not to be confused with 'absolute' or even with 'supreme' in this context. The legislature's retained power is now one of limitation rather than one of grace, but it remains an all-pervasive power, nonetheless."). As the Florida Supreme 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).

Consistent with its constitutional authority to establish statewide policy, the Legislature has preempted local regulation in several fields, including—since 1987—"the whole field of regulation of firearms and ammunition." § 790.33(1), Fla. Stat. A vast majority of states have preempted local regulation in the same field.[1]

By 2011, the Legislature became concerned that the traditional remedies available in the event of a violation—declaratory and injunctive relief against an offending local government—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." § 790.33(2)(a), Fla. Stat. (as amended in 2011). The Legislature therefore amended the statute by replacing the existing subsection (3) with a new one, entitled "Prohibitions; Penalties," § 790.33(3)(a), Fla. Stat.

Subsection (3)(a) reinforces and incorporates the decades-old preemption set forth in subsection (1):

> 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

[1] *See Preemption of Local Laws*, GIFFORDS LAW CENTER (2018), http://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/.

> regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein.

§ 790.33(3)(a), Fla. Stat.

Subsection (3)(b) maintains citizens' pre-existing right to seek declaratory and injunctive relief against local government entities and adds that "[i]t is no defense" to such claims "that in enacting the ordinance, regulation, or rule the local government was acting in good faith or upon advice of counsel." § 790.33(3)(b), Fla. Stat.

Subsections (3)(c) through (3)(f) create the "Penalties" referred to in the subsection's title, some of which may be imposed against local government entities, and others of which may be imposed against local government officials. As for the former, subsection (3)(f) creates a private right of action that adversely affected citizens and organizations may bring against local government entities that violate the preemption. § 790.33(3)(f), Fla. Stat. In addition to declaratory and injunctive relief, citizens and organizations may seek compensation for actual damages suffered (up to $100,000), as well as legal fees and costs. *Id.*

As for local government officials, "knowing and willful" enactment of a preempted firearms regulation "shall be cause for termination of employment or contract or removal from office by the Governor," § 790.33(3)(e), Fla. Stat., and 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).

II. PROCEDURAL HISTORY

On February 14, 2018, a gunman killed 17 students at Marjory Stoneman Douglas High School in Parkland, Florida. In response to that and other recent tragedies, 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 defended and continues to defend against Second Amendment and other challenges in state and federal court. *See*, *e.g.*, *Nat. Rifle Ass'n of Am., Inc. v. Bondi*, No. 4:17-cv-128 (N.D. Fla.) (pending challenge to age restriction on commercial purchase of firearms); *Hunt v. State*, No. 2018-CA-564 (Fla. 2d Jud. Cir. May 10, 2019) (order dismissing challenge to prohibition on possession, use, or sale of bump-fire rifle stocks); *Roberts v. Swearingen*, No. 8:18-cv-1062-T-33-TGW (N.D. Fla. Aug. 21, 2018) (order dismissing various challenges to same statute).

Approximately 100 counties, municipalities, and certain of their officials sought to enact further firearms regulations at the local level and, frustrated by Section 790.33(3)'s penalty provisions, which posed an obstacle to their desired regulatory schemes, they filed three separate lawsuits challenging the constitutionality of the penalties. Plaintiffs also challenged the validity of Section

790.335(c)(4), which subjects local government entities to a civil fine of up to $5,000,000 should 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. In addition, Plaintiffs identified specific actions they wished to take (*e.g.*, regulation of firearms components and accessories, such as magazines and rifle stocks) and sought declaratory judgment as to whether, if taken, such actions would be within the scope of their lawful authority. Plaintiffs asked the court to address those issues if, and only if, the court upheld the penalties. *See* R.509.

Because the central question in each lawsuit was the validity of Section 790.33(3)'s penalty provisions, the three cases raised many overlapping issues and were therefore consolidated before the Honorable Charles Dodson of the Second Judicial Circuit. R.271. After a brief discovery period, the parties agreed that there were no disputed issues of material fact and filed cross-motions for summary judgment on the merits of Plaintiffs' claims. On July 26, 2019, the court entered declaratory judgment that the penalty provisions of Sections 790.33(3) and 790.335(4)(c) are facially unconstitutional on the ground that they violate legislative immunity and governmental immunity for discretionary functions.

III. THE TRIAL COURT'S ORDER

Although styled "Final Summary Judgment for Plaintiffs and Against Defendants," R.2005, the trial court's order is a mixed result. As a threshold matter,

the court upheld the preemption itself, agreeing that "the legislature may prohibit local regulation of firearms and accessories," R.2019; R.2006 ("This legal doctrine is referred to as 'preemption' and the legislature can do this."). Of the several analytically distinct counts in which Plaintiffs challenged the constitutionality of the penalties, the court rejected most of them, entering declaratory judgment that whatever ambiguity may exist in [Section 790.33(3)] does not rise to the level of unconstitutional vagueness," that "it does not violate due process," and that it leaves citizens "free to speak, assemble, or petition and instruct their local representatives about firearms and ammunition." R.2012-15.

With respect to Plaintiffs' immunity claims, the court agreed with Defendants that "the legislature abrogated the common law legislative immunity" because "[t]he legislature was clear in its intent to create a new cause of action and for it to extend to local legislators." R.2007. However, the court determined that legislative immunity is not only a common law doctrine, but also independently arises from constitutional law and therefore "cannot be waived by statute." R.2007; *see* R.2007-09. *First*, the court found immunity for local officials rooted in the Separation of Powers Clause of the Florida Constitution, R. 2007, although that provision, by its terms, calls only for "divi[sion]" "of the powers of state government" "into legislative, executive and judicial branches" and says nothing about local governments, Art. II, § 3, Fla. Const.

Second, the court found legislative immunity rooted in the Speech or Debate Clause of the United States Constitution, although the court recognized that provision "is limited by its terms to members of Congress." R.2009 (quoting *Fla. House of Reps. v. Expedia*, 85 So. 3d 517, 522 (Fla. 1st DCA 2012)). For those reasons, insofar as the statutes at issue create penalties applicable to local officials carrying out legislative duties, the court ruled that those provisions "violate the legislative immunity doctrine." R.2009.

The trial court likewise ruled that, insofar as the statutes at issue create penalties applicable to local governments, those provisions are invalid because "[g]overnmental function immunity" arises from the Separation of Powers Clause of the Florida Constitution and "exempts governments from appearing before a court and answering for judgment decisions inherent in the act of governing." R.2009. Although the court agreed with Defendants that "[l]ocal governments are indeed subject to 'legislative prerogatives in the conduct of their affairs,'" R.2010 (quoting *Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971), the court disagreed that "local governments can be penalized by the courts for acting, or attempting to act, outside the scope of the legislature's preemption"—*i.e.*, outside the scope of their lawful authority, R.2010.[2]

[2] As a point of clarification, the trial court's order refers to the "civil penalties" created by Sections 790.33(3) and 790.335(4)(c), collectively, as "the penalty

The trial court also concluded that one provision at issue—Subsection 790.33(3)(e)—is invalid because it gives the Governor power to remove from office local officials who knowingly and willfully violate the preemption and, in the court's view, the Governor's power to suspend officials under Article IV, Section 7 of the Florida Constitution "expressly provides the manner of doing a thing" and thus "impliedly forbids its being done in a substantially different manner." R.2012.

As noted above, in addition to their constitutional claims, Plaintiffs sought declaratory judgment that specific actions they wished to take in the area of firearms would, if taken, be within the scope of their lawful authority. Although Plaintiffs asked the court to address those issues if, and only if, the court upheld the penalties

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provisions." R.2006. In light of that shorthand, the order may be read to invalidate each subsection of "the penalty provisions" on both legislative immunity grounds, *see* R.2009, and governmental immunity grounds, *see* R.2011. But Subsection 790.33(3)(a) merely prohibits the enactment and enforcement of preempted firearms regulations, and Subsection 790.33(3)(b) merely invalidates preempted regulations and provides for declaratory and injunctive relief. Neither provision creates any "civil penalty." The trial court's order must therefore be read to uphold those provisions and invalidate only Subsections 790.33(3)(c) through (3)(f) and 790.335(4)(c). *See* R.2010 (concluding that while a "preempted law" may be "stricken by a court," the penalties are invalid because they "create liability").

Subsections 790.33(3)(c), (d), and (e) create penalties applicable only to individual officials, not governmental entities. The trial court's order must therefore be read to invalidate those provisions only on governmental immunity grounds, not legislative immunity grounds. Likewise, Subsections 790.33(3)(f) and 790.335(4)(c) impose penalties only against governmental entities, not individual officials. The trial court's order must therefore be read to invalidate those provisions only on governmental immunity grounds, not legislative immunity grounds.

(which it did not), *see* R.509, the court declined Plaintiffs' request to hold off, and addressed all of their claims. The court concluded that many of the actions Plaintiffs sought to take would be outside the scope of their authority: specifically, "regulation of firearms 'components' and 'accessories,'" such as rifle stocks and large-capacity magazines, R.2019, regulation of firearms on local government property outside the context of "internal government operations," R.2018, and the establishment of gun-free zones, *id.*

On July 30, 2019, Defendants filed a timely notice of appeal. Plaintiffs did not cross-appeal.

SUMMARY OF ARGUMENT

The trial court erred by declaring that the penalties at issue violate the doctrines of legislative and discretionary governmental function immunity. Article X, Section 13 of the Florida Constitution empowers the Legislature to waive the sovereign immunity of the State and its subdivisions for "all liabilities now existing or hereafter originating." Art. X, § 13, Fla. Const. As a narrow exception to that rule, governmental entities remain immune from tort liability that is premised on the execution of their discretionary functions. Lawsuits brought under Section 790.33(3)(f) do not sound in tort; the conduct on which they are premised—the enactment and enforcement of preempted firearms regulations—is prohibited by statute and therefore is not discretionary. The same is true of lawsuits brought under

Section 790.335(4)(c), which are likewise premised on conduct prohibited by statute.

The rationale for the discretionary function immunity doctrine is that, in "a tort action alleging that careless conduct contributed to the governmental decision" regarding a "discretionary function," *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1021 (Fla. 1979), "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). That concern is present only "absent a violation of constitutional or statutory rights." *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985). A lawsuit premised on a statutory violation does not "entangle the Court" in questions "within the exclusive domain" of the political branches, because the lawsuit merely asks the court to carry out the familiar judicial task of applying the statute to the facts at issue.

Moreover, the Florida Constitution expressly subjugates local governments' authority to that of the Florida Legislature, *see* Art. VIII, §§ 1(f)-(g), 2(b), Fla. Const.; *Weaver*, 245 So. 2d at 296. By invalidating the mechanisms the Legislature deemed necessary to enforce limitations on local government power, the trial court's order inverts that constitutional structure, giving political subdivisions "the power to frustrate the ability of the Legislature to set policies for the state," *Metro. Dade*

Cty., 737 So. 2d at 504.

Nor do penalties against local officials under Section 790.33(3) violate legislative immunity. The trial court correctly recognized that, in that provision, the Legislature "abrogated the common law legislative immunity" that local officials would otherwise enjoy as to the penalties created by the statute. R.2007. The trial court nevertheless concluded that legislative immunity for local officials also derives from two constitutional sources, the Speech or Debate Clause of the United States Constitution and the Separation of Powers Clause of the Florida Constitution, and therefore "cannot be waived by statute." R.2007.

That conclusion was erroneous. The Speech and Debate Clause of the United States Constitution confers legislative immunity only on U.S. Senators and members of Congress. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Expedia, Inc.*, 85 So. 3d at 522 ("The Speech or Debate clause is limited by its terms to members of Congress."). Likewise, Article II, Section 3, of the Florida Constitution calls only for the separation of powers among the branches "of our *state* government" and "was not intended to apply to local governmental entities and official." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (emphasis added). Thus, Article II, Section 3 extends legislative immunity only to members of the State Legislature. *See League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 143 (Fla. 2013). Other officials (including local officials) enjoy the immunity as well, but that

immunity "arise[s] from the common law," *Expedia, Inc.*, 85 So. 3d at 523-24, which state legislatures are free to modify or eliminate, as the Legislature did in Section 790.33(3).

STANDARD OF REVIEW

"The standard of review of a final summary judgment is de novo." *State v. Gainesville Woman Care, LLC*, 278 So. 3d 216, 220 (Fla. 1st DCA 2019) (citing *Bowman v. Barker*, 172 So. 3d 1013, 1014 (Fla. 1st DCA 2015)).

ARGUMENT

I. THE TRIAL COURT ERRED BY CONCLUDING THAT SECTION 790.33(3)(f) VIOLATES GOVERNMENTAL FUNCTION IMMUNITY.

The trial court agreed with Defendants that "[l]ocal governments are indeed subject to 'legislative prerogatives in the conduct of their affairs'" and that Section 790.33 is a valid exercise of that authority insofar as it preempts local firearms regulations and prohibits local governments from enacting and enforcing them. R.2010 (citing *Weaver*, 245 So. 2d at 296). In the trial court's view, however, local regulation is a form of "legislation," and "enacting legislation" is "an inherently discretionary governmental function" for which governmental entities are immune from liability. R.2010-11. The trial court thus invalidated Section 790.33(3)(f), which allows adversely affected citizens and organizations to sue for damages, fees, and costs against local governments that enact or enforce preempted regulations.

The trial court's ruling must be reversed because Article X, Section 13 of the

Florida Constitution expressly empowers the Legislature to waive the sovereign immunity of the State and its subdivisions for "all liabilities now existing or hereafter originating," Art. X, § 13, Fla. Const., and the sole, narrow exception to that blanket authorization does not apply. In *Commercial Carrier Corporation v. Indian River County* and its progeny, the Florida Supreme Court ruled that "certain policy-making, planning or judgmental governmental functions,"—*i.e.*, "discretionary functions," as opposed to "operational" or "ministerial" functions—"cannot be the subject of traditional tort liability." 371 So. 2d 1010, 1020 (Fla. 1979). Accordingly, the Court held that governmental entities remain immune from traditional tort liability in lawsuits premised on discretionary governmental functions, notwithstanding the waiver of sovereign immunity for common law torts in Section 768.28. *See id.*

Neither the letter of nor the rationale for that doctrine applies where the governmental action at issue—here, the enactment or enforcement of a preempted firearms regulation—is prohibited by statute and therefore outside the scope of the government's lawful authority. Moreover, separation of powers concerns militate against extending the doctrine to that context.

A. The Discretionary Function Immunity Doctrine Does Not Apply Where, As Here, The Governmental Action In Question Is Prohibited By Statute.

Below, neither the trial court nor Plaintiffs identified a single case applying

the discretionary function immunity doctrine in a lawsuit premised on a statutory prohibition, and we are aware of none. By its terms, when applicable, the doctrine renders local governments immune to "traditional tort liability," *Commercial Carrier*, 371 So. 2d at 1020, not liability premised on conduct that is prohibited by statute.

Discretionary function immunity is rooted in Article II, Section 3 of the Florida Constitution, which requires the separation of powers among the three co-equal branches of state government. *See* Art. II, § 3, Fla. Const. The rationale is that, in "a tort action alleging that careless conduct contributed to the governmental decision" regarding a "discretionary function," *Commercial Carrier Corp.*, 371 So. 2d at 1021, "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); *see City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 690 (Fla. 1st DCA 2013) ("A 'discretionary,' planning-level function involves 'an exercise of executive or legislative power such that a court's intervention by way of tort law would inappropriately entangle the court in fundamental questions of policy and planning.'" (quoting *Mosby v. Harrell*, 909 So. 2d 323, 328 (Fla. 1st DCA 2005)).

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.* at 918. A lawsuit asserting a violation of statutory limits on government power does not enmesh the court with policy issues; it merely calls upon the court to apply the statute, *i.e.*, the policies established by the political branches through the legislative process.

Thus, in a lawsuit alleging that a local government has violated Section 790.33(3)(a) by enacting a preempted firearms regulation, the court need only determine at the outset whether the regulation at issue falls within the ambit of the statutory prohibition, a quintessentially judicial task that raises no separation of powers concern whatsoever. Because the constitutional basis for the discretionary function immunity doctrine falls away where the government action in question is barred by statute, the trial court erred by extending the doctrine to such lawsuits. It is therefore unsurprising that neither the trial court nor Plaintiffs identified any case extending the doctrine to such lawsuits, and we are aware of none.

Nevertheless, in the trial court's view, adopting regulations is "an inherently discretionary governmental function" and, "[a]lthough the local government may ultimately be mistaken, and the preempted law stricken by a court, this subsequent finding would not convert the original decision to enact legislation into the sort of

operational act which would be subject to judicial review." R.2010-11. In other words, the trial court concluded that the adoption of regulations is categorically discretionary, as opposed to "operational," and therefore cannot serve as the basis for governmental liability even if the specific regulation at issue is barred by statute.

The trial court's reasoning is flawed for at least two other, independent reasons. *First*, the case law does not support the trial court's categorical approach, and instead asks whether "the challenged act" was discretionary. *Wallace*, 3 So. 3d at 1054. To answer that question, the Florida Supreme Court "adopted a group of four related questions," one of which is whether the challenged act was within the government's "lawful authority and duty."[3] *Id.* As a matter of common sense, where, as here, the challenged act was prohibited by law and thus outside the government's "lawful authority and duty," *id.*, that consideration must be dispositive, as an action that is not "lawful" cannot be "discretionary." Indeed, the court noted that, when "government employees, officers, or agents are acting without authority," "they would be personally liable." *Id.* at 1054 n.1. Neither the trial court nor plaintiffs have

[3] The other three questions are: "First, does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?" *Wallace*, 3 So. 3d at 1054. "Second, 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?" *Id.* Third, does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?" *Id.*

offered any reason governmental entities should be treated differently.

Consistent with that commonsense approach, employment decisions such as compensation, terms, and conditions of employment are ordinarily "discretionary" on the part of governmental entities, yet the Florida Supreme Court has concluded that statutes restricting that discretion waive the State's sovereign immunity as to the prohibited actions. For example, Section 760.10 prohibits governmental entities from setting "compensation, terms, conditions, or privileges of employment" on the basis of race, sex, and other protected traits, and the Florida Supreme Court has concluded that the statute waives the defendant's sovereign immunity in actions brought under the statute. *Maggio v. Fla. Dep't of Labor & Employment Sec.*, 899 So. 2d 1074, 1078 (Fla. 2005). The retention and termination of employees are also quintessentially "discretionary." Yet Section 440.205 prohibits the "discharge" of employees "by reason of such employee's valid claim . . . under the Worker's Compensation Law," and the Florida Supreme Court held that the statute "waived sovereign immunity for workers' compensation retaliation claims when the State and its subdivisions are acting as employers." *Bifulco v. Patient Bus. & Fin. Servs., Inc.*, 39 So. 3d 1255, 1257 (Fla. 2010).

Second, the issue of fault, *i.e.*, whether a local government's action is merely "mistaken," may well be relevant to the ultimate issue of liability, but we are aware of no authority for the proposition that fault is relevant to the issue of sovereign

immunity. *See Wallace*, 3 So. 3d at 1040 (criticizing "the decision below [for] improperly conflat[ing] the separate questions of duty and sovereign immunity"). Even if there were, Section 790.33(3) maintains the defenses of good faith and advice of counsel in actions for damages, expressly abrogating those defenses only as to claims for declaratory and injunctive relief. Thus, under the statute, governments that act without fault cannot be held liable.

B. Separation of Powers Concerns Militate Against Extending The Discretionary Function Immunity Doctrine To Cases Brought Under The Challenged Provisions.

The Florida Constitution requires the separation of powers among the three co-equal branches of *state* government, but establishes a hierarchical relationship between the State and its *local* governments, subjugating the authority of the latter to that of the former. In other words, "[t]he respective counties of this State do not possess any indicia of sovereignty; they are creatures of the legislature, created under Art[icle] VIII, § 1, of the State Constitution, and accordingly are subject to the legislative prerogatives in the conduct of their affairs." *Weaver*, 245 So. 2d at 296; *see* Art. VIII, §§ 1(f)-(g). The same is true of the State's municipalities. *See* Art. VIII, § 2(b), Fla. Const. As the Florida Supreme Court has explained, if the rule were otherwise, political subdivisions would "have the power to frustrate the ability of the Legislature to set policies for the state," *Metro. Dade Cty.*, 737 So. 2d at 504.

The trial court acknowledged that well-established principle and upheld

Section 790.33 insofar as it preempts local firearms regulations and prohibits local governments from enacting and enforcing them. R.2010 (internal quotation marks omitted). By extending the discretionary function immunity doctrine to invalidate the statute's penalties, however, the trial court rendered the statute toothless. *See City of El Cenizo v. Texas*, 890 F.3d 164, 181 n.11 (5th Cir. 2018) ("When a state is allowed to substantively regulate conduct, it must be able to impose reasonable penalties to enforce those regulations." (citing *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 605-07 (2011)); *id.* (upholding statutory penalties available against local governments that adopt sanctuary city policies). By giving local governments the very "power to frustrate" legislative decision-making that the State's constitutional hierarchy was designed to prevent, *Metro. Dade Cty.*, 737 So. 2d at 504, the trial court turned that hierarchy on its head.

To be sure, the trial court's order leaves citizens free to seek declaratory and injunctive relief against local governments that violate the preemption. But rather than put the onus on citizens to play "whack-a-mole" with invalid ordinances, at their own personal and financial expense, the Legislature determined that the better course was to deter the enactment of such ordinances in the first place. To the extent the trial court disagreed with the Legislature's determination, that is a question of policy that was not properly within the court's jurisdiction.

In any event, the cause of action created by Section 790.33(3)(f) merely gives

successful plaintiffs the right to seek reasonable legal fees and costs. Should a plaintiff also prove both causation and "actual damages," the plaintiff may recover those actual damages as well. § 790.33(3)(f), Fla. Stat. That prototypical recovery regime falls well within the range of "reasonable" means the Legislature routinely deploys to enforce a statutory prohibition. *City of El Cenizo*, 890 F.3d at 181 n.11. For that and the other reasons discussed above, the trial court's invalidation of Section 790.33(3)(f) should be reversed.

II. THE TRIAL COURT ERRED BY CONCLUDING THAT SECTION 790.335(4)(c) VIOLATES GOVERNMENTAL FUNCTION IMMUNITY.

With no explanation, the trial court also invalidated Section 790.335(c)(4) on the ground that it violates governmental function immunity. Section 790.335(c)(4) subjects local government entities to a civil fine of up to $5,000,000 should 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. Presumably, the trial court understood keeping lists, records, and registries on behalf of governmental entities to be discretionary, like regulatory activity.

Regardless of whether that is correct, the provision must be upheld for the same reason as the cause of action created by Section 790.33(3)(f). The discretionary function immunity doctrine does not apply because, like the enactment and enforcement of local firearms regulations discussed above, the Legislature validly

prohibited the lists, records, and registries in question. In other words, those tasks are not discretionary and are not shielded by sovereign immunity.

III. THE TRIAL COURT ERRED BY CONCLUDING THAT SUBSECTIONS 790.33(3)(c), (d), AND (e) VIOLATE LEGISLATIVE IMMUNITY.

As discussed more fully above, Section 790.33(3) also creates penalties applicable to local officials who knowingly and willfully enact or enforce a preempted firearms regulation, subject to those officials' defenses of good faith and advice of counsel. *See supra* pp. 3-4, 18-19. The trial court declared those penalties facially unconstitutional on the ground that "local legislators are immune from suit because they are protected by legislative immunity, making the penalty provisions unenforceable against them." R.2007.

The Speech and Debate Clause of the United States Constitution renders U.S. Senators and members of Congress immune from suit for activities "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The separation of powers "codified in article II, section 3, of the Florida Constitution" extends the same immunity to members of the State Legislature. *See League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 143 (Fla. 2013). Other officials (including local officials) enjoy the immunity as well, but that immunity "arise[s] from the common law." *Expedia, Inc.*, 85 So. 3d at 523-24.

The trial court correctly recognized that, in Section 790.33(3), the Legislature

"abrogated the common law legislative immunity" that local officials would otherwise enjoy as to the penalties created by the statute. R.2007. It is well-established that common law immunities exist at the pleasure of the Legislature, and that the Legislature may "do away with the[m] altogether," *McNayr v. Kelly*, 184 So. 2d 428, 430 n.6 (Fla. 1966), as long as it does so "clearly," *Bates v. St. Lucie Cty. Sheriff's Office*, 31 So. 3d 210, 213 (Fla. 4th DCA 2010). By expressly creating civil penalties for local officials who willfully violate the statute, Section 790.33(3) does just that. *See Bifulco*, 39 So. 3d at 1257 ("[U]nder the plain language of the Workers' Compensation Law, actions for workers' compensation retaliation are authorized against the State," waiving "sovereign immunity for workers' compensation retaliation claims when the State and its subdivisions are acting as employers."); *Maggio*, 899 So. 2d at 1078-79, 1081 (explaining that the Florida Civil Rights Act's inclusion of the State as an "employer" subject to liability was "a waiver of sovereign immunity").

The trial court nevertheless concluded that legislative immunity for local officials also derives from two constitutional sources, the Speech or Debate Clause of the United States Constitution and the Separation of Powers Clause of the Florida Constitution, and therefore "cannot be waived by statute." R.2007. That conclusion was error, and the trial court's judgment must be reversed.

A. The U.S. Constitution Does Not Clothe Local Officials With Legislative Immunity.

In concluding that the Speech or Debate Clause "affords local legislators legislative immunity," the trial court relied on this Court's decision in *Florida House of Representatives v. Expedia, Inc*. R.2009. *Expedia*, however, stands for the opposite proposition. As this Court explained, "[t]he Speech or Debate clause is limited by its terms to members of Congress." *Expedia, Inc.*, 85 So. 3d at 522; *see Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403 (1979) (concluding that "the Speech or Debate Clause" has "no application to a body such as TRPA," a regional authority).

Breaking from the trial court, Plaintiffs did not argue below that the Speech or Debate Clause applies to local officials; they instead argued that state legislatures cannot waive local officials' legislative immunity because it exists as a matter of "federal common law," R.508, which Plaintiffs argued is binding against the states through the Supremacy Clause. That argument fares no better.

As a general matter, "[t]here is, of course, 'no federal . . . common law.'" *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Legislative immunity is no exception, and the U.S. Supreme Court has never suggested that it is. Rather, the Court has explained that the immunity existed *at* common law in the sense that "[t]he immunity of legislators from civil suit for what they do or say as legislators has its roots in the

parliamentary struggles of 16th- and 17th-century England." *Lake Country Estates, Inc.*, 440 U.S. at 403. Plaintiffs' argument conflates common law tradition, which state legislatures are free to modify or eliminate, with "federal common law," which is binding on the states but which the U.S. Supreme Court "has recognized" exists only in "limited areas." *Tex. Indus., Inc.*, 451 U.S. at 640.

Those "'few and restricted'" areas "fall into essentially two categories": "those in which Congress has given the courts the power to develop substantive law," and, in the absence of a federal statute, "those in which a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Id.* (citations omitted). No federal statute clothes local officials with legislative immunity and, except as it applies to members of Congress, the immunity is not "'necessary to protect uniquely federal interests,'" which are limited to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Id.* at 641.

Even in the limited circumstances in which the courts *have* recognized a federal common law immunity, the U.S. Supreme Court has made clear that the immunity preempts a state law cause of action only if "the interests of the United States [would] be *directly affected.*" *In re Fort Totten Metrorail Cases*, 895 F. Supp. 2d 48, 86 (D.D.C. 2012) (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504

(1988)) (emphasis in original). For example, federal common law immunity "shield[s] Government contractors from liability for design defects in military equipment." *Boyle*, 487 U.S. at 504. But the doctrine preempts state law claims only when they would otherwise affect "the performance of federal procurement contracts, *id.* at 506, or "directly affect the terms of Government contracts," *id.* at 507; *see*, *e.g.*, *Olivares v. Brown & Gay Eng'g, Inc.*, 401 S.W.3d 363, 374 (Tex. App. 2013), *aff'd* 461 S.W.3d 117 (Tex. 2015) (holding that government contractor immunity does not otherwise bar state law claims). The challenged provisions apply only to local officials, not federal officials or their agents.

B. The Florida Constitution Does Not Clothe Local Officials With Legislative Immunity.

Pointing again to *Expedia*, the trial court was likewise incorrect to conclude that local officials have legislative immunity as a matter of Florida constitutional law. R.2007-08. Members of the State Legislature uniquely enjoy such immunity because "[t]he power vested in the legislature under the Florida Constitution would be severely compromised if legislators were required to appear in court to explain why they voted a particular way or to describe their process of gathering information on a bill." *Expedia, Inc.*, 85 So. 3d at 524. In other words, [o]ur state government could not maintain the proper 'separation' required by Article II, section 3 if the judicial branch could compel an inquiry into these aspects of the legislative process." *Id.*

As discussed above, Article II, Section 3 of the Florida Constitution requires the separation of "powers of the state government," which "shall be divided into legislative, executive and judicial branches," Art. II, § 3, Fla. Const. (emphasis added). But that provision addresses only the branches "of our *state* government" and "was not intended to apply to local governmental entities and official." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (emphasis added).

With respect to them, unlike the vertical separation of powers that the U.S. Constitution establishes between the federal government and the states, the Florida Constitution establishes a direct hierarchical relationship between the State and its local governments. Counties and municipalities, "may be created, abolished or changed by law." Art. VIII, §§ 1(a), 2(a), Fla. Const. The Florida Constitution thereby "establishes the constitutional superiority of the Legislature's power over [local] power." *Masone v. City of Aventura*, 147 So. 3d 492, 494-95 (Fla. 2014). And nothing in the Constitution suggests the framers intended to give the Legislature that power over local governments while, in the same breath, rendering it toothless by shielding local governments or their officials from liability for actions outside the scope of their lawful authority. *See City of El Cenizo*, 890 F.3d at 181 n.11. Indeed, as discussed above, the opposite is generally true: When "government employees, officers, or agents are acting without authority," "they [are] personally liable." *Wallace*, 3 So. 3d at 1054 n.1.

The trial court did not identify any decision holding that separation of powers principles limit the Legislature's authority over local governments, much less that such principles render local officials immune to statutory penalties for *ultra vires* actions. Plaintiffs, too, identified no such decision, and we are aware of none.

The trial court instead distilled several cases, each of them inapposite, into an assertion of broad, undefined "separation of powers principles" that "Florida courts regularly apply to counties and cities." R.2008. Specifically:

- *Solares v. City of Miami* is a routine standing case in which the plaintiff's claims were dismissed for failure to assert a "special injury."166 So. 3d 887, 888 (Fla. 3d DCA 2015). The defendant happened to be a local government.

- *Broward County v. La Rosa* holds that "the legislature cannot authorize . . . agencies to exercise powers that are fundamentally judicial in nature." 505 So. 2d 422, 423 (Fla. 1987). Section 790.33(3) does not usurp judicial authority; it creates a cause of action and civil penalties that may be enforced through court proceedings, the bread-and-butter of the judiciary.

- *City of Miami v. Wellman* upheld a local code enforcement and vehicle impoundment process against the claim that the process encroached on judicial power. 976 So. 2d 22, 26 (Fla. 3d DCA 2008)

- As discussed above, *Trianon Park Condominium Association v. City of Hialeah* holds that courts cannot adjudicate tort suits premised on discretionary governmental functions "absent a violation of constitutional or statutory rights" because doing so would embroil the courts in policy issues that are committed to the political branches. 468 So. 2d at 918. That concern is not present in a lawsuit asserting the violation of statutory limits on government power. *See supra* pp. 11-15.

By muddling these and other authorities into a separation of powers concept that bears no relation to the text of the Florida Constitution or the precedents derived

therefrom, the trial court's order "treat[s] the Constitution as though it were no more than a generalized prescription," when "[t]he Constitution is not that." *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting), *cited in Chiles v. Children A, B, C, D, E and F*, 589 So. 2d 260, 264 n.6 (Fla. 1991). The Constitution "is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* . . . set forth their conclusions in the document." *Id.* (emphasis in original).

The trial court in fact agreed that the Legislature has "ultimate authority over local governments" and "could abolish all counties and cities." R.2008. In light of that conclusion, the court should have resolved the question of local legislative immunity in favor of the State. But, sidelining the constitutional text and structure in favor of a "generalized prescription," *Mistretta*, 488 U.S. at 426, the trial court "s[aw] no relevance to the legislative supremacy argument when considering the separation of powers question" because, in the court's view, once local governments exist, they must have legislative bodies and the State Legislature "cannot change these fundamental aspects of counties and cities without amending the Constitution," R.2009. In other words, the court appears to have concluded, the Legislature can abolish local governments, but as long as local governments exist, the Legislature cannot abolish their local legislative bodies (*e.g.*, city councils and county commissions).

Defendants have never suggested otherwise, as that question is not before the Court. The State's position is that the Legislature may penalize local officials for acting outside the scope of their authority because there is no "separation of powers" doctrine that bars the Legislature from holding them accountable for their official actions. The trial court addressed that argument only insofar as the court appears to have accepted its underlying premise, the Legislature's "ultimate authority over local governments." R.2008.

Glossing over the absence of any pertinent constitutional limitation on the Legislature's authority over local governments and officials, the court compounded its error by relying on *Bogan v. Scott-Harris* for the proposition that the "rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators," R.2008 (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 44 (1998)). Regardless of whether it is correct that "the time and energy required to defend against a lawsuit are of particular concern at the local level," *Bogan*, 523 U.S. at 45, that is a policy rationale that supports extending immunity to local officials only as a matter of common law principles, which, as noted above, state legislatures may modify or eliminate.

Consistent with that understanding, *Bogan* holds that the federal Civil Rights Act, 42 U.S.C. § 1983, did not abrogate traditional common law immunity for legislative activity, including such activity at the local level. 523 U.S. at 54. The U.S.

Supreme Court has expressly rejected the argument that the immunity "is found in constitutional [law]," *Lake Country Estates, Inc.*, 440 U.S. at 403, and, as discussed above, confirmed that the immunity persists under Section 1983 because Congress "did not intend § 1983 to abrogate the common-law immunity of state legislators," *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732 (1980). By contrast, when the Florida Legislature added the penalty provisions to Section 790.33, it unmistakably intended to waive any immunity that would otherwise shield local governments and officials from those penalties.

CONCLUSION

For the foregoing reasons, the judgment of the trial court must be reversed insofar as it declares that the penalty provisions of Sections 790.33(3) and 790.335(4)(c) violate the doctrines of legislative immunity and discretionary government function immunity.

Respectfully submitted,

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I certify that this brief was prepared in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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