Filing # 118023808 E-Filed 12/10/2020 04:41:09 PM

RECEIVED, 12/10/2020 04:41:29 PM, Clerk, Supreme Court

SC20-1284

In the Supreme Court of Florida

THE CITY OF WEST PALM BEACH,
Petitioner,

v.

PETER M. HAVER, *et al.*,
Respondents.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
Case No. 4D19-1537

**AMICUS BRIEF OF THE STATE OF FLORIDA
IN SUPPORT OF NEITHER PARTY**

ASHLEY MOODY
Attorney General

AMIT AGARWAL (FBN 125637)
Solicitor General

JAMES H. PERCIVAL (FBN 1016188)
Chief Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300
(850) 410-2672 (fax)
amit.agarwal@myfloridalegal.com
james.percival@myfloridalegal.com

Counsel for the State of Florida

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Article II, Section 3 does not apply to local governments. 3

A. Article II, Section 3's text. 3

B. Lower court decisions reflect uncertainty regarding the application of the separation of powers clause to local governments. 5

C. *Commercial Carrier* and its progeny. 6

D. The Court should not apply the separation of powers doctrine in this case. 9

CONCLUSION 11

CERTIFICATE OF SERVICE 13

CERTIFICATE OF COMPLIANCE 15

TABLE OF AUTHORITIES

Cases

City of Freeport v. Beach Comty. Bank,
108 So. 3d 684 (Fla 1st DCA 2013) 6

Citizens for Strong Sch. v. Fla. State Bd. of Educ.,
262 So. 3d 127 (Fla. 2019)..10

Commercial Carrier Corp. v. Indian River County,
371 So. 2d 1010 (Fla. 1979)..6, 7

City of Fort Lauderdale v. Patrick,
254 So. 2d 193 (Fla. 1971)... 9, 10

Dep't of Transp. v. Neilson,
419 So. 2d 1071 (Fla. 1982)..7

Detournay v. City of Coral Gables,
127 So. 3d 869 (Fla. 3d DCA 2013) 6, 8

Haver v. City of W. Palm Beach,
298 So. 3d 647 (Fla. 4th DCA 2020) 6, 8

Lake Worth Utils. Auth. v. City of Lake Worth,
468 So. 2d 215 (Fla. 1985)..1, 5

Locke v. Hawkes,
595 So. 2d 32 (Fla. 1992)..3

Partridge v. St. Lucie Cty.,
539 So. 2d 472 (Fla. 1989)..10

Rucho v. Common Cause,
139 S. Ct. 2484 (2019)..10

State v. Bloom,
497 So. 2d 2 (Fla. 1986)... 9, 10

Trianon Park Condominium Association v. City of Hialeah,
468 So. 2d 912 (Fla. 1985) 6, 8, 9

Vieth v. Jubelirer,
541 U.S. 267 (2004) 10

Wallace v. Dean,
3 So. 3d 1035 (Fla. 2009) 8, 9, 10

Statutes and Constitutional Provisions

Art. II, § 2, Fla. Const. 5

Art. II, § 3, Fla. Const. .... passim

Art. II, § 5(a), Fla. Const. 3

Art. III, § 1, Fla. Const. 4, 9

Art. IV, § 1(a), Fla. Const. 4

Art. IV, § 6, Fla. Const. 4

Art. V, § 1, Fla. Const. 10

Art. VIII, Fla. Const. 10

§ 768.28, Fla. Stat. 6, 7

§ 16.01(4), Fla. Stat. 1

IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The Attorney General submits this brief on behalf of the State of Florida as amicus curiae in support of neither party. The Attorney General is authorized by law to appear in any suit in which the State has an interest. *See* § 16.01(4), Fla. Stat.

Petitioner asks this Court to reverse a lower court decision holding that a citizen may sue a local government entity for declaratory and injunctive relief based on that entity's failure to enforce its own ordinances. The State does not have a position on this dispute between its citizens and one of its political subdivisions.

Petitioner, however, contends that the lower court's ruling implicates the separation of powers because Article II, Section 3 "applies to local government just as it applies to state . . . government." Br. of Pet'r 18. The State of Florida has an interest in this Court's interpretation of the separation of powers clause of the Florida Constitution, particularly when that interpretation could affect the State's "all-pervasive power" over local governments. *See Lake Worth Utils. Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985).

That interest is not a speculative one. For example, the State is litigating a challenge to a state statute where the plaintiff local governments contend that the

statute violates rights they possess under Article II, Section 3. *See, e.g.*, Br. of Appellees 15, *State of Florida v. City of Weston*, No. 1D19-2819 (Fla. 1st DCA).[1]

Regardless how the Court resolves the ultimate issues in this case, it should not decide them based on the separation of powers clause, which does not apply to local governments. A contrary holding could subject the State to a flood of lawsuits challenging its laws and call into question the State's power over its political subdivisions.

SUMMARY OF THE ARGUMENT

Article II, Section 3 of the Florida Constitution states that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches" and that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches." By its plain text, this provision does not apply to the local government entities or officials described in Article VIII.

Yet the lower court decisions giving rise to the certified conflict appear to assume that the separation of powers clause applies to local governments. The Court should take this opportunity to clarify what Article II, Section 3's text makes plain—that it does not apply to local governments.

---

[1] *Available at* https://www.1dca.org/Resources/Cases-of-Public-Interest/19-2819.

ARGUMENT

I. ARTICLE II, SECTION 3 DOES NOT APPLY TO LOCAL GOVERNMENTS.

A. Article II, Section 3's text.

Article II, Section 3 states that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches" and that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches." This Court has recognized that this clause "identifies the branches of our state government" and "was not intended to apply to local government entities and officials." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992). The Court's conclusion in *Locke* was sound—it is the best reading of the Florida Constitution's text.

First, the phrase "powers of the state government" refers only to those powers exercised by the three state-level branches. While local governments are political subdivisions of the State, their governments and officials are not part of "the state government" as that term is used in the Florida Constitution. Article II, Section 5(a), for example, distinguishes between "office[s] under the *government of the state*" and those under "the counties and municipalities therein." (emphasis added). Similarly, Article I, Section 24(b) distinguishes between "collegial public bod[ies] of the executive branch *of state government*" and "collegial public bod[ies] of a county [or] municipality." (emphasis added).

Second, neither local governments nor their officials "belong[] to" any of the "branches" described in Article II, Section 3. The powers of the state-level branches are enumerated in Articles III, IV, and V, whereas local government powers are enumerated in Article VIII. This reading is confirmed by Article I, Section 24(a), which refers to "the legislative, executive, and judicial branches of government" and then separately to "counties" and "municipalities." Art. I, § 24(a) ("This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.").

Third, even when local governments exercise powers of an "executive" or "legislative" nature, they do so pursuant to Article VIII. They do not, through delegation by the state-level branches, exercise *the* legislative or executive power of the state government. *See* Art. III, § 1; Art. IV, § 1(a). The Florida Constitution forbids such a delegation. *See* Art. IV, § 6 ("*All functions* of the executive branch of state government shall be allotted among not more than twenty-five departments." (emphasis added)); *accord* Art. III, § 1 ("The legislative power of the state shall be vested in a legislature of the State of Florida."). Rather, when local governments exercise executive or legislative powers, they are not exercising "powers appertaining" to the state-level branches, *see* Art. II, § 3, but their own

"governmental, corporate and proprietary powers." *See* Art. VIII, § 2(b); *accord id.* § 1(f), (g).[2]

Fourth, Article II, Section 3's use of the plural form "branches," in referring to "legislative, executive and judicial branches," does not alter this conclusion. It cannot be read to refer to more than one legislative or executive branch—such as the legislative and executive functions of local governments—because Article II, Section 3 uses the phrases "one branch" and "either of the other branches." The words "one" and "either of the other" make clear that there are only three such branches: one legislative branch, one executive branch, and one judicial branch.

Fifth, applying Article II, Section 3 to local governments would undermine Florida's constitutional structure. Local governments are not co-equal branches of the state government. *See, e.g.*, *Lake Worth Utils.*, 468 So. 2d at 217 (discussing the State's "all-pervasive power" over local governments). Applying the separation of powers clause to local governments could wrongly suggest that local government's Article VIII powers are protected from incursion by the state-level branches.

B. Lower court decisions reflect uncertainty regarding the application of the separation of powers clause to local governments.

Notwithstanding *Locke* and the text of the Florida Constitution, the decisions giving rise to the certified conflict appear to assume that the "constitutional doctrine

---

[2] Moreover, were local legislative bodies exercising powers of *the* Legislature, they would be required to do so in Tallahassee. *See* Art. II, § 2, Fla. Const.

of separation of powers" applies to local governments. *See Detournay v. City of Coral Gables*, 127 So. 3d 869, 873 (Fla. 3d DCA 2013); *Haver v. City of W. Palm Beach*, 298 So. 3d 647, 651 (Fla. 4th DCA 2020). These courts are not alone. The First District, for example, has stated that the sovereign immunity of a municipality "derives exclusively from the separation of powers provision found in article II, section 3 of the Florida Constitution." *City of Freeport v. Beach Comty. Bank*, 108 So. 3d 684, 687 (Fla 1st DCA 2013).

One source of that uncertainty—and, as explained below, the one that led to the certified conflict—is a line of this Court's case law beginning with *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).[3] That decision and its progeny warrant extended discussion.

C. *Commercial Carrier* and its progeny.

In *Commercial Carrier*, this Court considered the effect of Section 768.28, Florida Statutes on the tort liability of a county where the act alleged to be tortious was a discretionary governmental function. *See* 371 So. 2d at 1014–15. That statute "waives sovereign immunity for liability for torts" on behalf of the State and its political subdivisions. *Id.* at 1013. But unlike the Federal Tort Claims Act, which

[3] Petitioner relies on *Trianon Park Condominium Association v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), rather than on *Commercial Carrier*. Br. of Pet'r 5. But, as discussed below, *Trianon Park* is part of the *Commercial Carrier* line of cases.

contains "an express exception for discretionary acts," Section 768.28's text does not provide such an exception. *Id.* at 1017. Relying on that omission, the plaintiff argued that the "legislature had available to it the federal act, as is apparent from certain language borrowed from that legislation, and it made the conscious choice not to provide an exception for discretionary acts." *Id.*

This Court disagreed. It held that "even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." *Id.* at 1020. The Court did not ground its decision in the Florida Constitution, and did not cite Article II, Section 3. Instead, it relied on decisions from other jurisdictions holding that, as a matter of "[p]ublic policy," "there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability." *Id.* at 1018–19.

Four years later, this Court revisited its holding in *Commercial Carrier*. *See Dep't of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982). The defendant in *Neilson* was a state-level executive agency—which Article II, Section 3 unambiguously applies to—not a local government as in *Commercial Carrier*. The Court "reiterated" its holding in *Commercial Carrier* and interpreted that holding as an application of the "separation of powers doctrine." *Id.* at 1075.

Three years after *Neilson* was decided, this Court decided *Trianon Park Condominium Association v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), the principal case on which the decisions giving rise to the certified conflict disagree. *See Detournay*, 127 So. 3d at 872–73; *Haver*, 298 So. 3d at 650–51. The Court, as it did in *Commercial Carrier*, applied the discretionary governmental function immunity rule to a local government. But unlike in *Commercial Carrier*, the Court grounded its holding in Article II, Section 3, reasoning that "the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government." *Trianon Park*, 468 So. 2d at 918. In reaching that conclusion, the Court appeared to assume that local governments are part of the legislative or executive branches within the meaning of Article II, Section 3: "Clearly, the legislature, commissions, boards, city councils, and executive officers . . . are acting pursuant to basic governmental functions performed by the legislative or executive branches of government." *Id.* at 919. The Court did so without citation to authority and with no analysis regarding whether Article II, Section 3 applies to local governments.

Commercial Carrier and *Trianon Park* survived, undisturbed, until this Court's decision in *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009). In that decision, the Court clarified the specific concern behind *Commercial Carrier*. As the Court explained, the real problem with "tort liability" for discretionary decisions is that

adjudicating that liability would "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)." *Id.* at 1053–54. The Court did, however, continue to reference the separation of powers and Article II, Section 3, even though the defendant was a sheriff. *Id.* at 1045.

D. The Court should not apply the separation of powers doctrine in this case.

Petitioner, a local government, asks this Court to hold that its decision whether or not to bring an enforcement action is protected by Article II, Section 3. *See* Br. of Pet'r 18. Petitioner relies on three lines of cases: (1) the *Commercial Carrier* line of cases, especially *Trianon Park*, Br. of Pet'r 18 (citing *Trianon Park*, 468 So. 2d at 918); (2) cases governing the discretion of state attorneys bringing criminal prosecutions in the name of the State, Br. of Pet'r 27 (citing *State v. Bloom*, 497 So. 2d 2 (Fla. 1986)); and (3) this Court's decision in *City of Fort Lauderdale v. Patrick*, 254 So. 2d 193 (Fla. 1971), Br. of Pet'r 18. None of these cases support the conclusion that Article II, Section 3 applies to local governments.

1. Insofar as the *Commercial Carrier* line of cases suggest that Article II, Section 3 applies to local governments, the Court should take this opportunity to clarify those precedents. By its plain text, Article II, Section 3 does not apply to local governments. *See supra* § I.A. And this Court was correct in *Wallace* that these cases

are better understood as an application of the nonjusticiable political question doctrine.[4] *See* 3 So. 3d at 1053–54.

2. As to the cases governing prosecutorial discretion, the fact that a state attorney's prosecutorial decisions implicate the separation of powers does not mean that this doctrine applies to local governments. State attorneys bring criminal proceedings in the name of *the State*. *See Bloom*, 497 So. 2d at 2. Moreover, they are not discussed as local government officers in Article VIII of the Florida Constitution, *see* Art. V, § 17, and they are funded by state-level appropriations rather than by local governments. *See id.* § 14(a), (c).

3. This Court's reference to the "separation of powers" in *Patrick*, 254 So. 2d at 194, was not a holding about the scope of Article II, Section 3. Rather, the Court interpreted "the Charter of the City of Fort Lauderdale" as conferring upon the City Commission, but not the Mayor, the power to "establish a curfew and penalty" during a state of emergency. *Id.* at 193–95. In other words, that decision was about

---

[4] The nonjusticiable political question doctrine may be implicated even when the separation of powers doctrine is not. *See Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality op.) (concluding that the political question doctrine applies when "the question is entrusted to one of the political branches *or involves no judicially enforceable rights*" (emphasis added)); *accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019); *Partridge v. St. Lucie Cty.*, 539 So. 2d 472, 473 (Fla. 1989). This is because the inability of a court to adjudicate certain cases flows from "the very nature of judicial power." *See Citizens for Strong Sch. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 145 (Fla. 2019) (Canady, C.J., concurring); *accord* Art. V, § 1, Fla. Const.

the separation of powers only insofar as a distinction between local legislative and executive power was enshrined in the City of Fort Lauderdale's charter. The Court did not discuss Article II, Section 3.

CONCLUSION

To the extent the Court addresses the separation of powers clause of Florida's Constitution, it should reaffirm its holding in *Locke* that Article II, Section 3 does not apply to local governments. At a minimum, the Court should not extend the questionable reasoning of certain tort cases to non-tort cases like this one. The State takes no position on whether the particular facts of this case raise a nonjusticiable political question or on any of the other issues raised by the parties.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s James H. Percival
JAMES H. PERCIVAL (FBN 1016188)
Chief Deputy Solicitor General
AMIT AGARWAL (FBN 125637)
Solicitor General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, Florida 32399
james.percival@myfloridalegal.com
amit.agarwal@myfloridalegal.com
(850) 414-3300
(850) 410-2672 (fax)

Counsel for the State of Florida

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal, or by email, on December 10, 2020 to the following counsel of record:

/s/ James H. Percival
Chief Deputy Solicitor General

Peter M. Haver, Esq.
329 Alhambra Place
West Palm Beach, FL 33405
p.haver@dmh-law.com

Counsel for Respondents

Frances G. De La Guardia, Esq.
Holland & Knight LLP
7001 Brickell Avenue, Suite 3300
Miami, FL 33131
Frances.guasch@hklaw.com
Katie.isaac@hklaw.com
Julia.frow@hklaw.com

Counsel for City of Coral Gables

Miriam Soler Ramos, Esq.
City of Coral Gables
405 Biltmore Way
Coral Gables, FL 33134-5717
mramos@coralgables.com

Counsel for City of Coral Gables

Kenneth B. Bell, Esq.
Joseph W. Jacquot, Esq.
Lauren V. Purdy, Esq.
Gunster, Yoakley & Stewart, P.A.
215 S. Monroe St., Ste. 601
Tallahassee, FL 32301
KBell@gunster.com
jjacquot@gunster.com
lpurdy@gunster.com

Counsel for Petitioner

Kimberly L. Rothenberg, Esq.
K. Denise Haire, Esq.
City of West Palm Beach
City Attorney Office
401 Clematis Street, 5th Floor
West Palm Beach, FL 33401
krothenburg@wpb.org
dhaire@wpb.org

Counsel for Petitioner

Victoria Mendez, Esq.
John A. Greco, Esq.
Kerri L. McNulty, Sr., Esq.
444 SW 2nd Avenue, Suite 945
Miami, FL 33131-1910
jagreco@miamigov.com
klmcnulty@miamigov.com
kjones@miamigov.com
csantos@miamigov.com

Counsel for City of Miami

Sonja Dickens, Esq.
Miami-Dade County League of Cities
18605 NW 27th Avenue
Miami Gardens, FL 33056-3106
sdickens@miamigardens-fl.gov

Counsel for Miami-Dade County League of Cities

Edward G. Guedes, Esq.
Weiss, Serota, Helfman Cole
& Bierman, P.L.
2525 Ponce de Leon Blvd., Suite 700
Coral Gables, FL 33134
eguedes@wsh-law.com
szavala@wsh-law.com

Counsel for Florida League of Cities, City of Aventura, Florida, the Town of Cutler Bay and Village of Pinecrest, Florida

CERTIFICATE OF COMPLIANCE

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

/s/ James H. Percival
Chief Deputy Solicitor General