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No. SC18-747

In the Supreme Court of Florida

TASHARA LOVE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

*　　*　　*

On Discretionary Review from the Third District
Court of Appeal of Florida, DCA No. 3D17-2112
Cir. No. F15-24308

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION FREEDOM ACTION FOUNDATION IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE... 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Duty To Retreat Has Been a Disfavored Rule in American Jurisdictions Since at Least the Nineteenth Century. 3

II. The Legislature's Decision To Grant Immunity—Rather than an Affirmative Defense—in Cases of Justified Force Is Consistent with Ordinary, Longstanding Legal Principles. 10

III. By Allocating the Burden to the State, the Legislature Adopted a Coherent and Customary Protection for a Fundamental Right. 14

CONCLUSION 20

CERTIFICATE OF SERVICE 21

CERTIFICATE OF COMPLIANCE 23

TABLE OF AUTHORITIES

Cases **Page**

Addington v. Texas, 441 U.S. 418 (1979) 15, 16

Baker v. Parsons, 750 N.E.2d 953 (Mass. 2001) 18

Beard v. United States, 158 U.S. 550 (1895) 7

Bretherick v. State, 170 So. 3d 766 (Fla. 2015) 2, 13, 15, 18

Brown v. State, 672 So. 2d 861 (Fla. Dist. Ct. App. 1996) 11

Brown v. United States, 256 U.S. 335 (1921) 4, 7, 9

Carrillo v. State, 463 So. 2d 450 (Fla. Dist. Ct. App. 1985) 11

Commonwealth v. Riley & Stewart (Boston Mun. Ct. 1837), reprinted in 1 L.B. HORRIGAN & SEYMOUR D. THOMPSON, DEFENCES TO CRIME: THE ADJUDGED CASES IN THE AMERICAN AND ENGLISH REPORTS WHEREIN THE DIFFERENT DEFENCES TO CRIMES ARE CONTAINED (1887) 5, 6

Dennis v. State, 51 So. 3d 456 (Fla. 2010) 10, 11

District of Columbia v. Heller, 554 U.S. 570 (2008) 9, 10

Dixon v. United States, 548 U.S. 1 (2006) 15

Dolan v. City of Tigard, 512 U.S. 374 (1994) 17

Erwin v. Ohio, 29 Ohio St. 186 (1876) 6

Gentile v. Bauder, 718 So. 2d 781 (Fla. 1998) 17

Hernandez v. State, 915 So. 2d 667 (Fla. Dist. Ct. App. 2005) 13, 18

In re Winship, 397 U.S. 358 (1970) 15

Jenkins v. State, 942 So. 2d 910 (Fla. Dist. Ct. App. 2006) 15

Martin v. Ohio, 480 U.S. 228 (1987) 15, 16

Mullaney v. Wilbur, 421 U.S. 684 (1975) 15, 19

People v. Guenther, 740 P.2d 971 (Colo. 1987) 13, 14

Raffield v. State, 351 So. 2d 945 (Fla. 1977) 17

Rodgers v. Commonwealth, 285 S.W.3d 740 (Ky. 2009) 13

Runyan v. Indiana, 57 Ind. 80 (1877) 6, 7

Speiser v. Randall, 357 U.S. 513 (1958) 16, 17

State ex rel. Hough v. Popper, 287 So. 2d 282 (Fla. 1973) 12, 13

State v. Gardner, 96 Minn. 318 (1905) 9

Steidley v. Community Newspaper Holdings, Inc.,
383 P.3d 780 (Okla. Civ. App. 2016) 17, 18

Waters v. Churchill, 511 U.S. 661 (1994) 17

Constitution and Statutes

U.S. CONST. amend. V 12

18 PA. CONS. STAT. ANN. § 505 8

ALA. CODE § 13A-3-23 7

ALASKA STAT. § 11.81.3357 7

ARIZ. REV. STAT. ANN. § 13-405 7

ARK. CODE ANN. § 5-2-607 8

CONN. GEN. STAT. ANN. § 53a-19 8

DEL. CODE ANN. tit. 11, § 464 8

FLA. R. CRIM. P. 3.191 14

FLA. STAT.

§ 768.295 18

§ 776.032 ....1, 11, 13, 14

§ 777.03 11

§ 796.07 12

§ 893.21 11

GA. CODE ANN. § 16-3-23.1 7

IND. CODE ANN. § 35-41-3-2 7

KAN. STAT. ANN. § 21-5230 ....7, 8

KY. REV. STAT. § 503.055 8

LA. STAT. ANN. § 14:20 8

ME. REV. STAT. ANN. tit. 17-A, § 108 8

MICH. COMP. LAWS ANN. § 780.972 8

MISS. CODE ANN. § 97-3-15 8

MONT. CODE ANN. § 45-3-110 8
N.C. GEN. STAT. ANN. § 14-51.3 8
N.H. REV. STAT. ANN. § 627:4 8
N.J. STAT. ANN. § 2C:3-4 8
N.Y. PENAL LAW § 35.15 8
NEB. REV. STAT. § 28-1409 8
NEV. REV. STAT. § 200.120 8
OKLA. STAT. ANN. tit. 21, § 1289.25 8
S.C. CODE § 16-11-440 8
S.D. CODIFIED LAWS § 22-18-4 8
TENN. CODE ANN. § 39-11-611 8
TEX. PENAL CODE ANN. § 9.32 8
W. VA. CODE ANN. § 55-7-22 8

Other

1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE (Sollum Emlyn, ed. 1736) 5
2 MCCORMICK ON EVIDENCE § 337 (7th ed.) 14
2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW (2d ed. 2016) 7
3 THE WORKS OF JAMES WILSON (1804) 5, 6, 9
2016 Fla. Sess. Law Serv. 2016–24 12
Darian Etienne, *Victims, Not Criminals: Exempting and Immunizing Children Subjected to Sex Trafficking from Prosecution for Prostitution*, 16 WHITTIER J. CHILD & FAM. ADVOC. 44 (2017) 12
GRAND JURY LAW & PRACTICE (2d. ed.) 12
Jeffrey F. Ghent, Annotation, *Homicide: Duty to Retreat as Condition of Self-Defense When One Is Attacked at His Office, or Place of Business or Employment*, 41 A.L.R.3d 584 (1972) 4
John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L. J. 1325 (1979) 16
Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903) 3, 4

Pamela Cole Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood*, 46 U. MEM. L. REV. 383 (2015) 8

RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991) 5

Richard Singer, *The Resurgence of Mens Rea: II-Honest But Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459 (1987) 5

STAFF ANALYSIS OF BILL NO. CS/CS/HB 545 (Jan. 21, 2016), *available at* https://goo.gl/J2YXDd..12

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 4, 5

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (St. George Tucker ed., 1803) 10

IDENTITY AND INTEREST OF AMICUS CURIAE

The NRA Freedom Action Foundation ("Freedom Action Foundation") is a public charity, dedicated to providing non-partisan Second Amendment education to all American citizens. The Freedom Action Foundation's primary mission is to ensure that gun-owners are registered to vote and educated about issues that affect their fundamental rights. The Freedom Action Foundation has a strong interest in ensuring that this Court's decision upholds the fundamental right of self-defense that the legislative representatives of Florida voters sought to protect.

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly held that Florida Legislature acted well within its constitutional authority when it amended the Stand Your Ground Law to require the State to bear the burden of proving by clear and convincing evidence that a defendant's use of force was unlawful once that defendant has made a prima facie claim of self-defense immunity. *See* FLA. STAT. § 776.032.

Although the court below upheld the amendment as constitutional, Amicus submits this brief to respond to broader criticisms of the Stand Your Ground Law that have been advanced in some quarters, including various courts throughout the state. *See, e.g.*, *Rodriguez v. State*, No. 3D17-1633. Specifically, this brief places the Stand Your Ground Law in the context of historical developments in the law of this

State and across the Nation to show how its substantive and procedural features are inextricably intertwined with the fundamental right of self-defense.

1. By rejecting the duty of retreat native to *English* common law, the Stand Your Ground Law continues a centuries-old trend in *American* law of respecting the right of self-defense by not forcing innocent victims of violent assault to take the often-more-dangerous path of backing down in the face of potentially lethal force.

2. By conferring immunity from prosecution on individuals who use force justifiably, the Stand Your Ground Law employs a common tool for protecting certain important values: in this case, the values of self-defense and protection of the innocent.

3. Finally, consistent with Florida's practice in other areas of the law, the Stand Your Ground Law protects those same values by placing the burden of persuasion on the State. Because it effectuates substantive rights, the provision at issue here was well within the Legislature's constitutional authority.

ARGUMENT

As this Court recognized in 2015, when it set out to discern the legislative intent behind the Stand Your Ground Law, the Florida Legislature has the constitutional authority to enact transactional immunity and to allocate and define the burden for proving it. *Bretherick v. State*, 170 So. 3d 766, 772 (Fla. 2015). The choices the Florida Legislature has made in this regard reflect an effort to empower

Florida citizens to protect themselves without fear of wrongful prosecution. As the court below correctly held, Ptr.'s App. 6 n.2, the Legislature has not lost its constitutional authority to enact measures that protect the fundamental right of self-defense simply because this Court interpreted an earlier version of the law to impose the burden of persuasion on a criminal defendant before the Legislature clarified that the State bears the burden.

I. The Duty To Retreat Has Been a Disfavored Rule in American Jurisdictions Since at Least the Nineteenth Century.

Although some have characterized the Stand Your Ground Law as a departure from the time-honored principles of the duty to retreat, this assumption misapprehends the common law of duty to retreat, the Castle Doctrine, and the divergent paths those doctrines took in the United States and England. Far from universally accepting a duty to retreat, American jurisdictions have recognized the right of those threatened with harm to stand their ground since the early years of the Republic. In those jurisdictions, the right to stand one's ground was nearly absolute when a person was at home and well-recognized wherever a person had a right to be.

The early English common law of self-defense emerged in a radically different legal and social context, and it has little relevance to the case before this Court. During the thirteenth century, homicide committed in self-defense was not justifiable in England. *See* Joseph H. Beale, Jr., *Retreat from a Murderous Assault*,

16 HARV. L. REV. 567, 568 (1903). A man convicted of homicide who raised evidence of self-defense could receive a pardon from the king, but he could not be acquitted. *Id.* Such a form of self-defense, whether at home or on the highway, differed radically from its American form. As Justice Holmes observed,

> [i]t is useless to go into the developments of the law [of self-defense] from the time when a man who had killed another no matter how innocently had to get his pardon, whether of grace or of course. Concrete cases or illustrations stated in the early law in conditions very different from the present . . . have had a tendency to ossify into specific rules without much regard for reason.

Brown v. United States, 256 U.S. 335, 343 (1921).

By the time this Nation was founded, however, the English right of self-defense had expanded considerably. "[S]everal exceptions and modifications arose, the most universally applied being the rule that a person who is assaulted in his own dwelling, and who is without fault in bringing on the difficulty, need not retreat but, being in his 'castle,' may stand his ground and kill his assailant if necessary to save himself from death or great bodily harm." Jeffrey F. Ghent, Annotation, *Homicide: Duty to Retreat as Condition of Self-Defense When One Is Attacked at His Office, or Place of Business or Employment*, 41 A.L.R.3d 584 § 2(a) (1972). In addition, the right of self-defense being "justly called the primary law of nature," even outside the home there was no duty to retreat when retreat was not feasible. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3–4 (1765) ("BLACKSTONE COMMENTARIES"). As Blackstone recognized, an assault "may be so

fierce as not to allow [the party assaulted] to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defense he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law." 4 BLACKSTONE COMMENTARIES *185.[1]

Whatever the status of the duty to retreat and the Castle Doctrine in England, the general movement in American jurisprudence has been to construe the obligation narrowly. This departure from English practice has been widely acknowledged to be a distinct feature of American criminal law. *See* RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 5 (1991) ("[O]ne of the most important transformations in American legal and social history occurred in the nineteenth century when the nation as a whole repudiated the English common-law tradition in favor of the American theme of no duty to retreat."). The movement began in the early days of the Republic, founded in "the

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[1] The duty to retreat was arguably even further circumscribed in English common law by the time of the Founding. Richard Singer, *The Resurgence of Mens Rea: II-Honest But Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 471 (1987). The duty to retreat arose in the context of "a very specific and concrete factual setting: it applied *only* where A and B, during a quarrel, became engaged in mutual combat and one of them escalated the level of the fight by beginning to use deadly force." *Id.* at 472. A second form of self-defense applied "where the ultimate slayer . . . was the innocent and unprovoking victim of a violent assault or other crime . . . ." *Id.* In this context, as in a person's dwelling, there was no duty to retreat. *Id. See, e.g.*, 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE *481 (Sollum Emlyn, ed. 1736) ("If a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant.").

great natural law of self-preservation, which . . . cannot be repealed, or superseded, or suspended by any human institution." 3 THE WORKS OF JAMES WILSON 84 (1804) ("WILSON"); *see, e.g.*, *Commonwealth v. Riley & Stewart* (Boston Mun. Ct. 1837), reprinted in 1 L.B. HORRIGAN & SEYMOUR D. THOMPSON, DEFENCES TO CRIME: THE ADJUDGED CASES IN THE AMERICAN AND ENGLISH REPORTS WHEREIN THE DIFFERENT DEFENCES TO CRIMES ARE CONTAINED 160–61 (1887). The natural right of self-defense was not qualified by a duty to retreat, which instead applied only to one who was partly at fault for the affray. 3 WILSON 88.

By the end of the Nineteenth Century, numerous American jurisdictions had developed a common law rule distinct from the English one. In a classic formulation of the American rule, the Ohio Supreme Court held:

> The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.

Erwin v. Ohio, 29 Ohio St. 186, 199–200 (1876). One year later the Indiana Supreme Court held that there was no general duty to retreat before an assailant "as it is now recognized by the general drift of the American authorities." *Runyan v. Indiana*, 57 Ind. 80, 83 (1877). The court also noted that the English doctrine had been "greatly

modified in this country, and has with us a much narrower application than formerly." *Id.* at 84.

In *Beard v. United States*, the U.S. Supreme Court adopted the Ohio Supreme Court's reasoning in *Erwin* in a case involving a quarrel occurring on the curtilage of a man's home in federal territory. 158 U.S. 550 (1895). Noting that "[t]he defendant was where he had the right to be," the Court held that "he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground . . . ." *Id.* at 564. In 1921, the Court, in an opinion by Justice Holmes, unequivocally extended this rule beyond the home. *Brown*, 256 U.S. at 343.

This tendency to restrict the duty to retreat has increased over the last century, so that today "[t]he majority of American jurisdictions holds that the defender (who was not the original aggressor) need not retreat, even though he can do so safely, before using deadly force upon an assailant whom he reasonably believes will kill him or do him serious bodily harm." 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4 (2d ed. 2016).[2] In adopting the Stand Your Ground Law, then, Florida

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[2] Numerous jurisdictions, like Florida, have codified the absence of a duty to retreat. *See, e.g.*, ALA. CODE § 13A-3-23 ("no duty to retreat" and "right to stand his or her ground" "in any place where he or she has the right to be"); ALASKA STAT. § 11.81.335 ("no duty to leave the area" if in a "place where the person has a right to be"); ARIZ. REV. STAT. ANN. § 13-405 ("no duty to retreat . . . if the person is in a place where the person may legally be"); GA. CODE ANN. § 16-3-23.1 (person "has no duty to retreat and has the right to stand his or her ground"); IND. CODE ANN. § 35-41-3-2 ("does not have a duty to retreat"); KAN. STAT. ANN. § 21-5230 (when "in a place where such person has a right to be," person "has no duty to retreat and

joined the mainstream tradition of American criminal law by rejecting the common law duty to retreat. Pamela Cole Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood*, 46 U. MEM. L. REV. 383, 400 (2015).

Florida did so with good reason: This development in American criminal law was a response to fundamental problems with the English rule. American jurists and legislators realized that attempting to discern whether a person was in a position to

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has the right to stand such person's ground"); KY. REV. STAT. § 503.055 (when "in [a] place where he or she has a right to be," person "has no duty to retreat and has the right to stand his or her ground"); LA. STAT. ANN. § 14:20 (when "in a place where he or she has a right to be," person has "no duty to retreat . . . and may stand his or her ground"); MICH. COMP. LAWS ANN. § 780.972 (one "anywhere he or she has the legal right to be" has "no duty to retreat"); MISS. CODE ANN. § 97-3-15 ("no duty to retreat . . . if the person is in a place where the person has a right to be"); MONT. CODE ANN. § 45-3-110 (person "lawfully in a place or location . . . has no duty to retreat"); NEV. REV. STAT. § 200.120 ("not required to retreat" if person has "a right to be present at the location"); N.H. REV. STAT. ANN. § 627:4 (person "not required to retreat" if "anywhere he or she has a right to be"); N.C. GEN. STAT. ANN. § 14-51.3 (person "does not have a duty to retreat in any place he or she has the lawful right to be"); OKLA. STAT. ANN. tit. 21, § 1289.25 (person in "place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground"); 18 PA. CONS. STAT. ANN. § 505 ("person employing protective force may estimate the necessity thereof . . . without retreating"); S.C. CODE § 16-11-440 (person in "place where he has a right to be . . . has no duty to retreat and has the right to stand his ground"); S.D. CODIFIED LAWS § 22-18-4 ("person does not have a duty to retreat if the person is in a place where he or she has a right to be"); TENN. CODE ANN. § 39-11-611 (person "in a place where the person has a right to be has no duty to retreat"); TEX. PENAL CODE ANN. § 9.32 ("person who has a right to be present at the location . . . is not required to retreat"); W. VA. CODE ANN. § 55-7-22 (person "in any place he or she has a legal right to be" is "without a duty to retreat").

In contrast, only a small number of modern codifications require retreat. *See, e.g.*, ARK. CODE ANN. § 5-2-607; CONN. GEN. STAT. ANN. § 53a-19; DEL. CODE ANN. tit. 11, § 464; ME. REV. STAT. ANN. tit. 17-A, § 108; NEB. REV. STAT. § 28-1409; N.J. STAT. ANN. § 2C:3-4; N.Y. PENAL LAW § 35.15.

retreat, after the fact and with the advantage of hindsight, is a foolhardy endeavor. "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown*, 256 U.S. at 343. It is not reasonable to demand that a person in such a situation "should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him." *Id.*

More importantly, the American rule recognizes how perilous attempting to retreat might be. "What might be a reasonable chance for escape in the one situation might in the other be certain death." *State v. Gardner*, 96 Minn. 318, 327 (1905). For that reason, the decision whether to run or fight ought not be gainsaid by those who were not there. A rule that permits second-guessing not only fails to account for the relative moral blameworthiness of the act; it costs innocent lives.

Finally, the American rule better reflects the importance the Founders placed on individual liberty and the right to bear arms for self-defense. Early on, American courts recognized a fundamental freedom of its citizens to protect themselves when confronted with an aggressor, including by means of the arms which they had a constitutional right to bear. *See, e.g.*, 3 WILSON 84 (writing in 1790 of the link between the right to use force in defense of one's person and the codification of the right to bear arms in Pennsylvania's constitution). As the U.S. Supreme Court held in the landmark decision in *District of Columbia v. Heller*, "the *central component*" of the right to bear arms codified in the U.S. Constitution is the individual "right of

self-preservation," the citizen's natural prerogative "to 'repel force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.' " 554 U.S. 570, 595, 599 (2008) (brackets omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *145 n.42 (St. George Tucker ed., 1803)).

In short, the overwhelming trend in American jurisdictions since the beginning of the nineteenth century has been towards a recognition of the right of citizens to stand their ground wherever they have a right to be. The Stand Your Ground Law has followed a long tradition of American law.

II. The Legislature's Decision To Grant Immunity—Rather than an Affirmative Defense—in Cases of Justified Force Is Consistent with Ordinary, Longstanding Legal Principles.

The grant of immunity in the Stand Your Ground Law mirrors the approach adopted by the Legislature across the spectrum of criminal law, where it has created immunity from prosecution to secure a variety of important values, from protecting minors from punishment for sexual victimization to ensuring that drug users suffering from an overdose receive medical assistance. And immunity from prosecution for the justified use of force is also no different, in practice, than such accepted and familiar legal doctrines as limits on prosecuting conduct outside the statute of limitations or the rule against double jeopardy.

The concept that an individual should, on account of some important value, have "a substantive right to assert immunity from prosecution and to avoid being

subjected to a trial," *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010), is not a novel one in this State. Florida criminal law employs the tool of immunity from prosecution throughout the *corpus juris*.

For example, one section of the Code provides immunity from criminal accessory liability for family members of an alleged criminal offender. While Section 777.03(1)(a) makes those who "assist[ ]" or "give[ ] . . . aid" to an offender liable as accessories before the fact, in some circumstances, the statute by its terms does not apply to any person "standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister," and the courts have recognized that this "immunity provision" "shield[s]" these family members "from prosecution." *Brown v. State*, 672 So. 2d 861, 863 (Fla. Dist. Ct. App. 1996); *see also Carrillo v. State*, 463 So. 2d 450, 451 (Fla. Dist. Ct. App. 1985).

Another statute gives immunity from prosecution to those who facilitate the provision of medical assistance to illegal drug-users suffering from an overdose. Under Section 893.21(1), "[a] person acting in good faith who seeks medical assistance for an individual experiencing a drug-related overdose may not be charged, prosecuted, or penalized . . . for possession of a controlled substance if the evidence for possession of a controlled substance was obtained as a result of the person's seeking medical assistance." Again, like Section 776.032, this provision protects a value that the legislature viewed as important—here, the provision of

adequate medical assistance to illegal drug users in acute medical danger—by shielding certain individuals from prosecution.

In like form, Florida recently joined several other states in granting minors immunity from prosecution for engaging in prostitution. In 2016, the Legislature amended Section 796.07(2)(e) to make persons under the age of eighteen immune from prosecution for engaging in prostitution or offering to do so. *See* 2016 Fla. Sess. Law Serv. 2016–24; STAFF ANALYSIS OF BILL NO. CS/CS/HB 545 at 11 (Jan. 21, 2016), *available at* https://goo.gl/J2YXDd (noting that the act makes minors "immune from prosecution for prostitution"); Darian Etienne, *Victims, Not Criminals: Exempting and Immunizing Children Subjected to Sex Trafficking from Prosecution for Prostitution*, 16 WHITTIER J. CHILD & FAM. ADVOC. 44, 70–75 (2017) (describing similar laws in other States and analogizing them to the immunity "provided under Florida's Stand Your Ground Laws").

The immunity conferred by Florida's Stand Your Ground Law also resembles the "transactional immunity" that was once the norm in Florida, *State ex rel. Hough v. Popper*, 287 So. 2d 282, 284–85 (Fla. 1973), and that remains the law in nineteen states, GRAND JURY LAW & PRACTICE § 7.8 (2d. ed.). Under the Fifth Amendment to the United States Constitution, no person may "be compelled in any criminal case to be a witness against himself," U.S. CONST. amend. V, and various states protect this right, in certain circumstances, by ensuring that where an individual *has* been

compelled to give incriminating testimony, he shall be "free forever from being subjected to a penalty, forfeiture or prosecution for any offense substantially connected with the transaction, matter or thing concerning which he testified . . . ." *Hough*, 287 So. 2d at 284–85.

Finally, as the courts have recognized, the immunity granted by Section 776.032 is functionally no different from a variety of other, familiar doctrines of criminal law that stop a criminal prosecution pre-trial. For instance, as this Court recognized in *Bretherick v. State*, the immunity Section 776.032 grants in cases of justified force is analogous to the doctrine that a defendant cannot be prosecuted if he has "previously been placed in jeopardy." 170 So. 3d 766, 776 (Fla. 2015); *see also Rodgers v. Commonwealth*, 285 S.W.3d 740, 753 n.5 (Ky. 2009).

As the Supreme Court of Colorado has further noted of Colorado's self-defense-immunity statute, courts also "perform[ ] a similar function" of preventing prosecution when they "determine whether the statute of limitations bars the prosecution of a charge." *People v. Guenther*, 740 P.2d 971, 977 (Colo. 1987); *see also Hernandez v. State*, 915 So. 2d 667, 668 (Fla. Dist. Ct. App. 2005) ("When a criminal defendant challenges his prosecution as untimely commenced, the State has the burden to establish that the prosecution is not barred by the statute of limitations."). And the discharge of a defendant whose right to a speedy trial has been violated is also functionally similar to Section 776.032's immunity rule. *See*

Guenther, 740 P.2d at 977; FLA. R. CRIM. P. 3.191(p)(3).

In Section 776.032, the Legislature has done nothing different than what it has done across the body of Florida's criminal jurisprudence: it has secured a value it deems fundamental by protecting individuals, in certain circumstances, from even "being subjected to a trial." *Dennis*, 51 So.3d at 462. This objective provides an important foundation for the amendment at issue in this case.

III. By Allocating the Burden to the State, the Legislature Adopted a Coherent and Customary Protection for a Fundamental Right.

The provision at issue allocates the burden of proof to the State, once a prima facie claim of self-defense immunity has been raised by the defendant. The choice to place the burden on the State is not only the most coherent choice—the State also bears the burden at trial—but it is also a time-honored method of safeguarding fundamental rights and other important values.

In the American legal system, burdens are distributed in such a variety of ways for such a variety of reasons that "there is no key principle governing the apportionment of the burdens of proof." 2 MCCORMICK ON EVIDENCE § 337 (7th ed.). Certain relevant factors are discernible, however, and these favor the Legislature's choice in the Stand Your Ground Law to require the State to bear the burden.

One way in which the burden allocation in Florida's Stand Your Ground Law is in keeping with the legal traditions of this State, the majority of States around the country, and the Federal Government is that it requires the State to disprove a claim

of self-defense. *See Dixon v. United States*, 548 U.S. 1, 24–25 (2006) (Breyer, J., dissenting). Under Florida law, once the defendant has presented "some evidence" that the killing was justified at trial, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. *Bretherick*, 170 So. 3d at 777; *see also Jenkins v. State*, 942 So. 2d 910, 914 (Fla. Dist. Ct. App. 2006). This has been the majority rule around the country since at least the middle of the twentieth century. *See Mullaney v. Wilbur*, 421 U.S. 684, 702 n. 30 (1975).

Although not compelled by due process, the decision to require the State to disprove claims of self-defense finds its roots in a fundamental principle of the American legal system: that the accused stands innocent until proven guilty. "In a criminal case . . . the interests of the defendant are of such magnitude that historically . . . , they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979). The burden borne by the State in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

True enough, the U.S. Supreme Court has held that the burden of persuasion may be placed on the defendant with respect to affirmative defenses to the crime as opposed to the elements of the crime. *See, e.g.*, *Martin v. Ohio*, 480 U.S. 228 (1987).

But the trend in favor of placing the burden of disproving self-defense on the State recognizes that the line between affirmative defenses and elements is shifting and consequently reflects a preference for ensuring that the State is held to its burden of proving guilt beyond a reasonable doubt. *See* John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L. J. 1325, 1331–32 (1979).

The core value of presuming innocence is the primary factor that informs the allocation of burdens in the criminal law, but it is not the only one. Especially "[i]n cases involving individual rights, whether criminal or civil, the standard of proof . . . reflects the value society places on individual liberty." *Addington*, 441 U.S. at 425 (quotation marks and brackets omitted). For example, "[w]here the transcendent value of speech is involved, due process . . . requires [in certain circumstances] that the State bear the burden of persuasion to show that the [regulated party] engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). In *Speiser*, it was not a foregone conclusion that the conduct for which the State sought to hold the party responsible was constitutionally protected—indeed, the Court assumed that the tax penalty at issue would be triggered only by unprotected speech, *id.* at 519–20—but in order to ensure that protected conduct was not impermissibly burdened by the specter of unjust enforcement, the Due Process Clause required the State to bear the burden of proving that the conduct was in fact

unprotected. *Id.* at 526; *see also Waters v. Churchill*, 511 U.S. 661, 669 (1994) (collecting other cases in which the First Amendment was held to dictate the allocation of a burden or similar rule of law).[3] If the fundamental right of free speech can *compel* the State to bear the burden of persuasion, then surely the equally fundamental right of self-defense *justifies* the Legislature's choice here.

Neither is the Legislature's decision to shift the burden away from the party asserting immunity unusual, especially when a fundamental right is at stake. For example, once a government official asserting qualified immunity establishes that he was acting within the scope of his discretionary authority, "the burden then shifts to the plaintiff to show that" the official is not entitled to immunity because his "action violated the plaintiff's clearly established rights." *Gentile v. Bauder*, 718 So. 2d 781, 784 (Fla. 1998). The anti-SLAPP statutes adopted in more than half of the states (including Florida) "effectively provid[e] immunity from suit" for individuals who face harassment in response to their exercise of First Amendment rights. *Steidley v. Community Newspaper Holdings, Inc.*, 383 P.3d 780, 786 ¶ 15

[3] The fundamental rights protected by the First Amendment are not the only ones that have justified requiring the State to bear the burden of persuasion. In Florida, for example, the State bears the burden of proving that "a warrantless search comes within an exception to the warrant requirement" of the Fourth Amendment. *Raffield v. State*, 351 So. 2d 945, 947 (Fla. 1977). And in the civil context, the U.S. Supreme Court has held that the government bears the burden of proving that an exaction is proportional once a property-owner establishes that a taking has occurred. *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994).

(Okla. Civ. App. 2016); *see* FLA. STAT. § 768.295. In many States, these statutes explicitly shift the burden of persuasion away from the party invoking immunity. *See Baker v. Parsons*, 750 N.E.2d 953, 961 n.19 (Mass. 2001). Finally, in Florida, the State bears the burden to disprove certain pre-trial defenses that, as noted above, function like a grant of immunity from trial. *See, e.g.*, *Hernandez*, 915 So. 2d at 668 (statute of limitations).

In any event, that a defendant's plea of self-defense comes packaged as an assertion of immunity does not change the underlying values that the Legislature must weigh in deciding who should bear the burden of persuasion. In fact, the procedural posture of a Stand Your Ground immunity decision reinforces the Legislature's choice. Given the overarching objective of protecting individuals who justifiably use force in self-defense not just from punishment but from prosecution, it makes little sense—both as a matter of logic and of judicial economy—to force them to go to trial if the government is not going to be able to bear its burden of persuading a fact-finder that the defendant's use of force was unlawful.

The policy considerations advanced in favor of placing the burden of persuasion on the defendant are both irrelevant to the constitutional question before the Court and unpersuasive. They rest on the premise that the facts supporting a self-defense claim are better known to the defendant, so it is more efficient for the defendant to bear the burden. *See Bretherick*, 170 So. 3d at 777. But the same could

be said of the affirmative defense of self-defense at the trial stage, or, for that matter, of the simple defense of an alibi. *See Mullaney*, 421 U.S. at 702. In both situations, the State bears the burden of persuasion, even when it is met with the sometimes-difficult task of proving a negative while at an informational disadvantage. Florida—and the Nation more broadly—accepts the risk that some legitimate prosecutions will be foiled in service of more important values. *Id*.

Here, those values are the protection of innocent lives and the fundamental right of self-defense. Although the Legislature had constitutional authority to allocate the burden to the State for less lofty reasons, these stakes underscore the degree to which the burden allocation is a matter for sound legislative discretion.

CONCLUSION

For the foregoing reasons, amicus curiae the NRA Freedom Action Foundation respectfully submits that Florida's Stand Your Ground Law is constitutional.

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Respectfully submitted,

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