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

In the Supreme Court of Florida

NICOLE "NIKKI" FRIED, FLORIDA COMMISSIONER OF AGRICULTURE AND CONSUMER SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF

Ashley Moody
ATTORNEY GENERAL

Henry C. Whitaker
SOLICITOR GENERAL
(FBN 1031175)

Daniel W. Bell
CHIEF DEPUTY SOLICITOR GENERAL
(FBN 1016188)

Counsel for Respondents

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INTRODUCTION

This case presents the question of whether the Legislature may—through traditional mechanisms such as fines and damages suits—provide for the enforcement of otherwise valid state laws that restrict local government power. Plaintiffs do not dispute that the Legislature has "all-pervasive power" over local governments, *Lake Worth Utils. Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985), including the power to preempt local enactments. Plaintiffs further agree that the provision at issue—Section 790.33, Florida Statutes—validly preempts local regulation in the "field of regulation of firearms and ammunition." §§ 790.33(1), (3)(a), Fla. Stat. Plaintiffs nevertheless seek to reverse the constitutional hierarchy by invalidating the statute's penalty provisions, rendering it toothless and thereby "frustrat[ing] the ability of the Legislature to set policies for the state." *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

Before the penalties were added, the onus was on citizens to challenge illegal ordinances defensively or by way of actions for declaratory and injunctive relief. That put the full burden of litigation on the citizen. The added penalties—like other civil rights remedies—

shifted the burden to those in the position to violate civil rights. This litigation demonstrates exactly why the Legislature determined that the penalties were necessary.

Plaintiffs are more than 100 local government entities and officials who seek to regulate firearms and ammunition. During the trial court proceedings, Plaintiffs identified several proposed ordinances they wished to adopt and, in addition to challenging the penalties, asked the court to enter declaratory judgment that each of their proposed ordinances would, if adopted, fall outside the scope of the preemption. For example, Plaintiffs alleged that they intended to adopt ordinances restricting the possession of "firearms 'components' and 'accessories'" like rifle stocks and magazines, R.2019, and restricting the possession of firearms in particular locations, R.1346–48, 2018.[1]

Plaintiffs asked the court to hold off addressing the validity of these ordinances (which would obviously be preempted) unless the court first upheld the penalties, R.509, laying bare that Plaintiffs'

[1] Other proposed ordinances were largely uncontested as permissible except as to minor details.

objective in this litigation is to secure the ability to violate state law with impunity. The trial court declined Plaintiffs' preferred approach and, despite invalidating the penalties, ruled that such ordinances would be preempted. R.2018–19. Plaintiffs nonetheless continue to press their view that the penalties are categorically unconstitutional even as applied to the enactment of preempted local ordinances.

Just two of Plaintiffs' claims are before this Court. *First*, they claim that the enforcement of financial penalties against local officials for the enactment of a preempted regulation would violate the officials' legislative immunity. That claim fails because any legislative immunity that local officials enjoy is, at most, a common-law doctrine that the Legislature was free to (and did) abrogate. *Second*, Plaintiffs claim that the enforcement of penalties against local government entities would violate their immunity for discretionary functions. That claim fails because the violation of state law is not a discretionary function. That conclusion is reinforced by this Court's precedents grounding discretionary-function immunity in the political-question doctrine. There is no political-question problem when the courts are merely asked to enforce a statutory rule.

This Court should approve the decision of the First District Court of Appeal. In doing so, the Court should hold that the Florida Constitution does not afford local "commissions, boards, city councils, and executive officers" freedom to violate preemption statutes without sanction, *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918–19 (Fla. 1985), and make plain that the courts may hold local governments and their officials accountable for their actions when, as here, the Legislature provides a rule for the courts to apply.

STATEMENT OF THE CASE

The Florida Constitution grants the Legislature plenary authority over the State's local governments, which have only those "powers of local self-government not inconsistent with general law." Art. VIII, § 1(g), Fla. Const. (charter counties); *see id.* § 2(b) (municipalities "may exercise any power for municipal purposes except as otherwise provided by law").[2] As this Court has explained,

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[2] Non-charter counties have even less power. *See* Art. VIII, § 1(f), Fla. Const. ("Counties not operating under county charters shall have

if the rule were otherwise, the State's "political subdivisions would have the power to frustrate the ability of the Legislature to set policies for the state." *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

The Legislature has exercised its power to preempt local regulation in several fields, including—since 1987—"the whole field of regulation of firearms and ammunition." § 790.33(1), Fla. Stat. By 2011, the Legislature became concerned that the remedies available under the original statute—declaratory and injunctive relief—were insufficient "to deter and prevent the violation of [the preemption] and the violation of rights protected under the constitution and laws of this state related to firearms." *Id.* § 790.33(2)(b) (as amended in 2011). The Legislature therefore amended the statute to provide in Subsection (3)(a) that:

> Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or

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such power of self-government as is provided by general or special law," but "may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law.").

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

Id. § 790.33(3)(a).

Subsections (3)(c) through (3)(f) create penalties for the violation of Subsection (3)(a), some of which may be imposed against local government entities and others of which may be imposed against local officials personally. Subsection (3)(f) creates a private right of action that adversely affected citizens and organizations may bring against local government entities for actual damages suffered (up to $100,000), as well as legal fees and costs. § 790.33(3)(f), Fla. Stat. As for local officials, "knowing and willful" enactment of a preempted firearms regulation may result in a "civil fine of up to $5,000," for which they are personally liable. *Id.* § 790.33(3)(c). The Legislature further determined that "public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated this section." *Id.* § 790.33(3)(d).

In these consolidated cases, Plaintiffs challenge the validity of those remedy provisions. Plaintiffs also challenge Section 790.335(4)(c), Florida Statutes, which subjects local-government entities to a substantial civil fine if they keep "any list, record, or

registry of privately owned firearms or any list, record, or registry of the owners of those firearms." § 790.335(2), Fla. Stat.

The trial court invalidated the challenged provisions on the grounds that (1) the penalties against local officials violate their legislative immunity, and (2) the penalties against local-government entities violate their immunity for discretionary government functions. The First District reversed, rejecting Petitioners' government-function immunity claim because that doctrine "protects only lawful and authorized planning-level activity" and "the actions penalized in the challenged statutes are, by definition, violations of statutes." App'x at 17. Accordingly, "[t]he Florida Legislature is authorized to prescribe penalties for violations" of those statutes "and the judicial branch can (and must) enforce them." *Id.* The court likewise rejected Petitioners' claim that Article II, Section 3 of the Florida Constitution clothes local officials with legislative immunity, as that provision "was not intended to apply to local governmental entities and officials, such as those identified in articles VIII and IX and controlled in part by legislative acts." App'x at 18–19 (citing *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992)).

SUMMARY OF THE ARGUMENT

A. Plaintiffs' legislative-immunity claim must be rejected because any immunity enjoyed by local officials is a mere common-law doctrine that the Legislature is free to abrogate, as long as it does so clearly. And Plaintiffs do not contest that the challenged provisions did just that by specifically imposing liability for local officials who enact unlawful ordinances. Plaintiffs instead contend that the immunity is a constitutional defense that cannot be modified by statute.

Plaintiffs rely heavily on federal cases that discuss the importance of legislative immunity at all levels of government, including at the local level. But those cases make clear that, however important the doctrine is, the legislative immunity enjoyed by local officials is a matter of "common-law principles" that were "incorporated into our judicial system" and may be freely "abrogated." *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)).

There is even less reason to recognize the immunity as a constitutional defense under Florida law than at the federal level. The

Supreme Court has long held that "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 157–58 (Fla. 2013) (Canady & Polston, JJ., dissenting) (discussing *United States v. Gillock*, 445 U.S. 360 (1980) (cleaned up)). And whereas the federal government has only limited power over the States, the Florida Legislature has plenary power over the State's local governments, which "do not possess any indicia of sovereignty," as "they are creatures of the legislature, . . . and accordingly are subject to the legislative prerogatives in the conduct of their affairs." *Weaver v. Heidtman,* 245 So. 2d 295, 296 (Fla. 1st DCA 1971).

B. Plaintiffs' discretionary-function immunity claim fares no better. In a lawsuit seeking damages under Section 790.33(3)(f), the challenged conduct—a preempted firearms regulation—is prohibited by statute and thus cannot be "discretionary." Accordingly, the conduct cannot be shielded by the immunity. *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) (explaining

that "the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government *absent a violation of constitutional or statutory rights*" (emphasis added)); *cf. Owen v. City of Independence*, 445 U.S. 622, 649 (1980) (rejecting the argument that discretionary function immunity shields municipalities from liability for damages under 42 U.S.C. § 1983).

While that should be the end of the inquiry, the conclusion is reinforced by the ultimate question this Court has asked when considering discretionary-function immunity: whether the litigation will "entangle the Court in a nonjusticiable political question that is more appropriately committed to" the political branches. *Wallace v. Dean*, 3 So. 3d 1035, 1053–54 (Fla. 2009). As the Supreme Court has explained, when courts are asked to "enforce a specific statutory right," they necessarily "are not being asked to supplant [the] decision of the political branches with the courts' own unmoored determination of what [the] policy . . . should be." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). In other words, there is no political-question problem where, as in litigation under Section 790.33, the courts are merely required to enforce a statutory rule—

here, no local "regulation of firearms and ammunition," § 790.33(3)(a), Fla. Stat.

ARGUMENT

I. IMPOSING THE CHALLENGED PENALTIES WOULD NOT VIOLATE THE LEGISLATIVE IMMUNITY OF LOCAL OFFICIALS.

The challenged statute creates civil fines for local officials who knowingly and willfully enact a preempted firearms regulation. § 790.33(3)(c), Fla. Stat. The statute also prohibits the use of public funds to defend or reimburse such officials. *See id.* § 790.33(3)(d).[3] Plaintiffs claim that these provisions are unconstitutional because they penalize local officials for legislative acts and thereby violate the officials' legislative immunity. *See* Pet. Br. at 24–33. The claim fails because the legislative immunity enjoyed by local officials is not a constitutional defense, but instead a common-law doctrine that the Legislature was free to—and did—abrogate.

[3] The penalties also apply to officials who knowingly and willfully "enforce" a preempted regulation, conduct that plainly is not "legislative activity." Plaintiffs' claim thus fails insofar as they seek to invalidate the penalties as applied to such non-legislative conduct.

Plaintiffs do not contest that Section 790.33 abrogates any common-law legislative immunity that local officials would otherwise enjoy. Nor could they. Common-law immunities exist at the pleasure of the Legislature, which may "do away with the[m] altogether," *McNayr v. Kelly*, 184 So. 2d 428, 430 n.6 (Fla. 1966), as long as it does so "clearly," *Bates v. St. Lucie Cnty. Sheriff's Off.*, 31 So. 3d 210, 213 (Fla. 4th DCA 2010). And Section 790.33 could not be clearer in that respect: It expressly prohibits the "enact[ment]" of preempted regulations and creates individual-capacity fines for any "elected or appointed local government official" who "enact[s]" them. § 790.33(3)(a), (c), Fla. Stat.[4]

Plaintiffs instead argue that the immunity is a constitutional defense that cannot be abrogated by statute. That argument is inconsistent with the text and structure of the Florida Constitution,

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[4] *Cf. Bifulco v. Patient Bus. & Fin. Servs., Inc.*, 39 So. 3d 1255, 1257 (Fla. 2010) (including "the State" as an "employer" under Florida's workers' compensation regime waived "sovereign immunity for workers' compensation retaliation claims when the State and its subdivisions are acting as employers"); *Maggio v. Fla. Dep't of Labor & Emp. Sec.*, 899 So. 2d 1074, 1078-79, 1081 (Fla. 2005) (including "the State" as an "employer" subject to liability under the Florida Civil Rights Act was "a waiver of sovereign immunity").

as well as the history and rationales underlying the legislative-immunity doctrine.

A. Applying legislative immunity to shield local officials from liability under Section 790.33 would be inconsistent with the text and structure of the Florida Constitution.

Unlike Congress, which has only those specific, enumerated powers granted by the U.S. Constitution, the Florida Legislature is vested with plenary regulatory authority, subject only to the specific limits set forth in the Florida Constitution. Thus, "[t]he Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power." *Chiles v. Phelps*, 714 So. 2d 453, 458 (Fla. 1998) (quoting *Savage v. Bd. of Public Instruction*, 133 So. 341, 344 (Fla. 1931)). In other words, "[t]he Legislature may exercise any lawmaking power that is not forbidden by organic law," and "unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid." *Id.*; *see Bush v. Holmes*, 919 So. 2d 392, 420 (Fla. 2006) (Bell, J., dissenting) ("[U]nlike the federal constitution, our state constitution is a limitation upon the power of government rather than a grant of that power.").

Plaintiffs' argument—that constitutional "separation of powers principles" bar the Legislature from abrogating the immunity of local officials, Pet. Br. at 18—is foreclosed by Article VIII of the Florida Constitution, which expressly subjects local governments to plenary control by the Legislature, giving them only those "powers of local self-government not inconsistent with general law." Art. VIII, § 1(g), Fla. Const. (charter counties); *see also id.* § 2(b) (same for municipalities). That language empowers the Legislature not only "to preempt substantive areas of law to the State," as Plaintiffs would have it, Pet. Br. at 23, but also to supersede and control "all powers of local self-government," Art. VIII, §§ 1(g), 2(b). Counties and municipalities may even be "abolished" by "law" at the Legislature's discretion. Art. VIII, § 1(a), Fla. Const. (counties); *id.* § 2(a) (municipalities).

It is true enough that Article VIII establishes "home rule" as the default for local governments, giving them "inherent power to meet [local] needs." *Lake Worth Utils. Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985). But as this Court has explained, "'inherent' is not to be confused with 'absolute' or even with 'supreme' in this

context." *Id.* "The legislature's retained power is now one of limitation rather than one of grace, but it remains an all-pervasive power, nonetheless." *Id.*; *see also Weaver v. Heidtman,* 245 So. 2d 295, 296 (Fla. 1st DCA 1971) (explaining that counties "do not possess any indicia of sovereignty; they are creatures of the legislature, created under Art[icle VIII, § 1], of the State Constitution, and accordingly are subject to the legislative prerogatives in the conduct of their affairs"). And historical practice confirms the "all-pervasive" nature of that power: The Legislature has, for decades, exercised its plenary power to regulate every aspect of local government operations, not only preempting dozens of substantive policy areas to the State, but also regulating, for example, their internal operations, fundraising, and elections. *See generally* Chs. 124–164, Fla. Stat. (counties); Chs. 165–185, Fla. Stat. (municipalities).

Article VIII thus establishes a constitutional hierarchy that cannot be reconciled with Plaintiffs' view that local legislative immunity can be deployed to defeat the will of a superior sovereign. By empowering local officials to violate state law with impunity,

despite clear legislation to the contrary, Plaintiffs would turn that hierarchy on its head.

B. THE HISTORY AND RATIONALES UNDERLYING LEGISLATIVE IMMUNITY SUPPORT ABROGATION BY THE LEGISLATURE.

The Speech or Debate Clause of the U.S. Constitution clothes U.S. Senators and members of Congress with immunity for their legislative acts. *Tenney v. Brandhove*, 341 U.S. 367, 372–73 (1951) (citing U.S. CONST. art. I, § 6, cl. 1). The Supreme Court has recognized legislative immunity for state, regional, and local policymakers as well, but not as a matter of federal constitutional law. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). The Speech or Debate Clause, after all, applies only to federal legislators.

The immunity of other officials is instead "recognized in the common law." *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 403 (1979). It derives from "the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here." *Tenney*, 341 U.S. at 376. Thus, when the Supreme Court held in *Tenney* and *Bogan* (decisions on which Plaintiffs heavily rely, *see* Pet. Br. 15, 16, 26, 28, 34) that legislative immunity bars Section 1983 claims

premised on the legislative acts of state, regional, and local policymakers, the Court held not that those officials were entitled to a constitutional defense, but instead that they "were entitled to absolute immunity from suit *at common law* and that Congress did not intend the general language of § 1983 to" change that tradition. *Bogan*, 523 U.S. at 49 (emphasis added); *see also Tenney*, 341 U.S. at 376. In other words, "common-law principles of legislative . . . immunity were incorporated into our judicial system," and may be freely "abrogated," but "should not be" found abrogated "absent clear legislative intent to do so." *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) (citing *Tenney*, 341 U.S. at 367).

Although "[t]he States are, of course, free to adopt" different principles governing legislative immunity at the state level, *Lake Country Ests., Inc.*, 440 U.S. at 404–05, there is no basis to conclude that legislative immunity for local officials operates differently under Florida law than it does under federal law. Just as the Supreme Court concluded that the Speech or Debate Clause of the U.S. Constitution clothes members of Congress with immunity for their legislative acts, *Tenney*, 341 U.S. 367, 372–73 (citing U.S. CONST. art. I, § 6, cl. 1.),

this Court has concluded that members of the Florida Legislature enjoy similar protection under the Separation of Powers Clause of the Florida Constitution, *see League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 146–47 (Fla. 2013).[5] And just as the U.S. Constitution is silent as to immunity for state officials, the Florida Constitution is silent as to immunity for local officials.

Indeed, the case for recognizing the legislative immunity of local officials as a mere common-law defense is even stronger under Florida law. In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court held that the privilege could not thwart a federal prosecution for bribery under a statute that, on its face, applied to state officials. As the Court explained, "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power," and there was simply no "constitutional limitation on the power of Congress to make state officials, like all other persons, subject to federal criminal sanctions." *Id.* at 370, 374;

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[5] This Court held that members of the Legislature enjoy a qualified privilege against compulsory evidentiary process, a doctrine that is corollary to and serves the same purposes as legislative immunity to suit. *League of Women Voters*, 132 So. 3d at 147 n.11.

see also League of Women Voters, 132 So. 3d at 157–58 (Canady & Polston, JJ., dissenting) ("[F]ederal interference in the state legislative process [i]s not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." (discussing *Gillock*) (cleaned up)). That logic applies with even greater force to local officials in Florida. After all, legislative immunity exists "not for [officials'] private indulgence" but to support "the independence . . . of the legislative process" of a governmental body. Pet. Br. at 35, 26 (citing *Tenney*, 341 U.S. at 377). And local governments in Florida enjoy no independence from the Legislature; rather, they are subject to its will. *See supra* pp. 13–16.

C. PLAINTIFFS' ARGUMENT WOULD HAVE SWEEPING IMPLICATIONS FOR THE REGULATION OF LOCAL GOVERNMENTS AND THEIR OFFICIALS.

The provisions at issue are far from unique in subjecting local officials to liability for acts that are within the "sphere of legitimate legislative activity" and thus otherwise shielded by legislative immunity. *Tenney*, 341 U.S. at 372. Indeed, if Plaintiffs were correct that local officials enjoy legislative immunity as a matter of constitutional law, the State would be powerless to address a broad

range of official abuses, including through the enforcement of longstanding provisions of Florida law. For example, Section 112.3143(3)(a), Florida Statutes has long provided that a "county, municipal, or other local public officer" may be subject to civil and criminal penalties if he or she "vote[s] in an official capacity upon any measure which would inure to his or her special private gain or loss." § 112.3143(3)(a), Fla. Stat.; *see id.* § 112.317 (establishing penalties).

This Court recently identified another example in Section 129.08, Florida Statutes. Under that provision, "any member of [a county board] who knowingly and willfully votes to take on debt in excess of the [county] budget 'shall be guilty of malfeasance in office and subject to suspension and removal from office as now provided by law, and shall be guilty of a misdemeanor' punishable by a fine and up to six months in county jail." *Alachua Cnty. v. Watson*, No. SC19-2016, 2022 WL 247086, at *3 (Fla. Jan. 27, 2022) (citing § 129.08, Fla. Stat.). As the Court explained, that provision puts "some teeth in the statute," "giv[ing] each county, and the individual members of the board of county commissioners, an incentive to

ensure that any adjustments to the budget are made a certain way." *Id.*

Nor can the implications of Plaintiffs' position be cabined to statutes that, like Section 790.33, penalize the "enact[ment]" of legislation. § 790.33(3)(a), Fla. Stat. Legislative immunity also shields officials for their communications about legislative activity and the manner in which they conduct meetings. *See, e.g.*, *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007); *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 632 (1st Cir. 1995). And Florida has a long history of regulating such aspects of the local legislative process and subjecting offenders to individual-capacity punishment.

For example, since before the 1968 Constitution, Florida law has required—on pain of civil and criminal penalties—that local board and commission meetings be open to the public if "official acts are to be taken." § 286.011(1), Fla. Stat.; *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 n.1 (Fla. 2d DCA 1969) (quoting the 1967 statute). Likewise, since before the 1968 Constitution, members of any local "board, bureau, [or] commission" have been required to

preserve (and provide upon request) copies of all records concerning "official business," including legislative business. § 119.011(2), (12), Fla. Stat. Officials who violate the law are subject to civil and criminal penalties. *Id.* § 119.10. Plaintiffs' position would even render unconstitutional various provisions of their own charters. *See*, *e.g.*, §§ 2-11.1(n), (cc), Miami-Dade Cnty. Code (subjecting county commissioners to fines and jail time if they participate in an official action despite a conflict of interest).

Those provisions have been in effect for more than 50 years without any serious challenge to their validity. *Cf., e.g.*, *Wolfson v. State*, 344 So. 2d 611, 613 (Fla. 2d DCA 1977) (prosecution of city commissioner for Sunshine Law violation). The longstanding, unchallenged practice of subjecting local officials to individual-capacity sanctions seriously undermines Plaintiffs' constitutional theory. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) ("In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'" (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014))).

Indeed, the historical pedigree of abrogating local legislative immunity is not confined to Florida. For example, the Georgia Supreme Court recently concluded that the Georgia Open Meetings Act—which mirrors Florida's Sunshine Law—abrogated local officials' immunity. *See Williams v. DeKalb Cnty.*, 840 S.E. 2d 423, 435 (Ga. 2020). Likewise, the federal courts have recognized that Congress may abrogate state legislative immunity. *See, e.g.*, *Chappell v. Robbins*, 73 F.3d 918, 923 (9th Cir. 1996). And the Supreme Court has similarly held that judicial immunity may be abrogated by Congress. *See Pulliam*, 466 U.S. at 543.

D. PLAINTIFFS' ARGUMENTS ARE UNPERSUASIVE.

Plaintiffs contend that legislative immunity for local officials "is enshrined in two distinct articles of the Florida Constitution." Pet. Br. at 17. They point to this Court's decision in *League of Women Voters of Florida v. Florida House of Representatives*, which, as noted above, concluded that Article II, Section 3 of the Florida Constitution clothes members of the Legislature (not local officials) with legislative privilege. 132 So. 3d at 146–47 & n.11. Article II, Section 3 requires the "powers of the state government" to "be divided into legislative,

executive and judicial branches." Given that language, which incorporates "inherent principles of comity that exist between the coequal branches of government," the Court was compelled to respect "the supremacy of each branch within its own assigned area of constitutional duties" by recognizing the privilege. *Id.* at 145–46 (citations and internal quotation marks omitted).

As Plaintiffs themselves observe, Article II, Section 3 "is written in terms of the 'branches' of the 'state government'" and, "[u]ndoubtedly, municipal and county governments are not one of the three state branches." Pet. Br. at 22. Plaintiffs nevertheless theorize that Article II, Section 3 "has implications not merely between the branches of state government, but within each one as well," emphasizing "limitations of judicial power" (*i.e.*, the boundaries of judicial competence) and offering the political question doctrine as an example. *Id.*[6] But Section 790.33(3) merely calls upon the

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[6] *See* Pet. Br. at 21-22 (citing *Everton v. Willard*, 426 So. 2d 996, 1001 (Fla. 1983); *State v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982); and *Com. Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1019 (Fla. 1979)); *see also Wallace*, 3 So. 3d at 1053-54 (explaining that the issue in *Everton*, *Neilson*, and *Commercial Carrier* was that courts

judiciary to enforce statutory penalties; that "is what courts do," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see infra* pp. 39–40, and there is certainly no issue of judicial competence.

Plaintiffs get things quite backwards in arguing that "legislative immunity necessarily flows from [A]rticle VIII" of the Florida Constitution. Pet. Br. at 23–24. It is true enough that Article VIII requires "boards of elected officials, exercising legislative powers." Pet. Br. at 23–24 (citing Art. VIII, §§ 1(e), 2(b)). But as discussed above, Article VIII expressly renders the legislative powers of those bodies subordinate to the will of the Legislature. Indeed, were Plaintiffs correct that the mere existence of local governing bodies implies the independence of those bodies, the Legislature's power to preempt local law in the first place would seem to be in doubt—an argument that not even Plaintiffs pursue. *But cf.* Pet. Br. at 23 n.12 (suggesting that "[w]hether the Legislature has the authority to abolish a local government by statute is an open question," despite

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must not become "entangled" in a "nonjusticiable political question"); *see* Pet. Br. at 30-31.

language in the Constitution expressly stating that the Legislature may "abolish[]" counties and municipalities, Art. VIII, §§ 1(a), 2(a)).

The Supreme Court indeed rejected an analogous argument in the federal cases on which Plaintiffs rely. The Guarantee Clause of the U.S. Constitution requires the states to have legislative bodies, *see* The Federalist No. 57 ("The elective mode of obtaining rulers is the characteristic policy of republican government."), yet the Supreme Court held that state legislators enjoy the immunity only as a matter of common-law doctrine, *see Bogan*, 523 U.S. at 49; *see also Tenney*, 341 U.S. at 376. And it did so while in the same breath recognizing the importance of the doctrine. *See Bogan*, 523 U.S. at 53.

The fact that the Constitution vests policymaking authority in local governments as a default rule at most supports common-law immunity for local policymakers. It simply does not follow that the immunity may not be abrogated by the Legislature. *See Masone v. City of Aventura*, 147 So. 3d 492, 494–95 (Fla. 2014) (explaining the "constitutional superiority" of "the Legislature's power over" local

governments" (quoting *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928 (Fla. 2013))).

II. ENFORCING THE CHALLENGED PROVISIONS WOULD NOT VIOLATE THE DISCRETIONARY-FUNCTION IMMUNITY OF LOCAL GOVERNMENTS.

Plaintiffs also challenge Section 790.33(3)(f), Florida Statutes, which creates a private right of action against county and municipal governments. Under the statute, citizens adversely affected by a preempted firearms regulation may seek declaratory and injunctive relief and actual damages (up to $100,000), as well as reasonable attorney's fees. *See* § 790.33(3)(f), Fla. Stat.

Plaintiffs claim that the enforcement of this provision would violate a defendant local government's "discretionary function immunity"—a doctrine under which "certain quasi-legislative policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." *Wallace v. Dean*, 3 So. 3d 1035, 1053 (Fla. 2009) (cleaned up). Plaintiffs' argument is without merit.

A. DISCRETIONARY-FUNCTION IMMUNITY DOES NOT BAR ENFORCEMENT OF SECTION 790.33(3)(F).

1. Like most states and the federal government, Florida has a broad statutory waiver of sovereign immunity in tort suits for the State, as well as its counties and municipalities. § 768.28(1), Fla. Stat.; *see* Dan B. Dobbs et al., THE LAW OF TORTS § 342 (2d ed.). But unlike those other jurisdictions, Florida has no "express exception for discretionary acts." *Com. Carrier*, 371 So. 2d at 1017; *see* 28 U.S.C. § 2680(a); Dobbs et al., § 342. That presented a problem—how could the courts assess tort liability premised on discretionary governmental decisions such as "the appropriation of money for highway construction, whether a highway is to be two- or four-laned, whether a highway is to be limited or open access, where a highway is to intersect with other streets, what type of construction materials will be used, and the route the highway will take"? *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982).

Faced with that problem, this Court has recognized, as a matter of Florida constitutional law, the same exception for discretionary functions that other jurisdictions have recognized in statute, finding it "bottomed on the concept of separation of powers." *Com. Carrier*,

371 So. 2d at 1019. Under this doctrine, "the separation-of-powers provision present in article II, section 3 of the Florida Constitution requires that 'certain [quasi-legislative] policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability.'" *Wallace*, 3 So. 3d at 1053. As this Court explained in *Wallace*, tort litigation premised on the exercise of "discretion at the policy making or planning level" would "entangle the Court in a nonjusticiable political question that is more appropriately committed to" the political branches, in violation of Article II, Section 3 of the Florida Constitution, which limits the courts to the exercise of "judicial" power. *Id.* at 1053–54 (emphasis omitted).

To determine whether a governmental act is the kind of "discretionary act" covered by the exception, the Court adopted a test that begins with "a group of four related questions." *Wallace*, 3 So. 3d at 1053 (citing *Com. Carrier*, 371 So. 2d at 1019). Those questions are:

- First, does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

- Second, is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

- Third, does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

- Finally, 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?

Id. at 1054. The Court then held that:

> If each of these questions may be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision is likely discretionary in nature and immune from a tort action; whereas, if any one of the questions may be answered in the negative, further inquiry is necessary to determine whether, under the circumstances, the question of tort liability will or will not entangle the Court in a nonjusticiable political question.

Id. at 1053–54 (internal quotation marks omitted).

2. Under that framework, the enactment of a preempted local ordinance plainly is not a discretionary function. Regulating firearms of course involves policy judgment and therefore implicates aspects of the first three of *Wallace*'s four questions. But the dispositive point

is that local policy judgment in the field of firearms is (subject to enumerated exceptions) prohibited by statute and thus *ultra vires*. Accordingly, a defendant local government faced with litigation under Section 790.33(3)(f) necessarily lacks "the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act," flunking *Wallace*'s fourth question. 3 So. 3d at 1053.[7]

In *Wallace*, this Court indicated that, when "one of the questions [is] answered in the negative," the next step is "further inquiry . . . to determine whether, under the circumstances, the question of tort liability will or will not entangle the Court in a nonjusticiable political question." 3 So. 3d at 1053. Although such

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[7] Plaintiffs would reframe *Wallace*'s fourth question at a high level of generality, asking whether local governments have the general "authority to enact or enforce legislation," Pet. Br. at 53, which they of course do. But the question is whether the "challenged act" (not some generic category of acts) is within the defendant local government's "lawful authority." *Wallace*, 3 So. 3d at 1054. Indeed, the question *must* turn on the specific governmental conduct before the Court, because the ultimate focus is a case-by-case inquiry: whether, "*under the circumstances*, the question of tort liability will or will not entangle the Court in a nonjusticiable political question." *Id.* at 1053 (emphasis added); *see also Owen v. City of Independence*, 445 U.S. 622, 649 (1980) (rejecting discretionary function immunity under Section 1983 because "a municipality has no 'discretion' to violate" federal law, although it has discretion to regulate generally).

"further inquiry" would only underscore that the "challenged act" in litigation under Section 790.33(3)(f) is not a discretionary function, *see infra* pp. 36–41, that step should be unnecessary under these circumstances. *Wallace*'s fourth question should be dispositive here because governmental conduct simply is not "discretionary" where it is prohibited by statute. *See Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) ("The judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government," but only "*absent a violation of constitutional or statutory rights*." (emphasis added)).

That logic finds support in the Supreme Court's approach to municipal liability for damages under 42 U.S.C. § 1983. Like Section 790.33, Section 1983 subjects subordinate governmental entities to damages liability for enactments that conflict with rights established by the superior sovereign. In *Owen v. City of Independence*, the Court rejected the argument that Section 1983 incorporated common-law immunity for discretionary functions, finding it dispositive that "a municipality has no 'discretion' to violate" federal law. 445 U.S. at 649; *see also United States v. Gaubert*, 499 U.S. 315, 324 (1991)

("[T]here will be no shelter from liability because there is no room for choice and the action will be contrary to policy.").[8] Such a case does not ask the court "to second-guess the 'reasonableness' of the city's decision" or "to interfere with the local government's resolution of competing policy considerations." *Owen*, 445 U.S. at 649. Instead, the court "looks only to whether the municipality has conformed to the requirements of the" provision at issue. *Id.*

So too here, local governments have no lawful discretion to enact ordinances that the Legislature has preempted, and a court enforcing Section 790.33 need ask only whether the local government (absent exception) engaged in the "regulation of firearms and

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[8] *Cf.* 18 MCQUILLIN MUN. CORP. § 53:72 (3d ed.) ("If a statute, regulation, or policy requires the government employee to follow a specific course of action for which the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-function exception to the waiver of sovereign immunity does not apply to the employee's action because the employee is not acting with individual judgment or choice."); *see also Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Guzman v. Cnty. of Monterey*, 209 P.3d 89, 95–96 (Cal. 2009); *Walker v. State*, 801 N.W.2d 548, 555 (Iowa 2011); *Thomas v. Cnty. Comm'rs of Shawnee Cnty.*, 262 P.3d 336, 354 (Kan. 2011); *Cormier v. T.H.E. Ins. Co.*, 745 So. 2d 1, 6 (La. 1999); *Coughlin v. Dep't of Corr.*, 686 N.E.2d 1082, 1087 (Mass. App. Ct. 1997); *Miss. Transp. Comm'n v. Adams ex rel. Adams*, 197 So. 3d 406, 412 (Miss. 2016).

ammunition." § 790.33(3)(a), Fla. Stat. The reasonableness of the challenged enactment is beside the point.[9]

3. Should the Court proceed to the second step described in *Wallace*—determining whether, "under the circumstances, the question of tort liability will or will not entangle the Court in a nonjusticiable political question," *id.* at 1053—the analysis would lead to the same result.

As the Supreme Court has explained, "a controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 566 U.S. at 195 (cleaned up) (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *see also Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 134 (Fla. 2019). Consistent with that test, this Court has

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[9] The result might be different if the statute imposed the kind of "traditional tort liability" with which *Wallace* was concerned, 3 So. 3d at 1053 (citing *Com. Carrier*, 371 So. 2d at 1020), *i.e.*, a reasonableness standard for legislation. But Section 790.33(3)(f) does nothing of the sort. *See infra* pp. 38–40.

concluded that claims for "traditional tort liability" premised on allegedly negligent or wrongful "policy-making" present nonjusticiable political questions. *Wallace*, 3 So. 3d at 1053 (citing *Com. Carrier*, 371 So. 2d at 1020). "There has never been a common law duty establishing a duty of care," much less a standard of care, "with regard to how" governmental entities should carry out discretionary functions like the "enactment of, or failure to enact, laws or regulations." *Trianon Park*, 468 So. 2d at 919. And absent an objective standard to apply, the court could conclude that an enactment was "negligent" or "wrongful" only by substituting its own, subjective judgment for that of policymakers.[10] The Court not only

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[10] Courts assess whether conduct was "reasonable" or "wrongful" every day, including when assessing the conduct of government officials. But they always do so by measuring that conduct against an objective standard. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (explaining that "the one-person, one-vote rule is relatively easy to administer as a matter of math" but concluding that partisan gerrymandering claims present a political question because "the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly"); *see also Citizens for Strong Schs., Inc.*, 262 So. 3d at 135 (question of "whether the State has made 'adequate provision' for an 'efficient' and 'high quality' system of education 'that allows students to obtain a high quality education'" admits of no judicially manageable

would lack "judicially discoverable and manageable standards," but also—given the lack of objective criteria—would be engaged in actual policymaking, a power constitutionally committed to the political branches. *Zivotofsky*, 566 U.S. at 195.[11]

Litigation to enforce penalties attendant a preemption statute does not present the same problem, "both because statutory interpretation is generally committed to the judicial branch and because statutory language is likely to include judicially manageable

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standard); *see id.* at 142–43 (suggesting that an objective definition of "high quality" might solve the problem).

[11] In *Wallace*, the Court asked whether "the question of tort liability" for policy-making activity "will or will not entangle the Court in a nonjusticiable political question that is more appropriately committed to the resolution of a coordinate or constituent branch of government (*e.g.*, the Legislature, the executive branch, *or a county or municipality*)." 3 So. 3d at 1053–54 (quoting *Com. Carrier*, 371 So. 2d at 1020 (emphasis added)). To be clear, even where the defendant is a local government, the adjudication of a political question violates Article II, Section 3 of the Florida Constitution because it requires the court (in the absence of judicially manageable standards) to engage in policymaking that is the sole province of the *Legislature*. *See* Art. VIII, § 1(g), Fla. Const.; *id.* § 2(b) (granting the Legislature plenary power over local government affairs). Because Article II, Section 3 requires the separation of powers only among the branches of state government, there can be no separation of powers principle that generally shields local governments from state-level decisions.

standards." *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 n.6 (D.C. Cir. 2019). As the Supreme Court explained in *Zivotofsky*, when the courts are merely asked to "enforce a specific statutory right," unlike in a tort case, they necessarily "are not being asked to supplant [the] decision of the political branches with the courts' own unmoored determination of what [the] policy . . . should be." 566 U.S. at 196.

Thus, "a statutory claim" will "present a political question" only in the rare circumstance where "an integral policy choice" is embedded in the statute. *Al-Tamimi*, 916 F.3d at 12 n.6. For example, the D.C. Circuit has held that determining whether "military action was 'wrongful'" under the Federal Tort Claims Act presents a political question. *Id.* The problem is the same as in a common-law tort suit: "[T]o determine whether the [military] conducted [its actions] in a negligent manner, a court would have to determine how a reasonable military force *would have* conducted the [same actions]." *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) (emphasis added). And there is no objective standard for that determination.

Here, however, the statute in question creates an objective, administrable standard—a bright-line rule with just a few

enumerated exceptions. There is no occasion for the court to "subject discretionary policy decisions to scrutiny . . . as to the wisdom of their enactment," Pet. Br. at 44; the court need only determine whether the challenged ordinance was a preempted (and thus "[p]rohibit[ed]") "regulation of firearms and ammunition," § 790.33(3)(a), Fla. Stat. That is exactly "what courts do." *Zivotofsky*, 566 U.S. at 201; *id.* at 197 (explaining that interpreting statutes and determining their validity "is a familiar judicial exercise"); *cf. Al-Tamimi*, 916 F.3d at 11–12 & n.6 (the statutory question "whether Israeli settlers are committing genocide" does not present a political question, because "[g]enocide has a legal definition").[12]

Plaintiffs concede that whether an ordinance is a preempted "regulation of firearms and ammunition" is not itself a political

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[12] Plaintiffs contend that local regulation of firearms remains "discretionary" under Section 790.33 because, in their view, the statute contains "enumerated exceptions to the Legislature's default preemption of firearms regulation" as well as "poorly worded and vague statutory definitions." Pet. Br. at 39. *First*, Plaintiffs brought a vagueness challenge in the trial court, which they litigated, lost, and did not appeal. *See* R.2013–14. *Second*, the only relationship between the clarity of the statute and the political question doctrine is whether the former presents judicially "manageable standards," *Zivotofsky*, 566 U.S. at 197, which it does.

question. Pet. Br. at 45–46, 56. Instead, Plaintiffs claim that administering a damages remedy will uniquely enmesh the courts in policy analysis. *See* Pet. Br. at 44. But determining damages is a traditional judicial function. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992). Indeed, "because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions." *Id.* It is therefore unsurprising that an overwhelming majority of cases dismissed on political question grounds seek declaratory and injunctive relief, not damages. *See, e.g.*, *Nixon*, 506 U.S. at 226; *cf. Baker v. Carr*, 369 U.S. 186, 194 (1962) (establishing the modern political question doctrine in a case seeking an injunction).

B. PLAINTIFFS' ARGUMENT WOULD UPEND THE HIERARCHY ESTABLISHED BY ARTICLE VIII OF THE FLORIDA CONSTITUTION.

Shielding local governments from liability under Section 790.33 would turn the constitutional hierarchy on its head. As discussed more fully above, Article VIII of the Florida Constitution expressly subjects local governments to State legislative control. Plaintiffs agree

that Article VIII gives the Legislature constitutional authority to preempt local firearms regulation through enactment of Section 790.33. Pet. Br. at 23. But all the same, they seek to render the statute toothless by invalidating its penalties.

The power to prohibit has no value absent the power to enforce. Thus, "[w]hen a state is allowed to substantively regulate conduct, it must be able to impose reasonable penalties to enforce those regulations." *City of El Cenizo v. Texas*, 890 F.3d 164, 181 n.11 (5th Cir. 2018) (citing *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 605-07 (2011)) (upholding statutory penalties against local governments that adopt sanctuary city policies). The same logic supports the Legislature's power not only to enact criminal laws, but also to provide penalties for their violation. Just as a criminal law without penalties would empower offenders to thwart the government's policy objectives, discretionary-function immunity here would give local governments the very "power to frustrate" legislative decision-making that the State's constitutional hierarchy was designed to prevent. *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504.

Plaintiffs' response is that the Legislature is free to provide for enforcement through "declaratory and injunctive remedies." Pet. Br. at 56. That makes no sense. The core analysis undertaken by the court under Section 790.33 is the same regardless of the relief sought—is the challenged ordinance a preempted "regulation of firearms or ammunition"? § 790.33(3)(a), Fla. Stat. Plaintiffs admit that that inquiry does not present a political question. Nor does assessing damages under this statutory scheme. *See supra* pp. 40–41.

Ultimately, Plaintiffs simply disagree with the policy judgment made by the Legislature to protect the right of Floridians to keep and bear arms. But nothing in the Florida Constitution confers on Plaintiffs the freedom to enact ordinances infringing those civil rights without meaningful sanction.

As amended, Section 790.33 gives successful citizen plaintiffs the right to pursue legal fees and costs. § 790.33(3)(f), Fla. Stat. If they can prove causation and "actual damages," they may recover those, too. *Id.* That prototypical and eminently reasonable enforcement regime shifted the burden to government actors to follow

the law, just as Congress did when it enacted 42 U.S.C. § 1983 more than 150 years ago. There is no sound constitutional basis to upset that legislative judgment.[13]

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the First District Court of Appeal.

Respectfully submitted,

Ashley Moody
ATTORNEY GENERAL

Henry C. Whitaker (FBN 1031175)
SOLICITOR GENERAL

/s/ Daniel W. Bell
Daniel W. Bell (FBN 1016188)
CHIEF DEPUTY SOLICITOR GENERAL

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
daniel.bell@myfloridalegal.com

Counsel for Respondents

[13] Plaintiffs claim that Section 790.335(4)(c) is invalid because it, too, subjects local government entities to monetary penalties in violation of their discretionary-function immunity. That claim fails for the same reason as Plaintiffs' challenge to Section 790.33(3)(f): The penalties apply only to conduct that is itself prohibited.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2022 a true and correct copy of the foregoing brief was furnished through the Florida Courts E-Filing Portal on the counsel identified in the following service list.

/s/ Daniel W. Bell
Chief Deputy Solicitor General

Steven Hall **Genevieve Hall** Florida Department of Agriculture and Consumer Services The Capitol 400 South Monroe St., PL-10 Tallahassee, FL 32399 Motion for Extension *genevieve.hall@FDACS.gov* *steven.hall@freshfromflorida.com* *Counsel for Petitioner Nicole "Nikki" Fried*	**Edward G. Guedes** **Jamie A. Cole** Weiss Serota Helfman Cole & Bierman, P.L. 2525 Ponce de Leon Blvd., Ste. 700 Coral Gables, FL 33134 *eguedes@wsh-law.com* *jcole@wsh-law.com* *szavala@wsh-law.com* *Counsel for the Weston, Miramar, Pompano Beach, Pinecrest, South Miami, Miami Gardens, Cutler Bay, Lauderhill, Boca Raton, Surfside, Tallahassee, North Miami, Orlando, Fort Lauderdale, Gainesville, St. Petersburg, Maitland, Key Biscayne, Turkel, West Palm Beach, North Miami Beach, Safety Harbor, Village of Palmetto Bay, Dunedin and Riviera Beach Petitioners*
Dexter W. Lehtinen	**Jacqueline M. Kovilaritch**

Claudio Riedi LEHTINEN SCHULTZ, PLLC 1111 Brickell Ave., Ste. 2200 Miami, FL 33131 *dwlehtinen@aol.com* *criedi@Lehtinen-Schultz.com* *asalmon@Lehtinen-Schultz.com* *General Counsel for Village of Palmetto Bay*	**Joseph P. Patner** Office of the City Attorney for the City of St. Petersburg P.O. Box 2842 St. Petersburg, FL 33731 *eservice@stpete.org* *jacqueline.kovilaritch@stpete.org* *joseph.patner@stpete.org* *Co-Counsel for the City of St. Petersburg*
Andrew J. Meyers **René D. Harrod** **Nathaniel A. Klitsberg** **Joseph K. Jarone** Broward County Attorney 115 S. Andrews Ave., Ste. 423 Fort Lauderdale, FL 33301 *ameyers@broward.org* *rharrod@broward.org* *nklitsberg@broward.org* *jkjarone@broward.org* *Counsel for Broward County, Vice Mayor Michael Udine, Commissioner Dale V.C. Holness, Commissioner Mark D. Bogen, Commissioner Nan H. Rich, and Commissioner Beam Furr*	**Altanese Phenelus** **Shanika A. Graves** **Angela F. Benjamin** Miami-Dade County Attorney 111 NW 1st St., Ste. 2810 Miami, FL 33128 *altanese.phenelus@miamidade.gov* *sgraves@miamidade.gov* *angela.benjamin@miamidade.gov* *Counsel for Miami-Dade County, Members of the Miami-Dade County Board of County Commissioners, and Mayor of Miami-Dade County*
Herbert W.A. Thiele **Lashawn Riggans** 301 South Monroe St., Ste. 202 Tallahassee, FL 32301 *countyattorney@leoncountyfl.gov* *riggansl@leoncountyfl.gov* *tsonose@leoncountyfl.gov* *Counsel for Leon County*	**Michael Cardozo** **Chantel L. Febus** Proskauer Rose LLP Eleven Times Square New York, NY 10036 *mcardozo@proskauer.com* *cfebus@proskauer.com* **Matthew Triggs**

	Proskauer Rose LLP 2255 Glades Rd., Ste. 421A Boca Raton, FL 33431 *mtriggs@proskauer.com* *florida.litigation@proskauer.com* **Eric A. Tirschwell** Everytown Law 450 Lexington Ave., #4184 New York, NY 10017 *etirschwell@everytown.org* *Counsel for Dan Daley, Frank C. Ortis, Rebecca A. Tooley, Justin Flippen, City of Coral Springs, City of Pembroke Pines, City of Coconut Creek, and City of Wilton Manors*
Abigail G. Corbett **Veronica L. De Zayas** Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. 150 West Flagler St., Ste. 2200 Miami, FL 33130 *acorbett@stearnsweaver.com* *vdezayas@stearnsweaver.com* *Counsel for the City of Coral Gables*	**Clifford B. Shepard** Shepard, Smith, Kohlmyer & Hand, P.A. 2300 Maitland Center Parkway, Ste. 100 Maitland, FL 32751 *cshepard@shepardfirm.com* *Co-Counsel for the City of Maitland*
Craig Mayfield Bradley Arant Boult Cummings LLP 100 N. Tampa Street, Suite 2200 Tampa, FL 33602 cmayfield@bradley.com	**Aleksandr Boksner** **Raul J. Aguila** City of Miami Beach 1700 Convention Center Dr., 4th Floor Miami Beach, FL 33139 *Aleksandrboksnereservice@miamibeachfl.gov*

Counsel for Amicus Curiae National Rifle Association of America, Inc.	*Counsel for the Miami Beach Plaintiffs*
Philip R. Stein **Kenneth Duvall** **Ilana Drescher** Bilzin Sumberg Baena Price & Axelrod, LLP 1450 Brickell Ave., Ste. 2300 Miami, FL 33131 *pstein@bilzin.com* *kduvall@bilzin.com* *idrescher@bilzin.com* *Counsel for Amici Curiae Giffords Law Center, Campaign to Defend Location Solutions, League of Women Voters of Florida, Brady, Equality Florida Institute, Inc., Alachua County Labor Coalition, Campaign to Keep Guns Off Campus, and Professor Rick T. Su*	**Brook Dooley** **David J. Rosen** **Andrew S. Bruns** Keker, Van Nest & Peters LLP 633 Battery St. San Francisco, CA 94111 *drosen@keker.com*

CERTIFICATE OF FONT COMPLIANCE

I certify that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Florida Rule of Appellate Procedure 9.045, and that the brief contains 8181 words, in compliance with Florida Rule of Appellate Procedure 9.370.

/s/ Daniel W. Bell
Chief Deputy Solicitor General