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October 25, 2016

To the Honorable City Council Chair Amy Foster and the Honorable City Council,

I am writing briefly with regard to a particular issue that I understand has emerged regarding the proposed ordinance in St. Petersburg applicable to contributions to super PACs and foreign corporate political spending.

As I understand it, the question has emerged of whether members of the City Council, or their staff, could be found individually and personally liable as a result of any litigation brought to challenge the ordinance. Under U.S. Supreme Court precedent, local legislators, like their state and federal counterparts, “are entitled to absolute immunity from civil liability for their legislative activities.” *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). As the unanimous opinion (written by Justice Thomas) in that case noted, absolute legislative immunity (including for local legislators) has been a consistent principle of constitutional and common law since the earliest days of the Republic. In particular, as the Court made clear, “acts of *voting for an ordinance* [are], in form, quintessentially legislative,” and therefore protected by absolute immunity. *Id.* at 55. Even officials *outside* the legislative branch itself—let alone legislative staff—“are entitled to legislative immunity when they perform legislative functions.” *Id.*

I have reviewed, and agree with the conclusions of, the attached letter addressing this question in more detail, which discusses additional federal and Florida appellate court decisions that reach this same conclusion. Given such consistent and clear precedent, members of the St. Petersburg City Council and their staff are certainly entitled to absolute and unqualified immunity for their legislative activities, including for the specific act of voting on ordinances. If I can be of assistance to the Council throughout the process in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Laurence H. Tribe". The signature is written in a cursive style.

Laurence H. Tribe  
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*\*Title and university affiliation included for identification purposes only.*

October 13, 2016

Assistant City Attorney Joseph Patner  
Office of the City Attorney for the City of St. Petersburg  
One Fourth Street North  
St. Petersburg, Florida 33701

Dear Mr. Patner,

We enjoyed speaking with you and your colleagues last week regarding the Defend Our Democracy ordinance (“Ordinance”) sponsored by Councilmember Rice. As follow-up to that conversation, we are providing some additional information regarding three questions that were discussed: (1) state preemption, (2) the federal regulation interpreting the federal “foreign nationals” spending ban, and (3) absolute legislative immunity. Please do not hesitate to contact us if you have further questions.

**I. State Preemption and the Defend Our Democracy Ordinance**

Under the Florida Constitution, Fla. Const. art. VIII, sec. 2, and the Municipal Home Rule Power Act, Fla. Stat. Ann. § 166.021, Florida municipalities, including St. Petersburg, have broad home rule powers, and may exercise any power for municipal purposes “except as otherwise provided by law.” Fla. Const. art. VIII, sec. 2. *See also Masone v. City of Aventura*, 147 So.3d 492 (Fla. 2014) (Municipal ordinances must yield to state statutes); *City of Kissimmee v. Florida Retail Federation, Inc.*, 915 So.2d 205 (Fla. Dist. Ct. App. 2005) (a municipality may, under its broad home rule powers, enact local ordinances that are not inconsistent with general law).

In 2010, the Florida Supreme Court made clear that state law did not preempt the field of election law, and that local governments could adopt ordinances in the field so long as they did not conflict with state law. *Sarasota All. For Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886-87 (Fla. 2010). This decision expressly overruled the only decision holding otherwise. *See Browning v. Sarasota All. for Fair Elections, Inc.*, 968 So.2d 637 (Fla. Dist. Ct. App. 2007).

The Court wrote:

While we agree that Florida’s Election Code is a detailed and extensive statutory scheme, we conclude that the Legislature’s grant of power to local authorities in regard to many aspects of the election process does not evince an intent to preempt the field of election laws...In the instant

case, the Legislature clearly did not deprive local governments of all local power in regard to elections. To the contrary, the Election Code specifically delegates certain responsibilities and powers to local authorities[.]

*Browning*, 28 So.3d at 886-88.

In *Browning*, the Court held that a conflict exists between a local ordinance and a state law when “one must violate one provision in order to comply with the other. Putting it another way, a conflict exists when two legislative enactments ‘cannot co-exist.’” *Id.* at 888 (quoting *Laborers’ Int’l Union of N. Am., Local 478 v. Burroughs*, 522 So.2d 852, 856 (Fla. Dist. Ct. App. 1987)).

That is to say, conflict is present “only if there is an *impossibility of the coexistence* of the two laws asserted to be in conflict.” *Id.* at 892 (emphasis added). *See also State ex rel. Dade County v. Brautigam*, 224 So.2d 688, 692 (Fla. 1969) (“The word ‘inconsistent’ as used in this provision of the constitution means contradictory in the sense of legislative provisions which cannot coexist.”). Thus, a reviewing court is most concerned with “whether compliance with a [municipal] ordinance *[r]equires* a violation of a state statute or renders compliance with a state statute impossible.” *Jordan Chapel Freewill Baptist Church v. Dade Cnty.*, 334 So.2d 661, 664 (Fla. Dist. Ct. App. 1976) (emphasis added). *See also Masone*, 147 So. 3d at 495; *Jass Properties, LLC v. City of N. Lauderdale*, 101 So.3d 400, 402 (Fla. Dist. Ct. App. 2012).

Florida’s relevant campaign finance laws, *see generally*, Fla. Stat. Ann. chapter 106, which regulate campaign financing for candidates, political committees, electioneering communication organizations, and political parties, do not conflict with the contribution limits that the Defend Our Democracy ordinance (“Ordinance”) would establish for municipally active outside spending groups, as Florida’s campaign finance laws do not establish—or even reference the possibility of—contribution limits to political committees or electioneering communication organizations. *Cf.* Fla. Stat. § 106.08.

And even if they *could* be said to do so somehow, the experiences of Ft. Lauderdale, Sarasota, Sarasota County, Leon County, and Tallahassee—all of which have adopted city- or county-level contribution limits, and all of which remain valid—demonstrate that contribution limits, such as those to be established by the Ordinance, are not only increasingly common on the municipal and county levels, but that they do not *require* a violation of any state statute nor render compliance with any state statute impossible. *See* LeRoy Collins Institute & Integrity Florida, *Money in Politics Reforms in Florida*, 4 (2015),

<http://collinsinstitute.fsu.edu/sites/collinsinstitute.fsu.edu/files/Campaign%20finance%20report%20AUG%202015.pdf> (discussing local contribution limits passed by these five Florida jurisdictions).

Thus, while in *Browning* a handful of election law-related provisions (e.g., vote certification deadlines, voting system auditing requirements, vote counting procedures) did trigger, and fail, the Florida Supreme Court's conflict test due to *explicit* disagreements between state and local law,<sup>1</sup> the Ordinance cannot be said to present *any* discernible conflicts with Florida's Election Code whatsoever.

## **II. Federal Regulation Prohibiting Independent Expenditures by Foreign Nationals**

You had inquired whether the federal foreign nationals prohibition at 52 U.S.C. § 30121 includes a prohibition on independent expenditures made by foreign nationals. As we mentioned on the call, the Federal Election Commission's regulation clarifies that independent expenditures are in fact covered. Here is the regulation:

### **11 CFR § 110.20 – Prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals (52 U.S.C. 30121, 36 U.S.C. 510).**

(e) *Disbursements by foreign nationals for electioneering communications.* A foreign national shall not, directly or indirectly, make any disbursement for an electioneering communication as defined in 11 CFR 100.29.

(f) *Expenditures, independent expenditures, or disbursements by foreign nationals in connection with elections.* A foreign national shall not, directly or indirectly, make any expenditure, independent expenditure, or disbursement in connection with any Federal, State, or local election.

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<sup>1</sup> For example, the Court found that the charter amendment conflicted with the Florida Election Code by providing, without specifying a date certain, that no election results could be certified until an independent auditing firm had completed mandatory audits and any cause for concern about accuracy of results had been resolved, whereas the Election Code required results to be certified by the county canvassing board by 5 p.m. on the seventh day after a primary election, and by 5 p.m. on the eleventh day following a general election. *See Browning*, 28 So.3d at 889-90.

### III. Legislative Immunity

Under unanimous U.S. Supreme Court precedent, “[i]t is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities.” *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (holding that local legislators are absolutely immune from suit under § 1983 for their legislative activities).

The principle that legislators are absolutely immune from liability for their legislative activities “has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries” and was “taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.” *Tenney v. Brandhove*, 341 U. S. 367, 372 (1951) (holding that members of California legislative subcommittee were protected by absolute immunity from damages liability as a matter of section 1983 interpretation). As such, U.S. Supreme Court jurisprudence shields legislators from liability for their legislative activities. *See Brandhove*, 341 U.S. at 372-75.

In particular, the U.S. Supreme Court has repeatedly made clear that legislative immunity includes both regional and local legislative conduct. *Bogan*, 523 U.S. at 46; *Owen v. City of Independence*, 445 U.S. 622 (1980); *U.S. v. Gillock*, 445 U.S. 360 (1980); *Lake County Estates v. Taboe Regional Planning Authority*, 440 U.S. 966 (1979); *Doe v. McMillan*, 412 U.S. 306 (1973).

The U.S. Court of Appeals for the Eleventh Circuit has held that absolute legislative immunity extends to a broad spectrum of “legislative activities”:

Acts such as voting...speech making on the floor of the legislative assembly...preparing committee reports...and participating in committee investigations and proceedings...are generally deemed legislative and, therefore, protected by the doctrine of legislative immunity.

*Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir. 1992). Acts that are generally *not* protected by the doctrine of legislative immunity, on the other hand, include the public distribution of press releases and newsletters, the acceptance of bribes in return for votes on pending legislative business, the administration of penal facilities, and the denial of licenses. *Id. See also Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (holding that exercises of absolutely immune legislative decision-making involved actions such as the vetoing of an ordinance passed by a city’s legislative body, the examining of a plaintiff before a legislative committee, and the vote of a city councilman).

The Florida Supreme Court has likewise extended absolutely immunity to legislative activities. In a wrongful death case involving a municipal police department, the Court reinforced the unassailability of this protection, writing: “We think it advisable to protect our conclusion against any interpretation that would impose liability on the municipality in the exercise of legislative or judicial, or quasi-legislative or quasi-judicial functions.” *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 133 (Fla. 1957).

This conclusion has been echoed time and time again across Florida’s courts of appeal. The First District Court of Appeals has stated that “[a]bsolute immunity...applies to government officials performing legislative functions.” *Junior v. Reed*, 693 So.2d 586, 589 (Fla. Dist. Ct. App. 1997). *See also Florida House of Representatives v. Expedia, Inc.*, 85 So.3d 517, 523-24 (Fla. Dist. Ct. App. 2012) (holding that because legislative immunity existed under the common law of England, it continues to exist in Florida: “Because we know of no law abrogating the common law on this point, we conclude that Florida legislators continue to enjoy legislative immunity under state law.”). The Fourth District Court of Appeals has similarly held that “State and local officials are immune from civil suits for their acts done within the sphere of legislative activity.” *City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co., LLC*, 942 So.2d 455, 456 (Fla. Dist. Ct. App. 2006).

In particular, the Second District Court of Appeals has made clear that “[i]f an exercise of legislative or judicial power is involved, the immunity is absolute.” *Penthouse, Inc. v. Saba*, 399 So.2d 456, 458 (Fla. Dist. Ct. App. 1981). This immunity has been applied precisely to city councilmembers: “City council members...are immune from personal liability for acts or omissions within the scope of their legislative function, unless they acted ‘in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.’” *P.C.B. P’ship v. City of Largo*, 549 So.2d 738, 740 (Fla. Dist. Ct. App. 1989) (quoting Fla. Stat. Ann. § 768.28(9)(a)). *See also Allen v. Secor*, 195 So.2d 586 (Fla. Dist. Ct. App. 1967) (“When the officials of a municipality engage in functions legislative or quasi-legislative in character they too are immune from suit...The mayor, acting in like capacity, is also immune.”).

Florida’s First District Court of Appeal, echoing the U.S. Court of Appeals for the Eleventh Circuit, has made clear that the act of *voting* is a legislative activity subject to absolute immunity:

The protection afforded by absolute immunity is available to local governmental officials as well as to those officials performing legislative functions at the federal and state levels....[A]n officer of the legislative branch of the government has absolute immunity only for legislative

functions. *A county commissioner could assert a valid claim of absolute immunity for the act of voting on a proposed county budget, for example, because that is a legislative function.* In contrast, a county commissioner has no claim of absolute immunity for comments made to the press following a commission meeting because that is an administrative function.

*Reed*, 693 So.2d at 589.

Thank you for your careful attention to these issues, and please do not hesitate to contact me if you have further questions.

Sincerely,

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