IN THE FIRST DISTRICT
COURT OF APPEAL

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

STATE OF FLORIDA et al.,
Appellants,

v.

CITY OF WESTON et al.,
Appellees.

APPELLEES' ANSWER BRIEF

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY

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INTRODUCTION

The penalties contained in Sections 790.33(3) and 790.335(4)(c), Florida Statutes (the "Penalty Provisions"), attendant to Florida's statutory preemption law against local regulation of firearms and ammunition, Section 790.33, et seq., Florida Statutes (the "Preemption Law"), are an unnecessary and unconstitutional overreach that interferes with fundamental aspects of Florida's system of government. The Penalty Provisions punish local governments and officials for actions taken in their official capacities, with penalties imposed based on an after-the-fact inquiry by the judicial branch into local officials' motives and mindsets. In defending the Penalty Provisions, Appellants have taken the position that inherent components of representative democracy—absolute legislative immunity and governmental function immunity—no longer apply to local governments, at least not when it comes to the subject of firearms. Over two hundred years of practice and precedent say otherwise.

STATEMENT OF THE CASE AND FACTS

I. Statement of the Facts

Appellees in these three consolidated actions (R. 84, 271, 1604, 1800) include thirty municipalities, three counties, and more than seventy elected representatives

of those entities ("Elected Officials").[1] Appellees wish to enact numerous safety measures that they believe are not preempted (R. 575), including requiring the reporting of failed background checks (R. 542), requiring documentation ensuring compliance with mandatory waiting periods and criminal history background checks (R. 542), prohibiting the sale of large-capacity detachable magazines (R. 575), and restricting the possession of firearms at certain government-owned or government-operated facilities and locations (R. 576). However, Appellees have not voted on or enacted such restrictions—even when they believe that such actions would *not* be preempted—because they fear that such actions could possibly be interpreted after the fact as violating the Preemption Law, thereby subjecting them to the severe punishments of the Penalty Provisions (R. 508, 575), including:

- ***Fines up to $5,000*** against elected officials for knowingly and willfully violating the statute (§ 790.33(3)(c), Fla. Stat.);
- ***Removal from office*** for any person knowingly and willfully violating the statute while acting in an official capacity (§ 790.33(3)(e), Fla. Stat.);
- ***Damages of up to $100,000 (plus uncapped attorneys' fees)*** against the local government entity in favor of any "adversely affected" individual or entity (§ 790.33(3)(f), Fla. Stat.);
- ***Prohibition on the use of public funds to defend or reimburse*** an official found to have knowingly and willfully violated the Preemption Law (§ 790.33(3)(d), Fla. Stat.); and
- ***Fines up to $5 million*** against a local government if a list, record, or registry of firearms or firearm owners was compiled or maintained with

[1] The undisputed facts presented to the trial court (R. 564–80) were based on extensive discovery propounded by Appellants. (R. 493, 564–80.)

> the knowledge or complicity of the local government entity (§ 790.335(4)(c), Fla. Stat).

Appellees' fears of being subjected to the Penalty Provisions for conduct they believed to be outside the scope of the Preemption Law are underscored by the numerous legal actions brought against several of the Appellees and other local governments in recent years (R. 508), as well as by the Attorney General's statements in advisory opinions as to the scope of the Preemption Law and her office's intervention in lawsuits defending the Penalty Provisions (R. 508, 574.) These concerns are further highlighted by the threats Appellees have received from private individuals and entities contending that actions taken or contemplated by Appellees would violate the Preemption Law and threatening suit under the Penalty Provisions (*see* R. 508, 572–75), including litigation threats from the National Rifle Association ("NRA"), an amicus in this appeal. (*See, e.g.*, R. 589–90, 600–01.)[2]

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[2] Appellants' own statements juxtaposed against the rulings in this case highlight Appellees' understandable uncertainty about what might constitute non-preempted local legislation. For example, as discussed below, the trial court declared certain proposed regulations would not be preempted, including a local regulation requiring that guns brought into gun shows for sale be tagged (R. 2018); those determinations have not been appealed. But while the trial court considered such a regulation to be within a local government's powers, Appellants previously contended that such regulation would be illegal and preempted (R. 1100), and the NRA's amicus brief still insists that such a regulation is preempted (NRA Amicus Brief 14–19).

Conversely, certain Appellees had considered enacting regulations prohibiting the sale and transfer of large-capacity magazines when sold as accessories separate from firearms, believing that this fell outside the scope of the Preemption Law because the law prohibits local regulation of "firearms, ammunition, or components thereof,"

II. Statement of the Case

Appellees filed this lawsuit seeking a declaration that the Penalty Provisions are invalid and unconstitutional on various grounds.

Following the filing of the amended complaints, all Appellants, other than the Governor, moved to dismiss (R. 227). The trial court denied Appellants' motion (although it did dismiss certain other defendants). (R. 444.) Appellants have not challenged any of the trial court's rulings on the motion to dismiss.

Following discovery, both sides moved for summary judgment. (R. 503, 1041.) As discussed below, the trial court granted Appellees' summary judgment motion in part, finding the Penalty Provisions violated the doctrines of legislative and governmental function immunity. (R. 2007–11.) However, the trial court denied Appellees' claims that the penalties chilled protected speech rights (R. 2012–13) and that the statute was impermissibly vague as to what regulations may or may not be preempted (R. 2013–14).

The remaining defendants—except the Florida Commissioner of Agriculture and Consumer Services—filed a notice of appeal. (R. 2020–21.) Appellants have not

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but not "accessories." (R. 552.) But the trial court declared that the regulation of firearms accessories would be preempted as well. (R. 2019.) Given the different consequences of just these two examples—one not preempted but appearing likely to be challenged nonetheless, the other found preempted, the enactment of which would have led to heavy penalties—Appellees' fears of the consequences of potentially violating the Penalty Provisions are reasonable.

challenged three rulings adverse to them: *first*, the trial court's declaration that the provision authorizing the Governor to remove local legislators (including municipal and county officials) who participated in enacting legislation later found to be preempted was an unconstitutional expansion of his limited power to suspend public officials; *second*, that the Penalty Provisions unconstitutionally impaired contracts between certain Appellees and their employees by diminishing the value of their employment contracts; and *third*, that certain proposed measures some Appellees wished to take were not preempted. (R. 2011–12, 2015–19; *see generally* I.B.)[3] The

[3] The court declared that the counties may implement the following measures to enforce counties' constitutional "local option power" under Article VIII, section 5(b) of the Florida Constitution: requiring documentation that demonstrates compliance with the waiting period; requiring documentation that demonstrates compliance with the criminal records history check; requiring posting of conspicuous signs throughout gun shows and providing written notice to all gun show dealers about waiting period and background screening requirements; requiring that guns brought into gun shows for sale be tagged and controlling access doors at gun shows to ensure regulatory compliance; creating records of firearms transactions (as opposed to owners or firearms); and establishing firearms policies in their capacities as employers and proprietors. (R. 2017–18.)

The NRA, in its amicus brief, improperly argues an issue that has not been appealed–that counties can require records of firearm transactions (NRA Amicus Brief 14–19). The NRA's attempt to appeal this issue by way of amicus brief violates a basic tenet of Florida appellate practice: "it is axiomatic that amici are not permitted to raise new issues." *Riechmann v. State*, 966 So. 2d 298, 304 n.8 (Fla. 2007) (citing *Dade Cty. v. E. Air Lines, Inc.*, 212 So. 2d 7, 8 (Fla. 1968)); *see also Westphal v. City of St. Petersburg*, 194 So. 3d 311, 315, n.2 (Fla. 2016) ("[W]e do not consider arguments raised by amici curiae that were not raised by the parties."). Therefore, this brief does not address, and this Court should not consider, the new issue raised by the NRA in its amicus brief.

sole issues on appeal are whether the trial court correctly invalidated the Penalty Provisions for violating legislative and governmental function immunity.

SUMMARY OF THE ARGUMENT

The trial court correctly held that the Penalty Provisions violate the legislative immunity and governmental function immunity secured by the Florida and United States Constitutions. These immunities underscore our republican form of government in which citizens choose their elected officials, who are then duty-bound to represent their constituents' interests through legislative and regulatory initiatives. Without immunity from liability, officials and localities are understandably likely to refrain from acting on matters they reasonably believe are both permissible and in the interest of their constituents, for fear of professional and financial ruin if it is later determined their belief was mistaken.

Appellants urge this Court to ignore two cornerstone principles of representative democracy.

First, the Legislature's constitutional authority over local legislative bodies and governments is not limitless. Local legislative authority derives expressly from the Florida Constitution, while legislative immunity arises from the separation of powers clause in the Florida Constitution and from common law principles underlying the United States Constitution. That immunity insulates local legislators from liability and other civil penalties for performing legislative acts like voting on

proposed legislation, even if the legislation is later deemed preempted, so that they may carry out their duties with fidelity to those who elected them.

Once the Legislature establishes a local government, its elected legislative body is imbued, under Article VIII, sections 1 and 2 of the Florida Constitution, like its state counterpart, with absolute immunity for legislative acts. That immunity cannot be statutorily abrogated by penalties that subject local officials to litigation and potential personal financial liability and removal from office simply for attempting to effectuate the political will of their constituents by enacting local legislation that *may* later be found to be preempted.

Second, it is axiomatic that the separation of powers doctrine proscribes judicial interference with discretionary governmental actions, such as enacting or enforcing laws. The Penalty Provisions insert the courts into this inherently political process by creating a cause of action against local governments that enact or cause enforcement of laws later found to violate the Preemption Law. In contrast, the existing remedy for violation of the preemption—a declaratory judgment action challenging the validity of a particular law on preemption grounds—is both sufficient and entirely consistent with separation of powers principles.

Local governments cannot properly function if stripped of immunity and thus coerced into inaction and rendered powerless to act on matters of the greatest importance to its citizenry. Because the Penalty Provisions violate the doctrines of

legislative and governmental function immunity in Florida, they must fail, and the trial court's decision should be affirmed.

STANDARD OF REVIEW

The parties agree that the standard of review is de novo and that there is no genuine issue as to any material fact in this case. (R. 1359.) *See Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000).

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE PENALTY PROVISIONS VIOLATE THE LEGISLATIVE IMMUNITY OF LOCAL GOVERNMENT OFFICIALS.

A. The Penalty Provisions Violate Elected Officials' Legislative Immunity.

The Elected Officials are protected by the doctrine of legislative immunity, which is an essential characteristic of American democracy. *See Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). For centuries, *all* legislators in America have been provided absolute immunity from suit and from damages for all actions taken within the sphere of legislative activity. *See id.*; *Woods v. Gamel*, 132 F.3d 1417, 1419 n.3 (11th Cir. 1998). The purpose of this immunity is clear and noncontroversial—"to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). It is simply "not consonant with our scheme of government for a court to inquire into the motives of legislators," *Tenney*, 341 U.S. at 377, or for legislative

discretion to be "distorted by the fear of personal liability," *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998).

In Florida, the law is settled that local government officials are entitled to absolute legislative immunity. In *McNayr v. Kelly*, 184 So. 2d 428 (Fla. 1966), the Florida Supreme Court stated that "absolute immunity in this State extends to county and municipal officials in legislative or quasi-legislative activities as well as to members of the State Legislature and activities connected with State legislation." *Id.* at 430. Likewise, in *Junior v. Reed*, 693 So. 2d 586 (Fla. 1st DCA 1997), this Court stated that "[t]he protection afforded by absolute immunity is available to local governmental officials as well as to those officials performing legislative functions at the federal and state levels." *Id.* at 589; *see also City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co.*, 942 So. 2d 455, 456 (Fla. 4th DCA 2006) ("State and local officials are immune from civil suits for their acts done within the sphere of legislative activity."); *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 740 (Fla. 2d DCA 1989) ("City council members enjoy absolute immunity in civil rights actions when acting in a legislative capacity.").

These cases recognize that local governments are a distinct and important feature of Florida's system of governance. Pursuant to Article VIII of the Florida Constitution, counties and municipalities possess the express political power to address matters of local concern. Art. VIII, §§ 1–2, Fla. Const. These powers enable

local governments to enact laws that benefit the public and to provide important public services for Floridians. *See Cauley v. City of Jacksonville*, 403 So. 2d 379, 386 (Fla. 1981) ("Municipalities can no longer be identified as partial outcasts as opposed to other constitutionally authorized local governmental entities.").

While it *may* be true that the Legislature has the authority to abolish local governments, so long as they exist, the Florida Constitution *mandates* that those local governments include a *legislative* body that is composed of elected officials. *See* Art. VIII, § 1(e)-(g), Fla. Const. (stating that "the governing body of each county shall be a board of county commissioners composed of" elected officials with legislative powers); *id.* § 2(b) ("Each municipal *legislative* body shall be elective." (emphasis added)). Article VIII of the Florida Constitution thus provides an independent, constitutional source of legislative immunity for local government officials. When local elected officials vote on ordinances or resolutions, they are undeniably engaging in "quintessentially legislative" action, and they must be free to perform their legislative duties without fear of undue interference by other branches of government. *See Bogan*, 523 U.S. at 55; *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1063 (11th Cir. 1992); *see also Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985).

Furthermore, the Legislature has no constitutional authority to introduce coercive interference into local legislative activities. Article VIII of the Florida

Constitution states that counties may enact ordinances that are "not inconsistent with general or special law," Art. VIII, § 1(f)–(g), Fla. Const., and that municipalities "may exercise any power for municipal purposes *except as otherwise provided by law*," *id.* § 2(b) (emphasis added). The phrases "not inconsistent with general law" and "except as otherwise provided by law" are understood to authorize the Legislature to preempt substantive areas of law to the State. *See generally Masone v. City of Aventura*, 147 So. 3d 492 (Fla. 2014). Significantly, though, the constitutional provisions requiring a governing board for counties and a legislative body for municipalities, each composed of elected officials, do *not* contain similar limiting language. *See* Art. VIII, §§ 1(e), 2(b), Fla. Const.

Despite this lack of authority, the Penalty Provisions impose unprecedented interference with local legislative activities for the express purpose of deterring and preventing local elected officials from fulfilling their constitutionally mandated legislative function of representing their constituents. *See* § 790.33(2)(b), Fla. Stat. Under the terms of the statute, the court is required to step outside of its traditional role of construing the applicability or validity of a local government regulation. If the court determines that a violation of section 790.33(1) "was knowing and willful, the court *shall* assess a civil fine of up to $5,000 against the elected or appointed local government official," § 790.33(3)(c), Fla. Stat. (emphasis added), and public funds may not be used to defend or reimburse the official for the fees or costs of the

lawsuit, § 790.33(3)(d), Fla. Stat. Additionally, "[a] knowing and willful violation of any provision of this section by a person acting in an official capacity . . . shall be cause for termination of employment or contract or removal from office by the Governor." *Id.* § 790.33(3)(e). The Penalty Provisions thus violate the legislative immunity of local government officials because they require the judicial branch and permit the executive branch to impose personal penalties against local government officials for performing purely legislative activities, including voting for an ordinance that is later found to be preempted.

The Penalty Provisions also violate the legislative immunity of local government officials because they require the judiciary to determine whether a local government official *knowingly and willfully* violated the statute by voting for a local ordinance or administrative rule or regulation. In order for the court to determine whether a local legislator "knowingly and willfully" violated the statute, local legislators and their staff will be forced to participate in private litigation and to "explain why they voted a particular way or to describe their process of gathering information on a [resolution or ordinance]," or risk severe personal liability based upon a court's speculation as to motives. *Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 524 (Fla. 1st DCA 2012); *Tenney*, 341 U.S. at 377 ("The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the

hazard of a judgment against them based upon a jury's speculation as to motives."). Allowing such judicial inquiries into legislative motives necessarily threatens the independence and integrity of local legislators. The court's determination will require an unprecedented spectacle where the judiciary must hale legislators into court to make factual findings about their state of mind and intent when considering and voting on the subject legislation.

In short, the trial court was absolutely correct to invalidate the Penalty Provisions for violating the absolute legislative immunity of local government officials. The Penalty Provisions are an affront to Florida's established system of government because they intentionally create fear of outside interference into political matters of local concern and "undermine[] the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone v. United States*, 493 U.S. 265, 279 (1990). In fact, the record irrefutably establishes that the mere existence of the Penalty Provisions has had a chilling effect on the exercise of local legislative functions throughout the state, including the enactment of regulations that arguably do *not* violate the Legislature's preemption of regulation of firearms and ammunition.[4] (R. 564–794.)

[4] To take just one example, at least one city commission wishes to pass a local ordinance that would require gun dealers within city limits to report to local police if someone comes in and tries to buy a gun, but fails a background check, so the police can decide whether further investigation is warranted. (R. 639–43.) While the record reflects a belief on the part of these elected local officials that such an

Tellingly, Appellants do not dispute that the Penalty Provisions purport to create personal liability for actions taken within the sphere of legislative activity. Nor do they dispute that the Penalty Provisions effectively require local "legislators and legislative employees [to] submit to an inquisition conducted to ferret out evidence of an improper purpose in the legislative process." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 157 (Fla. 2013) (Canady, J., dissenting). Rather, Appellants' sole argument in support of the Penalty Provisions is that local legislative immunity derives exclusively from general common law and that the Legislature abrogated that immunity when it enacted the Penalty Provisions. (I.B. 22–23.)

Appellants are fundamentally mistaken. The constitutional mandate for local legislative bodies stated in Article VIII thwarts Appellants' argument. Moreover, as explained in greater detail below, Florida law does not recognize a dichotomy between the immunity afforded to state and local legislators. As with the immunity provided to state legislators, local legislative immunity derives not only from Article VIII and general common law, but also from the separation of powers provision in

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ordinance—aimed at assisting law enforcement in investigating and preventing potential criminal acts—would not be preempted, the possibility that they might be hauled into court, examined as to their motives and beliefs in passing the local law, and that a court might later disagree and financially penalize them, has prevented these elected officials from acting. (R. 628–33.)

Article II, section 3, of the Florida Constitution, and federal common law. As a result, the Legislature cannot abrogate local legislative immunity in Florida.

B. Local Legislative Immunity Cannot be Abrogated Because It Derives from Florida's Separation of Powers Provision.

In *League of Women Voters* and *Expedia*, the Florida Supreme Court and this Court both held that "a legislative privilege exists in Florida, based on the principle of separation of powers codified in article II, section 3, of the Florida Constitution." 132 So. 3d at 143; 85 So. 3d at 524. In *Expedia*, this Court reasoned that "[o]ur state government could not maintain the proper 'separation' required by Article II, section 3 if the judicial branch could compel" legislators to appear in court and to "explain why they voted a particular way or to describe their process of gathering information on a bill." 85 So. 3d at 524. Similarly, in *League of Women Voters*, the Florida Supreme Court offered several reasons to support its holding, including the protection of the integrity of the legislative process, and "[protecting legislators] 'from the burdens of forced participation in private litigation.'" 132 So. 3d at 146 (quoting *Kerttula v. Abood*, 686 P.2d 1197, 1202 (Alaska 1984)).

Following *League of Women Voters* and *Expedia*, there can be no doubt that legislative immunity, like legislative privilege, is based upon the principle of separation of powers codified in article II, section 3, of the Florida Constitution. In both cases, the courts surveyed the case law addressing both legislative immunity and legislative privilege, among other types of official immunity. In *Expedia*, this

Court explained that legislative privilege and legislative immunity are "closely related" and based upon the same policy considerations. 85 So. 3d at 522–23. Furthermore, in *League of Women Voters*, the Court explained that "legislative privilege is *derived from* the principles underlying legislative immunity." 132 So. 3d at 147 n.11 (emphasis added).

In this case, Appellants do not dispute that legislative immunity is based on the principle of separation of powers codified in article II, section 3 and therefore cannot be abrogated by state statute. Instead, Appellants attempt to distinguish *Expedia* and *League of Women Voters* because the courts in those cases were addressing a claim of legislative privilege raised by state, rather than local, legislators. (*See* I.B. 24.) According to Appellants, the Penalty Provisions do not implicate the concerns of the separation of powers doctrine because local governments are not a "coequal" branch of state government. (I.B. 27.) In essence, Appellants contend that it is entirely appropriate for the state judiciary to inquire into the state of mind of, and personally penalize, local legislators—but not state legislators—for their legislative activities. (*See* I.B. 30.) Such a distinction lacks support in both history and reason.

In *Bogan*, the United States Supreme Court specifically explained that the "rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators." 523 U.S. at 52. The Court stated,

"Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Id.* at 53. "Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace." *Id.* "And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability." *Id.*; *see also Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009) ("In later decisions, the Court acknowledged that the legislative immunity federal and state legislators enjoy are essentially coterminous.").

Additionally, the Florida Supreme Court has repeatedly explained that the "judicial power" set out in Article V of the Florida Constitution does *not* include the authority to interfere with the legislative activities of local governments. *See, e.g.*, *Wallace v. Dean*, 3 So. 3d 1035, 1053–54 (Fla. 2009) (collecting cases); *Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) ("We find that it is impossible to preserve the constitutionality of the Tampa ordinance without effectively rewriting it, and we decline to 'legislate' in that fashion. Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments."); *Metro. Dade Cty. Fair Hous. & Emp't Appeals Bd. v. Sunrise Vill. Mobile Home Park, Inc.*, 511 So. 2d 962, 965 (Fla. 1987) ("Courts may not substitute their social and economic beliefs for the judgment of legislative bodies which are elected to pass laws . . . ."); *see also*

infra Section II (discussing the application of governmental function immunity, which is based upon separation of powers principles, to local governments). Thus, Florida law is clearly established that, based on separation of powers principles, courts have no authority to interfere with local legislative bodies in the exercise of their legislative functions.[5]

Notwithstanding this case law, Appellants argue that the Legislature's "constitutional superiority" gives it the authority to impose penalties upon local governments and their officials. (I.B. 27.) Appellants had to go out of state for support. *See id.* In *City of El Cenizo, Texas v. Texas*, 890 F.3d 164 (5th Cir. 2018), the court approved of penalties attached to "SB4"—a Texas law that "prohibits local authorities from limiting their cooperation with federal immigration enforcement"—

[5] Numerous courts outside of Florida have also articulated the same principle that the judicial power does not include the authority to influence, interfere with, or second-guess the legislative activities of local officials. *See, e.g.*, *Kawananakoa v. City & Cty. of Honolulu*, 413 P.3d 403, 404 (Haw. Ct. App. 2018) (rejecting Kawananakoa's argument that the political-question doctrine does not apply to the actions of the city's legislative and executive activities because they are not "co-equal" branches of government); *Steiner v. Superior Court*, 50 Cal. App. 4th 1771, 1785 (Ct. App. 1996) (stating that the principles "of the separation of powers doctrine regarding legislative acts apply to local government bodies, including boards of supervisors, when they act in a legislative capacity."); *Skokos v. Corradini*, 900 P.2d 539, 541 n.3 (Utah Ct. App. 1995) ("Municipalities, as political subdivisions of the state, are also subject to separation of powers notions in the context of their legislative/administrative operations and the state judiciary." (citation omitted)); *Bd. of Comm'rs of Marion Cty. v. Jewett*, 110 N.E. 553, 556 (Ind. 1915) ("The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction.").

because the state law did not conflict with federal law. *Id.* at 173, 181 n.11. However, in that case, the plaintiffs did not argue that SB4 violated the doctrine of legislative immunity. *Id.* at 173. Moreover, SB4 "imposes duties on certain state officials and provides civil and criminal liability for violations of those duties." *Id.* Unlike section 790.33, it does not impose penalties against local government officials for performing quintessentially legislative activities (such as voting on ordinances). *See id.* Therefore, Appellants' reliance on *City of El Cenizo* is misplaced.

Further, Appellants grossly overgeneralize the Legislature's constitutional authority vis-à-vis local governments. As explained previously, local governments are political subdivisions of the state that perform governmental functions independent from the judiciary. Although local governments are "controlled in part by legislative acts," *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992), this does not mean that the Legislature can ignore fundamental principles of government structure or trample on democracy at a local level.[6] While the *exercise* of home rule authority in certain areas can be circumscribed by the Legislature's authority to preempt to itself particular subject matters for comprehensive regulation, the Legislature does

[6] In his recent book, *A Republic, If You Can Keep It*, U.S. Supreme Court Justice Neil Gorsuch discusses the separation of powers doctrine at length: "The design of our founders doesn't just disperse power; it also has implications for how power should be exercised in each branch. … The founding generation did not have the luxury of overlooking the importance of the separation of powers, but I sometimes wonder if we are at risk of forgetting or discounting it today." Neil Gorsuch, *A Republic, If You Can Keep It* 78 (2019).

not have the constitutional authority to reach down and strip away *inherent* legislative immunity from local elected bodies. *See* Art. VIII, § 1(e), Fla. Const.; *id.* § 2(b). Below, the trial court correctly rejected Appellants' "legislative supremacy argument when considering the separation of powers question because the legislature cannot change the fundamental aspects of separation of powers." (R. 2009.) As the trial court astutely explained, "Because local governments must have what amounts to small legislatures, and because courts cannot interfere in legislative processes, neither this court, nor any other court in Florida, can enforce the civil penalty provisions of Section 790.33 against local legislators." *Id.*

Appellants' reliance on *Locke* is also misplaced. (*See* I.B. 27.) In *Locke*, the Court stated that Florida's separation of powers provision "was not intended to apply to local governmental entities and officials." 595 So. 2d at 36. However, that statement is neither controlling nor applicable in this context.

The Court in *Locke* did not address a claim of legislative immunity, and no local government or official was a party to that case. In *Locke*, the Court was addressing "the applicability of chapter 119, Florida Statutes (1987) (Public Records Law), to the individual records, including the individual bank accounts, of members of the Florida Legislature." *Id.* at 33. The House of Representatives argued that the judiciary is without jurisdiction over the internal operating procedures of the Legislature. *Id.* at 34. As such, one of the issues before the Court was whether the

separation of powers doctrine prohibits the judicial branch from construing chapter 119 to apply to the Legislature. *Id.* at 36.

In response to the House's argument, the Court held that it does not violate the separation of powers doctrine when it construes a statute that adversely affects either the executive or legislative branch. *Id.* The Court stated, "As the supreme court of the judicial branch, one of our primary judicial functions is to interpret statutes and constitutional provisions." *Id.* The Court's statement regarding the application of the separation of powers provision to local governments was mere dictum because it was not essential to reach (or even relevant to) its holding.[7] *See Hart v. Stribling*, 6 So. 455, 456 (Fla. 1889). In the twenty-seven years since *Locke* was decided, no Florida court has ever cited the case for the proposition that the separation of powers provision in Florida's constitution does not apply to local governments.

In this case, Appellees do not contend—and have never contended—that any regulation that impacts local officials would necessarily always violate Florida's separation of powers provision. Rather, Appellees contend, and the trial court

[7] Even if it were not *dictum*, the statement cannot be divorced from its context. The Florida Constitution enshrines the principle of access to public records, Art. I, § 24(a), Fla. Const., but *expressly* confers authority on the Legislature to create exemptions from public access, *id.* at § 24(c). It is not surprising, then, that in the context of interpreting Chapter 119, the Court would have concluded that legislative intrusion into local governmental affairs would not involve a separation of powers concern. However, in the context of the legislative function mandated by Article VIII, there is no comparable authorization for the Legislature to carve out exceptions.

agreed, that the Penalty Provisions violate the doctrine of legislative immunity—which is based upon separation of powers principles—because they require the state judiciary to interfere with the purely legislative activities of local government officials, including by mandating intrusive inquiries into their state of mind. Without a doubt, the judicial branch has the authority to construe the applicability or validity of local government regulations, and the Legislature has some authority to control or influence the operations of local governments, as chapter 119 demonstrates. But the state judicial branch does not have the "judicial power" to interfere with the legislative activities of a separate governmental entity that functions independently of Article V.

For all of these reasons, the trial court was correct to invalidate the Penalty Provisions for violating the doctrine of legislative immunity based upon Florida's separation of powers provision.

C. Local Legislative Immunity Cannot be Abrogated Because It Derives from Federal Common Law.

Additionally, the trial court was correct to invalidate the Penalty Provisions for violating the doctrine of legislative immunity that is based upon federal common law. In *Tenney* and *Bogan*, the U.S. Supreme Court specifically held that federal common law provides legislative immunity to state and local legislators. *See Tenney*, 341 U.S. at 376; *Bogan*, 523 U.S. at 52; *see also Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979) ("[T]he absolute immunity for state

legislators recognized in *Tenney* reflected the Court's interpretation of federal law.").

Appellants acknowledge that federal common law exists in certain areas and is "binding on the states." (I.B. 24–25.) They argue, though, that federal common law does not apply to legislative immunity, or at least not to legislative immunity for local government officials.[8] *See id.* Appellants are incorrect. In addition to *Tenney* and *Bogan*, numerous courts have explained that legislative immunity for state and local legislators is derived from federal common law, rather than the U.S. Constitution or some other source. *See Bryant*, 575 F.3d at 1304 ("Doctrinally, legislative immunity emanates from the well-spring of the federal common law."); *Fowler-Nash v. Democratic Caucus of Pa. House of Representatives*, 469 F.3d 328, 331 (3d Cir. 2006) ("The Speech and Debate Clause does not, by its terms, extend any protection to state legislators or officials. Nevertheless, the *Tenney* Court extended legislative immunity to state legislators and officials as federal common law, extensively referencing the immunity's deep common law origins."); *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 629 (1st Cir. 1995) ("While this

[8] Appellants also argue that the U.S. Constitution does not afford legislative immunity to local government officials. (I.B. 24.) However, the trial court's reasoning was based upon common law principles, not the Speech or Debate Clause, as Appellees argued below. (R. 2009.) In fact, the trial court specifically quoted from *Expedia*'s explanation that *Tenney* and *Bogan* applied the underlying "common law principles" to state and local legislative officials, respectively. (R. 2009 (quoting *Expedia*, 85 So. 3d at 522).)

immunity is derived from federal common law, it is similar in scope and object to the immunity enjoyed by federal legislators under the Speech or Debate Clause."); *see also Montgomery Cty. v. Schooley*, 627 A.2d 69, 74 (Md. App. 1993) (holding that legislative immunity, including testimonial privilege, applies to local legislators on the basis of federal common law principles); *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Ill., Inc.*, 729 F.2d 1128 (7th Cir. 1984) (holding that the "common law doctrine of official immunity" barred complaint based on the legislative acts of former state legislators, including state statutory claim and state tort claims of fraud, unfair competition, and interference).

Thus, legislative immunity is not merely a state "common law tradition, which state legislatures are free to modify or eliminate," as Appellants claim. (I.B. 25.) Under the Supremacy Clause, the Florida Legislature has no authority to override the doctrine of absolute legislative immunity that originated in, and developed through, federal common law. *See Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1366 (S.D. Fla. 2002) (stating that the "Florida legislature has no authority under the supremacy clause to eradicate a federal common law rule"), *aff'd sub nom., Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003); *see also N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012) ("It is undisputed that state law can be preempted by federal common law as

well as federal statutes."). The trial court was correct to strike the Penalty Provisions for this reason as well.

II. THE TRIAL COURT CORRECTLY HELD THAT THE PENALTY PROVISIONS VIOLATE THE GOVERNMENTAL FUNCTION IMMUNITY OF LOCAL GOVERNMENTS.

In Florida, counties and municipalities have immunity for their planning level decisions because judicial interference with those decisions would require the judiciary to "second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine." *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985). "Accordingly, where governmental actions are deemed discretionary, as opposed to operational, the government has absolute immunity from suit." *City of Freeport v. Beach Comm. Bank*, 108 So. 3d 684 (Fla. 1st DCA 2013), *remanded on other grounds*, 150 So. 3d 1111 (Fla. 2014). "Planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy." *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1021 (Fla. 1979).

Governmental function immunity is a distinct feature of sovereign immunity that cannot be waived by statute.[9] *See Commercial Carrier*, 371 So. 2d at 1021.

[9] Governmental function immunity is sometimes referred to as "discretionary function" immunity. *Trianon*, 468 So. 2d at 919.

Unlike generic sovereign immunity, which is derived 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," *Wallace*, 3 So. 3d at 1045 (citation omitted); *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989); *see also City of Freeport*, 108 So. 3d at 690 (stating that the judiciary may not entangle itself in fundamental questions of policy and planning). And the Legislature does not have the authority to undermine a constitutional provision through the enactment of a general law. *See State v. Raymond*, 906 So. 2d 1045, 1052 (Fla. 2005); *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 269 (Fla. 1991); *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 33 (Fla. 1st DCA 2008).

In this case, Appellants do not and cannot contest the applicability of governmental function immunity to local governments. Indeed, Florida courts routinely apply the doctrine of governmental function immunity to local governments based upon separation of powers principles. *See Trianon*, 468 So. 2d at 919; *Commercial Carrier*, 371 So. 2d at 1022; *Cauley*, 403 So. 2d at 386–87; *City of Freeport*, 150 So. 3d at 1114; *Carter*, 468 So. 2d at 956–57; *Miami-Dade Cty. v. Jones*, 232 So. 3d 1127, 1130 (Fla. 3d DCA 2017).

Under Florida law, the decision to enact or enforce a regulation is a paradigmatic discretionary governmental function. *See Trianon*, 468 So. 2d at 918.

These actions are "inherent in the act of governing" and cannot be performed by private individuals. *Id.* at 919–20. The decision to enact a regulation obviously requires careful planning and judgment. *See* § 125.66, Fla. Stat. (county procedure); § 166.041, Fla. Stat. (municipal procedure). In fact, the decision to enact a regulation is the creation of policy and thus cannot be operational. Likewise, a local government's discretionary choice to enforce laws, including the priority and manner of enforcement, is a planning-level, judgmental decision. *See Carter*, 468 So. 2d at 957; *Trianon*, 468 So. 2d at 919 ("How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care.").

Under section 790.33(3)(f), any person or organization may file suit against a local government for declaratory and injunctive relief *and* for damages based solely upon an allegation that the local government enacted a local ordinance or administrative rule or regulation impinging upon the Legislature's exclusive occupation of the field of regulation of firearms and ammunition. § 790.33(3)(f), Fla. Stat. The statute provides that "[a] court *shall* award the prevailing plaintiff in any such suit" any actual damages up to $100,000, and reasonable attorney's fees and costs, including a contingency multiplier. *Id.* (emphasis added). However, as Appellants agree, "[s]ection 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." (I.B. 19); § 790.33(3)(b), Fla. Stat. Additionally, under section 790.335, a local government that knowingly and willfully keeps or causes to be kept any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms may be assessed a fine up to $5 million. § 790.335(4)(c), Fla. Stat. The Penalty Provisions thus violate the governmental function immunity of local governments because they expressly create liability for discretionary policymaking, planning or judgmental governmental functions. *Wallace*, 3 So. 3d at 1044, 1044 n.14.

Contrary to Appellants' suggestion (I.B. 16), the existence of the damages provision in section 790.33 takes this case out of the traditional framework governing legal challenges to arguably preempted laws. Although a court must "determine *at the outset* whether the regulation at issue falls within the ambit of the statutory prohibition" (I.B. 16) (emphasis added), which may result in a declaration and injunction, in any suit for damages, the court (or a jury) must *also* determine whether damages are warranted. Because the defenses of good faith and advice of counsel remain available (I.B. 19), this determination will invariably require the court (or a jury) to make factual findings about the state of mind and intent of local legislators when considering and voting on the subject legislation. Not only will this determination threaten the independence and integrity of local legislators, *see supra*

Section I, it will also subject discretionary policy decisions to scrutiny by judge or jury as to the wisdom of their performance. In order to determine whether the local government should be liable for damages, the court (or a jury) must determine whether the decision to enact or enforce a particular regulation should have been made in the first place, which is a quintessential political question that falls within the exclusive domain of the local elected officials. *See Commercial Carrier*, 371 So. 2d at 1019.

Appellants effectively agree that section 790.33 did not (and could not) waive governmental function immunity because they characterize the doctrine as a "narrow exception" to the Legislature's general authority to waive sovereign immunity in Article X, Section 13. (I.B. 10, 14.) Instead, Appellants argue that governmental function immunity simply does not apply to the governmental action at issue. (I.B. 14.) According to them, "the enactment or enforcement of a preempted firearms regulation" is not discretionary because such conduct is prohibited by section 790.33. (I.B. at 14.)

Section 790.33, however, does not impose any ministerial duty on local governments or their officials. *See 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."). Instead, it sets out the *policy* that the Legislature is occupying the field of regulation

of firearms and ammunition and creates a private right of action if a local government enters that field. §§ 790.33(1), (3)(f) Fla. Stat. Notwithstanding section 790.33(1), local governments retain considerable authority and discretion to enact regulations that are related to firearms and ammunition, but that are not preempted.[10] As the trial court correctly found below (R. 2010–11), the mere possibility that local officials may ultimately be mistaken about the validity of the law does not transform their original planning-level, discretionary decision to enact the law into an "operational" act. *See Commercial 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.").[11]

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[10] For example, the statute itself provides exceptions for zoning ordinances that encompass firearms businesses and for regulations pertaining to the carrying of firearms and ammunition by an employee during and in the course of the employee's official duties. § 790.33(4), Fla. Stat. Additionally, local governments retain discretion to act in their proprietary capacity to limit gun shows in public venues, *Fla. Gun Shows, Inc. v. City of Fort Lauderdale*, No. 18-62345-FAM, 2019 WL 2026496, at *2 (S.D. Fla. Feb. 19, 2019), to pass local business taxes that affect gun smiths or gun dealers, *see* Fla. Op. Att'y Gen. 2011-20, and to take many other actions that are arguably not preempted by the statute.

[11] *See also Cent. Advert. Co. v. City of Novi*, 283 N.W.2d 730, 734 (Mich. Ct. App. 1979) ("[T]he mere fact that an ordinance has been invalidated does not strip the city of its mantle of governmental immunity."); *J. S. K. Enters., Inc. v. City of Lacey*, 493 P.2d 1015, 1015–16 (Wash. Ct. App. 1972) ("Public policy and good government require that a legislative body be free to enact good faith legislation without incurring tort liability, even though that legislation be subsequently held to

Furthermore, even if section 790.33 did impose a duty on local governments, this would not mean that the decision to enact a regulation is not "discretionary" within the meaning of the governmental function immunity doctrine. The Florida Supreme Court has "repeatedly recognized that a duty analysis is *conceptually distinct* from any later inquiry regarding whether the governmental entity remains sovereignly immune." *Wallace*, 3 So. 3d at 1044; *see also Kaisner*, 543 So. 2d at 737 ("[G]overnmental immunity derives entirely from the doctrine of separation of powers, not from a duty of care or from any statutory basis"). Thus, even "if a duty of care is owed, it must then be determined whether sovereign immunity bars an action for an alleged breach of that duty," and the Florida Supreme Court has determined that basic judgmental or discretionary governmental functions, including the enactment and enforcement of regulations, are immune from legal action.[12] *See Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 933 (Fla. 2004).

Nonetheless, Appellants argue that the trial court's reasoning is flawed because "the case law does not support the trial court's categorical approach, and

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be unconstitutional."). Both *Central Advertising* and *J.S.K. Enterprises* were cited with approval in *Trianon*. 468 So. 2d at 919.

[12] Additionally, any such duty would be owed to the public generally, rather than to a particular constituent. *See Willingham v. City of Orlando*, 929 So. 2d 43, 50 (Fla. 5th DCA 2006) ("There could be, however, no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual, as opposed to the general public, under similar circumstances.").

instead asks whether 'the challenged act' was discretionary." (I.B. 17.) Appellants then incorrectly apply a single factor of a four-part test to conclude, categorically, that the enactment of a regulation is never "discretionary" if the regulation is found to be not "lawful." *See id.*

In *Commercial Carrier*, the Court adopted a four-part test "to *assist* in distinguishing between the discretionary planning or judgment phase, and the operational phase of government." *Trianon*, 468 So. 2d at 918; *Commercial Carrier*, 371 So. 2d at 1022. Specifically, the Court's inquiry focused on a group of four related questions:

> (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?

Commercial Carrier, 371 So. 2d at 1019 (quoting *Evangelical United Brethren Church of Adna v. State*, 407 P.2d 440, 445 (1965)). "In applying this test to a particular set of circumstances, if all the questions can be answered in the affirmative, then the governmental conduct is discretionary and 'nontortious.'" *Trianon*, 468 So. 2d at 918. However, "[i]f one or more questions call for a negative

answer, then further inquiry is necessary, depending upon the facts and circumstances involved."[13] *Id.* at 918–19.

In this case, the four-part test "need not be applied" because there is no common law or statutory duty of care for a private person at issue. *See Trianon Park*, 468 So. 2d at 919 ("[A]lthough the *Evangelical Brethren* test works properly in instances where a common law or statutory duty exists, it need not be applied in situations where no common law or statutory duty of care exists for a private person because there clearly is no governmental liability under those circumstances."). The enactment of regulations by local governments is a core governmental function that has *always* been recognized as "discretionary." *See Commercial 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.").

But even if the four-part test were applied, it only supports the trial court's reasoning as to why the Penalty Provisions violate governmental function immunity. Appellants do not dispute that the first three questions can be clearly and unequivocally answered in the affirmative.[14] (*See* I.B. 17 n.3.) Therefore, the only

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[13] Appellants do not engage in any "further inquiry" although directed to do so by the Florida Supreme Court.

[14] The decision to enact or enforce legislation necessarily involves a basic governmental policy, is essential to the realization or accomplishment of that policy, and requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved.

remaining question would be whether local governments "possess the requisite constitutional, statutory, or lawful authority and duty to" make the decision to enact or enforce regulations that are subsequently found to be preempted. *See Commercial Carrier*, 371 So. 2d at 1019.

In *Department of Health & Rehabilitative Services v. Yamuni*, the Florida Supreme Court explained that "[q]uestion number four has limited value under Florida's statutory waiver of immunity because the answer will almost invariably be *yes* unless the government employees, officers, or agents are acting without authority outside the scope of their office or employment." 529 So. 2d 258, 260 n.1 (Fla. 1988) (emphasis added). In *Wallace*, for example, which is relied upon by Appellants (I.B. 17), the Court found 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.

Here, local governments clearly have the general authority to enact and enforce regulations in Florida. *See* Art. VIII, §§ 1–2, Fla. Const.; §§ 125.66, 166.021, Fla. Stat. Moreover, when local government officials vote for legislation from the dais, they are clearly acting within the scope of their employment at that time.[15] *See Hennagan v. Dep't of Highway Safety & Motor Vehicles*, 467 So. 2d 748, 751 (Fla.

[15] If they were not, then the local government would be immune from suit for a different reason. *See Wallace*, 3 So. 3d at 1054 n.27.

1st DCA 1985) ("Conduct is within the scope of employment if it occurs substantially within authorized time and space limits, and it is activated at least in part by a purpose to serve the master."). Therefore, under the four-part test adopted in *Commercial Carrier* (and misapplied by Appellants), all four questions indicate that the decision to enact or enforce a regulation, including those ultimately determined to be preempted, are discretionary governmental functions. *See Yamuni*, 529 So. 2d at 260 n.1.

To reach the opposite conclusion, Appellants conflate the discretionary general authority to act with the validity of the act itself. According to Appellants, if a local government regulation is ultimately found to be preempted, then the local government never had the discretionary authority to enact or enforce the regulation in the first place. (*See* I.B. 17.) This puts the proverbial cart before the horse. To determine whether a government is acting within the scope of its discretionary authority, "[t]he inquiry is not whether it was within the [government's] authority to commit the allegedly illegal act." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1282 (11th Cir. 1998). "Framed that way, the inquiry is no more than an 'untenable' tautology." *Id.* Contrary to the Court's explanation in *Yamuni*, the answer to the fourth question will always be "no" if the question presupposes that the challenged conduct was unlawful.

In Appellants' view, whether or not a lawmaker has the discretion to take an action in the first instance is retroactively decided by a court. Such a position distorts logic and, if accepted, would effectively render the fourth factor meaningless. In another context, it would mean that a police officer does not have the discretionary authority to arrest a suspect if the arrest is subsequently found to lack probable cause. But, even if the arrest is an operational act for other reasons, it does not follow that the government actor did not possess the basic authority to make the arrest.[16] *See, e.g.*, *McGhee v. Volusia Cty.*, 679 So. 2d 729, 732 (Fla. 1996) ("The officer's misconduct, though illegal, clearly was accomplished through an abuse of power lawfully vested in the officer, not an unlawful usurpation of power the officer did not rightfully possess."); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004) (rejecting the misconception that "violating someone's constitutional rights is never a legitimate job-related function or within the scope of a government official's authority or power").

In contrast, Appellants analogize the enactment or enforcement of regulations to employment decisions and claim that "the Florida Supreme Court has concluded that statutes restricting that discretion waive the State's sovereign immunity as to prohibited actions." (I.B. 18.) However, the cases they cite do not support that

[16] Somewhat contradictorily, Appellants later concede that the issue of fault is not relevant to this analysis. (*See* I.B. 18–19.)

proposition. In *Maggio v. Florida Department of Labor and Employment Security*, 899 So. 2d 1074 (Fla. 2005), and *Bifulco v. Patient Business & Financial Services, Inc.*, 39 So. 3d 1255 (Fla. 2010), the Court held that the pre-suit notice requirements of section 768.28(6) did not apply to employment discrimination claims under the Florida Civil Rights Act, *Maggio*, 899 So. 2d at 1080, or to workers' compensation retaliation claims under section 440.205, Florida Statutes, *Bifulco*, 39 So. 3d at 1256. In these types of cases, the government defendant is acting as an *employer* and is being sued for operational acts, rather than core discretionary governmental functions. *See Wallace*, 3 So. 3d at 1053 ("Because every human endeavor involves some level of discretion in the dictionary sense, this Court was quick to reject such an approach."); *Yamuni*, 529 So. 2d at 260 ("We have no doubt that the HRS caseworkers exercised discretion in the dictionary or English sense of the word, but discretion in the *Commercial Carrier* sense refers to discretion at the policy making or planning level."). These cases did not hold or even suggest that the Florida Civil Rights Act or section 440.205 waived sovereign immunity for discretionary governmental functions.

Separately, Appellants again emphasize the hierarchical relationship between the state and local governments and suggest that the trial court's ruling gave local governments the power to frustrate the Legislature's ability to set policies for the state. (I.B. 19–20.) However, the trial court expressly acknowledged the

Legislature's continuing ability to preempt local governments from regulating the field of firearms and ammunition and left that portion of the statute in place. (R. 2019.) The Legislature clearly retains the ability to set policies for the state and to prevent local governments, through traditional judicial remedies, from entering fields of regulation that are reserved exclusively to the Legislature.

The trial court's ruling did not render the statute "toothless" either. (I.B. 20.) The doctrine of governmental function immunity is so entrenched in Florida law that, prior to the enactment of the Penalty Provisions in 2011, the Legislature had never attempted to impose penalties on local governments for taking legislative actions. When the Preemption Law was amended to add the Penalty Provisions in 2011, the Final Bill analysis stated that the harsh penalties were needed due to local governments' continued attempts to regulate firearms despite the state's preemption of local firearm regulation. (*See* R. 1012–13.) However, the examples that the Legislature cited in support of this claim show that the preemption statute was already accomplishing its goals without the need for penalties.[17] No examples were

[17] In fact, according to the Final Bill Analysis, Palm Beach County "considered an ordinance banning high capacity ammunition clips, but rescinded from consideration because of the preemption." (R. 1013.) Similarly, Lee County rescinded its ban on firearms in city parks on account of the preemption law. *Id*. And the City of South Miami's ordinance requiring locking devices on firearms was passed in good faith, with the support of the Attorney General's opinion that it did not conflict with the preemption statute and was later voided when a court found it to be preempted. (R. 1012); *N.R.A. v. City of S. Miami,* 812 So. 2d 504, 505–06 (Fla. 3d DCA 2002).

provided of cities or counties passing or attempting to pass ordinances that they knew or thought to be preempted. (*See generally* R. 1011–17 (Final Bill Analysis).) Not one.

In this case, Appellants concede that "the trial court's order leaves citizens free to seek declaratory and injunctive relief against local governments that violate the preemption." (I.B. 20.) Appellants can do so as well. Thus, the trial court's ruling did not materially affect the Legislature's policy objectives. It merely applied the well-established principle that local governments cannot be punished for making a mistake in the ordinary course of their discretionary governmental functions because the imposition of financial penalties would violate the constitutional doctrine of separation of powers as to constituent local government legislative and executive divisions. (*See* R. 2010.) If anything, the trial court's ruling furthers the important public policies of this state because it is faithful to a "cornerstone of American democracy," *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004), protects the public treasury, and promotes the maintenance of the orderly administration of local governments. *See Trianon*, 468 So. 2d at 922–23 (stating that substantial encroachments on the public treasury would "inevitably restrict the development of new programs, projects, and policies and would decrease governmental regulation intended to protect the public and enhance the public welfare"); *State Rd. Dep't v. Tharp*, 1 So. 2d 868, 869 (Fla. 1941) ("If the [government] could be sued at the

instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked."). Accordingly, the trial court's order should be affirmed.

CONCLUSION

The Court should affirm the decision of the trial court holding that the Penalty Provisions are unconstitutional because they violate the doctrines of legislative immunity and governmental function immunity.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E- Filing Portal on December 23, 2019 to the individuals listed on the Service List below.

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

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