Case No. SC20-1284

In the Supreme Court
State of Florida

CITY OF WEST PALM BEACH,

Petitioner-Appellant,

v.

PETER AND GALINA HAVER,

Respondents-Appellees.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4D19-1537

AMICUS CURIAE BRIEF OF FLORIDA LEAGUE OF CITIES, CITY OF AVENTURA, TOWN OF CUTLER BAY AND VILLAGE OF PINECREST

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INTRODUCTION

Living in a municipality can be filled with disappointments. A neighbor doesn't behave as she should; drivers run red lights; crime is higher than it "ought to be"; and government services don't always live up to expectations. If every such disappointment gave rise to a cause of action against local government to enforce legal standards, local government would grind to a halt. All available financial resources would be depleted in endless litigation. And yet, that is the Pandora's Box the decision in *Haver v. City of West Palm Beach*, 298 So. 3d 647 (Fla. 4th DCA 2020) opens. Local governments must retain the authority to make discretionary planning and enforcement decisions without the threat of litigation—and the judicial branch's concomitant supervision—every time such a choice is made. The Florida Constitution and separation of powers doctrine have never envisioned such an invasive role for Florida's courts.

STATEMENT OF IDENTITY AND INTEREST OF AMICI

The Florida League of Cities ("League") is the united voice for Florida's municipal governments. Its goals are to serve the needs of Florida's municipalities and promote local self-government. The League, consisting of hundreds of municipal members throughout Florida, was founded on the belief that local self-governance is the keystone of American democracy. Those municipalities, including Aventura, Cutler Bay and Pinecrest, provide services that are dependent on the exercise of police power and almost invariably require the exercise of legislative, executive or prosecutorial discretion. Their thousands of employees who are tasked with the exercise of this authority do so in good faith with the

understanding that each of their discretionary determinations will not automatically give rise to litigation from a resident who disagrees with that exercise of discretion.

SUMMARY OF ARGUMENT

Amici commend the City of West Palm Beach on its excellent argument drawing the critical distinction between the concepts of standing and justiciability as developed in *Boucher v. Novotny*, 102 So. 2d 132 (Fla. 1958), and its progeny. Amici will not belabor that argument here and instead join in it. For this brief, Amici respectfully draw the Court's attention to the potential consequences of any decision the Court may render in this appeal.

First, the Fourth District's decision neither draws principled boundaries within which its ruling will apply nor articulates a standard for when the local government *must* exercise its discretion. Relying on the dissent from *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013), the decision declares that so long as individuals can show special harm satisfying *Boucher*, they may sue a local government to compel enforcement of the law. While the decision arises in the code enforcement context, it has broader application to any scenario where the law prescribes standards that a local government has the authority to enforce.

Second, the Fourth District's decision violates the separation of powers doctrine not only by allowing the judiciary to question the wisdom of inherently discretionary enforcement decisions, but also by effectively intruding into local government budgetary processes and compelling them to raise and allocate revenues to accomplish particular enforcement objectives.

Third, affirming the decision below would require the Court to question and possibly overturn decades of jurisprudence governing writs of mandamus. A mandatory injunction and a writ of mandamus share many legal characteristics. The latter is normally invoked to accomplish the same objective that the former (directed to West Palm Beach) was ostensibly intended to achieve: to compel a government to perform a specific act. But in the case of mandamus, a writ will issue only when the action to be compelled is a purely ministerial function and does *not* involve the exercise of discretion. The executive or prosecutorial decision to exercise the government's police power to enforce a code provision, or any other law, is inherently discretionary and may not be judicially compelled.

Fourth, the Attorney General of Florida, appearing as amici, should not be seeking to overturn precedent governing the application of the separation of powers doctrine to local governments; and even if this case were the proper vehicle for the effort, she is mistaken in her argument.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION SETS NO GOVERNING PRINCIPLES FOR WHEN AND HOW A LOCAL GOVERNMENT MAY BE COMPELLED TO ENFORCE THE LAW.

Local and state laws create myriad standards that are theoretically enforceable by local governments. In addition to the municipal zoning codes at issue here, there are building codes, local and statewide traffic laws, and a whole host of other state laws prohibiting particular conduct. The Fourth District's decision effectively "weaponizes" local government at the behest of individual

residents who may have disagreements with fellow residents. Under the best of circumstances, neighbors occasionally disagree about how the other is behaving, whether it relates to where cars are parked, how loudly music is played, what color a home is painted, what landscaping choices are made—the list goes on. Under less auspicious circumstances, neighbors become feuding adversaries, looking for every opportunity to retaliate for every perceived slight.

Those neighbors often call upon local government—either code enforcement officials or police officers—to help resolve the disputes. Those employees, exercising the government's police power, intercede either to de-escalate a situation or, in appropriate situations, take enforcement action. In each instance, though, the nature and scope of the government's exercise of that police power is circumscribed by the enforcing officials' discretion. The Fourth District's opinion, however, announces a new rule of law that *whenever* a specially harmed resident disagrees with the local government's exercise of enforcement discretion, the government may be compelled to enforce the law for the benefit of the resident.

For example, one neighbor dislikes the particular shade of blue his neighbor has painted her house. The neighbor believes the color is not "approved" by the local government and files a complaint, insisting that his neighbor be cited and fined. The code enforcement officer investigates and, in the exercise of her discretion, makes a determination that the color falls within the range of approved colors and takes no enforcement action. The complaining neighbor disagrees, and under the authority of *Haver*, files suit to compel the government to enforce the code and require the neighbor to re-paint her house. Tens of thousands of taxpayer

dollars in legal fees later, a court exercises its own discretion and agrees with the code enforcement officer that the color is "approved."

Because *Haver* provides no parameters for determining how erroneous the exercise of discretion must be before enforcement may be compelled, *every* disagreement between a resident and an enforcement official gives rise to a potential cause of action for declaratory and injunctive relief. The greater the animosity between neighbors, the greater the likelihood the local government gets caught in protracted litigation.

The dilemma created by the opinion below is not limited to neighbor disputes. Coincidentally, that same neighbor who dislikes the color of his neighbor's house also happens to live adjacent to a busy traffic intersection, and he dislikes that South Florida drivers speed through the intersection and at times run the red light. The resident contends that because of the location of his home, he is adversely affected by the traffic infractions to a greater degree than others in the community, and he believes it is unsafe for him or his family to visit the park across the street. Despite requests, the police department has refused to permanently station a police officer (or more likely, several officers) at the intersection to pull over *all* drivers who exceed the speed limit or who run through the red light. Relying on *Haver*, the neighbor files yet another lawsuit to compel the local government to devote all necessary resources to enforce the law and prevent (or at least, punish) *all* traffic infractions at the intersection.

These are merely two of the adverse consequences arising from the Fourth District's opinion and *one* unhappy resident. Local government cannot function in

this manner. In fact, this Court recently considered and rejected an argument based on the under-enforcement of traffic laws by local governments. In *Jimenez v. State*, 246 So. 3d 219 (Fla. 2018), the Court considered a challenge to municipal red light camera programs. *Id.* at 221. The police departments operating those programs developed guidelines directing their camera vendors to review, screen and categorize captured events based on the guidelines and the enforcement priorities of the issuing departments. *Id.* at 222-23. Officers tasked with reviewing the evidence captured by the cameras would then make discretionary enforcement decisions in the same manner they did roadside, but only as to those events that had been pre-screened pursuant to the guidelines. *Id.* at 222, 223-24.

Among the challenges was the contention that the red light camera enforcement program was "underinclusive because there is a possibility that other motorists may have committed a … violation but did not receive a citation…." *Id.* at 229-30. The municipality pointed out that "it often makes decisions regarding the enforcement of traffic infractions, including where to place red light cameras, as they are not placed at every intersection. … [T]raffic enforcement officers cannot be present at every intersection. As a result, there will inevitably be traffic infractions that go undetected and uncited." *Id.* at 230.

Ultimately, the Court concluded that this "under-enforcement" did not give rise to a cognizable complaint. Citing Judge Wells' concurrence in the decision under review, the Court observed:

> [I]t is the traffic infraction officer *alone* who determines from the population of possible violators, *those who will be subject to prosecution*. This … is *neither a violation of the law nor a matter*

> *about which those cited for a violation have authority to complain*. … This argument is no different than that made by an individual issued a speeding ticket who complains that other speeders also were not ticketed. … That determination, as the record before us confirms, is left *solely* to the traffic infraction enforcement officers.

Id. at 230 (emphasis added) (citing *City of Aventura v. Jimenez*, 211 So. 3d 158, 173-54 (Fla. 3d DCA 2016) (Wells, J., concurring)).

The Court's observations regarding the exercise of enforcement discretion were certainly not novel. In *Carter v. City of Stuart*, 468 So. 2d 955 (Fla. 1985), this Court made clear that municipalities have the inherent authority to determine enforcement priorities. Relying on its earlier decision in *Wong v. City of Miami*, 237 So. 2d 132 (Fla. 1970), the Court held:

> *Wong*'s holding denying liability because of the strategy the city employed in use of its police force is a clear illustration of *nonactionable* activity because *inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers.* [citation omitted]
>
> A government *must have the flexibility to set enforcement priorities on its police power ordinances in line with its budgetary constraints.* Without the ability to make such choices a government must either pay the high cost of total enforcement or forego the exercise of its police power. Neither option serves the public interest.

Carter, 468 So. 2d at 956-57 (emphasis added; internal quotation marks omitted) (quoting *Wong*, 237 So. 2d at 134). *See also infra* at Argument III.

Similarly, in *Everton v. Willard*, 426 So. 2d 996 (Fla. 1983), a case testing the immunity of "any governmental unit" from tort liability arising from discretionary enforcement decisions, the Court held:

> The underlying premise for this immunity is that it cannot be tortious conduct for a government to govern. Our decision recognized that *there are areas inherent in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine*.

Id. at 1001 (emphasis added) (quoting *State v. Nelson*, 419 So. 2d 1071, 1075 (Fla. 1982) (quoting *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1019 (Fla. 1979)). *See also State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) ("Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute.").

While the Fourth District was focused on a specific code enforcement dispute, its ruling results in the potential application of the rule across a very broad spectrum of disputes.[1] As West Palm Beach has aptly observed, just because an individual suffers special harm from a local government's discretionary decision not to enforce the law does not necessarily give rise to a justiciable controversy. To avoid the litany of woes that would befall local governments from application of the Fourth District's newly announced rule, the Court should reverse.

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[1] In jurisdictions where government contracts with private entities for the provision of services—and this can include code enforcement—the Fourth District's decision raises the question of when a local government may be compelled by the courts to sue a government contractor for breach of contract. If the local government executive considers all aspects of an existing contractual relationship and determines, in the exercise of her discretion, that the benefits of the relationship outweigh the consequences of declaring a breach, the Fourth District's reasoning would seem to allow the judiciary to require the local government to engage in litigation to assuage a resident's demand for full enforcement.

II. THE DECISION BELOW ALLOWS THE JUDICIARY TO INTRUDE IN LOCAL LEGISLATURES' APPROPRIATIONS TO ENSURE COMPLETE ENFORCEMENT OF LAWS.

As noted above, the effect of the Fourth District's decision is that local legislatures must be prepared, at the direction of the judiciary, to appropriate and expend whatever financial resources are necessary to ensure complete enforcement of the law, either through the hiring of sufficient code enforcement officers or police officers or through some other measure. This intrusion by the judiciary into the appropriations process violates the separation of powers doctrine.

Florida courts, including this Court, have repeatedly acknowledged that the appropriation of funds to pay for government services is an exclusively *legislative* function, and the judiciary may not intrude upon that function without violating the separation of powers doctrine. *See, e.g., Chiles v. Children A, B, C, D, E and F*, 589 So. 2d 260, 265 (Fla. 1991) ("[T]his Court has long held that the power to appropriate state funds is legislative[.] … *The legislative responsibility to set fiscal priorities through appropriations is totally abandoned when the power to reduce, nullify, or change those priorities is given over to the total discretion of another branch of government*.") (emphasis added); *In re Order on Prosecution of Crim. Appeals by Tenth Jud. Cir. Pub. Def.*, 561 So. 2d 1130, 1136 (Fla. 1990) ("Appropriation of funds for the operation of government is a legislative function."); *Still v. Justice Admin. Comm'n*, 82 So. 3d 1168, 1170 (Fla. 4th DCA 2012) ("[I]t must be recognized that matters of appropriation and adequacy of state funds are legislative functions and not judicial. It would be a violation of the

separation of powers doctrine for trial courts to address whether adequate state funding is available to discharge a statutory [duty.]").

Dep't of Children and Fam. v. K.R., 946 So. 2d 106 (Fla. 5th DCA 2007), is particularly instructive in this instance:

> The courts of this state have frequently held that an order of a trial court compelling a governmental department or agency *to pay for a service or to incur another expense to the benefit of a private party* "interferes with both *legislative discretion in determining the funds required of an agency and executive discretion in spending those appropriated funds, in derogation of the doctrine of separation of powers*."

Id. at 107 (emphasis added) (quoting *Dep't of Juvenile Justice v. C.M.*, 704 So.2d 1123, 1125 (Fla. 4th DCA1998)).

The decision here creates the potential for infinite demand for local enforcement in the face of finite revenue options. Constitutional limitations on the judiciary aside, not all municipalities are capable of increasing revenue intake in order to satisfy the judiciary's dictates on how comprehensively enforcement must be achieved. Some local governments—particularly those serving lower income communities—find themselves with lower tax bases, capped-out millage rates, exhausted bond financing options, and lack of funding to commission studies to support the implementation of impact and other service fees. In addition, the state legislature is increasingly restricting the ability of local governments to increase intake of revenue. *See, e.g.,* § 200.065, Fla. Stat., and Florida Department of

Revenue's 2020 Trim Compliance Workbook (regulating voting requirements for local legislative bodies to increase ad valorem taxes).[2]

The decision here creates insurmountable legal and practical problems in implementation. Florida courts lack the constitutional authority to effectively dictate to local elected officials that they must find the funding to pay for complete enforcement of existing laws. As the Fifth District correctly concluded in *K.R.*, doing so infringes not only the legislative discretion to raise revenues but also the executive discretion to determine how revenues should be spent for the greater good. The Fourth District's decision should be reversed.

III. AFFIRMANCE HERE WOULD REQUIRE THIS COURT TO RE-EXAMINE AND POSSIBLY RECEDE FROM ITS MANDAMUS JURISPRUDENCE.

Writs of mandamus and mandatory injunctions share many characteristics. Both are equitable remedies that can direct governmental entities to take affirmative action, but only where the party invoking the remedy has a clear legal right to the relief requested. *Compare*, *e.g.*, *Wilson v. Sandstrom*, 317 So. 2d 732, 736 (Fla. 1975) (holding mandatory injunction may issue "where … *the party has a clear legal right thereto*") (emphasis added); *Alorda v. Sutton Place Homeowners Ass'n, Inc.*, 82 So. 3d 1077, 1080 (Fla. 2d DCA 2012) ("A mandatory injunction is proper where a clear legal right has been violated….") (quoting *Shaw*

[2] Eventually, even the wealthiest of communities will exhaust their revenue generating options, either because of legal limitations or because the political will of the electorate will preclude an endless increase in taxation.

v. Tampa Elec. Co., 949 So. 2d 1066, 1069 (Fla. 2d DCA 2007)); *with Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009) ("To be entitled to mandamus relief, 'the petitioner must have *a clear legal right to the requested relief* [and] the respondent must have an indisputable legal duty to perform the requested action[.]") (quoting *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)).

In the mandatory injunction context, when the conduct to be enjoined is subject to the exercise of discretion, the party seeking the injunction has failed to demonstrate a clear legal right to the injunctive relief. Thus, in the analogous situation presented in *Heath v. Bear Island Homeowner's Ass'n, Inc.*, 76 So. 3d 39 (Fla. 4th DCA 2011), the plaintiff sought to compel his homeowner's association "to enforce the terms of its Declaration of Covenants and Restrictions" against other association members who allegedly made "changes, modifications, or improvements … without first seeking the Association's approval[.]" *Id.* at 40. The Fourth District affirmed the denial of injunctive relief, holding that because the declaration "makes enforcement … a purely discretionary decision on the part of the Association, Heath had no clear legal right to an injunction to compel the Association to enforce the terms of the Declaration." *Id.* (citing *Murtagh v. Hurley*, 40 So. 3d 62, 66 (Fla. 2d DCA 2010)).

This same principle governs the issuance of a writ of mandamus. Cases are legion (and longstanding) that mandamus will not lie when the conduct to be compelled is subject to the exercise of discretion. *See, e.g.*, *Somlyo v. Schott*, 45 So. 2d 502, 503 (Fla. 1950) ("It is settled law that mandamus will lie to enforce a ministerial act *as distinguished from … the exercise of power involving discretion*.

If the power sought to be coerced involved the exercise of discretion then a clear legal right has not been shown and the writ of mandamus will not issue."); *see also City of Miami Beach v. Mr. Samuel's Inc.*, 351 So. 2d 719, 722 (Fla. 1977) ("Because the representatives of the City must exercise some discretion in determining whether to grant or deny the … application, mandamus does not lie."); *State v. Yarborough*, 257 So. 2d 891, 894 (Fla. 1972) (holding "where the duty [to be compelled] is discretionary, mandamus does not lie"). While mandamus is available to compel a government official to act and exercise discretion, it is not available to dictate *how* the official should exercise the discretion. *See*, *e.g.*, *Hunter v. Solomon*, 75 So. 2d 803, 806 (Fla. 1954); *Kraft v. State*, 156 So. 3d 1116 (Fla. 4th DCA 2015); *PCA Life Ins. Co. v. Metro. Dade Cty.*, 682 So. 2d 1102 (Fla. 3d DCA 1995).

In all material respects, then, a writ of mandamus achieves the same objective (and under essentially the same key criteria) as a mandatory injunction directed to local governmental officials to engage in specific conduct.[3] The precedents in both areas of the law have developed on parallel and congruent

[3] The Third District Court of Appeal in *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013), noted the parallels between the two doctrines. *Id.* at 873 ("Our decision in this regard dovetails with the cases holding that a writ of mandamus cannot issue against a city on behalf of a private party to require the city to enforce its building and zoning laws against another private party. [citations omitted].") (citing, *inter alia*, *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1213 (Fla. 4th DCA 1999) (holding mandamus does not lie to compel a city to enforce its zoning regulations, because the decision whether to enforce is discretionary, rather than ministerial)).

tracks so as not to create disparate remedies.[4] And yet, the Fourth District has concluded that so long as a resident has standing by virtue of suffering harm different in severity or nature from the public at large, that resident may sue in equity to compel a local government to perform a wholly discretionary act.[5] The court's announcement of this rule creates an unwarranted incongruity in the law—why would a litigant seek mandamus relief to compel a municipality to act when he can accomplish the same objective through a mandatory injunction and side-step the question of discretion as it affects his clear right to the relief requested?

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[4] The United States Supreme Court has recognized that there are no material differences between the remedies. *Stern v. S. Chester Tube Co.*, 390 U.S. 606, 609 (1968) ("The distinction drawn by the Court in *Knapp* [*v. Lake Shore & MSR Co.*, 197 U.S. 536 (1905)] between mandamus and a mandatory injunction seems formalistic in the present day and age, but it must be remembered that *Knapp* was decided before the simplification of the rules of pleading and, more importantly, before the merger of law and equity."). *See also Am. Civil Liberties Union of Mo. v. Ashcroft*, 577 S.W.3d 881, 897-98 (Mo. Ct. App. 2019) ("Our cases recognize that injunctive relief and mandamus are, in fact, akin to one another. As our Supreme Court noted in *State ex rel. Shartel v. Humphreys*, 338 Mo. 1091, 93 S.W.2d 924, 926 (Mo. 1936), '"in those states where the same court is vested with both legal and equitable jurisdiction … there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction...."' (quoting 7 McQuillin's Muncipal Corp. (2d Ed.) § 1975)).

[5] Oddly, the Fourth District summarily affirmed without explanation the trial court's dismissal of the Havers' request for mandamus relief, citing the same Fourth District precedent (*RHS Corp.*) *Detournay* cited. 298 So. 3d at 653.

IV. THE SEPARATION OF POWERS DOCTRINE DOES APPLY TO LOCAL GOVERNMENTS.

A. This appeal is not the proper vehicle for addressing the Attorney General's concerns.

The Attorney General has intervened as amicus and argues to the Court that it should recede from longstanding precedents and conclude that the separation of powers doctrine has no application when considering the legislative or executive decisions of local government vis-à-vis the state judiciary.[6] Before turning to the merits of the argument, Amici would point out the longstanding rule that amici cannot inject new issues that the parties would otherwise be precluded from raising. *See Lee Mem'l Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1041 n.1 (Fla. 2018) ("[I]t is well-settled that amici are not permitted to raise new issues."); *Nationwide Mut. Ins. Co. v. Chillura*, 952 So. 2d 547, 553 n.7 (Fla. 2d DCA 2007) ("Amici do not have standing to raise issues not available to the parties….") (quoting *Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982)).

No party in these proceedings has argued, at any point, that the separation of powers doctrine is inapplicable to local governments. The Fourth District certainly did not ground its decision on such a belief. As a result, the Court is being asked to recede from extensive existing precedent without the benefit of comprehensive

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[6] While the Attorney General couches her request in terms of "clarifying" existing precedent, AGB at 2, 9, the "clarification" would gut bedrock local government precedents like *Commercial Carrier* and *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985).

briefing and full development of the issues.[7] In fact, as the Attorney General notes, AGB at 2, the precise issue she engages *has* been fully briefed in *State of Fla. v. City of Weston*, No. 1D19-2819 (Fla. 1st DCA), and is pending determination by the First District. Her amicus brief here should not become a means by which the First District's decision is pretermitted—the Court's decision here is not an advisory opinion to other Florida courts.

B. Even if this appeal were the proper vehicle to resolve the issue, the Attorney General is mistaken in her conclusion regarding application of the doctrine.

This Court in *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), could have, but did not, overrule any of its prior precedents in which the separation of powers doctrine *was* applied to local government. *See City of Miami v. McGrath*, 824 So. 2d 143, 152 (Fla. 2002) (noting Court does not overrule itself *sub silentio*). While *Locke* observes that Florida's separation of powers provision "was not *intended* to apply to local governmental entities and officials," 595 So. 2d at 36 (emphasis added), the context of that statement reveals it was dictum.

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[7] For example, the Attorney General argues her position without once mentioning the constitutionally conferred home rule authority municipalities enjoy, Art. VIII, § 2(b) ("Municipalities shall have governmental … powers to enable them to conduct municipal government … and may exercise any power for municipal purposes except as otherwise provided by law[.]"), or the Constitution's recognition of the elective legislative bodies that exercise that power. *Id.* In-depth exploration of these critical provisions and their interplay with the separation of powers doctrine falls well beyond the limitations of this amicus brief.

No local government or official was a party in *Locke*, where the Court was addressing "the applicability of chapter 119, Florida Statutes (1987) (Public Records Law), to the individual records … of members of the Florida Legislature." *Id.* at 33. The House argued the judiciary was without jurisdiction over the internal operating procedures of the Legislature. *Id.* at 34. As such, the issue before the Court was whether the separation of powers doctrine prohibited the judicial branch from construing chapter 119 to apply to the Legislature. *Id*. at 36.

The Court held that it does not violate the separation of powers doctrine when it construes a statute that adversely affects either the executive or legislative branch. *Id*. The Court's statement regarding the application of the separation of powers provision to local governments was dictum because it was not essential (or even relevant) to its holding. *See State v. Johnson*, 295 So. 3d 710, 715 (Fla. 2020) (defining dicta). In the 28 years since *Locke* was decided, no Florida court has ever cited the case for the proposition that the separation of powers provision in Florida's constitution does not apply to local governments.

The Attorney General suggests that this Court's decision in *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009), somehow "disturbed" *Commercial Carrier* or *Trianon Park*. AGB at 8. Respectfully, it did not. If anything, *Wallace*—in its repeated citation to and reaffirmation of *Commercial Carrier*—cemented the continuing imprimatur of *Commercial Carrier*. In fact, the *Wallace* Court, in considering local governmental immunity, specifically cited *Commercial Carrier* and expressed its concern that courts not become "entangled" 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 (emphasis added).

Without doubt, the judicial branch has the authority to construe the validity of local government action, and the Legislature has authority to preempt local governments. But the judiciary does not have the "power" to interfere with the discretionary legislative or executive activities of a governmental entity that functions independently of Article V. The Attorney General's conceptualization of separation of powers would permit the judiciary to substitute its judgment for the legislative or executive judgment of local officials—an idea Florida courts have consistently rejected. *See, e.g., Metro. Dade County Fair Hous. and Employ. Appeals Bd. v. Sunrise Village Mob. Home Park, Inc.*, 511 So. 2d 962, 965 (Fla. 1987) ("Courts may not substitute their social and economic beliefs for the judgment of legislative bodies which are elected to pass laws, nor may the judiciary pass on the wisdom of legislative enactments."); *Altman v. Brevard County*, 300 So. 3d 347, 359 (Fla. 5th DCA 2020) ("A court is not authorized to substitute its judgment for that of the governmental body acting within the scope of its lawful authority.") (quoting *Canal Auth. v. Miller*, 243 So. 3d 131, 133 (Fla. 1970)); *City of Tarpon Spring v. Tarpon Springs Arcade Ltd.*, 585 So. 2d 324, 326 (Fla. 2d DCA 1991) (applying Art. II, sec. 3 and holding "this Court has no right to second-guess or substitute its judgment in proper areas of discretion reserved for the duly elected or appointed members of the City of Tarpon Springs").

To avoid this wholly untenable and unacceptable conclusion, the Attorney General apparently wants to untether the concept of justiciability from the

separation of powers doctrine. AGB at 10 n.4. They are, however, *very* related. In fact, this Court has cited Article II, section 3 of the Florida Constitution as the foundation for why "political questions … fall within the exclusive domain of the legislative and executive branches." *Johnson v. State*, 660 So. 2d 637, 646 (Fla. 1995). Neither of the cases cited by the Attorney General—*Partridge v. St. Lucie County*, 539 So. 2d 472 (Fla. 1989) and *Citizens for Strong Schools, Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 145 (Fla. 2019) (Canady, C.J., concurring)—stands for the proposition that political question justiciability is a concept divorced from or unrelated to the separation of powers. In fact, Chief Justice Canady's concurrence reflects the opposite. As a prelude to the language quoted by the Attorney General in her brief, the Chief Justice wrote, "There is no reason to believe that the judiciary is competent to make these complex and difficult policy choices. And there is every reason to believe that arrogating such policy choices to the judiciary *would do great violence to the separation of powers established in our Constitution*." *Id.* at 143-44 (Canady, C.J., concurring) (emphasis added).

The United States Supreme Court reached a similar conclusion in *Baker v. Carr*, 369 U.S. 186 (1962): "The nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 210. *See also DeSantis v. Fla. Educ. Ass'n*, --- So. 3d ---, 2020 WL 5988207, *6 (Fla. 1st DCA Oct. 8, 2020) (quoting *Baker*, 369 U.S. at 210). As the First District correctly observed, "[P]olitical questions 'fall within the exclusive domain of the legislative and executive branches under the guidelines *established by the Florida Constitution*.'" *Id.* (emphasis added) (quoting *Johnson*, 660 So. 2d at 646); *see also Merkle v.*

Guardianship of Jacoby, 912 So. 2d 595, 600 (Fla. 2d DCA 2005) ("[T]he limitation on the exercise of judicial power to the decision of justiciable controversies has been attributed to judicial adherence to the doctrine of separation of powers.") (citing *Ervin v. City of N. Miami Bch.*, 66 So. 2d 235, 236 (Fla. 1953)).[8]

The Court should decline the Attorney General's invitation to vitiate the separation of powers doctrine.

CONCLUSION

The Court should reverse the decision below and approve *Detournay* and *Chapman v. Town of Reddington Beach*, 282 So. 3d 979 (Fla. 2d DCA 2019).

[8] The Attorney General's plain language argument ignores that the language of Art. 2, sec. 3, has broader implications in the *exercise* of allocated, separated powers. Neil Gorsuch, *A Republic, If You Can Keep It* 78 (2019) ("The design of our founders doesn't just disperse power; it also has implications for *how* power should be exercised in each branch. … The founding generation did not have the luxury of overlooking the importance of the separation of powers, but I sometimes wonder if we are at risk of forgetting or discounting it today.") (emphasis added). In other words, even if Art. 2, section 3 of the Florida Constitution was "intended" to allocate powers among the branches of *state* government, it also has implications in how the judicial power may be exercised across all disputes, including those involving local government. The exercise of the judicial power cannot assume characteristics deriving from the legislative or executive power.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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