

**IN THE SUPREME COURT
STATE OF FLORIDA**

**CASE NO. SC18-468
DCA CASE NO: 1D16-3940**

FLORIDA HIGHWAY PATROL, etc.,

Petitioner,

v.

LASHONTA RENEJA JACKSON,

Respondent.

**INITIAL BRIEF OF AMICUS CURIAE CITY OF CORAL GABLES IN
SUPPORT OF PETITIONER FLORIDA HIGHWAY PATROL**

**Frances Guasch De La Guardia
HOLLAND & KNIGHT LLP
701 Brickell Avenue, Suite 3000
Miami, Florida 33131
Tel: (305) 374-8500
Fax: (305) 789-7799**

**Miriam Soler Ramos
City Attorney
Board Certified by the Florida Bar
In City, County and Local
Government Law
City of Coral Gables,
405 Biltmore Way
Coral Gables, Florida 33134**

Attorneys for Amicus City of Coral Gables

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INTRODUCTION

Amicus Curiae, the City of Coral Gables (the “City”) submits its brief in support of the Petitioner, the Florida Highway Patrol, in an effort to inform the Court of the potential impact and consequences of its decision and how the constitutional principles of sovereign immunity and the separation of powers doctrine support the Petitioner’s argument.

IDENTITY AND INTEREST OF AMICUS CURIAE

The City is one of the most highly-planned communities with one of the strictest zoning regulations in the state. *Kuvin v. City of Coral Gables*, 45 So. 3d 836 (Fla. 3d DCA 2010), *withdrawing and superceding opinion on reh'g en banc*, 62 So. 3d 625 (Fla. 3d DCA 2010). Due to its extensive planning and zoning regulations, the City has a significant interest in preserving its right to take an immediate appeal from a non-final order which determines the legal entitlement to sovereign immunity even when the order fails to elaborate the denial is “as a matter of law” but the record demonstrates that the issue decided was a pure question of law. The City’s interest is a right and interest shared with the vast majority of municipalities, cities and governmental entities in the State of Florida. Clearly, the impact of the decision will be felt statewide.

The right to take an immediate appeal of a non-final order denying sovereign immunity directly impacts the City’s ability to enforce and implement policy and

planning-level decisions within its municipality. Denying a governmental entity the right to an appeal would be a violation of the separation of powers provision guaranteed by the Florida Constitution from which a government's sovereign immunity rights are derived. If let to stand, the decision will curtail the City's — as well as other cities, municipalities, and governments — right to be immune from suit simply because certain “magic words” are missing from the order under review, rather than determining the right to review based on the actual reasoning underlying the order.¹

SUMMARY OF ARGUMENT

The sovereign immunity bestowed upon cities, municipalities, and governmental entities arises exclusively from Florida's constitutional separation of powers provision. That constitutional doctrine limits the judicial branch from interfering with the police power decisions of other branches of government. The separation of powers doctrine is one of the basic structural pillars of our government. The constitutional principle and grant of sovereign immunity should not be subject to happenstance, based only whether a trial court issues an order that fails to elaborate, or does so inadequately, its rationale for not conferring sovereign

¹ The City agrees and adopts in whole all of the legal arguments raised by the Petitioner. The City will focus its amicus brief on the constitutional and policy implications that support answering the certified question in the affirmative.

immunity. Such an interpretation of the rule would permit the judicial branch to disregard the separation of powers and effectively second guess the political and police power decisions of the other branches of government. Moreover, an appeals court's jurisdiction should not be conferred based on the recitation of certain "magic words" in an order, rather a court should be empowered to determine its jurisdiction based on the content of the record to aptly determine if the issue on appeal is a pure issue of law.

The right to take an appeal from a non-final order denying sovereign immunity, notwithstanding that the order failed to expressly state that sovereign immunity was denied as "matter of law" is not a novel issue. The Court has already addressed this issue and noted that the appealability of the denial is based, not on the words recited in the order under review, but rather on whether the trial court's decision determines entitlement to sovereign immunity on a pure legal question.²

² *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014).

ARGUMENT

The Right To Appeal A Non-Final Order Denying Sovereign Immunity Should Not Depend On The Use of Certain Words In An Order As Such An Interpretation Would Violate The Separation of Powers Doctrine And Essentially Abrogate The Constitutional Right To Be Immune From Suit Based on Sovereign Immunity.

The Court should answer the certified question in the affirmative because Florida Rule of Appellate Procedure 9.130(a)(3)(C)(xi) (the “Rule”) permits the immediate appeal of a non-final order denying sovereign immunity when the record demonstrates it was denied based on a pure question of law. To hold otherwise would be contrary to the plain text of the Rule, would exalt form over substance, and would violate the constitutional doctrine of separation of powers thereby rendering illusory the right to sovereign immunity from suit. The aforementioned arguments are all sound reasons to interpret the Rule to require that a reviewing court look beyond the four-corners of an order to the content of the record to determine whether the denial was based on a pure question of law and consequently, whether appellate jurisdiction is proper under the Rule.

A. Denying the Right to An Immediate Appeal Due To The Lack Of Certain Language In the Order Would Abrogate The Right Of Sovereign Immunity Founded Upon The Constitutional Grant of Separation Of Powers

The importance of safeguarding a sovereign’s immunity from suit, which includes its right to seek an immediate appeal, rests on the most basic of the structural pillars of government: the constitutional doctrine of separation of powers.

Wallace v. Dean, 3 So. 3d 1035, 1045 (Fla. 2009) (right to sovereign immunity derives exclusively from the separation of powers provision found in Article II, Section 3 of the Florida Constitution); *see also Dep't of Educ. v. Roe*, 679 So. 2d 756, 759 at fn. 1 (Fla. 1996) (citing *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1019 (Fla. 1979)) (stating that Florida's sovereign immunity provision stems in part from separation of powers concerns).³ The separation of powers doctrine—and the immunity that derives from it—is necessary to ensure the orderly administration and functioning of each branch of the government. *Id.* For the City, and other municipalities, cities, and governmental entities, this constitutional doctrine prevents the judicial branch from interfering with the discretionary functions of the government by granting it sovereign immunity and shielding it from suit, unless the legislature explicitly creates a statutory exception waiving immunity.

Because immunity from suit is different than immunity from liability, it should be subject to immediate review.⁴ The latter serves to bar a court's subject

³ *See also Alden v. Maine*, 527 U.S. 706, 748–49 (1999) (“Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.... The principle of sovereign immunity preserved by constitutional design thus accords the States the respect owed them as members of the federation.”) (internal citations and quotations omitted).

⁴ The Florida Bar Appellate Rules subcommittee noted the distinction when deliberating the proposed amendment to the Rule:

matter jurisdiction (unless it falls under an express statutory waiver), while the former only dispels liability. *Wallace*, 3 So. 3d at 1044 (“[S]overeign immunity may shield the government from an action in its courts (i.e., a lack of subject-matter jurisdiction”).⁵ Governmental entities rely upon these constitutionally-based doctrines (and the immunity they afford) to enable them to function and govern effectively with respect to policy, judgmental and planning decisions. For instance, the constitutional doctrines operate to limit the judicial branch from interfering with the police power of other branches of government:

[T]he reason courts cannot generally supervise the executive . . . is not based on the archaic notion that “the king can do no wrong.” Instead, it is founded on the doctrine of separation of powers, . . . “under the

Whether something is immune from suit is decided by substantive law, namely statutes and case law. If a determination has been made that a legal principle or defense is so important that it immunizes the potential defendant from suit, then the decision by the trial court regarding the inapplicability of the immunity should be reviewable by an appellate court.

Civil Practice Rules Committee, Subcommittee Report at 2, June 17, 2013.

⁵ *But see Department of Ed. v. Roe*, 679 So. 2d at 757 (finding that orders denying sovereign immunity are not appealable because sovereign immunity is a defense to liability rather than an immunity from suit). It appears, however, that based on *Tucker, Keck* and the amendment of the Rule (adding the right to appeal denials of sovereign immunity) *Roe* may no longer be good law. Moreover, if *Roe* is still good law, the Court should consider receding from it. *See Rodriguez v. Miami-Dade County*, 117 So. 3d 400, 410 (Fla. 2013) (Canady, J., concurring in result only) (“Once it is legally established that the statutory waiver of sovereign immunity is inapplicable, the sovereignly immune entity is both immune from liability and immune from suit,” and to hold otherwise “fundamentally degrades the meaning of immunity from suit.”).

constitutional doctrine of separation of powers, 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.” . . . To hold otherwise, the Court reasoned, “would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine.

Detournay v. City of Coral Gables, 127 So. 3d 869, 872-73 (Fla. 3d DCA 2013) (internal citations omitted). Sovereign immunity and the separation of powers doctrine ensure, among many other policy reasons, the “protection of the public treasury” and the “maintenance of the orderly administration of government.” *Id.* at 874. In order to preserve these policy considerations, courts are often called to determine the legal issue of whether sovereign immunity that shields a government from suit over basic policy, planning, and judgmental government decisions exists. *See Wallace*, 3 So. 3d at 1053. The substantive guarantees and protection offered by the separation of powers doctrine and sovereign immunity would be rendered meaningless if a government’s right to appeal is based solely on specific words in a court’s order without resort to the substance of the record to determine if a pure issue of law was the basis for denial of immunity.

It is precisely because sovereign immunity arises pursuant to a substantive constitutional right—making it different from an immunity that only insulates a party from liability and not suit—that it is strictly construed in favor of the government. *See Tampa-Hillsborough County Expressway Auth. v. K.E. Morris*

Alignment Serv., Inc., 444 So. 2d 926, 928 (Fla. 1983) (“A waiver of sovereign immunity ... should be strictly construed in favor of the state and against the claimant.”) (internal citations omitted); *Gerard v. Dep’t of Transp.*, 455 So. 2d 500, 502 (Fla. 1st DCA 1984), *approved in part, quashed in part*, 472 So. 2d 1170 (Fla. 1985) (stating that waiver of sovereign immunity must be clear and unequivocal, as well as strictly construed); see also Art. X, § 13, Fla. Const. (stating that “[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”); *Rodriguez*, 117 So. 3d at 406 (stating discretionary acts such as the exercise of legislative power is shielded by sovereign immunity). Here, the same construction — favoring sovereign immunity — should be employed when a reviewing court is determining if a denial of sovereign immunity is immediately appealable under the Rule.⁶

⁶ The Civil Practice Subcommittee report reflects that the subcommittee considered and discussed the differences from immunity from suit when working on the proposed amendment. *See* Civil Practice Rules Committee, Subcommittee Report at Exhibit 4, Email from Craig E. Leen, Esq. to Civil Practice Rules Subcommittee (Jan. 15, 2013):

[I]f the legislature or an appellate court has made the determination that a legal principle or defense is so important that it immunizes the potential defendant from suit itself, then the decision by a trial court that such immunity from suit does not apply should be reviewable by an appellate court. Otherwise, the party claiming an immunity is faced with a situation where an important right has been provided, often based on significant policy grounds, but no remedy has been afforded if that right is incorrectly denied (as someone cannot be re-immunized after the fact), Further, many of these immunities protect officials exercising

Notably, the application of the Rule in sovereign immunity appeals has been addressed by the Court before. The Court in *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014), issued on the same date the Rule was amended, noted that the sovereign immunity denial in that case presented the “exact scenario” in which an interlocutory appeal may be taken from a non-final order denying sovereign immunity, notwithstanding that the order failed to expressly state that sovereign immunity was denied as “matter of law.” *Id* at 1113-14.

Moreover, relying on workers’ compensation cases in determining the appealability of an order denying immunity from suit is inapposite. For instance in a denial of sovereign immunity, unlike in workers’ compensation cases, whether the denial is decided on a motion to dismiss where the alleged facts are assumed to be true or in a motion for summary judgment — where no disputed factual issues exist— the court must necessarily determine that the governmental entity is not entitled to immunity as a matter of law. That is not the case in a denial of workers’ compensation immunity, where the defendant may still have to go to trial on other theories of liability even if the immunity is denied. Therefore, unlike in a sovereign immunity denial, there remains an adequate remedy at law in workers’ compensation

important governmental functions (I.e. prosecutorial immunity, judicial immunity, legislative immunity), and serious separation of powers concerns are implicated if the case is incorrectly allowed to proceed, which supports allowing an immediate appeal.

immunity denials, which makes the workers' compensation cases distinguishable and inapplicable to sovereign immunity cases.

Simply put: sovereign immunity and separation of powers is the rule—not the exception. Applying the Rule without a review of the record to properly ascertain the basis for the denial of the immunity could effectively swallow the doctrine whole. The interpretation and argument of the Rule as proposed by Petitioner is entirely consistent with the constitutional doctrine of separation of powers — that is to protect municipalities', cities', and governmental entities' right to be shielded from suit thereby ensuring a government's ability to legislate and engage in discretionary governing functions.⁷

Additionally, precluding the immediate appeal of a denial of sovereign immunity (simply due to the lack of certain words in an order) not only subjects the entity to defend itself at trial, which effectively eviscerates the right to immunity

⁷ Similarly, the enduring presumption in favor of the Home Rule bestowed upon municipalities' ordinances and the enforcement of its regulations would also be impacted. Florida adopted the Home Rule Powers Act in 1973, which ended challenges related to city and county powers. Indeed, the Florida Constitution states in Article VIII, Section 2(b):

“Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise power for municipal purposes except as otherwise provided by law.”

from suit, but also violates the separation of powers doctrine by allowing a court or jury to invade the province of the legislative or executive branch.⁸ After the government entity is denied its right to interlocutory review and is forced to trial, there is no longer an adequate remedy available because once the shield of sovereign immunity is lost, it cannot be regained. *See Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994) (*citing Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (finding that immunity “is effectively lost if a case is erroneously permitted to go to trial” and it is “effectively unreviewable on appeal from a final judgment,” as a party cannot be “re-immunized” if erroneously required to stand trial). Thus, as a result of its unique nature, sovereign immunity “should be resolved at the earliest possible stage of a litigation,” *Holmes v. Hale*, 701 F. App'x 751, 756 (11th Cir. 2017) (*citing Anderson v. Creighton*, 483 U.S. 635, 646 n.6, (1987)); *see also Keck v. Eminisor*, 104 So. 3d 359, 364–65 (Fla. 2012) (recognizing that immunity from suit “is effectively lost if a case is erroneously permitted to go to trial” because a party cannot be re-immunized if it is erroneously required to stand trial or face the other burdens of litigation and the right to immunity becomes“ illusory and the very policy that

⁸ *Town of Indialantic v. McNulty*, 400 So. 2d 1227, 1230 (Fla. 5th DCA 1981) (“The courts should not become “super” zoning review boards. Zoning decisions are primarily “legislative” in nature and such decisions should be made by zoning authorities responsible to their constituents.; *see also Broward County v. Capeletti Bros., Inc.*, 375 So. 2d 313 (Fla. 4th DCA 1979), *cert. denied*, 385 So. 2d 755 (Fla. 1980).

animates the decision to afford such immunity is thwarted”); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004) (“The defense of sovereign or qualified immunity protects government officials not only from having to stand trial, but from having to bear the burdens attendant to litigation, including pretrial discovery.”).

Accordingly, the more reasoned application of the Rule would be to require a review of the record, and not just the order, to determine if sovereign immunity was denied as a matter of law. If the denial of these constitutional powers are not subject to a more thorough review, the constitutional protection and powers delegated to cities and municipalities are, effectively, illusory.

B. To Rely Solely on A Court’s Order To Determine If The Denial of Sovereign Immunity Is Appealable Is Contrary to the Plain Text Of The Rule And Would Allow Subject Matter Jurisdiction To Be Determined By Judicial Fiat.

Foremost, the plain text of the Rule does not mandate that the words “as a matter of law” be expressed in the order denying sovereign immunity for the order to be appealable. Rather, the Court has expressly held that the right to an immediate appeal under the Rule was intended to permit review of “*decisions determining entitlement to sovereign immunity where the case involves a pure legal question.*” *Beach Community Bank v. City of Freeport*, 150 So. 3d at 1112 (emphasis added). Thus, neither the Rule or the applicable precedent require that the right to an immediate appeal from an order denying sovereign immunity contain the express

statement “as a matter of law.” If the appellate jurisdiction of the court is to be confined solely to a review of the order and whether it contains certain magic words — without resort to the rest of the record— the law would unreasonably give weight to form over substance.

Furthermore, such a formulaic approach effectively operates to confer or remove appellate jurisdiction by the literal stroke of a judge’s pen, rather than by virtue of the law. It is well settled that jurisdiction cannot be conferred by consent, by the parties, **or by an act of court.** *84 Lumber Co. v. Cooper*, 656 So. 2d 1297, 1298 (Fla. 2d DCA 1994) (quoting *Florida Export Tobacco Co. v. Dep’t of Revenue*, 510 So. 2d 936, 943 (Fla. 1st DCA), *review denied*, 519 So. 2d 986–987 (Fla. 1987) (emphasis added) (“Subject matter jurisdiction cannot be created by . . . or by the exercise of power by the court; it is a power that arises solely by virtue of law.”). Under Florida law, jurisdiction is conferred only by the will of the people through legislative enactments and the Constitution. “Jurisdiction, simply put, is the inherent power to decide a case.” *Oceania Joint Venture v. Ocean View of Miami, Ltd.*, 707 So. 2d 917, 919 (Fla. 3d DCA 1998); *See also State ex rel. Caraker v. Amidon*, 68 So. 2d 403, 405 (Fla. 1953) (“Jurisdiction is conferred upon a court by the Constitution or a statute and not by agreement between the parties.”). The practical effect of the decision under review is to allow a trial court to confer appellate jurisdiction by the recitation (or non-recitation) of certain words, *i.e.*, “as a matter of

law.” That type of application would be in contravention of the well-settled principles that subject matter jurisdiction cannot be conferred by consent, word or action of the court.

Similarly, relying solely on the words of the order to determine jurisdiction exalts form over substance contrary to the basic legal principle that the substance of an order, and not the label or use of certain words, determines an order’s appealability. *See Zabawa v. Penna*, 868 So. 2d 1292, 1293 (Fla. 5th DCA 2004) (“It is the substance of the order, not the label affixed to it, that determines its nature for purposes of section 4(b)(1) and rule 9.030(b)(1)(A)”) (internal citations omitted); *see also Boyd v. Goff*, 828 So. 2d 468 (Fla. 5th DCA 2002); *North Shore Realty Corp. v. Gallaher*, 99 So. 2d 255 (Fla. 3d DCA 1957).

If the right to appeal depends solely on what a trial court does or does not say in the order and not the nature of the issue, an order containing “as a matter of law” would automatically confer jurisdiction and permit an immediate appeal even if a review of the record would demonstrate that the nature of the issue was not a pure issue of law. And vice versa, a trial court could remove the right to review and eliminate appellate jurisdiction simply by omitting the words “as a matter of law” from the order. Clearly, that is not what was intended by the amendment to the Rule, nor does it comport with the fundamentals of the Florida Constitution. The mere recitation (or non-recitation) of certain words should not provide the basis upon

which to confer appellate jurisdiction because jurisdiction is substantive in nature and cannot be conferred by judicial process or action.

CONCLUSION

The sovereign immunity bestowed upon cities, municipalities, and governmental entities arises exclusively from Florida's constitutional separation of powers. The separation of powers doctrine limits the judicial branch from interfering with the police power decisions of other branches of government, it is one of the structural pillars upon which American freedoms rest. That principle, and the sovereign immunity it grants, should not be subject to happenstance when a trial court issues an order and fails (or refuses) to elaborate its rationale for not conferring the immunity.⁹ To hold otherwise would permit the judicial branch to effectively second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine. Moreover, the jurisdiction of the courts should not be conferred based on labels or the recitation of certain "magic words" in an order, instead it should be based on the content of the record to aptly determine if the issue decided was one of a pure issue of law.

⁹ Alternatively, if the Court is concerned with the potential of varying applications regarding the non-final appeal of immunities in general, it may well recommend that the Appellate Rules Committee fashion a more uniform rule based on the content controlling and not just the words in the written order.

Accordingly, the City respectfully submits that the certified question should be answered in the affirmative in accordance with the arguments raised by the Petitioner and Amicus Curiae.

Dated: February 27, 2019

/s/Frances G. De La Guardia
Frances G. De La Guardia – FBN 775762
HOLLAND & KNIGHT LLP
Counsel for the City of Coral Gables
701 Brickell Avenue, Suite 3300
Miami, Florida 33131
Tel.: (305) 374-8500
Fax: (305) 789-7799
frances.guasch@hkllaw.com

Miriam Soler Ramos
City Attorney – FBN 581348
Board Certified by the Florida Bar in
City, County and Local Government Law
City of Coral Gables
405 Biltmore Way
Coral Gables, FL 33134-5717
Coral Gables, FL 33134
Tel.: (305) 460-5216
Fax: (305) 460-5264
cleen@coralgables.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 27, 2019, a true and correct copy of the foregoing document has been electronically filed with the Supreme Court of Florida via Florida Courts E-Filing Portal which will serve it via transmission of Notices of Electronic Filing generated by the ePortal System on counsel of record on the Service List below:

s/ Frances G. De La Guardia
Frances G. De La Guardia

SERVICE LIST

Pamela Jo Bondi, Esq.
Amit Agarwal, Esq.
Britt Thomas, Esq.
Rachel Nordby, Esq.
Tort Litigation Bureau
Office of the Attorney General
The Capitol PL-01
Tallahassee, FL 32399
Tel: (850) 414-3945

Amit.agarwal@myfloridalegal.com
Britt.thomas@myfloridalegal.com
Rachel.nodby@myfloridalegal.com

Counsel for Petitioner FHP

Jack J. Fine, Esq.
Melissa S. Morris, Esq.
FINE, FARKASH & PARLAPIANO, P.A.
622 N.E. 1st Street
Gainesville, FL 32601
Tel: (352) 372-7777
Fax: (352) 372-0049
jfine@ffplaw.com
mmorris@ffplaw.com
jduchaj@ffplaw.com

Counsel for Respondent

Daniel Glassman, Esq.
GLASSMAN & ZISSIMOPULOUS
804 NW 16th Ave., Suite B
Gainesville, FL 32601
Tel: (352) 505-4515
dan@putclientsfirst.com

Co-Counsel for Respondent

Edward G. Guedes, Esq.
**WEISS SEROTA HELFMAN, COLE &
BIERMAN, P.L.**
2525 Ponce de Leon Blvd., Ste. 700
Coral Gables, FL 33134
Telephone: (305) 854-0800
Prim. E-Mail:
eguedes@wsh-law.com
Sec. E-Mail:
szavala@wsh-law.com

Counsel for Florida League of Cities

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Times New Roman,
14-point font.

s/Frances G. De La Guardia