CASE NO. 1D19-2819

In the District Court of Appeal
First District of Florida

STATE OF FLORIDA, GOVERNOR RON DESANTIS, ATTORNEY GENERAL ASHLEY MOODY, and FDLE COMMISSIONER RICHARD L. SWEARINGEN,

Appellants,

v.

CITY OF WESTON, et al.,

Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE CIRCUIT COURT IN AND FOR THE SECOND JUDICIAL CIRCUIT IN LEON COUNTY, FLORIDA
CASE NOS. 2018CA699, 2018CA882, 2018CA1509

APPELLEES' MOTION FOR CERTIFICATION OF QUESTIONS OF GREAT PUBLIC IMPORTANCE

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Pursuant to Florida Rule of Appellate Procedure 9.330(a)(1) and (a)(2)(C), Appellees move for certification of questions of great public importance.[1]

INTRODUCTION

The implications of the Court's opinion of April 9, 2021, are far-reaching and could have significant and adverse effects on local governance in the more than 400 municipalities and 67 counties in Florida. There are equally significant implications for the *thousands* of elected officials who, often with little recompense, are voted into office with the expectation (and constitutional obligation) that they will represent the interests of their constituents. While this particular case involves the constitutionally significant subject matter of firearms regulation, Slip Op. at 4 n.1, the Court's rationale potentially applies to any case involving preemption by the Florida Legislature—including preemption statutes that touch on subject areas of uniquely local significance and impact, such as landscaping requirements, neighborhood aesthetics, and vacation rentals.

In effect, the Court's decision permits the judiciary to determine the scope of the Legislature's intent to preempt laws, not

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[1] The appellees joining in this motion are identified in Exhibit A attached to this motion.

through the normal procedures for evaluating the bounds of a preemption law, but by allowing the penalty provisions to create a chilling effect on local legislators across *all* possible local legislative efforts.

In a situation in which the Legislature has adopted provisions intended to punish local elected officials and their local governments whenever they pass a preempted law, but where the Legislature has *also* left open the ability for legislators to regulate in related non-preempted areas, the local legislators should be able to regulate in those non-preempted areas without fear of punishment. Yet by determining that such legitimate actions are not protected by legislative or government immunity if a court *subsequently* determines the actions were actually preempted, the Court's opinion threatens to chill local legislators from taking *any* action at all—even actions that the Florida Legislature deliberately left open for them.

For the reasons articulated herein, Appellees respectfully request that this Court certify questions of great public importance for potential resolution by the Florida Supreme Court.

ARGUMENT

In a case of first impression in Florida, this Court considered and ruled upon competing arguments that called into question the interplay between the penalty provisions in section 790.33(3),

Florida Statutes, and separation of powers principles, such as governmental function immunity and legislative immunity. The Court concluded that because the Florida Legislature had preempted the field of regulation of firearms and ammunition, local governments and their elected officials could not invoke the well-established doctrines of governmental function immunity and legislative immunity. The Court thus upheld penalty provisions that targeted otherwise discretionary functions of local governments, such as enacting legislation, or purely legislative activities, such as voting in favor of local legislation.

A. Legislative immunity.

With respect to legislative immunity, the Court characterized the local elected officials' invocation of the doctrine as an attempt to "partake of the same immunity afforded members of the Florida Legislature." Slip Op. at 8-9. Respectfully, the local elected officials did not contend they were entitled to invoke the legislative immunity of state legislators under article II, section 3 of the Florida Constitution.[2] Rather, they argued that article VIII, sections 1(f), 1(g) and 2(b) of the Florida Constitution expressly recognize that

[2] For that reason, the Court's reliance on *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (Slip Op. at 9-10), which examines *solely* article II, section 3 and its purpose, is unwarranted with respect to Appellees' argument.

counties and municipalities must have legislative bodies that may engage in legislative activities. That constitutional authority necessarily gives rise to legislative immunity for engaging in purely legislative functions.

This Court rejected this argument because (i) "the constitutional text does not support this argument," and (ii) the "argument fails in the face of state preemption." Slip Op. at 10. The Court did not cite to any precedents in support of its conclusion, and Appellees respectfully suggest that is because no Florida precedent has ever previously examined the interplay between article VIII, sections 1 and 2, and the issue of legislative immunity.[3]

The Court's opinion does not, for example, consider the implications of the United States Supreme Court's holding in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), in which the Supreme Court unequivocally stated that the "rationales for according absolute immunity to federal, state, and regional legislators apply with equal

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[3] Presumably, the Court did not mean by its ruling to suggest that the Legislature would be authorized through its preemption authority to enact a statute that prohibits local governments from enacting *any* legislation, thus preempting *all* subject matters to the Legislature. While the "constitutional text" in article VIII does not address this, the possibility of such preemption begs the question of how the Florida Constitution could mandate the existence of local legislative bodies without any legislative powers.

force to local legislators." *Id.* at 52. The Supreme Court further elaborated:

> *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. … 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*. … 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. at 53 (emphasis added). *See also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The claim of an unworthy purpose does not destroy the [legislative] privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. … The holding of this Court … that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.")

Notwithstanding the foregoing, the Legislature has sought, without express constitutional authority, to confer on the judiciary the power to "inquire into the motives of legislators." § 790.33(3)(c), Fla. Stat. The Court notes that the Florida Supreme Court permitted a "limited inquiry" into state legislators' intent in the redistricting case of *League of Women Voters of Florida v. Florida*

House of Representatives, 132 So. 3d 135 (Fla. 2013). Slip Op. at 9. The Court, though, fails to note that the Florida Constitution specifically makes the intent of the legislators relevant to the redistricting analysis. *Id.* at 147 (holding that article III, section 20(a) "specifically outlaws improper legislative 'intent' in the congressional reapportionment process"). Even so, then-Justice Canady countered in dissent:

> In this case, for the first time in the recorded history of our Republic, a court has ruled that state legislators are required to submit to interrogation in a civil case concerning their legislative activities. I dissent from this unprecedented decision—a decision which effectively abrogates the well-established common law legislative privilege and grievously violated the constitutional separation of powers.

Id. at 156 (Canady, J., dissenting).

Thousands of elected officials, irrespective of political party, in hundreds of local governments throughout the state, take oaths of office to serve the public good and represent their constituents; and they do so believing that their quintessentially legislative act of voting in favor of an ordinance will not subject them to either liability or a judicial inquisition into their motives. In light of the questions of great public importance at issue in subjecting such public servants to dissection of thought and motive in fulfilling their legislative obligation to vote, it is appropriate for the Florida Supreme Court to reconcile the competing constitutional interests

in this case, to weigh the pronouncements of the U.S. Supreme Court on the importance of local legislative immunity, and to decide whether the Legislature's desire to punish local elected officials can survive that inquiry.

B. Governmental function immunity.

On the subject of governmental function immunity, this Court concluded that because *any* consideration of possible local legislation touching upon issues addressed in section 790.33 is "by definition" a violation of statute, Slip. Op. at 8, no governmental function immunity could attach—regardless of whether the local government in good faith believed the proposed legislation was not preempted in the first instance. Slip Op. at 3. Appellees advanced their argument in light of the Legislature's *express* acknowledgment that local governments *may*, in fact, legislate and regulate with respect to certain subject matters relating to firearms. § 790.33(4)(a)-(c), Fla. Stat. Because section 790.33 contains these enumerated exceptions to the Legislature's default preemption of firearms regulation, and also contains poorly worded and vague statutory definitions, genuine disagreements have arisen, and will continue to arise, at the local level regarding what is, and is not, preempted under section 790.33. *See, e.g., N.R.A. v. City of S. Miami*, 812 So. 2d 504, 505–06 (Fla. 3d DCA 2002) (invalidating as preempted local regulation requiring locking devices after Florida's

Attorney General opined to the contrary that the regulation was *not* preempted by section 790.33).[4]

Making judgment calls about the scope of such a statute falls squarely within the type of discretionary decision-making that governmental function immunity has long protected. Prior to the Court's opinion, no Florida court had ever concluded that a local government could face a lawsuit for damages—in this instance, an action for damages up to $100,000 and payment of fees, under section 790.33(3)(f)—merely for having engaged in the wholly discretionary function of *enacting* legislation.

In contrast, the Florida Supreme Court has repeatedly concluded that local government liability for discretionary planning functions is inconsistent with separation of powers principles, irrespective of any legislative waiver of common law sovereign immunity in section 768.28, Florida Statutes. *See, e.g., Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009) ("[A]rticle II, section 3 of the Florida Constitution (the separation-of-powers provision) requires the judicial application of a discretionary-function exception to the otherwise broad waiver of sovereign immunity present in section

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[4] Had the penalty provisions been in place when South Miami followed the advice of the Attorney General, it would have been subjected, at a minimum, to potentially multiple lawsuits for damages and attorney's fees by those claiming to be adversely affected by the local regulation later found to be preempted.

768.28, Florida Statutes.") (citing *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1017-22 (Fla. 1979)); *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.") (emphasis added). Reconciling these precedents, among others, with the reach of the penalties in section 790.33(3) was a matter of first impression.

While the Court focuses considerably on (i) the supremacy of the Legislature to preempt local legislation—a point not disputed by Appellees; and (ii) the ability of the Legislature to abolish local governments, something that has not occurred with respect to any of the Appellees, no court had previously held that a local government may be subjected to liability simply because a court *subsequently* determines the enacted legislation is, in fact, preempted. For decades, hundreds of local governments throughout Florida have relied upon governmental function immunity to engage in local governance, in making the wholly discretionary, policy-driven determinations of what legislation to enact for the benefit of their residents. This Court's opinion for the first time holds that such immunity may, notwithstanding any separation of powers concerns, be stripped away from local governments simply because

a court later determines that particular local legislation was preempted.

The practical consequences of this intrusion upon the doctrine of separation of powers are unprecedented and are having a substantial impact on each and every local government in Florida. In this case, the extremely onerous and uncapped financial penalties set out in section 790.33, which could potentially bankrupt a local government (particularly after factoring in a multiplier on attorney's), have created a specter where local governments rightly fear being later deemed to have made an error in their interpretation of the statutory preemption language and its enumerated exceptions.

C. Grounds for certification of a question of great public importance.

On multiple levels, this case calls out for certification of questions of great public importance to be resolved by the Florida Supreme Court. First, the case presents multiple constitutional issues of first impression. *See Duggan v. Tomlinson,* 174 So. 2d 393, 393 (Fla. 1965) (noting certification of a question as one of great public importance "is particularly applicable to decisions of the district courts of appeal of first impression").

Second, history reflects that many of the Florida Supreme Court's pivotal decisions addressing the issues of preemption,

governmental function immunity, and legislative immunity have arisen from certified questions of great public importance. *See, e.g., Jimenez v. State*, 246 So. 3d 219 (Fla. 2018); *Masone v. City of Aventura*, 147 So. 3d 492 (Fla. 2014); *Saratosa Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 2010); *City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006); *Maggio v. Fla. Dep't of Labor and Employment Security*, 899 So. 2d 1074 (Fla. 2005); *St. Johns Cty. v. Northeast Fla. Builders Assocs., Inc.*, 583 So. 2d 635 (Fla. 1991); *Metro. Dade Cty. Fair Hous. & Emp't Appeals Bd. v. Sunrise Vill. Mobile Home Park, Inc.*, 511 So. 2d 962 (Fla. 1987); *City of Lake Wales v. Lamar Advertising Ass'n of Lakeland, Fla.*, 414 So. 2d 1030 (Fla. 1982); *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010 (Fla. 1979); *McNayr v. Kelly*, 184 So. 2d 428 (Fla. 1966).

Third, the issues presented here have the broadest and most consequential implications for local democracy, including local government decision-making and service in elected office. *See, e.g., Santa Rosa County v. Admin. Comm'n, Div. of Admin. Hearings*, 642 So. 2d 618, 624 (Fla. 1st DCA 1994) (granting certification based on the effect of growth management laws on county and state governments), *approved in part, disapproved in part*, 661 So. 2d 1190 (Fla. 1995); *Publix Super Markets, Inc. v. McGuire*, 629 So. 2d 862, 866 (Fla. 1st DCA 1993) (granting certification in a case with

"potentially broad ramifications" for tort law); *Smith v. State*, 497 So. 2d 910, 912 (Fla. 3d DCA 1986) (granting certification in a case with "far-reaching possible consequences").

Fourth, the scope of this Court's opinion will have far-reaching, statewide implications across a multitude of local governmental decisions, not just with respect to the subject matter of firearms, but potentially with respect to any local legislation that is subsequently determined to be preempted by state statute. *See, e.g., Gibbs v. State*, 676 So. 2d 1001, 1006 (Fla. 4th DCA 1996) (certifying an issue of great public importance in a case where the issue would "arise[] frequently throughout the state and affect[] numerous prosecutions in this and other districts"); *Young v. State,* 678 So. 2d 427, 429 (Fla. 4th DCA 1996) (certifying an issue of great public importance where the issue would affect numerous criminal defendants throughout the state); *Beach v. Great W. Bank,* 670 So. 2d 986, 994 (Fla. 4th DCA 1996) (certifying question of great public importance because it would affect numerous mortgages across the state).

Accordingly, Appellees respectfully request that this Court certify the following questions of great public importance for resolution by the Florida Supreme Court:

> PURSUANT TO ARTICLE VIII, SECTIONS 1(f), 1(g) AND 2(b) OF THE FLORIDA CONSTITUTION, ARE ELECTED OFFICIALS SERVING ON MUNICIPAL OR COUNTY

LEGISLATIVE BODIES ENTITLED TO LEGISLATIVE IMMUNITY WHILE PERFORMING LEGISLATIVE FUNCTIONS SUCH AS VOTING IN FAVOR OF LOCAL LEGISLATION, AND IF SO, MAY THE LEGISLATURE STRIP AWAY SUCH IMMUNITY THROUGH LEGISLATION THAT SEEKS TO PREEMPT LEGISLATION IN A PARTICULAR FIELD AND IMPOSES PERSONAL FINES ON THE OFFICIALS?

MAY THE LEGISLATURE LAWFULLY ABROGATE THE GOVERNMENTAL FUNCTION OR DISCRETIONARY FUNCTION IMMUNITY RECOGNIZED IN *WALLACE V. DEAN* 3 So. 3d 1035, 1045 (FLA. 2009), AND *COMMERCIAL CARRIER CORP. V. INDIAN RIVER COUNTY*, 371 So. 2d 1010 (FLA. 1979), THROUGH LEGISLATION THAT SUBJECTS LOCAL GOVERNMENTS TO LIABILITY MERELY FOR ENACTING LEGISLATION SUBSEQUENTLY DETERMINED TO BE PREEMPTED?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this motion was filed and served via the E-Portal on April 23, 2021, on the individuals listed in the accompanying service list.

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3. City of Maitland
4. City of Lauderhill and Mayor Kenneth Thurston
5. City of West Palm Beach
6. City of Gainesville and Mayor Lauren Poe, Commissioners Harvey Ward, David Arreola and Adrian Hayes-Santos
7. Village of Key Biscayne
8. City of Tallahassee and Commissioner Jeremy Matlow
9. City of Miami Gardens and Mayor Rodney Harris, Vice Mayor Reggie Leon and Commissioner Katrina Wilson
10. City of Fort Lauderdale
11. City of St. Petersburg and Council Chair Lisa Wheeler-Bowman, Vice Chair Gina Driscoll and Council Members Brandi Gabbard, Darden Rice and Amy Foster
12. City of Safety Harbor
13. City of Boca Raton
14. City of Orlando and Mayor Buddy Dyer, Commissioners Jim Gray, Tony Ortiz, Robert Stuart, Patty Sheehan and Regina Hill
15. City of Miami Beach and Mayor Daniel Gelber and Commissioners Mickey Steinberg, Mark Samuelian, Michael Góngora, and Ricky Arriola
16. City of Coral Gables and Mayor Vince Lago
17. City of Miramar
18. City of Riviera Beach
19. Village of Palmetto Bay
20. City of South Miami
21. City of North Miami
22. City of North Miami Beach
23. Village of Pinecrest and Mayor Joseph Corradino and Councilmembers Anna Hochkammer and Doug Kraft
24. Town of Cutler Bay and Vice Mayor Michael Callahan and Councilmember Roger Coriat
25. City of Coral Springs and Commissioner Dan Daley

26. City of Pembroke Pines and Mayor Frank Ortiz
27. City of Coconut Creek
28. City of Wilton Manors and Mayor Justin Flippen
29. City of Dunedin
30. Town of Surfside and Vice Mayor Tina Paul
31. Amy Turkel
32. Broward County and Vice-Mayor Michael Udine, Commissioner Nan H. Rich, Commissioner Mark D. Bogen, Commissioner Beam Furr, and Commissioner Dale V.C. Holness
33. Leon County
34. Miami-Dade County, Members of the Miami-Dade County Board of County Commissioners, and Mayor of Miami-Dade County