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

Case No. 1D15-5520

FLORIDA CARRY, INC., et al.,

Appellants,

v.

CITY OF TALLAHASSEE, et al.,

Appellees.

BRIEF OF AMICUS CURIAE, THE FLORIDA LEAGUE OF CITIES, IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

Harry Morrison, Jr.
Florida Bar No. 339695
cmorrison@flcities.com
Florida League of Cities, Inc.
P.O. Box 1757
Tallahassee, Florida 32302
(850) 222-9684 (Tel)
850-222-3806 (Fax)

Bryant Miller Olive P.A.
Susan H. Churuti
Florida Bar No. 284076
schuruti@bmolaw.com
One Tampa City Center, Suite 2700
Tampa, FL 33602
(813) 273-6677 (Tel)
(813) 223-2705 (fax)
Elizabeth W. Neiberger
eneiberger@bmolaw.com
Florida Bar No. 0070102
One S.E. Third Avenue, Suite 2200
Miami, Florida 33131
(305) 374-7349 (Tel)
(305) 374-0895 (Fax)

Counsel for Amicus Curiae, Florida League of Cities

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions and Statutes

Rules

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida League of Cities ("League") is a statewide organization whose membership consists of more than 400 municipalities throughout the state. Founded in 1922, the League is the united voice for Florida's municipal governments. Its goals are to protect and promote local self-government. Florida's cities are governed by their citizens. The League is founded on the belief that this local self-governance is the keystone of American democracy.

The statute at issue in this case preempts local government authority to regulate guns and imposes civil liability and penalties on the citizens' elected city legislators who vote in favor of ordinances in this area. § 790.33, Fla. Stat. ("Gun Law").

The League takes no position on gun control or the state's preemptive authority. Instead, the League's *only* interest is in the law's penalty provisions. Under the penalty provisions, it is irrelevant whether an elected city legislator votes in favor of an ordinance outright eliminating guns, or an ordinance requiring every citizen to carry one. The penalty provisions subject elected city legislators to personal civil liability for voting in favor of any ordinance that is somehow subsequently found to be within the state's field of preemption (*i.e.*, any gun-related ordinance). It is the unprecedented *imposition of civil liability on elected city officials for purely legislative activity—their votes on local legislation*—that is of

concern to the League. Even more alarming, provisions of this type appear to be an emerging trend in the state legislature.[1]

The appellees/cross-appellants, the City of Tallahassee and its commissioners, challenge the constitutionality of these provisions on grounds that they: (1) violate elected city legislators' constitutional right to absolute immunity from civil liability for legislative action; and (2) violate elected city legislators' free speech rights because they are viewpoint discriminatory and do not pass strict scrutiny.

The League believes that these issues are of great public concern because they affect all municipalities in Florida in their fundamental ability to adequately represent their citizens. A ruling upholding the penalty provisions would have unprecedented, far-reaching, and devastating implications for municipal representative democracy in Florida. The League is uniquely positioned to help the court understand and resolve these issues.

[1] Indeed, bills introduced in the 2016 legislative session contained provisions that would make elected city legislators civilly liable for legislative activity. Two companion bills proposed to make legislators who vote in favor of alien sanctuary legislation liable for civil penalties and grant a person injured by an illegal alien a private civil right of action for damages against legislators who voted in favor of the sanctuary legislation. Fla. HB 675, § 2 (2016) (proposed §§ 908.003(8), 908.009 (2), 908.012, Fla. Stat.); Fla. SB 872, § 2 (2016) (proposed §§ 908.003(8), 908.009 (2), 908.012, Fla. Stat.). Although these bills did not pass, they indicate a movement toward imposing civil liability on elected city officials as a new "tool" to control legislative activity at the local level.

SUMMARY OF ARGUMENT

The penalty provisions of the Gun Law do something unheard of in our system of government. They impose personal, financial liability and other penalties on elected city legislators simply for voting "yes" on certain ordinances brought before them. In other words, they coerce individual city legislators to vote a certain way, on a particular type of legislation, under the threat of personal liability and other penalties

The penalty provisions are facially unconstitutional because they violate the absolute legislative immunity accorded to legislative acts and the free speech rights of elected city legislators and the citizens for whom they speak. The state legislature's constitutional authority over municipalities, though broad, stops short of dictating how elected city legislators vote on local legislation, whether directly or through coercion. The state legislature may limit the powers cities may exercise; it can even abolish cities altogether. But it cannot abrogate the legislative immunity accorded to elected city legislators under the Florida Constitution.

Article VIII, section 2 of the Florida Constitution requires each municipality to be governed by an elected legislative body. Legislative immunity is inextricably woven into the representative government this provision mandates. The essence of the republican form of government is that citizens are entitled to choose who will govern them, and those chosen to govern them are entitled (and, indeed, have a duty)

to represent them. A statute that subjects elected city officials to personal liability for their votes is designed to cause them to act in their personal interests, rather than in the interests of those they represent; and, therefore, fundamentally undermines the democratic process

Because legislative immunity is an inherent component of the constitutional guarantee of local representative democracy, the state legislature has no authority to remove the immunity by statute. To conclude otherwise would allow the state legislature to undermine—and, perhaps, effectively eliminate—the representative nature of elected city legislative bodies.

For similar reasons, the penalty provisions the violate the constitutionally protected freedom of speech of elected city legislators and the citizens who choose them to represent them. Because the penalty provisions only apply to "yes" votes, they are viewpoint-based restrictions that are subject to strict scrutiny. Elected city legislators and those who elected them have the right to speak on political viewpoints, particularly on controversial subjects like gun control. The penalty provisions not only deter elected city officials from communicating their views of their constituents' wishes—they deter citizens with views different than the state's views from running for office in the first place. Because the penalty provisions are not narrowly drawn to achieve a compelling state interest, they must fall.

ARGUMENT

I. Elected city legislators are absolutely immune from suit for legislative activity under the Florida Constitution

A. Legislative immunity is inherent in article VIII, section 2 of the Florida Constitution, which requires municipalities to be governed by elected legislative bodies

Article VIII, section 2 of the Florida Constitution provides that "[e]ach municipal ***legislative body*** shall be ***elective***." (Emphasis added.) This confers a constitutional right to legislative immunity on elected city legislators for their votes on legislation which cannot be abridged by statute.

Legislative immunity is inherent in the express mandate that cities have elected legislative bodies. A legislative body is, by definition, vested with the power to govern through legislation. Legislative immunity is an inherent and incidental feature of the power to legislate, and one that is bestowed on those who are elected to exercise that power. Although the state legislature has authority to create and abolish municipalities and to curb their powers, it has no authority to eliminate the legislative immunity that exists under article VIII as an essential part of what it means to be a legislative body.

Legislative immunity is absolute and extends to all legislative acts. Indeed, the immunity accorded to whose performing legislative functions was so well-established at common law that it was "taken as a matter of course by our nation's

founders." *Lake Cnty. Estates v. Tahoe Planning Agency*, 440 U.S. 391, 405-06 (1979).

Whether an act is "legislative" turns solely on its character. An elected city legislator's vote on an ordinance is quintessentially legislative. That ends the analysis. The legality of the ordinance is irrelevant. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 688 F. Supp. 1522, 1528 n.1 (S.D. Fla. 1988) (rejecting argument that legislative immunity did not apply to city council members on basis that the ordinance was preempted by state statute and therefore illegal). So are the city legislator's motive and intent in voting for it. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (act of voting for an ordinance is legislative in character; local legislator's unlawful and discriminatory motive and intent irrelevant). The fact that a city legislator knowingly and willfully votes in favor of an illegal ordinance—even an unconstitutional ordinance—does not remove the legislator's vote from the sphere of legislative acts, or otherwise affect the legislator's immunity. *See id.*

Similarly, the existence of competing constitutional interests is irrelevant to the absolute immunity analysis. Because legislative immunity is an *absolute* immunity from suit, it does not yield to other constitutional interests. *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 147 (Fla. 2013). Absolute means absolute.

B. Legislative immunity is also inherent in Article VIII's guarantee of representative democracy at the municipal level

Although the state legislature may limit the powers cities may exercise, it has no authority to exercise the functions of a municipal legislative body itself, or to choose who may exercise those functions. Article VIII vests the governance of each city in a legislative body chosen by the city's voters through the democratic process.

Legislative immunity is embedded in the concept of the "elective" "municipal" "legislative body" that Article VIII requires. These words must be interpreted to mean what a "municipality" and an "elective" "legislative body" were understood to mean at the time Article VIII was adopted. The word "municipality" itself leaves "no doubt that the makers of the Constitution had in mind…municipal corporations with certain powers of local self-government, among them the power of selection of their governing body, which was and had been for centuries an essential feature of municipal corporations in this country, including Florida, and in the British Isles, from whence so many of our ancestors came." *State ex rel. Landis v. Ault*, 176 So. 789, 793-95 (Fla. 1937) (Brown, J., concurring).

That Article VIII expressly requires "elective" "legislative bodies" confirms and emphasizes this essential characteristic of "municipalities." Since our country's founding, elective legislative bodies have been the cornerstone of the republican form of government. *Powell v. McCormack,* 395 U.S. 486, 547 (1969) ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that

the people should choose whom they please to govern them.'"). By requiring municipal legislative bodies to be elective, there can be no question that Article VIII's drafters intended to make municipalities representative governments, where the citizens speak through those they elect.

The state legislature has no power to eliminate what Article VIII's framers considered to be the quintessential characteristics of representative government. *See State ex rel. Landis*, 176 So. at 793. Legislative immunity is one of those characteristics. Therefore, it is inherent in Article VIII and cannot be abrogated by statute.

Legislative immunity has existed for centuries because it is necessary to protect the integrity of elected legislative bodies and, thus, the republican form of government. Essential characteristics of representative governments are (i) advancing the views of the electorate; and (ii) accountability to the electorate. Freedom from the threat of civil liability for legislative action secures the legislative independence necessary to achieve both. A statute that makes an elected city legislator civilly liable for voting a certain way coerces a vote that serves two interests, neither of which are the interests of the legislator's constituents: the state legislator's interests and the legislator's personal financial interests. *Spallone v. United States*, 493 U.S. 265, 279 (1990) (citations omitted). Simply put, the threat

of liability "undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Id.*

Given this, Article VIII's drafters could not have envisioned that the state legislature could essentially commandeer elected city legislators by enacting statutes subjecting them to civil liability for voting in a way the state legislature does not like. Legislative immunity is itself an inherent characteristic of what the drafters of Article VIII understood a representative government to be.

The notion that local legislative immunity exists only as common law right which the state legislature has plenary authority to extinguish by statute, if accepted, it would have far-reaching and troubling consequences. It would allow the state legislature to control what individual elected city officials do and say in unlimited contexts, simply by enacting statutes subjecting them to personal liability for voting the "wrong" way. This would create a mockery of the constitutional mandate that the members of a city's legislative body be elected by its citizens, and the representative government that mandate envisions.

There is no dispute that the state legislature has plenary authority to create municipalities, abolish them, and limit the powers they may exercise. The state legislature may, if it wishes, eliminate every city in the state. However, the power to abolish cities (and, thus, their legislative bodies) altogether does not encompass a right to tell elected city legislators what to say when called to vote on an ordinance.

C.f., *Meyer v. Grant*, 486 U.S. 414 (1988) (the fact that state could have banned certain type of speech altogether did not give the state the right to freely impose limits on such speech). The Constitution does not allow the state legislature to create a city—with a constitutionally-mandated elected legislative body accountable to its electors—and then turn the city's elected legislators into mouthpieces for the state by coercing them to vote in the way the state legislature dictates.

C. Legislative immunity is necessary to protect representative democracy, particularly at the local level

The need for legislative immunity is especially strong at the local level. *Bogan v. Scott-Harris*, 523 U.S. 44, 51 (1998); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 612 (8th Cir. 1980) (recognizing that "municipal legislators are…perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation") (citation and quotation omitted). In nearly all cities in Florida, a seat on the city's legislative body is a part-time position, and those who are elected to serve do so for no (or de minimus) pay.

As the United States Supreme Court has recognized, "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." *Bogan v. Scott-Harris*, 523 U.S. 44, 51 (1998). And, apart from the distractions resulting from litigation, the mere "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.* Exposing elected city legislators to civil liability would be destructive to a properly working and qualified representative government at the local level.

II. The penalty provisions of the Gun Law violate constitutionally protected speech and associational rights

In *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), the United States Supreme Court held a state recusal statute, requiring legislatures to abstain from voting on matters in which they have a conflict of interest, did not violate the Free Speech clause of the First Amendment. The Court explained the legislator did not have a First Amendment right to vote. *Carrigan* is distinguishable in key respects and is not controlling here.

In *Carrigan*, the Court first stated our country's universal and long-established tradition of conflict of interest recusal rules created a strong presumption they do not violate a legislator's freedom of speech. *Id.* at 122. A conflict of interest recusal rule was put in place in Congress shortly after the Constitution was ratified, and, although members of Congress were subject to the recusal rule at the time Congress voted to ratify the First Amendment, no one objected based on an inconsistency between them. Recusal rules have been commonplace at the federal and state levels for over 200 years. *Id.* at 122-25. The Court concluded this was "overwhelming evidence of constitutional acceptability." *Id.* at 125.

The second key consideration in the Court's decision was the challenged recusal statute was not "viewpoint discriminatory." *Id.* The Court explained it has

"applied heightened scrutiny to laws that are view point discriminatory even as to speech *not* protected by the First Amendment." *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)) (emphasis original). However, the recusal statute was "content-neutral and applie[d] equally to all legislators regardless of party or position." *Id.*

The Court also explained restrictions on legislators' voting are not restrictions on their protected speech because legislative votes "belong to the people." *Id.* at 126. A "legislator casts his vote 'as trustee for his constituents, not as a prerogative of personal power.'" *Id.* However, the Court expressly acknowledged that the recusal statute was ***not*** challenged on the basis that it impermissibly burdened the free speech rights of "legislators and constituents ***apart*** from an asserted right to engage in the act of voting." *Id.* at 129 (Kennedy, J., concurring). Additionally, the Court did not address First Amendment associational rights because the right to association was not raised.

The penalty provisions of the Gun Law are quite different than conflict of interest recusal laws. Quite the opposite of the long history and tradition of recusal laws (which presented strong evidence the Constitution's framers considered them to be constitutional), the long history and tradition here is that elected city legislators cannot subject to personal liability for the way they vote on legislation. This history weighs in favor of finding First Amendment protection.

However, the utterly dispositive distinction here is the Gun Law is viewpoint discriminatory. As *Carrigan*, explained, even where speech is not protected, viewpoint discrimination triggers the First Amendment and makes the restriction subject to strict scrutiny. *Id.* at 125.

That the Gun Law penalizes "yes" votes, instead of expressly mandating "no" votes, is irrelevant to the First Amendment analysis. Constitutional protections are "not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Indeed, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990).

Citizens' rights to elect the city legislators who will represent them necessarily requires legislators to be able to vote freely on issues as they arise. *See Clarke v. United States*, 705 F. Supp. 605, 612 (D.D.C.1988). The right to vote freely enables legislators "to consummate their duty to their constituents." *Id.*; *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 532-33 (1st Cir. 1989). The "'right of citizens to ban together in promoting among the electorate candidates who espouse their political views' is among the First Amendments most pressing concerns." *Carrigan* at 2353 (Kennedy, J., concurring).

Therefore, the First Amendment is triggered when an elected city legislator is threatened with liability based on the content of his or her expression when a matter is before the legislative body for a vote. *Wrzeski v. City of Madison*, 558 F. Supp. 664, 667 (W.D. Wis. 1983) (entering preliminary injunction against city ordinance which compelled council members to vote "aye" or "no" based on improper infringement of members first amendment right to refrain from voting).

Because the Gun Law's penalty provisions are viewpoint discriminatory, they must be stricken unless they pass strict scrutiny. In other words, they must serve a compelling state interest and be narrowly tailored to serve the compelling state interest. They do not.

First, there is not a compelling interest in protecting the state's preemptive authority. Because the Gun Law's preemption of local gun legislation is self-executing, local legislation in the field of preemption is automatically void. Therefore, it does not interfere with the state's preemptive authority in any way whatsoever. Nor does the state have a compelling interest in preventing confusion that may be caused by the passage of preempted ordinances. The Gun Law clearly states local regulations in this area are preempted, null, and void.

Even assuming there is a compelling state interest, imposing personal liability on elected city legislators is not the least restrictive means of achieving the interest. There are other ways of protecting the state's preemptive authority, which would not

fundamentally undermine the rights of citizens to petition their elected city officials and the rights of elected city officials to speak on behalf of those who have chosen them to govern.

The Gun Law already imposes direct liability on local governments. While imposing liability directly on cities is coercive, it is coercive in a way that does not intrude on the rights that citizens and their elected representatives have in a republican form of government. Where the city itself faces financial liability, an elected official's vote to avoid liability is based on the interests of the city and its citizens. But when an elected official faces personal liability, that decision is made based on his or her own personal interest.

Therefore, the penalty provisions that subject individual legislators to liability do not pass strict scrutiny and must fail.

CONCLUSION

The penalty provision of the Gun Law are facially unconstitutional and should therefore be stricken to the extent they subject individual elected city legislators to civil liability and penalties for voting in favor of legislation that is somehow subsequently found to be preempted.

Respectfully submitted on May 27, 2016.

Harry Morrison, Jr.
Florida Bar No. 339695
cmorrison@flcities.com
Florida League of Cities, Inc.
P.O. Box 1757
Tallahassee, Florida 32302
(850) 222-9684 (Tel)
850-222-3806 (Fax)

/s/Elizabeth W. Neiberger
Bryant Miller Olive P.A.
Susan H. Churuti
Florida Bar No. 284076
schuruti@bmolaw.com
One Tampa City Center, Suite 2700
Tampa, FL 33602
(813) 273-6677 (Tel)
(813) 223-2705 (fax)
Elizabeth W. Neiberger
eneiberger@bmolaw.com
Florida Bar No. 0070102
One S.E. Third Avenue, Suite 2200
Miami, Florida 33131
(305) 374-7349 (Tel
(305) 374-0895 (Fax)

Counsel for Amicus Curiae, Florida League of Cities, Inc.

CERTIFICATE OF SERVICE

I certify that, on May 27, 2016, a copy of the foregoing was served on the following by email:

Louis C. Norvell, Esquire
Assistant City Attorney
City of Tallahassee
300 S. Adams Street, #A5
Tallahassee, Florida 32301-1721
louis.norvell@talgov.com

Blaine H. Winship, Esquire
Office of the Attorney General
400 S. Monroe Street, Suite PL-01
Tallahassee, Florida 32399-6536
Blaine.Winship@myfloridalegal.com

Edward G. Guedes, Esquire
Jamie A. Cole, Esquire
Adam Schwartzbaum, Esquire
Weiss Serota Helfman
Cole & Bierman, P.L.
2525 Ponce de Leon Blvd., Suite 700
Coral Gables, Florida 33134
eguedes@wsh-law.com
jcole@wsh-law.com
aschwartzbaum@wsh-law.com

Eric J. Friday, Esquire
Fletcher & Phillips
541 E. Monroe, Suite 1
Jacksonville, Florida 32202
efriday@fletcherandphillips.com

Marc J. Fagel, Esquire
Lauren G. Escher, Esquire
Gibson Dunn
555 Mission Street, Suite 3000
San Francisco, California 94105
mfagel@gibsondunn.com
lescher@gibsondunn.com

Lesley McKinney, Esquire
McKinney, Wilkes & Mee, PLLC
13400 Sutton Park Drive S
Suite 1204
Jacksonville, Florida 32224
lesley@mwmfl.com

/s/Elizabeth W. Neiberger
Elizabeth W. Neiberger

CERTIFICATE OF COMPLIANCE

I certify that this brief is in Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

/s/Elizabeth W. Neiberger
Elizabeth W. Neiberger