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

STATE OF FLORIDA, GOVERNOR RON DESANTIS, ATTORNEY GENERAL ASHLEY MOODY, and FDLE COMMISSIONER RICHARD L. SWEARINGEN,	**CASE NO. 1D19-2819**
Appellants,	**LOWER COURT CASE NOS. 2018-CA-000699, 2018-CA-001509 2018-CA-000882**
v.	
CITY OF WESTON, FLORIDA, DAN DALEY, in his official capacity as Commissioner of the City of Coral Springs, Florida, BROWARD COUNTY, a political subdivision of the State of Florida, et al.,	
Appellees.	

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **No.**

STATUTORY PROVISIONS

OTHER SOURCES

STATEMENT OF INTEREST

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

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

The League and FAC and their respective memberships have a direct interest in the outcome of this appeal, given that it has the potential to impact judicially-recognized immunities supported by the greater weight of historical judgment, sound public policy and the fundamental doctrine of separation of powers embodied in the Florida Constitution. A decision by this Court that reverses the lower court's holding that the penalty provisions of section 790.33, Florida

Statutes, are unconstitutional, threatens democracy in municipalities and counties statewide.

SUMMARY OF THE ARGUMENT

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

In a representative government, which the Florida Constitution requires of local governmental entities, unrestrained and unhindered lawmaking, is vital to effectuating the voice of the people through their elected officials. The penalty provisions of section 790.33 take an unprecedented swipe at the ability of local government officials to effectuate the will of their constituents. The consequence of the penalty provisions is to eradicate centuries of history and tradition guaranteeing the immunities afforded to legislators at every level of government

and create ex ante incentives for elected officials to refrain from doing that which they were elected to do and which the Florida Constitution calls on them to do: legislate.

The trial court correctly found that the attempt to abridge the legislative and government function immunities by the Florida legislature through the enactment of the penalty provisions of section 790.33 was unconstitutional. For these reasons, the decision of the lower court must be affirmed.

ARGUMENT

I. THE HISTORY OF THE DEVELOPMENT OF THE IMMUNITIES RECOGNIZED BY THE LOWER COURT SUPPORTS AFFIRMANCE.

The historical foundations of the doctrine of legislative immunity highlight its importance to legislators and the political process. Legislative immunity is not a concept unique to this country, but rather finds its origins dating back to sixteenth century England. Its importance to the democratic growth of England and the United States cannot be overstated.

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

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

Another English statesman, Sir John Eliot, met a different fate. Sir Eliot was imprisoned by King Charles I for advancing the rights of Parliament as a body independent from the Crown. Eliot languished and eventually perished in prison after the Crown charged him for a speech he made protesting the imposition of "tonnage and poundage without grant of Parliament." See id. at 1126 (citing Harold Hulme, The Life of Sir John Eliot 1592 to 1632: Struggle for Parliamentary Freedom 226-64, 312 (George Allen & Unwin Ltd, 1957); Proceedings against Sir John Elliot, 3 Howell's St Trials at 293-294 (KB 1629)). The Court of the King's Bench convicted Sir Eliot; his defense was that "these offenses are supposed to be

done in parliament, and ought not to be punished in this court, or in any other, but in parliament." See id. (citing 3 Howell's St Trials at 294; Hulme, The Life of Sir John Eliot at 316-38). Eliot's objective in his opposition was to defend the independence of the House of Commons from the Crown's influence and as he explained in his "Apologie for Socrates," his positions were taken "for fear of the public privilege and prejudice, not in jealousy of himself, that [he] exposed his fortune and his person to preserve the right of the Senate." See id. at 1127 (citing Sir John Eliot, Apologie for Socrates 15, reprinted in 3 Old South Leaflets No 59 (Directors of the Old South Work, 1896)).

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

The Framers of the US Constitution, no doubt cognizant of the struggles of English lawmakers, also adopted legislative immunity as "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the

Colonies from the Crown and founded our Nation." Id. at 372-373. As the Supreme Court held, the doctrine of legislative immunity is deeply rooted in our historical traditions and necessary to the efficient operation of a democratic form of government. Id. at 376. Indeed, the doctrine of legislative immunity was written into the Articles of Confederation and later into the Constitution. Id. at 372-373.

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

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Id. at 377.

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

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

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

The penalty provisions in section 790.33 disregard these constitutional provisions and the long history and tradition of legislative immunity in this country and in our state by imposing significant penalties on the very act of legislating. Worse still, the penalty provisions prohibit the use of public funds from being used to represent the government official that allegedly enacted or enforced a preempted regulation if that conduct is found to be "knowing and willful." Those types of

regulations that could potentially be preempted are described in the statute in a general way, with open-ended language. Local governmental legislators, when faced with any arguably preempted regulation, will surely be cognizant of this potential threat. That cognizance will undoubtedly interfere with the obligations of elected officials to represent their constituents and threaten the very form of representative democracy of local governments embodied in the Florida Constitution.

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

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

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

Speech, debate, and lawmaking must be left unrestrained by punitive threats to the lives and livelihood of local government officials for the public voice to be

carried out, and for the benefits of representative government to be realized. History and tradition provide the foundation for the immunities unlawfully stripped away by the penalty provisions of section 790.33. Local legislators represent the most immediate embodiment of the political will of the people. History, therefore, supports that they be shielded from personal liability for fulfilling a function the Founding Fathers recognized to be central to American democracy.

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

Strong public policy rationales also counsel against reversing the decision of the trial court in this case. If this Court holds that the purely punitive penalty provisions of section 790.33, Florida Statutes, are constitutional and that legislative and government function immunity do not shield local government lawmakers from liability and exposure, the will of the people through elected local governmental officials will be thwarted.

Clearly, the penalty provisions create perverse pecuniary disincentives to local government officials actually doing the job they are elected to do, which is to govern in accordance with the will of their constituents. The provisions of section 790.33 subject local government officials to fines that will deter elected officials from considering and implementing any regulation, ordinance or code that even

arguably touches upon subject areas preempted by the statute. The record on appeal contains much support for this fact.

United States Supreme Court jurisprudence recognizes this dilemma. The absence of immunity for legislators creates a fear of personal liability and restricts the exercise of legislative discretion. See Spallone v. United States, 493 U.S. 265, 279 (1990) (noting that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"). As the Supreme Court has also noted, these rationales are even more heightened at the local government level. Bogan, 523 U.S. at 52-53. Indeed, "the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator is common." Id. at 52. Further, "the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability." Id. (citation omitted). Finally, and as previously explained, legislators at the local level are often more accountable and more closely responsible to the electorate. Id. at 53.

Analysis of trends related to constitutional takings litigation involving local governments provides some useful context for the analysis of the effects of the penalty provisions on local government officials' actions, given that such litigation is not covered by insurance in most every state. In this realm, local governmental

action is discouraged to avoid even meritless litigation for which there is no insurance coverage. Christopher Serkin, Insuring Takings Claims, 111 Nw. U. L. Rev. 75, 78–79 (2016). This is true even if the regulation will have positive effects and the likelihood of litigation is remote. Id. Some local governments that self-insure might be willing to take on the risk of litigation, but smaller governments might be want to do so. See id. at 79; see also Christopher Serkin, Big Differences for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. REV. 1624, 1668 (2006) ("Government risk aversion therefore correlates more to the size than to the wealth of the tax base, and it is inversely related to the number of taxpayers over whom the risk is spread.").

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

dissuading a legislator from supporting legislation even if he or she does not believe that legislation to be preempted. See Richard Briffault, The Challenge of the New Preemption, 70 Stan. L. Rev. 1995, 2022–23 (2018). This is a chilling effect that the legislative immunities at issue were meant to address and which the trial court correctly held were unconstitutionally abridged by Section 790.33.

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

CONCLUSION

For the reasons cited herein, the Florida League of Cities and the Florida Association of Counties urge this Court to affirm the trial court.

Respectfully submitted this 2nd day of January, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of January, 2020, a true and correct copy of the foregoing has been electronically filed with the First District Court of Appeals via the Florida Courts E-Filing Portal which will serve it via transmission of Notices of Electronic Filing generated by the e-Portal System on counsel of record on the Service List below.

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