IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CITY OF GAINESVILLE; CITY OF LAKE WORTH BEACH; CITY OF LAUDERHILL; CITY OF MIRAMAR; CITY OF NORTH MIAMI; CITY OF NORTH MIAMI BEACH; CITY OF TALLAHASSEE; and CITY OF WILTON MANORS, *Plaintiffs,* vs. RON DESANTIS, in his official capacity as Governor of the State of Florida; ASHLEY MOODY, in her official capacity as Attorney General of the State of Florida; and the ADMINISTRATION COMMISSION, *Defendants.*	Case No. 2021 CA 001959

BRIEF OF LOCAL GOVERNMENT LAW PROFESSORS IN SUPPORT OF PLAINTIFFS

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A. SUMMARY OF ARGUMENT

Florida's House Bill 1 ("HB1") undermines municipal authority and decision-making, running counter to decades of support for local autonomy and equal access to the political process in Florida. *Amici* submit this brief to support plaintiff Cities' litigation against this reallocation of authority away from local elected officials and to highlight the historical support, both in Florida and nationally, for maintaining local control over budgets and policing.

Specifically, *Amici* argue that the provisions of HB1 undermine the broad grant of home rule authority to Florida municipalities in the Florida constitution. HB1 undermines this grant by limiting localities' ability to set a budget responsive to the fiscal needs of their constituents, chilling localities' exercise of budgetary authority, limiting localities' ability to express policy preferences through local budgeting, and suppressing the political voice of residents. *Amici* contend that HB1, if upheld, will mute local voices and strip local governments of their authority to engage in local policymaking without the threat of state retaliation.

HB1 flies in the face of Florida's constitutional grant of local autonomy and commitment to local political power. This Court should strike down the provisions that abrogate local power.

B. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae local government law professors include individuals with an interest in protecting Florida's home rule, as set forth in the Florida constitution, and promoting and protecting local democratic action.

Nestor Davidson is the Albert A. Walsh Chair in Real Estate, Land Use, and Property Law at Fordham University School of Law and the director of the Urban Law Center. He teaches and writes in the field of local government law.

Sarah L. Swan is an Associate Professor at Rutgers Law School, where she teaches and writes in the area of state and local government law. She was an Assistant Professor at Florida State University College of Law from 2018-2022.

Richard Schragger is the Perre Bowen Professor of Law, Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law at University of Virginia School of Law. He has taught State and Local Government Law and Urban Law and Policy since 2002.

Rick Su is a Professor of Law at the University of North Carolina School of Law. His research focuses on preemption and the relationship between localities, the states, and the federal government.

Erin A. Scharff is an Associate Professor of Law at Sandra Day O'Connor School of Law. Her scholarship focuses on local government law and the allocation of revenue authority between state and local governments.

Sarah Fox is an Associate Professor of Law at Northern Illinois University College of Law. Her scholarship focuses on the intersections of property, land use, and environmental law.

Jorge X. Camacho is a Clinical Lecturer in Law at Yale Law School. He teaches and writes in the field of local government law.

Laurie Reynolds is a Research Professor and the Prentice H. Marshall Professor Emerita at the University of Illinois. Her work focuses on local government law and home rule authority. She regularly collaborates with municipal attorneys, public interest law firms, and local government units to advance home rule powers.

Steven L. Nelson is an Associate Professor of Education Policy and Leadership at the University of Nevada, Las Vegas. He works at

the intersection of education law, education policy, and race in urban educational settings.

Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. He is a leading thinker on state preemption and home rule and has written extensively on the topic.

C. ARGUMENT

1. Florida Enshrined Local Autonomy in its Home Rule Statutes and Constitution.

The history of the home rule movement in Florida reveals a deeply-rooted tradition of local governance. Nearly a century ago, in *Amos v. Mathews*, 126 So. 308, 336-338 (Fla. 1930), the Florida Supreme Court noted the long tradition of protecting the principle of local self-government—that "local affairs shall be decided upon and regulated by local authorities, and that the citizens of particular districts have the right to determine their own public concerns" without control by "the State at large"—has deep roots in English law. *Id.* at 336. This was reflected in many early American decisions, which "regarded the principle of local self-government as fundamental in our institutions and as a matter of constitutional right." *Id.* Thus, Florida courts recognized the importance of home

rule even before it became textually enshrined in the Florida constitution. *See* Art. VIII, Fla. Const.

In 1968 the people amended the Florida Constitution to "authorize local home rule powers for both cities and charter counties."[1] This change focused on facilitating localities handling demands for "fundamental services such as water, sewage, transportation, zoning, and police and fire protection."[2] In other words, the home rule amendment ensured that local governments would have broad powers to assess and respond to the general needs of their communities.

In the ensuing years, Florida's recognition of the value of home rule was further inculcated in the state's law. Thus, when the Florida Supreme Court held in *Miami Beach v. Fleetwood Hotel*, 261 So. 2d 801, 803 (Fla. 1972), that "if reasonable doubt should arise as to whether [a] municipality possesses a specific power," the doubt should be resolved in favor of the state, the legislature swiftly enacted the Municipal Home Rules Power Act (MHRPA) the following year. The

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[1] James R. Wolf and Sarah H. Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 FLA. BAR J. 92 (2009).

[2] Mark J. Wolff, *Home Rule in Florida: A Critical Appraisal*, 19 STETSON L. REV. 853, 854 (1990).

MHRPA guarantees that under Art. VIII, Sec. 2(b) of the Florida Constitution, local governments "shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, except when expressly prohibited by law." § 166.021, Fla. Stat.

MHRPA reflected the will of the voters that cities and counties should have broad powers, and that courts should not presume that local government action be narrowly confined to residents' immediate needs.[3] As such, MHRPA and the 1968 Constitution both demonstrate a strong preference that local officials deal with problems relating to local health and welfare.[4] Against the backdrop of this history, home rule powers ensure that today, Florida's 412 municipalities are "effectively and efficiently providing for the wishes of their citizens."[5]

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[3] Wolf & Bolinder, *supra* note 2.

[4] *Id.*

[5] Florida League of Cities, *Understanding Florida's Home Rule Power* (last visited May 30, 2022 at 12:49 PM), *available at* http://www.floridaleagueofcities.com/Resources.aspx?CNID=645.

2. Florida Courts Have also Recognized the Narrow Scope of State Preemptive Authority.

Although Florida courts recognize the power of the state to preempt local authority, they have also upheld Florida's localist traditions through a variety of doctrines, including by limiting state preemption of local ordinances, and by finding no conflict between state and local ordinances.

a. Florida Courts Disfavor Implied Preemption.

Despite some competing threads, Florida courts have demonstrated that they value local governance by consistently stating that implied state preemption is disfavored. For example, in *Tallahassee Memorial Regional Medical Ctr. v. Tallahassee Medical Ctr.*, 681 So. 2d 826 (Fla. 1st DCA 1996), the court sided with a community hospital that refused to pay for ambulance service pursuant to a county ordinance because it conflicted with a state statute requiring the patient to pay. In that case, the court warned that Florida courts must be careful when imputing legislative intent to preclude local bodies from exercising their home rule powers. In setting out the standard, the court held that "[i]mplied preemption should be found to exist only where the legislative scheme is so

pervasive as to evidence an intent to preempt the particular area, *and* where strong public policy reasons exist for finding such an area to be preempted." *Id.* at 831 (emphasis added) (citing *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984)).

Even further, the scope of preemption must be limited to the "specific area" where the legislature has expressed intent to be the "sole regulator." *Id.* More recently, in *Telli v. Broward County*, 94 So.3d 504, 513 (2012), the court confirmed their disfavoring of implied preemption, reasoning that Florida courts should not interpret the state constitution to restrict municipal power by implication—instead, courts must look for express restrictions in the law. *Id.*

b. Florida courts avoid conflicts in an effort to uphold local ordinances.

Likewise, when tasked with determining whether local ordinances conflict with state law for preemption purposes, Florida courts have recognized the value of local autonomy. In *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006), the Florida Supreme Court found that a city ordinance authorizing the impoundment of vehicles used in misdemeanor drug and prostitution

offenses was not preempted by the Florida Contraband Forfeiture Act, because the scope of the state statute was limited to felonies. In explaining its decision, the court reiterated that under the MHRPA, municipalities are "given broad authority to enact ordinances under [their] home rule powers," and therefore, the absence of express legislative intent to preempt becomes "more significant." *Id.* at 1245-46; *see also Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008) (upholding local fireworks ordinances on the grounds that chartered counties have "broad powers of self-government.").

In the matter before the Court today, the state asks the court to ignore Florida's long history of respect for local autonomy, particularly in the areas of budgeting and policing. HB1, which removes local control over police budgeting, runs counter to the local governance values echoed for years by the judiciary.

3. The Ability to Make Budgetary Decisions is the Core of Local Government and Has Been Repeatedly Upheld by the Florida Courts.

Attempts by the state to preempt local governance, including HB1's attempt to hamstring the decision-making ability of cities regarding police funding, undermine the heart of local governance and cut against the intention of the Florida Constitution.

Article VIII, Section 2 of the Florida Constitution expressly grants to every municipality the authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose."[6] Budgeting and the determination of city spending are at the core of municipal functions and are vital to a city's ability to provide municipal services.

The ability of a city to determine its own budget based on the needs and desires of its constituents is protected further by Article VII, §18 of the Florida Constitution. This provision expressly prohibits the state legislature from exercising control of local budgets using unfunded mandates, stating that the state cannot force municipalities to make expenditures without state financial support. The authority of localities to make independent determinations of budget and local governance has been repeatedly upheld over the last four decades by Florida courts. In 1992, the Florida Supreme Court in *Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992), held that the city had the power under its home rule grant to impose a special

[6] *Boca Raton v. State*, 595 So. 2d 25, 28 (Fla. 1992) (holding that city of Boca Raton had power under home rule grant to impose a special assessment to fund city governance).

assessment to fund city governance. In 2002, the Third District Court of Appeal rejected an attempt by state lawmakers to divert a portion of Miami-Dade County's indigent care surtax funds away from local hospitals in *Homestead Hosp. v. Miami-Dade Cty.*, 829 So. 2d 259, 260 (Fla. 3d DCA 2002). The court found this attempt by lawmakers to be an impermissible intervention into the County's budgeting and self-governance, in contravention of its home rule charter. *Id.* These courts recognized and emphasized the value of home rule in the day-to-day fiscal administration of localities.

Florida courts have further upheld the broad grant of power given to home rule cities and counties with respect to city governance and decision-making, such as in the setting of county voting protocols, determining when to impound cars used in crimes, and setting commissioner term limits. *See Levy v. Miami-Dade County*, 254 F. Supp. 2d 1269 (S.D. Fla. 2003) (holding that the Miami-Dade County Commission, that county's governing body, is the "legislative and governing body of the county and [has] the power to carry on a central metropolitan government."); *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006) (holding that cities could set their own policies to determine when to impound cars used in criminal

enterprise); *Telli v. Broward*, 94 So.3d 504, 513 (Fla. 2012) (overturning an implied restriction on the ability of the county to set their own term limits for county commissioners and officers). The ability of localities to make their own budgetary and governmental decisions is enshrined in the long history of Florida law. HB1 strikes against that vital ability, and in doing so, chills local municipal functioning.

4. Policing is Inherently Local and HB1's Attempt to Wrest Control from Local Government of Police Budgeting Undermines Local Political Process and Accountability.

HB1 limits local control over police budgets, yet policing is distinctly local, as demonstrated by the geographic boundaries that name and define their presence.

Policing has historically lain within the control of local governments. Indeed, ensuring local control over police budgets was part of the broad, national shift towards home rule and local governance that originally gave rise to home rule. As cities grew drastically in size over the course of the nineteenth century, state governments attempted to exert increased control over the form and function of metropolitan government. For example, in 1857 the New York state legislature transferred control over both the New York City

and Brooklyn metropolitan police departments to a set of commissioners appointed by the governor in Albany. This sparked a wave of pushback, and by 1870 control was returned to the cities.[7] Similar efforts by states to micromanage and curtail local governance were also met with resistance, so that by the end of the nineteenth century many states passed constitutional amendments enshrining home rule, shifting control over budgets and policing to municipalities.[8] Thus, by the early twentieth century, the home rule movement had successfully placed cities at the forefront of their own operations, most notably in policing.

Municipalities' solidification of control over their functions ushered in a wave of governmental innovation over the first half of the twentieth century.[9] As a result of home rule reform, the vast majority of local police departments in the United States became integral parts of city governments.[10] Despite attempts in the last

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[7] *See* James F. Richardson, The N.Y. Police: Colonial Times to 1901 123, 163–64 (1970).

[8] Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) at 9.

[9] *Id.* at 15

[10] *See* Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197 (2022) at 1225.

(Continued...)

three decades by some states to take control of police departments,[11] these institutions remain fundamentally local, with decisions around budgeting and administration being made where it is most responsive and accountable, at the local political level.

Florida courts have also recognized the distinctly local nature of policing, stating that local government "must have the flexibility to set enforcement priorities on its police power ordinances in line with its budgetary constraints." *Carter v. Stuart*, 468 So. 2d 955, 957 (Fla. 1985). Authority over its police budget has traditionally been placed with local governments, as courts have held that "the amount of resources and personnel to be committed to the enforcement [of a particular law] is a policy decision of the city not generally subject to review by the judiciary." *City of Aventura v. Stein*, 306 So. 3d 296, 303 (Fla. 3d DCA 2020) (upholding a city's allocation of red-light camera resources because it was a local decision); *see also Wong v. City of Miami*, 237 So. 2d 132, 134 (Fla. 1970) (holding a city had discretion to decide how to allocate limited police resources because

[11] *Id.* at 1217.

"inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers").

Because police serve the local community, an awareness of, and a proximity to that community is necessary for any police force to be effective. In turn, police are accountable to the localities they serve, in no small part by virtue of localities' ability to fund them.

HB1 confounds this vital local function. Fear of state intervention in local budgeting inhibits local officials, chilling their efforts to make independent budget decisions. But local officials are in the best position to know local preferences, and state interference makes it hard for voters to know who to hold accountable for local budgeting decisions. Thus, the state's interference in local control over police department budgets "erode[s] the political accountability of police agencies at the local level. . . Budgetary considerations take precedence over local political demands in determining the role and function of police agencies."[12] When local governments are not allowed to freely manage the budget of their police force as they

[12] *See id.* at 1264.

determine is best for their residents, the integrity of local government as a whole is undermined.

5. Florida's HB1 Must be Seen in the Context of the State's Frontal Assault on Home Rule Authority.

The state's actions in HB1 are a continuation of its curtailment of municipalities' constitutionally protected home rule powers across an array of domains. HB1 is one of many laws the legislature has passed in recent years that seeks to dismantle local autonomy and home rule authority in Florida.

When the legislature passed the Municipal Home Rule Powers Act in 1973, it understood that home rule was a broad grant of power to be given wide latitude. The legislature incorporated into the statute the instruction that "the provisions of [the MHRPA] shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution." *See* Fla Stat. §166.021. Courts have respected this broad grant in the ensuing decades.

The current Florida legislature has subverted this understanding, putting municipalities on notice that any action politically unaligned with the state legislature will result in preemption. Through HB1, the State legislature has taken from

municipalities the power to respond to local needs and the preferences of local residents in a way most appropriate for their particular economic, demographic, and social factors.

HB1 is a continuation of the State's hostility to home rule power. In recent years, the Florida legislature has passed laws prohibiting local regulation of smoking, §386.209; of nutrition and food policy, §509.032; of paid sick leave and other employment benefits such as vacation time, §218.077; of minimum wage, §218.077; of firearms, §790.033, and many more. HB1 and each of these previous laws is part of a statewide effort to unnecessarily invalidate the decisions of local governments. With each law, localities are increasingly restrained from exercising the authority granted to them by the Florida Constitution.

6. HB1 Undermines the Right of Citizens to Petition their Local Government by Moving Decision-Making Authority to the State.

HB1's restructuring of government decision-making violates the spirit of the right to participate in the political process and petition one's government. Since 1789, the federal Constitution has enshrined this right in the First Amendment, which reads "Congress shall make no law… prohibiting the… right of the people peaceably

to assemble, and to petition the Government for a redress of grievances."[13]

The right to petition the Government has been affirmed repeatedly since the formation of this Nation. In 1964, the United States Supreme Court stated that "each and every citizen has an inalienable right to full and effective participation in the political processes." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (striking down a disproportionate system of apportioning state representation because equal access to democracy is a "bedrock of our political system").

Targeted attempts to curtail local residents' rights to participate in the political process, including those with a discriminatory effect, have long been rejected by the courts. In 1969, the United States Supreme Court in *Hunter v. Erickson*, 393 U.S. 385 (1969), struck down an amendment to the Akron city charter that rendered any ordinance enacted by the city council related to racial, religious, or ancestral discrimination moot unless approved by a majority of city voters. This was a targeted attempt to make it more difficult for racial

[13] U.S. Const. amend. 1.

minorities to pass anti-discrimination ordinances at the city level. The Court made clear that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393. Decades later, voters in Colorado passed a constitutional amendment prohibiting any statute that gave individuals a protected status based on sexual orientation. The Supreme Court of Colorado roundly denied this targeted attempt at diminishing the political voice of a specific subgroup, stating that the "Equal Protection Clause guarantees the fundamental right to participate equally in the political process" *Evans v. Romer*, 854 P.2d 1270, 1279 (Colo. 1993), aff'd, 517 U.S. 620 (1996).

HB1 undermines the right to participate equally in the political process by shifting decision making authority away from local elected officials – whom residents of a locality are best positioned to petition, and who are most responsive to the needs and concerns of a community. This shift was not done in a vacuum. As detailed in the First Amended Complaint, HB 1 was conceived after cities throughout Florida took to the streets to protest racial injustice and

police brutality in the wake of the deaths of George Floyd and Breonna Taylor.[14] These protests led to greater civic engagement - engagement surrounding the use of local resources for public safety, and the allocation of scarce resources towards the community.[15] Governor DeSantis responded otherwise, explicitly stating when endorsing HB1 that the purpose of the bill was to ensure that reformers in favor of rethinking police funding and other public safety strategies were "not going to be allowed to ever carry the day in the state of Florida."[16] Now, instead of empowering community members to devise creative solutions to address their needs, HB1 confers authority over local budgeting and policing to a state "Administration Commission," an unelected board that has no accountability to local constituents.

When it is no longer in the hands of local officials to determine how best to allocate funding for local services like the police, the voice of residents is diminished and the state chills meaningful political

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[14] *See City of Gainesville v. Desantis*, No. 2021 CA 001959, (Fla. 2d Cir. Ct. Apr. 1, 2022)(First Amended Complaint) ¶¶ 64-68.

[15] *Id.* at ¶ 70.

[16] *Id.* at ¶ 88.

access. Because of this, HB1 should join a long list of statutes the courts have struck down because they erode political access.

D. Conclusion

HB1 unlawfully erodes the budgetary and decision-making authority of Florida cities and counties, flying in the face of decades of precedent upholding the vital importance of local control over municipal functions. The decision of how much and where to allocate municipal funds lies squarely and solely with the municipality, including on the issue of policing and social services provision. By seizing this fundamental power from cities, the Governor of Florida is undermining the political voice of residents. Florida residents deserve to have a voice in the local politics of their cities and counties, no matter their political beliefs.

Dated: July 8th, 2022

Respectfully submitted,

By: */s/ Ryan D. Barack*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing with the Clerk of the Courts on July 8, 2022, by using the E-Filing Portal, which will send a notice of electronic filings to all counsel of record.

/s/ Ryan D. Barack
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