IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA v-9

CASE NO. 5D19-1853

ANITA YANES and BRITTNEY SMITH,
Appellants/Plaintiffs,
vs.
O C FOOD & BEVERAGE, LLC, d/b/a RACHEL'S and WEST PALM BEACH FOOD AND BEVERAGE, LLC, d/b/a RACHEL'S ADULT ENTERTAINMENT AND STEAKHOUSE,
Appellees/Defendants.

On Appeal from the Ninth Judicial Circuit of Florida

BRIEF OF AMICI CURAE ORANGE COUNTY, CITY OF MIAMI BEACH, LEON COUNTY, PALM BEACH COUNTY, PINELLAS COUNTY CITY OF DELRAY BEACH, CITY OF FT. LAUDERDALE CITY OF WILTON MANORS, VILLAGE OF WELLINGTON IN SUPPORT OF APPELLANTS/PLAINTIFFS

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IDENTITY AND INTEREST OF AMICI CURIAE

All --- of the undersigned *amici* have enacted a Human Rights Ordinance ("HRO") that provides additional and/or different protections and remedial schemes than those set forth in the Florida Civil Rights Act ("FCRA"). Therefore, this group of *amici* can provide a unique and valuable perspective to this Court on the issues before it.

An HRO is a regulation passed on the local level to prohibit discrimination based on certain characteristics. These policies often ban discrimination in housing, public accommodations, and employment. HRO policies most often ban discrimination based on race, religion, sex, disability, ethnicity, national origin, sexual orientation, gender identity, and marital status. Some include less commonly protected categories such as intersexuality, marital and familial status, age, ancestry, height, weight, domestic partner status, labor organization membership, familial situation, and political affiliation.[1]

At least 400 cities and counties nationwide have implemented HROs. In Florida, 46 local governments have enacted their own HROs to provide different and/or additional protections for their citizens in addition to federal and/or state protections. [2] The instant appeal concerns the validity of the Orange County HRO,

[1] See Code of City of Miami Beach § 62-31.
[2] *See, e.g*, Ch. 111 of Alachua Cnty. Code; Ch. 9 of City of Atlantic Beach Code; Ch. 29 of City of Fort Lauderdale Code; Ch. 16½ of Broward Cnty. Code; Ch. 1-13 of

codified in Chapter 22 of the Orange County Code, entitled "Human Rights" which prohibits discrimination on the basis of age, race, color, religion, national origin, disability, marital status, familial status, sex, or sexual orientation. Specifically, the question before this Court is whether Orange County's HRO is pre-empted by, or conflicts with, the FCRA.

The Circuit Court's decision that Orange County's HRO is preempted by the FRCA is unsupported by existing precedent, is wrong, sets a dangerous precedent, and potentially jeopardizes the validity of local HROs across the state of Florida, including those enacted by *amici*.[3] For this reason, amici submit this brief in support of the Plaintiffs/Appellants to ensure that the law is properly

City of Wellington Code; Ch. 137 of City of Delray Beach Code; Ch. 14 of Monroe Cnty Code; Ch. 42 of City Dunedin Code, Ch. 26 of City of Gulfport Code; Ch. 8 of City of Gainesville Code; Ch. 30 of Hillsborough Cnty. Code; Title XI of City of Jacksonville Code; Ch. 20 of City of Lake Worth Code; Ch. 7 of City of Leesburg Code; Ch. 9 of Leon Cnty. Code; Ch. 9 of City of Mascotte Code; Ch. 62 of City of Miami Beach Code; Ch. 11A of Miami-Dade Cnty. Code; Ch. 25 of City of Miami Code; Ch. 14 of Monroe Cnty. Code; Ch. 58 of City of Mount Dora Code; Ch. 16 of City of North Port Code; Ch. 2 of City of Oakland Park Code; Ch. 22 of Orange Cnty. Code; Ch. 57 of City of Orlando Code; Ch. 27 of Osceola Cnty. Code; Ch. 15 of Palm Beach Cnty. Code; Ch. 70 of Pinellas Cnty. Code; Ch. 18 of City of Sarasota Code; Ch. 16 of City of St. Augustine Code; Ch. 12 of City of Tampa Code; Ch. 36 of Volusia Cnty. Code; Ch. 2, Art. V of City of Wilton Manors Code.

[3] Each of *amici*'s HROs are different to some degree. None of the undersigned amici (except Orange County) concede that a negative ruling in this case would invalidate their own HROs. However, given the subject matter of the Circuit Court Order, it is obviously concerning to all. Obviously, if this Court were to invalidate the Orange County HRO, *amici* urge the Court to narrow and limit its holding to the HRO at issue and to the specific facts of this case.

presented to this Court

SUMMARY OF THE ARGUMENT

Orange County, operating as a charter county with home rule authority, has all powers of local self-government that are not inconsistent with general law. For over 30 years, it has been established that those home rule powers include the power to adopt anti-discrimination ordinances to further the elimination of discrimination.

Appellee took the position, and the Circuit Court agreed, that Orange County's HRO is impliedly pre-empted by the FCRA as a whole, and additionally, by the pre-suit administrative regime set forth in §760.11, Fla. Stat. This Court should reverse the Circuit Court Order for two independent, but equally meritorious reasons.

First, the Circuit Court lacked subject matter jurisdiction to issue its Order invalidating the Orange County HRO because Orange County was not a party to the suit. § 86.091, Fla. Stat., requires a party seeking a declaration that a local ordinance is invalid to join that local government as a party to the lawsuit so that the local government can be heard. Defendants/Appellees failed to do so, therefore the Circuit Court Order is void *ab initio*.[4]

[4]*See Seminole Entm't, Inc. v. City of Casselberry*, 866 So. 2d 1242, 1245 (Fla. 5th DCA 2004)("[W]hen an aggrieved party asserts a constitutional challenge to

Second, the Circuit Court erred on the substantive issue when it found that the Orange County HRO was impliedly preempted by the FCRA. No other court has so held, and every Florida decision to address the question has held the opposite.[5]

There are two ways the HRO could be unconstitutionally inconsistent with the §760.11 scheme: (i) if the FCRA subject area of enforcing violations of discriminatory practices has been preempted to the state; and (ii) if not preempted to the state, and both the County and state can legislate concurrently in enforcing violations of discriminatory practices, the County's enforcement of its HRO cannot directly conflict with the §760.11 scheme. *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (2008). Appellees' argument fails because in this case neither of those two conditions exist.

The HRO is not explicitly or impliedly pre-empted by the FCRA as a whole because Florida municipalities, as recognized by the Florida Supreme Court, possess constitutional authority to enact local anti-discrimination ordinances.

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the facial validity of an ordinance, an original declaratory judgment or injunction action in the circuit court is the proper vehicle.").

[5]*Metro. Dade Cty. Fair Hous. & Emp't Appeals Bd. v. Sunrise Vill. Mobile Home Park, Inc.*, 511 So. 2d 962, 965 (Fla. 1987); *Laborers' Int'l Union, Loc. 478 v. Burroughs*, 541 So. 2d 1160, 1161 (Fla. 1989); *Randolph v. Fam. Network on Disabs. of Fla., Inc.*, No. 4:11-cv-555-RS-WCS, 2012 U.S. Dist. LEXIS 2947, at *5-6 (N.D. Fla. Jan. 10, 2012); *Bohentin v. CESC, Inc.*, No. 2016-CA-0024111 (Fla. 2nd Cir. Ct. Sep. 27, 2017)(decision attached as Exhibit A).

With regard to the absence of a pre-suit administrative remedy in Orange County's HRO, it is clear that the Florida Legislature did not intend for §760.11, Fla. Stat. to be a pervasive regulatory scheme that preempts the field of enforcing violations of discriminatory practices. Taking into consideration the entirety of the provisions of the FCRA, nothing demonstrates an intent that the legislative scheme in §760.11 is to be the sole mechanism for enforcing violations of discriminatory practices. As such, the FCRA does not preclude Orange County from adopting under its home rule power an HRO that provides additional substantive rights with its own remedial scheme. Furthermore, because the § 760.11 pre-suit administrative process only addresses a plaintiff's ability to seek relief in court under the state law's remedies, a person who is aggrieved by a discriminatory practice prohibited under the HRO may seek the private cause of action remedy provided thereunder without violating the FCRA provision. As such, the HRO and the FCRA can co-exist and there is no conflict between the two.

BACKGROUND

In 1973, the Florida Legislature enacted the Municipal Home Rules Power Act ("MHRPA"), now codified in Chapter 166 of the Florida Statutes. The MHRPA guarantees that local governments retain governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal

functions, and render municipal services. The MHRPA specifically states that local governments should be able to act unless otherwise provided by law.[6]

The Florida Civil Rights Act ("FCRA"), codified in Sections 760.01-760.11 of the Florida Statutes, provides protection from discrimination in employment, public accommodations, and housing on the basis of race, color, religion, sex, national origin, age, physical disability, and marital status. Since the FCRA is patterned after the federal law on the same subject, the FCRA is accorded the same construction in the state courts as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation.[7]

The Florida Commission on Human Relations ("FCHR") enforces the FCRA by investigating and resolving discrimination complaints brought under state law. The FCHR complaint and investigation process is only a condition precedent to bringing suit in court to enforce the FCRA.[8]

In addition, 46 local governments in Florida have enacted HROs that prohibit discrimination. The various HROs prohibit different forms of discrimination, many establishing different categories of protected classes over and above state law. Additionally, each HRO sets forth its own enforcement mechanism. None of the Florida HROs require exhaustion of the FCHR complaint process before

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[6] *See* § 166.021, Fla. Stat.
[7] *O'Laughlin v. Pinchback*, 579 So. 2d 788, 791 (Fla. 1st DCA 1991).
[8] *See* § 760.07.

enforcement of the HRO's mandates.

The HRO at issue here, the Orange County HRO, Orange County Code of Ordinances §§ 22-1 – 22-55, prohibits discrimination based upon age, race, color, religion, national origin, disability, marital status, familial status, sex, or sexual orientation in employment, public accommodation, and housing. The Orange County HRO provides for enforcement by a civil suit in state court with remedies generally less generous than those available under the FCRA.[9]

STANDARD OF REVIEW

Questions of preemption and validity of a local ordinance are reviewed de novo.[10]

ARGUMENT

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION TO INVALIDATE THE ORANGE COUNTY HRO BECAUSE ORANGE COUNTY WAS NOT MADE A PARTY.

The Circuit Court's Order must be reversed because the court lacked subject matter jurisdiction. § 86.091, Fla. Stat., requires a party seeking a declaration that a local ordinance is invalid to join that local government as a party to the lawsuit

[9]The Orange County HRO allows "a temporary or permanent injunction or other equitable relief, a temporary restraining order, an award of actual damages, including back pay, punitive damages, an award of reasonable attorney's fees, interest, and costs, or other such relief as the court deems appropriate. "Orange County Code §22-4(b). The FCRA additionally allows for damages for "mental anguish loss of dignity, and any other intangible injuries" but limits punitive damages to $100,000.00.

[10]*D'Agastino v. City of Miami*, 220 So.3d 410, 421 (Fla. 2017).

so that the local government can be heard. Defendants/Appellees failed to do so, so the Circuit Court Order is void *ab initio*.[11]

Defendants/Appellees have stated in their papers in this Court that they engaged in some sort of informal process to inform Orange County of their claim that the HRO was invalid, but they do not claim that Orange County was ever "made a party" as required by § 86.091.[12] The failure to formally join the county as a party means that the Circuit Court never had subject matter jurisdiction over the claim that the HRO was invalid, so the Circuit Court Order is void. It must be reversed for that reason alone. There is, therefore, no need for this Court to reach the substantive question of the validity of the Orange County HRO; but if it does, it should reverse on that ground as well, as set forth immediately below.

II. FCRA DOES NOT PREEMPT OR CONFLICT WITH THE ORANGE COUNTY HRO.

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[11] *See Seminole Entm't, Inc.*, 866 So. 2d at 1245 (Fla. 5th DCA 2004) ("[W]hen an aggrieved party asserts a constitutional challenge to the facial validity of an ordinance, an original declaratory judgment or injunction action in the circuit court is the proper vehicle."); *Bohentin v. CESC, Inc*., No. 2016-CA-0024111 (Fla. 2nd Cir. Ct. Feb. 14, 2017)("[I]f Defendants wish to challenge the constitutionality of [the Leon County HRO], they must file a declaratory judgment claim under Section 86.091, Florida Statutes, and name Leon County, Florida, a charter county and political subdivision of the state of Florida, as a party[.]")(decision attached as Exhibit B).

[12] *See* Appellee's Composite Response Opposition to Orange County's and Miami Beach's Motions for Leave to File Briefs in Support of Appellants, filed October 4, 2019.

In *Phantom of Brevard, Inc. v. Brevard County*, the Florida Supreme Court explained that county ordinances are valid and enforceable unless the county: (1) legislates in a subject area that has been preempted by the State; or (2) enacts an ordinance that directly conflicts with a statute:

> Pursuant to our Constitution, chartered counties have broad powers of self-government. *See* art. VIII, § 1(g), Fla. Const. Indeed, under article VIII, section 1(g) of the Florida Constitution, chartered counties have the broad authority to "enact county ordinances not inconsistent with general law." *See also* David G. Tucker, *A Primer on Counties and Municipalities, Part I*, Fla. B.J., Mar. 2007, at 49. However, there are two ways that a county ordinance can be inconsistent with state law and therefore unconstitutional. First, a county cannot legislate in a field if the subject area has been preempted to the State. *See City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006). "Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature." *Id*. (quoting *Phantom of Clearwater*, 894 So.2d at 1018). Second, in a field where both the State and local government can legislate concurrently, a county cannot enact an ordinance that directly conflicts with a state statute. *See Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc*., 681 So.2d 826, 831 (Fla. 1st DCA 1996). Local "ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993); *Hillsborough County v. Fla. Rest. Ass'n*, 603 So.2d 587, 591 (Fla. 2d DCA 1992) ("If [a county] has enacted such an inconsistent ordinance, the ordinance must be declared null and void."); *see also Rinzler v. Carson*, 262 So.2d 661, 668 (Fla.1972) ("A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.").[13]

The ordinance at issue here is neither preempted by state law nor in conflict with it.

[13]3 So. 3d at 314.

Local governments in Florida have enacted HROs that have provided additional protections with different procedures than the FCRA (and its predecessor statute) for decades. The Florida Legislature, which has preempted regulation of everything from plastic bags[14] to minimum wage[15] to firearms,[16] has never expressly preempted regulation of discrimination to the State. Indeed, in enacting the FCRA, the Legislature mandated that it be interpreted consistently with Title VII, which expressly does not preempt different and/or additional anti-discrimination regimes by lesser jurisdictions.[17]

Preemption can be either express or implied.[18] Express preemption requires "a specific legislative statement," expressing an intent to completely occupy the field.[19] Absent express preemption, a local ordinance is only preempted if it is impliedly preempted or conflicts with state law. No such intention is evidenced here, so preemption, it is argued, is implied here.

Implied preemption only exists "when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy

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[14] § 403.7033, Fla. Stat.
[15] § 218.077, Fla. Stat.
[16] § 790.251 & § 790.33 Fla. Stat.
[17] 42 U.S.C. § 2000h-4.
[18] *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).
[19] *Id.*

reasons exist for finding such an area to be preempted"[20] The Florida Supreme Court has stated that "[i]t generally serves no useful public policy to prohibit local government from deciding local issues."[21] Application of implied preemption to invalidate a local ordinance is "severely and strongly disfavored."[22]

Finally, as the Florida Supreme Court in *Phantom of Brevard, Inc*. has confirmed, a conflict between an ordinance and statute will not be found where the ordinance and the statute can coexist such that compliance with one does not require violation of the other:

> There is conflict between a local ordinance and a state statute when the local ordinance cannot coexist with the state statute. *See City of Hollywood*, 934 So. 2d at 1246; *see also State ex rel. Dade County v. Brautigam*, 224 So. 2d 688, 692 (Fla. 1969) (explaining that "inconsistent" as used in article VIII, section 6(f) of the Florida Constitution "means contradictory in the sense of legislative provisions which cannot coexist"). Stated otherwise, "[t]he test for conflict is whether 'in order to comply with one provision, a violation of the other is required.'" *Browning v. Sarasota Alliance for Fair Elections, Inc*., 968 So.2d 637, 649 (Fla. 2d DCA 2007) (quoting *Phantom of Clearwater*, 894 So.2d at 1020), *review granted*, No. SC07-2074, 2007 Fla. LEXIS 2263 (Fla. Nov. 29, 2007).[23]

A. The Florida Supreme Court has Explicitly Held that Local HROs are Not Impliedly Preempted by Florida law and Every Court Thereafter has Complied with this Mandate.

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[20] *Id*.
[21] *Id*. at 887.
[22] *Miami-Dade Cty. v. Dade Cty. Police Benevolent Ass'n*, 154 So. 3d 373, 379 (Fla. 3d DCA 2014)(quoting *Exile v. Miami-Dade Cty*., 35 So. 3d 118, 119 (Fla. 3d DCA 2010)).
[23] *Phantom of Brevard, Inc*., 3 So. 3d at 314.

Applying these principles, the Florida Supreme Court has long held that local governments possess the constitutional authority to enact ordinances like the Orange County HRO, that these local discrimination ordinances are not impliedly preempted by the Florida Legislature, and that they do not conflict with the state's remedial scheme.[24,25]

Defendants/Appellees have argued that this binding authority is not dispositive because the cited cases adjudicated the authority to enact local discrimination ordinances under the predecessor statute to the FCRA, the Florida Human Rights Act ("FHRA")(also found at §§ 760.01-.10, Fla. Stat. (1985)). However, there was no substantive change between the earlier FHRA and the subsequent FCRA that would allow a departure from the Supreme Court's earlier analysis. The FHRA contained a detailed scheme barring certain forms of discrimination in Florida and also contained a pre-suit administrative exhaustion requirement that plaintiffs were required to fulfill before filing suit in court to enforce the state law. In 1992, the Florida Legislature enacted the FCRA, but much of the legislation, including the pre-suit exhaustion requirement, remained

[24] No party advised the Circuit Court of this controlling authority before it rendered the Order at issue here and the Circuit Court did not cite it in its Order.

[25] *Metro. Dade Cty. Fair Hous. & Emp't Appeals Bd.*, 511 So. 2d at 965 ("[L]local governments have the power to adopt appropriate legislation to further the elimination of invidious discrimination"); *Laborers' Int'l Union, Loc. 478*, 541 So. 2d at 1161 ("A more reasonable interpretation is that the legislature left this area open to local regulation).

substantially the same.

For example, in 1991, the FHRA required at §760.10 (10) - (13), Fla. Stat., that " (10) [a]ny person aggrieved by this section may file a complaint with the commission within 180 days…and at (12) that if the commission did not take action within 180 days, "an aggrieved person may bring a civil action…in any court of competent jurisdiction." Similarly, after 1992, the FCRA provides at §760.11 (1) – (8), Fla. Stat., that "(1) [a]ny person aggrieved by a violation of §§ 760-01-760-10 may file a complaint with the commission within 365 days"…and at (8) if the commission fails to take action within 180 days, the claimant may file suit in court (as one route to court). Therefore, there was no textual or doctrinal deviation between the FHRA and the FCRA that would require or allow a different implied preemption analysis.

Indeed, two trial courts that have analyzed the question have explicitly held that the FCRA does not impliedly preempt or conflict with a local HRO virtually identical to Orange County's. First, in *Randolph v. Fam. Network on Disabs. of Fla., Inc*., a federal district court found that the FCRA administrative pre-suit complaint process did not preempt or conflict with the Leon County HRO with no pre-suit administrative complaint requirement.[26] Similarly, another Florida circuit

[26] No. 4:11-cv-555-RS-WCS, 2012 U.S. Dist. LEXIS 2947, at *5-6 (N.D. Fla. Jan. 10, 2012).

court addressed the exact same argument in *Bohentin v. CESC, Inc.*. After requiring the defendant to make Leon County a party by filing a third-party claim challenging the Leon County ordinance,[27] the court held that the Leon County HRO was not impliedly preempted by the FCRA and that the FCRA pre-suit administrative exhaustion process did not conflict with the Leon County remedy that did not require pre-suit exhaustion before filing suit in court to enforce the HRO.[28]

Courts of other states have similarly held that state laws similar to FCRA do not impliedly preempt local HROs.[29]

Other Florida appellate courts have similarly found no implied preemption of a locally authorized cause of action in court despite the presence of detailed and extensive statutory schemes at the state level. For example, in *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, the First District Court of Appeal considered a Leon County ordinance requiring hospitals to pay for ambulance

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[27] *Bohentin v. CESC, Inc*., No. 2016-CA-0024111 (Fla. 2nd Cir. Ct. Feb. 14, 2017("[I]f Defendants wish to challenge the constitutionality of [the Leon County HRO], they must file a declaratory judgment claim under Section 86.091, Florida Statutes, and name Leon County, Florida, a charter county and political subdivision of the state of Florida, as a party[.]").

[28] *Bohentin v. CESC, Inc.*, No. 2016-CA-0024111 (Fla. 2nd Cir. Ct. Sep. 27, 2017.

[29] *See, e.g., Hartman v. City of Allentown*, 880 A.2d 737, 751 (Pa. Commw. Ct. August 11, 2005)("PHRA does not preempt the Ordinance"); *Seattle Newspaper-Web Pressmen's Union v. Seattle*, 24 Wn. App. 462, 469 (Wash. Ct. App. October 22, 1979)("The Seattle Ordinance does not attempt to authorize practices that have been forbidden by the state Statute. It merely provides further prohibition against unfair labor practices.").

services rendered to its patients.[30] The ordinance provided civil remedies to an aggrieved person as may be necessary to ensure compliance with the ordinance.[31] Among the issues decided by the First District was that the plain and unambiguous terms of the ordinance demonstrated an intent to create a private cause of action, and that state statutes covering the same subject matter did not impliedly preempt Leon County from doing so.[32]

B. The Orange County HRO Similarly Does Not Conflict with the FCRA Administrative Exhaustion Requirement.

The Circuit Court alternatively found that "Chapter 760 requires that a party exhaust all of his/her administrative remedies, whereas the ordinance makes no such provision. The Court therefore agrees with the Defendants that the Plaintiffs must seek relief under Chapter 760."[33]

The Florida Supreme Court has recognized that the test of conflict between a local government enactment and state law is "whether one must violate one provision in order to comply with the other. Putting it another way, a conflict exists

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[30] *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.,* 681 So. 2d 826, 828 (Fla. 1st DCA 1996).
[31] *Id.* at 828.
[32] 681 So. 2d at 830-32. *See also Miami-Dade County v. Dade County Police Benev. Ass'n,* 154 So.3d 373 (Fla. 3d DCA 2014)
[33] *See* Order Granting Defendants' "Composite Motion to Dismiss Complaint Dated April 6, 2018" and Order Dismissing the Plaintiffs' Complaint Without Prejudice."

when two legislative enactments cannot co-exist."[34]

In *Laborers' Int'l Union*, the Florida Supreme Court compared a provision of a county ordinance barring discriminatory employment practices to a comparable provision in the FHRA to determine if there was conflict between the two.[35] The appellant argued that because the applicable provision of the FHRA limited its scope to employers with fifteen or more employees, while the ordinance was applicable to employers with five or more employees, the ordinance conflicted with the statute.[36] The Supreme Court disagreed, however, reasoning that, "[n]either formulation of the rule applies in a situation like this one in which the identical anti-discrimination requirements are simply imposed by the county upon a wider and broader class of entities than the state." As such, the Court held that ordinance did not unconstitutionally conflict with the statute.[37]

Moreover, in *Randolph v. Family Network on Disabilities of Fla., Inc*., the federal district court found that FCRA's administrative pre-suit complaint process did not conflict with Leon County's HRO with no pre-suit administrative complaint requirement.[38] There, plaintiff filed a lawsuit alleging race, gender, and sexual

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[34] *Sarasota Alliance*, 28 So. 3d at 888 (quoting *Laborers' Int'l Union*, 541 So. 2d at 1161.
[35] *Laborers' Int'l Union*, 541 So. 2d at 1161.
[36] *Id.*
[37] *Id*. at 1163.
[38] *Randolph*, No. 4:11-cv-555-RS-WCS, 2012 U.S. Dist. LEXIS 2947, at *5-6 (N.D. Fla. Jan. 10, 2012)

orientation discrimination under Leon County's HRO and Title VII of the Civil Rights Act of 1964.[39] Defendant moved to dismiss, arguing that violations brought under Leon County's HRO were barred by the county's one-year statute of limitations.[40] Plaintiff argued that the claims relying on Leon County's HRO should not be dismissed as barred by the Leon County statute of limitations because the shorter Leon County limitations period conflicted with the FCRA's longer statute of limitations.[41]

The court dismissed Plaintiff's time-barred claims, finding that "Leon County Ordinances do not conflict with the Florida Statutes because it is possible to comply with both provisions without violating either one."[42]

This authority compels the same result here. The Florida Supreme Court has specifically authorized local governments to "impose[]" its anti-discrimination framework on "a wider and broader class of entities than the state."[43] *Id*. The Legislature only intended for the §760.11 scheme to be one option by providing that any such aggrieved person **may** file a complaint with the Florida Commission on Human Relations if he or she wishes to assert rights under **state statutory law**.[44]

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[39] *Id.* at *2.
[40] *Id.*
[41] *Id.* at *4.
[42] *Id.* at *6-7.
[43] *Laborers' Int'l Union*, 541 So. 2d at 1161.
[44] §760.11(1), Fla. Stat. (emphasis added).

Orange County's HRO is both broader and provides a different remedial scheme than state law that protects broader categories of discrimination in public accommodation. For example, the Orange County HRO specifically prohibits discrimination in public accommodations by bars, which are not explicitly covered under the FCRA. Also, the Orange County HRO prohibits discrimination in public accommodation based upon marital status, which it defines as married, separated, or unmarried, including being single, divorced, or widowed.[45] The lawsuit at issue here raised claims that potentially implicate these broader county protections and the remedies provided under the Orange County HRO. The Legislature has not indicated in any way that broader protections with different remedial schemes conflict with its purpose. For instance, the Legislature has not abrogated common law causes of action arising out of discriminatory conduct or made them dependent upon a prior complaint and investigation by the FCHR.[46] Additionally, and relevant here, the Legislature has not indicated in any way that it intended to abrogate local remedial frameworks different from its own. By doing so, the Legislature mandated that filing of an administrative complaint is simply the prerequisite for obtaining judicial relief

[45] *Cf.* §760.08 (public accommodations) and Orange County Code 22-2 (definitions).
[46] *See, e.g., Smith v. Anheuser-Busch Brewing Co.*, 346 So. 2d 125, 126 (Fla. 1st DCA 1977)(defamation); *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1102-03 (Fla. 2008)(invasion of privacy); *Eastern Airlines, Inc. v. King*, 557 So. 2d 574, 575-76 (Fla. 1990)(intentional infliction of emotional distress).

under some of the state's antidiscrimination laws,[47] and nothing more.

Moreover, the FCRA was patterned after and meant to mirror Title VII, the Federal Civil Rights Act.[48] As set forth in Title XI, Title VII does not conflict with a Florida Civil Rights Act claim:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.[49]

Federal courts have uniformly held that Title VII does conflict with state or local laws that provide greater protections or allow greater access to judicial remedies in court.[50] Florida has taken advantage of this ability by providing rights and remedies in FCRA that are additional and different than those allowed under federal law, with a different route to court. Taking into consideration the provisions of the FCRA as a whole, nothing demonstrates an intent that the §760.11 scheme is to be the "sole

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[47] Many statutory discrimination claims in Florida do not require administrative exhaustion at all, further evidencing an intent not to prohibit all local ordinances that do not require FCHR administrative exhaustion. *See, e.g.*, §760.50, Fla. Stat. (HIV discrimination) and §1000.05, Fla. Stat. (educational discrimination).

[48] *O'Laughlin v. Pinchback*, 579 So. 2d at 791.

[49] 42 U.S.C. § 2000h-4.

[50] *See, e.g., Gray v. Webco Gen. Pshp.*, 36 F. Supp. 2d 1331, 1335 (M.D. Fla. 1999)(rejecting claim that Florida whistleblower claim (without administrative exhaustion requirement) conflicted with Title VII's administrative exhaustion requirement for claims based upon the same facts.

mechanism" for enforcing violations of discriminatory practices.[51]

Under the Florida Supreme Court's test, in order to find that a conflict exists, this Court must look to the remedies in the Ordinance and to those in §760.11 to determine if "one must violate one provision in order to comply with the other" and if the "two legislative enactments cannot co-exist."[52] As multiple courts have held, it is entirely possible to comply with both the FCRA (if the state law remedy is sought) and a local HRO like Orange County's (if the local remedy is sought). There is no conflict.

CONCLUSION

The Circuit Court got it wrong. First, it never had subject matter jurisdiction to decide the validity of Orange County's HRO without requiring the Defendants/Appellees to formally join the County in the lawsuit. Equally importantly, nothing in the FCRA demonstrates an intent to occupy the field of discrimination regulation and nothing in the FCRA states that §760.11 shall be the sole mechanism for enforcing violations of discriminatory practices. As such, the FCRA does not preclude Orange County from adopting, under its home rule power, an HRO with different requirements and remedies than those provided by state law. As such, the Orange County HRO and the FCRA can co-exist and there is no

[51] *See e.g., St. Johns County v. Northeast Florida Builders Ass'n, Inc*., 583 So.2d 635, 641-42 (Fla. 1991).
[52] *Sarasota Alliance,* 28 So.2d at 888.

conflict between the two.

For these reasons, Orange County's HRO is neither preempted by, nor in conflict with, state law and, therefore, is constitutionally valid.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text of the foregoing Initial Brief is written in Times New Roman 14-point font pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Fifth District Court eDCA Portal to be served this ___ day of _____, 2019, on counsel of record listed below.

s/Robert F. Rosenwald, Jr.
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